



RPD File No. / N° de dossier de la SPR : TB2-14514

*Private Proceeding / Huis clos*

## Reasons and Decision – Motifs et Décision

<b>Claimant(s)</b>	XXXX XXXX	<b>Demandeur(e)(s) d'asile</b>
<b>Date(s) of Hearing</b>	October 17, 2018 November 13, 2018	<b>Date(s) de l'audience</b>
<b>Place of Hearing</b>	Toronto, Ontario	<b>Lieu de l'audience</b>
<b>Date of Decision and reasons</b>	December 27, 2018	<b>Date de la décision et des motifs</b>
<b>Panel</b>	James Waters	<b>Tribunal</b>
<b>Counsel for the Claimant(s)</b>	Naseem Mithoowani Barrister and Solicitor	<b>Conseil(s) du (de la/des) demandeur(e)(s) d'asile</b>
<b>Designated Representative(s)</b>		<b>Représentant(e)(s) désigné(e)(s)</b>
<b>Counsel for the Minister</b>	Clark Michelle	<b>Conseil du (de la) ministre</b>

2018 CanLII 147459 (CA IRB)

## REASONS FOR DECISION

[1] The claimant XXXX XXXX claims to be a citizen of Sri Lanka and claims refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act* (IRPA).

[2] The Minister intervened<sup>1</sup> in the hearing by way of presenting evidence,<sup>2</sup> questioning the claimant and making submissions. The Minister is of the opinion that the claimant is excluded from refugee protection pursuant to section E of Article 1 of the *United Nations Convention Relating to the Status of Refugees*, by virtue of him having obtained status in Italy similar to that of an Italian national. The Minister's counsel also raised serious concerns relating to the credibility of the claimant and program integrity.

### IDENTITY

[3] The claimant's oral testimony in the Tamil language and that of his sister together with the supporting documentation<sup>3</sup> filed established on a balance of probabilities that the claimant is a 37 year old Tamil citizen of Sri Lanka born and raised in XXXX. Sri Lanka is the country of reference.

### Summary of the oral and written testimony and personal documentary evidence

[4] In 1999, while enrolled in a trades program to become a XXXX XXXX at a technical institute in XXXX, the claimant was regularly stopped and questioned at checkpoints manned by the Sri Lanka Army (SLA) and the Eelam People's Democratic Party (EPDP).

[5] The claimant obtained an Italian work permit and travelled to Italy in the fall of 2001 where he remained until returning to Sri Lanka for three weeks in December 2005 to visit his parents.

[6] He returned to Italy in XXXX 2006 to work but returned to Sri Lanka in XXXX 2006 where he worked XXXX XXXX.

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<sup>1</sup> Exhibit 6, Notice of Intention to Intervene.

<sup>2</sup> Exhibit 7, Minister's Evidence.

<sup>3</sup> Exhibit 2.

[7] It is alleged that the claimant was detained at the Plantain Point army camp for about a week during which he was questioned about helping the Tigers, beaten and asked to identify an individual who was in possession of a boat engine the claimant had repaired and affixed a warranty sticker to. The claimant's father obtained his release upon payment of a bribe.

[8] The claimant returned to Italy to work in XXXX of 2006 and went back to Sri Lanka in XXXX 2009.

[9] In February 2010, the claimant was taken from his home by the Karuna Group and detained for several weeks at an army checkpoint. He was beaten and questioned about his help for Tamil refugees and the Liberation Tigers of Tamil Eelam (LTTE) as well as his time in Italy. The claimant refused an offer to join the Karuna group but was released upon a promise to reconsider.

[10] The claimant hid with a Sinhalese friend of his father's for about a month before returning to Italy in XXXX of 2010. On XXXX XXXX, 2010, the claimant obtained a long term EC resident permit in Italy<sup>4</sup> and in December made an unsuccessful application for a temporary residence permit<sup>5</sup> to visit his sister in Canada.

[11] In August 2011, he was advised by his parents that two people stopped by their house in XXXX and inquired when he would be returning from Italy.

[12] The claimant travelled from Italy to Mexico in XXXX of 2012 and arrived in the United States in XXXX 2012 where he was detained for about six months and made an asylum claim.

[13] The claimant made a refugee claim in Canada at the Fort Erie border crossing on November 22, 2012.

