

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. [18CV0135L AGS]

VIJAYAKUMAR THURAISSIGIAM, PETITIONER

v.

U.S. DEPARTMENT OF HOMELAND SECURITY (“DHS”);
U.S. CUSTOMS AND BORDER PROTECTION (“CBP”);
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
 (“USCIS”); U.S. IMMIGRATION AND CUSTOMS
 ENFORCEMENT (“ICE”); KIRSTJEN NIELSEN,
 SECRETARY OF DHS; JEFFERSON BEAUREGARD
 SESSIONS III, ATTORNEY GENERAL OF THE UNITED
 STATES; KEVIN K. MCALEENAN, ACTING
 COMMISSIONER OF CBP; THOMAS HOMAN, ACTING
 DIRECTOR OF ICE; L. FRANCIS CISSNA, DIRECTOR OF
 USCIS; PETE FLORES, SAN DIEGO FIELD DIRECTOR,
 CBP; GREG ARCHAMBEAULT, SAN DIEGO FIELD
 OFFICE DIRECTOR, ICE; FRED FIGUEROA, WARDEN,
 OTAY MESA DETENTION CENTER, RESPONDENTS

Filed: Jan. 19, 2019

PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Vijayakumar Thuraissigiam fled Sri Lanka after being abducted and severely beaten, leading to his hospitalization for days. Petitioner is a Tamil, an ethnic minority group that is persecuted in Sri Lanka, who was active in supporting a Tamil political party and

candidate. He was kidnapped and beaten by government officials as a result. In the aftermath of the civil war in Sri Lanka, Tamils like Petitioner have been subjected to a consistent and extreme pattern of abduction and torture. Indeed, even without the kind of persecution Petitioner suffered, Tamils removed to Sri Lanka after unsuccessfully seeking asylum abroad—as Petitioner would be absent relief—are routinely assumed to be traitors, arrested, and tortured.

Petitioner entered the United States in February, 2017, and was subsequently apprehended by immigration agents near San Ysidro, California. After apprehension, Petitioner was afforded only a cursory administrative asylum hearing and was subsequently issued an “expedited removal” order pursuant to 8 U.S.C. § 1225(b)(1). Absent court intervention, Petitioner will be deported to Sri Lanka, where he faces further beatings, torture, and death because of his political associations; his imputed political opinions as a Tamil; and the perception by Sri Lankan government officials that asylum seekers like Petitioner are traitors. Petitioner is currently detained at the Otay Mesa Detention Center in San Diego, California.

Petitioner’s expedited removal order violated his statutory, regulatory and constitutional rights. His hearing was procedurally unfair because it did not provide him with a meaningful opportunity to prove his claims. The expedited removal order issued against him is also substantively unlawful because an erroneous legal standard was applied and because, based on the undisputed facts in the administrative record, Petitioner can show a significant possibility of prevailing on his claims for asylum and other forms of relief available to noncitizens fleeing

persecution and torture. Petitioner accordingly seeks to vacate his existing removal order and seeks an order directing Respondents to provide him with a new, meaningful opportunity to apply for asylum and other relief from removal.

Petitioner respectfully alleges, by undersigned counsel, as follows:

JURISDICTION AND VENUE

1. This case arises under the United States Constitution; the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.*; the regulations implementing the INA’s asylum and expedited removal provisions; the Convention Against Torture (“CAT”), the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231), and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* This Court has jurisdiction pursuant to 8 U.S.C. § 1252(e)(2) (INA provision providing habeas jurisdiction over certain challenges to expedited removal); 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 2241 (general habeas statute); Art. I., § 9, Cl. 2 of the United States Constitution (“Suspension Clause”); Art. III of the United States Constitution; the Due Process Clause; and the Common Law.

2. Petitioner is in federal immigration custody because he is subject to an order of removal and is presently detained at the Otay Mesa Detention Center in San Diego, California.

3. Venue is proper under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to this action occurred in this District.

PARTIES

4. Mr. Thuraissigiam is a native and citizen of Sri Lanka who fled his home country to seek asylum in the United States. He entered the United States in February 2017, and he was subsequently apprehended by immigration agents.

5. Respondent U.S. Department of Homeland Security (“DHS”) has responsibility for enforcing the immigration laws of the United States.

6. Respondent U.S. Customs and Border Protection (“CBP”) is the sub-agency of DHS that is responsible for the initial processing and detention of noncitizens who are apprehended near the border and placed in expedited removal proceedings.

7. Respondent U.S. Citizenship and Immigration Services (“USCIS”) is the sub-agency of DHS that, through its Asylum Officers, conducts interviews of certain individuals placed in expedited removal to determine whether they have a credible fear of persecution and should be permitted to apply for asylum.