[14] He alleges that, approximately twice a year since he came to Canada, his house in XXXX is searched by army officials who question his parents about his life in Canada and advise them that the claimant must report to them for an inquiry when he returns to Sri Lanka.

## ANALYSIS

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<sup>4</sup> Exhibit 8, item 14, p. 23,

<sup>5</sup> Exhibit 7, Minister's Evidence, pp. 1-9.

[15] The determinative issue in this case is exclusion pursuant to Article 1E of the *UN Convention*.

[16] Article 1E reads as follows:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.<sup>6</sup>

[17] The Federal Court of Appeal in *Zeng*<sup>7</sup> has set out the test that must be taken into account when deciding whether Article 1E applies. The Court noted that the reformulated test to be applied to Article 1E determinations is:<sup>8</sup>

Considering all relevant factors to the date of the hearing, does the claimant have status substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

### **Does the Claimant have status similar to that of an Italian national?**

[18] I am not able to take judicial notice of foreign law. The Minister produced copies of internet articles<sup>9</sup> on resident permits in the European Union and Italy for consideration.

[19] The claimant produced a translation of his EC long term residence card<sup>10</sup> issued on XXXX XXXX, 2010 and a legal opinion<sup>11</sup> from an Italian Immigration lawyer.

[20] The legal opinion and the documentary evidence<sup>12</sup> filed establish on a balance of probabilities that the claimant had status similar to that of an Italian national when he arrived in Canada on November 22, 2012 and made his claim for refugee protection. The legal opinion and

<sup>6</sup> *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), Schedule (Subsection 2(1)), Sections E and F of Article 1 of the *United Nations Convention Relating To The Status Of Refugees*, Article 1E.

<sup>7</sup> *M.C.I. v. Zeng, Guanqiu* (F.C.A., no. A-275-09), Noël, Layden-Stevenson, Stratas, May 10, 2010, 2010 FCA 118.

<sup>8</sup> *Ibid.*, at para. 28.

<sup>9</sup> Exhibit 7, pp. 13-20

<sup>10</sup> Exhibit 8, item 13, pp.22-24.

<sup>11</sup> Exhibit 9, Legal Opinion of XXXX XXXX, pp. 4-10.

<sup>12</sup> Exhibit 5, National Documentation Package (NDP) for Italy ( May 30, 2018), items 3.2, 3.3 , 3.6 and 3.7

the documentary evidence established that there is a revocation process that can be initiated by the Italian authority.

[21] One foreign legal issue in dispute is whether revocation is mandatory or discretionary for a holder of an EC long-term resident card who has been absent from European Union territory for twelve consecutive months. It is not disputed that the claimant has been in Canada since November 22, 2012.

[22] Item 3.3 in the National Documentation Package (NDP) indicates the European Commission (EC) resident permit for long term residents was formerly known in Italy as the carta di soggiorno.<sup>13</sup>

[23] The same Response to Information Request indicates that

The official explained that although the carta di soggiorno “confers permanent residence to its holders,” that a permanent resident who is absent from Italy for twelve months or more will lose his or her permanent resident status, “regardless of the validity indicated on the Carta di Soggiorno.”<sup>14</sup>

[24] It also notes however that the EC Long –Term Resident Permit can be revoked for the reason that “the applicant has been absent from EU territory for twelve consecutive months.”<sup>15</sup> The National Documentation Package is not entirely clear as to whether “can” means “may” or “shall” in the context of the EC Long-Term Resident Card revocation proceedings on the grounds of twelve consecutive months absence from European Union territory.

[25] The Minister’s counsel took the position in her submissions<sup>16</sup> that the claimant has not established on a balance of probabilities that his permanent residence status in Italy has been cancelled or revoked. She relied on her documentary evidence<sup>17</sup> which indicated that for a variety of circumstances including if a person had been absent from the territory of the European Union for a period of twelve consecutive months that a person’s long –term EC resident card may be revoked. She submits that there is no evidence from the Italian authorities that the claimant’s long –term resident status has been cancelled or revoked and that the claimant has not made serious efforts to contact the Italian authorities to determine whether or not that status has been revoked.

<sup>13</sup> Exhibit 5, NDP for Italy (May 30, 2018), item 3. 3, section 2.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Submissions of the Minister received on November 26, 2018, pp. 7 -11.

<sup>17</sup> Exhibit 7, p. 16.