8. Respondent U.S. Immigration and Customs Enforcement (“ICE”) is the sub-agency of DHS that is responsible for carrying out removal orders and operates and oversees the Berks detention facility.

9. Respondent Kirstjen Nielsen is sued in her official capacity as the Secretary of the Department of Homeland Security. In this capacity, she directs each of the component agencies within DHS, ICE, USCIS, and CBP. As a result, Respondent Nielsen has responsibility for the administration of the immigration laws

pursuant to 8 U.S.C. § 1103, is empowered to grant asylum or other relief, and is a legal custodian of Petitioner.

10. Respondent Jefferson Beauregard Sessions III is sued in his official capacity as the Attorney General of the United States. In this capacity, he has responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, oversees the Executive Office of Immigration Review, is empowered to grant asylum or other relief, and is a legal custodian of Petitioner.

11. Respondent Kevin K. McAleenan is sued in his official capacity as the Acting Commissioner of CBP, and is a legal custodian of Petitioner.

12. Respondent Thomas Homan is sued in his official capacity as the Acting Director of ICE, and is a legal custodian of Petitioner.

13. Respondent L. Francis Cissna is sued in his official capacity as the Director of USCIS, and is a legal custodian of Petitioner.

14. Respondent Pete Flores, is sued in his official capacity as the San Diego Field Director of CBP, and is a legal custodian of Petitioner.

15. Respondent Greg Archambeault is sued in his official capacity as the San Diego Field Office Director of ICE, and is a legal custodian of Petitioner.

16. Respondent Fred Figueroa is sued in his official capacity as the Warden of Otay Mesa Detention Center, and is a legal custodian of Petitioner.

STATUTORY BACKGROUND**Jurisdiction:**

17. In general, a final removal order must be challenged directly in the court of appeals by petition for review. 8 U.S.C. § 1252(a)(1).

18. However, with respect to expedited removal orders issued pursuant to 8 U.S.C. § 1225(b)(1), the proper forum for review is a district court habeas proceeding. 8 U.S.C. § 1252(e)(2).

The Expedited Removal Scheme:

19. Under 8 U.S.C. § 1225(b)(1), certain persons who are seeking admission to the United States may be placed into “expedited removal” proceedings. Section 1225(b)(1)(A)(i) authorizes the Attorney General to apply expedited removal to certain inadmissible noncitizens who are “arriving” in the United States and seeking admission at a port of entry. *Id.*; 8 C.F.R. § 1.2 (defining “arriving aliens” as including “applicant[s] for admission coming or attempting to come into the United States at a port-of-entry”).

20. Section 1225(b)(1)(A)(iii) also authorizes the Attorney General to apply expedited removal to certain inadmissible noncitizens located within the United States “who have not been admitted or paroled” and who cannot demonstrate that they have been continuously physically present in the United States for two years. 8 U.S.C. § 1225(b)(1)(A)(iii). Pursuant to that provision, in 2004, the Attorney General began to apply expedited removal to persons within the United States who are apprehended within 100 miles of the border and who are

unable to demonstrate that they have been physically present in the United States for 14 days. *See* 69 Fed. Reg. 48877 (Aug. 11, 2004). Petitioner entered the United States, was arrested in the United States, and was placed into expedited removal under this authorization.

21. All persons subject to expedited removal are entitled to an interview with an asylum officer if they indicate either an intention to apply for asylum or a fear of returning to their country. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4) (providing that if “an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer”); 8 U.S.C. § 1225(b)(1)(B) (setting forth procedure for interviews by asylum officers to determine whether the noncitizen has a “credible fear of persecution”); *see also* 8 C.F.R. § 208.30.

22. If the noncitizen is referred to an asylum officer, the officer conducts a “credible fear interview” which is designed “to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture.” 8 C.F.R. § 208.30(d).

23. The asylum officer must “conduct the interview in a non-adversarial manner, separate and apart from the general public.” 8 C.F.R. § 208.30(d). If the asylum officer determines that an individual “is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer may reschedule the interview.” 8 C.F.R. § 208.30(d)(1). The

asylum officer is required to determine that the individual “has an understanding of the credible fear determination process.” 8 C.F.R. § 208.30(d)(2).

24. The statute and the regulations further provide that the noncitizen has a right to “consult with a person or persons of the alien's choosing prior to the interview or any review thereof.” 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. § 208.30(d)(4). “Any person or persons with whom the alien chooses to consult may be present at the interview,” and may be allowed to present a statement at the end of the interview. 8 C.F.R. § 208.30(d)(4). If the noncitizen “is unable to proceed effectively in English,” and the asylum officer “is unable to proceed competently in a language chosen by the alien,” the officer “shall arrange for the assistance of an interpreter in conducting the interview.” 8 C.F.R. § 208.30(d)(5).