[26] The Minister's counsel noted again in her reply submissions that the claimant failed to approach the Italian authorities to obtain information about his current status in Italy. She argued that the onus is on the claimant to do this, as it is his onus to rebut the prima facie evidence that he holds a valid EC Long-Term Resident Card. She submitted that the claimant has not provided a reasonable explanation for why he not do this or why he did not have his counsel in Italy obtain specific and current information about the validity of his EC Long-Term Resident Permit. The Minister's counsel submitted in her reply submissions that Canadian federal jurisprudence and the information in the National Documentation Package (NDP) supports the position that the loss of permanent resident status is not automatic. The Minister's counsel submits that the essence of the Federal Court of Appeal decision in *Zeng* is that the onus is on refugee claimants to take all possible actions to maintain or renew their status and to preserve their ability to return to a safe third country.

[27] A translated certificate of residence history in Italy was filed.<sup>18</sup> The legal opinion<sup>19</sup> indicates that it is a mandatory obligation for every resident in Italy to register in this Population Register. The certificate of residence history indicates a deletion entered ex-officio on August 7, 2008 and re-immigration from October 9, 2008 to November 30, 2014.

[28] The legal opinion filed by the claimant states as follows:<sup>20</sup>

The status of long-term resident is withdrawn in the event of absence from the National Territory for a period of consecutive twelve months according to Article 9 Section 1c of Directive 2003 /109/EC and Article 9 section 7d of the 1998 Aliens Act.

The period of absence results from Population Registrar's database and from the border entry and exit records.

The language of the law leaves no room for discretion, Article 9 section 7 states "A permit for long-term resident shall be withdrawn wherever one of the events listed above recur. So the revocation is an automatic consequence wherever the authority finds that the concerned person is in any of such circumstances.

[29] In her submissions,<sup>21</sup> claimant's counsel argued that the claimant has provided a Population Register extract<sup>22</sup> which shows that the Italian authorities have noted him absent from

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<sup>18</sup> Exhibit 9, pp. 1-3.

<sup>19</sup> Exhibit 9, pp. 4-7.

<sup>20</sup> Exhibit 9, at p. 5.

<sup>21</sup> Submissions of Claimant's counsel received on December 12, 2018, pp. 2-4.

2014. Claimant's counsel notes in her submissions that the expert legal opinion provided the following:

I must conclude that Mr. XXXX ceased to reside in Italy since December 2014. This is sufficient evidence of the Italian authority to conclude that he was absent from the country for a period exceeding twelve consecutive months and therefore his previous status of long term resident must be withdrawn...<sup>23</sup>

[30] The claimant's counsel submitted that legal opinion is expert evidence<sup>24</sup> personalized to the claimant. She submitted that the Minister's evidence is general information from internet websites whose qualifications are less transparent. I assign more weight to the expert legal opinion in areas where it conflicts with the Minister's evidence as to the claimant's current status in Italy.

[31] I find on a balance of probabilities that the claimant has lost his EC Long-Term Resident status as he has been outside of Italy for a period exceeding a consecutive twelve month period. In the event that the claimant has not formally lost his EC Long-Term Resident status, I find that he will lose his EC Long-Term residency status in Italy should revocation proceedings be instituted and finalized. Considering all the relevant factors to the date of the hearing, I find that the claimant does not have status substantially similar to that of an Italian national, in that the EC Long-Term Resident status he obtained on XXXX XXXX, 2010 will be mandatorily revoked if a revocation process is instituted because he has been living outside of Italy for a period exceeding a consecutive twelve months. I find on a balance of probabilities that the claimant does not have status as of the date of the hearing, substantially similar to that of an Italian national.

### **Whether the claimant previously had such status and lost it?**

[32] Relying on the translation of the EC long-term resident card and legal opinion discussed above, I find on a balance of probabilities that the claimant previously had status in Italy similar to that of an Italian national

[33] Accordingly, in accordance with *Zeng*, I must balance the following factors: the reason for the loss of status (voluntary or involuntary), whether the claimant could return to Italy, the risk the

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<sup>22</sup> Exhibit 9, pp. 1-2.

<sup>23</sup> Exhibit 9, p. 6.

<sup>24</sup> Exhibit 9, pp. 7-10.

claimant would face in Sri Lanka, Canada's international obligations and any other relevant factors.

[34] In this regard, the Court of Appeal in *Zeng* also stated:<sup>25</sup>

At the hearing of this appeal, the submissions of the parties evolved toward common ground. The Minister and the respondents agreed on a number of basic propositions, each of which I consider to be unassailable. These propositions are:

- the objectives set out in subsection 3(2) of the IRPA seek, among other things to provide protection to those who require it and, at the same time , provide a fair and efficient program that maintains the integrity of the system;
- the purpose of Article 1E is to exclude persons who do not need protection;
- asylum shopping is incompatible with the surrogate dimension of international refugee protection;
- Canada must respect its obligations under international law;
- there may be circumstances where the loss of status in the third country is through no fault of a claimant in which case the claimant need not be excluded.

### **The Reasons for the Loss of Status (Voluntary or Involuntary)**

[35] The case of *Shamlou*<sup>26</sup> as well as other decisions of the Federal Court, indicate that there is an onus on the claimant to renew or maintain his long-term resident status in Italy.

[36] The claimant testified that his employment in Italy was getting more sporadic and that he believed that he could lose his long-term resident status in the future if he was unable to procure gainful stable employment. The claimant was not facing revocation proceedings when he left Italy.

[37] In this regard, the legal opinion notes that:

Although the law does not provide that employment or lack of employment income is a reason for withdrawing a status of long term residence in practice the

<sup>25</sup> *M.C.I. v. Zeng, Guanqiu* (F.C.A., no. A-275-09), Noël, Layden-Stevenson, Stratas, May 10, 2010, 2010 FCA 118, at para. 19.

<sup>26</sup> *Shamlou, Pasha v. M.C.I.* (F.C.T.D., no. IMM-4967-94), Teitelbaum, November 15, 1995. **Reported:** *Shamlou v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 135 (F.C.T.D.)



authorities withdrew such permits as a result of a reviews process in a number of cases reported to our law office.<sup>27</sup>

No details of the anecdotal evidence is provided and no opinion is expressed as to whether an appeal process is available to remedy this apparent breach of the law.

[38] The claimant made no efforts after his arrival in Canada to renew or maintain his long term residence status in Italy.

[39] I find that the claimant voluntarily lost his long term residence status in Italy.

### **Can the claimant return to Italy?**

[40] The Addendum to the legal opinion<sup>28</sup> states as follows.

Mr. XXXX prior residence in Italy bears no relevance for reacquiring a right of entry and stay. The only possibility to re-acquire the right of entry and stay is to apply for a new visa and temporary resident status. After achieving a stable economic and social situation for a period of three years, the applicant may be granted the status of a long-term resident again.”

[41] The claimant has established on a balance of probabilities that he cannot return to Italy.

### **The Risk the claimant would face in Sri Lanka**

[42] In her Reply submissions, the Minister’s counsel submitted that the RPD is not to do a full analysis regarding exclusion when a claimant is excludable from refugee protection under Article 1E.

[43] This procedural point was not raised on October 17, 2018 at the end of the first hearing date devoted to exclusion. Instead with the concurrence of the parties, November 13, 2018 was set as the hearing date to deal with inclusion.

[44] I acknowledge the Minister’s counsel Reply submission that *Zeng* may not require a full inclusion analysis by the RPD to assess the risk to the claimant in Sri Lanka. However, evidence was heard and submissions made with respect to a full inclusion analysis. While such an

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<sup>27</sup> Exhibit 9, p. 6.

<sup>28</sup> Exhibit 13, p. 1.

extensive analysis may not be required by *Zeng*, it is not prohibited. Since the evidence and submissions made are available, I have done such a full inclusion analysis.

[45] The Minister's counsel cited in her questions at the hearing and in her submissions significant concerns with respect to the credibility of the claimant. The claimant did not testify in a straightforward manner on the initial hearing date which dealt with exclusion. His testimony was defensive, guarded and at times contradictory.

[46] In this regard, the claimant initially testified that he applied for a Canadian Visitor's visa while in Italy in December 2010 because he wished to visit his sister in Canada. The only problems the claimant was experiencing in Italy where he was in possession of a long term residency permit was sporadic employment.

[47] The claimant indicated in his application<sup>29</sup> that his brother was living and working in Italy, even though he testified that his brother had gone to France in 2000 where he made a refugee claim and had never been to Italy.