25. At the conclusion of the interview, the asylum officer must create a written summary of the “material facts” provided during the interview, review that summary with the individual and provide him/her with the opportunity to correct any errors. 8 C.F.R. § 208.30(d)(6); *see also* 8 U.S.C. § 1225(b)(1)(B)(iii)(II). If the asylum officer makes a negative credible fear determination, the officer must provide a written record of the determination that “shall include . . . the officer’s analysis of why, in light of [the] facts, the alien has not established a credible fear of persecution.” 8 U.S.C. § 1225(b)(1)(B)(iii)(II).

26. Upon the individual’s request, the agency must provide for prompt review of the asylum officer’s determination by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *see also* 8 C.F.R. § 208.30(g)(1). The immigration judge “may receive into evidence any

oral or written statement which is material and relevant to any issue in the review.” 8 C.F.R. § 1003.42(c). And the statute specifies that the immigration judge review must include an opportunity for the individual “to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. . . . ” 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

27. The immigration judge’s decision “is final and may not be [administratively] appealed.” 8 C.F.R. § 1208.30(g)(2)(iv)(A). However, an immigration judge “may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision[.]” 8 C.F.R. § 1003.23(b)(1).

28. Likewise, an asylum officer may reconsider a negative determination. 8 C.F.R. § 1208.30(g)(2)(iv)(A). If reconsideration is granted, a new interview under 8 U.S.C. § 1225(b)(1)(B) must be conducted, and a new credible fear determination must be made. In the event of a negative determination, a written record is required, 8 U.S.C. § 1225(b)(1)(B)(iii)(II), and the applicant has a right to administrative review by an immigration judge, 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

29. When a noncitizen is granted a credible fear interview, he is entitled to the procedural protections set forth by statute and regulation, including the right to seek administrative review of any negative credible fear determination. *See also* Michael A Benson, Executive Assoc. Commissioner for Field Operations, Immigration & Naturalization Service, Memorandum, Expedited Removal: Additional Policy Guidance (Dec. 30, 1997) (“Re-interviews will occur when the Office of Interna-

tional Affairs determines that the alien has made a reasonable claim that compelling new information concerning the case exists and should be considered. Districts should cooperate by continuing to detain the alien until the second adjudication, and potentially also a second review by the immigration judge, is completed.”).

30. To prevail ultimately on an asylum claim, the applicant must establish that there is at least a 10% chance that he or she will be persecuted on account of one of the listed grounds, including political affiliation or belonging to a particular social group. Critically, however, to prevail at the *credible fear* interview, Congress did not require applicants to establish their ultimate entitlement to asylum, *i.e.*, a 10% chance of being persecuted. Rather, to prevail at a credible fear interview, the applicant need only show “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum. . . . ” 8 U.S.C. § 1225(b)(1)(B)(v). Thus, to prevail at the credible fear stage, applicants need only show a *significant possibility* that there is a *10% chance* of persecution if they are returned to their home country.

31. If a noncitizen is found by the asylum officer to have a “credible fear,” he may not be removed from the United States until his application for asylum is adjudicated in a full removal hearing. *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (“If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum.”).

32. Specifically, noncitizens who satisfy the credible fear standard are taken out of the expedited removal system altogether and placed into the regular (INA Section 240) removal process. 8 U.S.C. § 1229; INA § 240. At the Section 240 hearing, they will have the opportunity to develop a full record before an immigration judge, and may appeal an adverse decision to the BIA and federal court of appeals. 8 C.F.R. § 208.30(f); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii).

33. The reason for the low threshold at the credible fear stage is straightforward. An asylum claim is complex and often will take significant amount of time, resources and expertise to develop properly, including expert testimony and extensive country conditions evidence. It is thus highly unrealistic for applicants in the expedited removal system, especially if unrepresented, to present a full asylum claim while in detention and under severe time constraints. Accordingly, by establishing a low threshold at the credible fear stage, Congress ensured that potentially valid asylum claims could be developed properly and presented in a full Section 240 hearing before an immigration judge.

FACTUAL BACKGROUND

34. Mr. Thuraissigiam is a 46-year-old Sri Lankan man who fled to the United States in order to escape persecution by the Sri Lankan government.

35. Mr. Thuraissigiam is Tamil, an ethnic minority group in Sri Lanka. A decades-long civil war between government forces and the Tamil separatist group Liberation Tigers of Tamil Eelam (LTTE) began in the 1980s.