[48] The claimant also withheld his long term residence status in Italy from Canadian immigration officials when he made his refugee claim in Canada. He denied that he had ever been to Italy.<sup>30</sup> The claimant explained his untruthful behavior at the border on the basis that he was following the instructions his agent had given him.

[49] The claimant has travelled to and from Sri Lanka. He has lived and worked for a substantial time in Italy, visited France, and transited through countries in the Middle East, South North and Central America. He has had extensive experience in dealing with immigration officials.

[50] The claimant attempted to explain his mistruths as to his status in Italy by indicating that he understood that if he told the truth, he would be deported back to Italy. However, as an EC long-term resident cardholder in Italy, he was not facing removal to Sri Lanka. The claimant at the port of entry to Canada misrepresented his immigration and travel history.

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<sup>29</sup> Exhibit 7, IMM 5645, Section C, p.9.

<sup>30</sup> Exhibit 1.

[51] As indicated in *Navaratnam*,<sup>31</sup>

An applicant who trifles with the truth in legal proceedings cannot expect to be successful; thus, a Court may discredit even true statements, not knowing where the truth begins and ends, and a climate of uncertainty then prevails.

Justice Michael Kelen, in *Rrukaji v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 605, 130 ACWS (3d) 1012 stated:

The board's function includes assessing credibility, and one of the common tools for testing credibility is comparing the applicant's evidence at three different time during the refugee claim process:

- i) the POE notes;
- ii) the PIF statement;, and
- iii) the oral evidence at the hearing.

[52] It is trite law that statements to immigration officials at the POE may be considered by the Board.

[53] I draw an adverse inference with respect to the credibility of the claimant arising out of his untruthful answers and misleading information he provided to Canadian immigration officials at the port of entry.

[54] The claimant's demeanor was better on the resumption date that dealt with inclusion and he testified in a less defensive manner and provided some spontaneous details when asked about his alleged detentions.

[55] At the first hearing date dealing with exclusion, the claimant testified that he had a copy of his expired 2006 Sri Lanka passport which he had obtained recently and it was only through an oversight that he had not filed a copy. He did not produce a copy of the 2006 passport at the second hearing date which dealt mainly with inclusion and under re-examination by his counsel disclosed that he did not have a complete copy. The Claimant testified that an agent had confiscated his last Sri Lanka passport issued in 2010 while the claimant was in Mexico on his way to Canada. Post hearing he filed a copy of the biodata page and one other page from his 2006

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<sup>31</sup> *Navaratnam, Gunaratnam v. M.C.I.* (F.C., no. IMM-6744-10), Shore, July 12, 2011, 2011 FC 856, at para. 1.

expired Sri Lanka passport which was issued on XXXX XXXX, 2001 and valid until XXXX XXXX, 2006.<sup>32</sup>

[56] The partial copy of his 2006 passport confirmed his travel to Italy in 2001 on an Italian visa. It also confirmed his return to Sri Lanka in December 2005 to visit his parents. It does not contain stamps supporting his oral testimony that he left Sri Lanka in January 2006 to return to Italy three weeks after his arrival.

[57] No passport pages with stamps were filed to support the claimant's oral testimony that he travelled back to Sri Lanka in June 2006 because of his father's illness. The claimant testified that he obtained a job XXXX XXXX XXXX at XXXX XXXX indicative of a longer stay than the previous three week trip undertaken about six months earlier in December 2005. No letter confirming his employment was obtained; however, the claimant indicated that he had attempted to get such a letter but had been informed that the owner of the business had left Sri Lanka and resided abroad. It was during this trip that the claimant was allegedly detained at an army camp for a week for reasons relating to a warranty sticker he had affixed to an engine that he had repaired. The Army accused the claimant of helping the LTTE.

[58] The claimant's sister XXXX XXXX provided a letter in support<sup>33</sup> of the claim and testified on the resumption date. She was at the Fort Erie border on November 22, 2012 awaiting the claimant's arrival in Canada and had brought with her the documents required to establish their sibling relationship. She was interviewed by Canadian immigration officials and answered truthfully disclosing that he had spent time in Italy and her belief that he had status to work there. She testified at the hearing that their elder brother lived in France not Italy. I found her to be a credible witness.

[59] She was present in XXXX in the summer of 2006 and described how her parents made inquiries at the army camp to confirm their son was being held there and what could be done to facilitate his release. Having regard to all of the evidence the claimant has established on a balance of probabilities his one week detention at an army camp in the summer of 2006.

[60] The Minister's counsel argued in her written submissions that the claimant's admitted three trips back to Sri Lanka are demonstrative of a lack of subjective fear.

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<sup>32</sup> Exhibit 15, pp. 3-4.

<sup>33</sup> Exhibit 11.

[61] Given the extensive documentary evidence on the problems at that time faced by young Tamil males in the northeast including XXXX, I accept as plausible the allegations in the Personal Information Form narrative<sup>34</sup> as to the claimant being arbitrarily stopped and questioned at checkpoints manned by the SLA and the EDPD between 1999 and his departure to Italy in 2001. The claimant was not specifically targeted or detained but was caught up in security measures directed at the Tamil community in XXXX particularly young Tamil males.

[62] Nothing worth noting happened to the claimant on his short three week visit between December of 2005 and January 2006. The claimant had not been personally targeted, arrested, detained or beaten while in Sri Lanka prior to the summer of 2006. He returned to Italy shortly after his release from this detention.

[63] Given his treatment during his one week detention by the army in the summer of 2006, the claimant's decision to return to Sri Lanka in the fall of 2009 does raise questions as to re-availment and lack of subjective fear.

[64] A copy of the claimant's Sri Lanka Driver's license<sup>35</sup> issued on October 26, 2009 supported the claimant's oral testimony that he returned to Sri Lanka from Italy in October 2009 to assist his ailing father. A copy of a medical note<sup>36</sup> supported the oral testimony of both the claimant and his sister as to the medical condition of their father. The claimant also indicated that he was hopeful that his situation had improved as a result of the Sri Lanka's Army decisive defeat of the LTTE in the spring of 2009.

[65] While the three returns are indicative of a lack of subjective fear at the time of arrival, they are not determinative of the claimant's subjective fear as of the date of the hearing.

[66] The claimant alleges that he was taken from his home by the Karuna Group in February 2010 and detained for several weeks at an army checkpoint where he was beaten and questioned about his assistance for Tamil refugees and support of the LTTE as well as his time in Italy.

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<sup>34</sup> Exhibit 2, Narrative, lines 10-35.

<sup>35</sup> Exhibit 15, pp. 1-2.

<sup>36</sup> Exhibit 8, pp. 32-33.

[67] A copy of a medical report from Dr. XXXX XXXX concluded that: “Mr. XXXX bears physical scars and ongoing symptoms consistent with his history of torture in Sri Lanka.”<sup>37</sup>

[68] A psychological assessment<sup>38</sup> of the claimant was also filed.

[69] Having regard to all of the evidence, the claimant established his targeting by the Karuna Group in February 2010.

[70] He testified about being advised by his parents about two people believed to be from the Karuna Group stopping by his parents’ house and inquiring when he would be returning from Italy. He alleges that his parents have informed him of visits by the army questioning them about his whereabouts wherein they disclosed he was in Canada. It is alleged that the army officials informed the claimant’s parents that he must report to them for an inquiry when he returns to Sri Lanka. Brief letters from his father,<sup>39</sup> a neighbor,<sup>40</sup> the secretary treasurer of his temple<sup>41</sup> and a Justice of the Peace<sup>42</sup> supported his claim.

## Nexus

[71] It has been argued that persons such as the claimant are mere victims of extortion because of their actual or perceived wealth or that of relatives living abroad and thus face no greater risk than a generalized fear of crime.

[72] However, in *Gunaratnam*,<sup>43</sup> the Federal Court stated that:

...it is clear that both the EPDP and the Karuna group are specifically targeting young, Tamil males because they can threaten them by denouncing them as LTTE supporters to the government.

This activity does not strike me as either extortion that is without racial targeting, or a risk that is faced generally by other individuals in Sri Lanka.

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<sup>37</sup> Exhibit 13, p. 4.

<sup>38</sup> Exhibit 13, pp. 6-10.

<sup>39</sup> Exhibit 8, pp.13-14.

<sup>40</sup> Ibid., pp. 17-18.

<sup>41</sup> Ibid., pp. 4-5.

<sup>42</sup> Ibid., p. 6.

<sup>43</sup> *Gunaratnam, Thusheepan v. M.C.I.* (F.C., no. IMM -4854-13), Russell, March 20, 2015, 2015 FC 358, at paras 53-54.

[73] I find that the underlying facts set out in this case are not distinguishable from those in *Gunaratnam*.

[74] The claimant fears returning to Sri Lanka due to a combination of factors including his past encounters with the army and the Karuna Group as well as his Tamil ethnicity, his origins in northeast of Sri Lanka, and being returned as a failed asylum seeker from Canada. I find that there is a link between what he fears and the Convention refugee grounds, specifically Tamil ethnicity, membership in a particular social group, Tamils from the northeast, and perceived political opinion.

## OBJECTIVE BASIS

[75] A British Home Office Report indicates that:<sup>44</sup>

The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka is a spent force. The government's present objective is to identify Tamil activists in the Diaspora who are working for Tamil separatism.

If a person is detained by the Sri Lankan security services there remains a real risk of mistreatment or harm requiring international protection.

Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area where their arrival will be verified by the CID or police within a few days.

For persons whose names appear on the watch list or stop list the risk of ill treatment following arrival in Sri Lanka will be as a result of arrest and detention by authorities rather than any prosecution itself for the crime or crimes for which the person is wanted.

[76] The latest Department of State Report indicates the following:

The International Truth and Justice Project and the Associated Press reported allegations of abductions, and torture carried out by security sector during the year. They reported most victims were Tamil men accused by security forces of having links to the LTTE and that security forces tortured and sexually abused them after the initial abduction.<sup>45</sup>

<sup>44</sup> Exhibit 5, National Documentation Package (NDP) for Sri Lanka (April 30, 2018), item 1.4, sections 2.3.3 and 2.3.37.

<sup>45</sup> Ibid., item 2.1, section 1(c).

[77] The military and police harassed civilians with impunity, and impunity for crimes committed during and since the armed conflict continued.<sup>46</sup>

[78] The claimant established a serious possibility of persecution in Sri Lanka in XXXX based on his Tamil ethnicity and imputed political opinion.

## STATE PROTECTION AND INTERNAL FLIGHT ALTERNATIVE

[79] The objective documentary evidence establishes that state protection is not available to the claimant in his country. Given the preponderance of the documentary evidence, I find that state protection is not available to the claimant in Sri Lanka and that there is no viable internal flight alternative available to the claimant in Colombo.

## BALANCING

[80] I find that the claimant voluntarily lost his EC long term resident status in Italy. This engages the references to maintaining the integrity of the Canadian refugee protection system mentioned in section 3(2) (e) of the *Immigration and Refugee Protection Act*. As noted in Zeng,<sup>47</sup> “asylum shopping is incompatible with the surrogate dimension of international refugee protection.” It is a negative factor in the balancing exercise.

[81] I find that the claimant cannot return to Italy. In and of itself, this factor is neutral.

[82] However, I also find that the claimant faces a serious possibility of persecution should he return to Sri Lanka. Given this finding of the risk to the claimant in Sri Lanka, the finding that the claimant cannot return to Italy becomes very important and engages Canada’s obligations under international and domestic law.

[83] Section 3(3)(f) indicates that the IRPA is to be construed in a manner that complies with international human rights instruments to which Canada is a signatory. Returning the claimant to a country where he faces a serious possibility of persecution, is contrary to the concept of non-refoulement enshrined in international and domestic refugee law.

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<sup>46</sup> Ibid., item 2.1.

<sup>47</sup> Zeng, *supra*, footnote 7, at para 19.



[84] There are strong negative and positive factors that collide in this claim.

[85] I do not condone asylum shopping. The claimant clearly permitted his EC Long-Term Resident status to be jeopardized. Based on the expert legal opinion, I have found that the claimant cannot return to Italy at this time.

[86] Given that the claimant faces a serious possibility of persecution in Sri Lanka, the concept of non-refoulement is also raised. Returning the claimant to Sri Lanka where he currently faces a serious possibility of persecution is contrary to Canada's obligations under international law. Considering the whole of the evidence, the factors in *Zeng* and those particular to this case, I do not exclude the claimant. The Minister's request for exclusion of the claimant is denied.

## CONCLUSION

[87] I find that the claimant XXXX XXXX is a Convention refugee. I therefore accept his claim.

(signed)

**"James Waters"**

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**James Waters**

**December 27, 2018**

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**Date**