36. In 2002, a cease fire was declared.

37. In 2004, elections were held in Sri Lanka. During the elections, Mr. Thuraissigiam worked on behalf of M.K. Shivajilingam, a candidate for parliament with the Tamil National Alliance, a Tamil-affiliated political group. He helped to arrange public meetings in support of Mr. Shivajilingam.

38. The cease fire collapsed in 2006. In 2007, Mr. Thuraissigiam was ordered to report to a Sri Lankan Army camp. He was detained and beaten, and told he should not support Mr. Shivajilingam. Eventually he was released.

39. In 2009, the Sri Lankan government defeated the LTTE, ending the civil war.

40. In 2013, Mr. Thuraissigiam again worked in support of Mr. Shivajilingam, who was then a candidate in a provincial election. He again helped to arrange public meetings in support of Mr. Shivajilingam.

41. In February, 2014, men approached Mr. Thuraissigiam at his farm and identified him by name. They told Mr. Thuraissigiam that they were government intelligence officers. A van arrived at the farm and the men pushed him into it.

42. In the van, he was bound, beaten, and interrogated about his political activities and connection to Mr. Shivajilingam. He was taken to a house where he was further beaten and asked similar questions about his political activities. He was lowered into a well, simulating drowning, threatened with death, and then suffocated, causing him to lose consciousness.

43. Mr. Thuraissigiam woke up in a hospital, where he spent days recuperating from his serious injuries.

He still suffers from numbness in his left arm and has scars from the beatings.

44. He went into hiding in Sri Lanka and India, and then fled the country in 2016. After an arduous journey through Latin America, he was able to reach the U.S.-Mexico border.

45. Mr. Thuraissigiam entered the United States on February 17, 2017, and was subsequently apprehended. He is currently detained at the Otay Mesa Detention Center in San Diego, California.

46. It is widely recognized that, since the end of the civil war, human rights violations have remained widespread and targeted at Tamils in Sri Lanka. *See Freedom From Torture, Tainted Peace: Torture in Sri Lanka since May 2009*, August 2015 (“*Tainted Peace*”) 10, 19 (documenting 148 cases of torture perpetrated since the end of the civil war, overwhelmingly against Tamils, including sexual torture in 71% of the cases), *available at* https://www.freedomfromtorture.org/sites/default/files/documents/sl_report_a4_-_final-f-b-web.pdf; Human Rights Watch, “*We Will Teach You a Lesson*,”: *Sexual Violence against Tamils by Sri Lankan Security Forces*, 2012 (“*Sexual Violence against Tamils*”) (documenting widespread violations of human rights committed against Tamils in Sri Lanka by government officials after the civil war), *available at* <https://www.hrw.org/report/2013/02/26/we-will-teach-you-lesson/sexual-violence-against-tamils-sri-lankan-security-forces>; *see also* United Nations, *Sri Lanka routinely tortures security suspects amid stalled reform process, UN expert finds*, July 18, 2017 (concluding that “The Tamil community has borne the brunt of the State’s well-oiled torture apparatus”), *available at* <http://www.ohchr.org/EN/>

NewsEvents/Pages/DisplayNews.aspx?NewsID=21884&LangID=E; Associated Press, *Dozens of men say Sri Lankan forces raped and tortured them*, Nov. 8, 2017 (“*Dozens of men*”) (documenting dozens of Tamil men who were abducted, tortured, and/or raped by Sri Lankan government forces in 2016 and 2017), *available at* <https://www.apnews.com/ced017bd441f46ba838aaedf6ff5d8e2>; *id.* (quoting a human rights investigator with 40 years of experience interviewing torture survivors explaining: “The levels of sexual abuse being perpetuated in Sri Lanka by authorities are the most egregious and perverted that I’ve ever seen.”)

47. In particular, there is a widespread pattern of Sri Lankan security forces abducting Tamils in vans, and subsequently torturing them. *See Tainted Peace* at 28 (victims “described a form of abduction by armed men from the street or their homes, who blindfolded or hooded them and took them in ‘white vans’ to unknown locations”); *Sexual Violence against Tamils* (documenting many accounts of abduction and torture by government officials in vans); *see also* International Truth and Justice Project, *Unstopped: 2016/17 Torture in Sri Lanka*, July 2017 (“*Unstopped*”) at 7, 18 (documenting 24 cases in which Tamils were abducted in vans and tortured), *available at* http://www.itjpsl.com/assets/ITJP_unstopped_report_final.pdf; *Dozens of men* (many victims “told similar tales: they were abducted at home or off the streets by men in white or green vans” and then tortured).

48. Individuals are targeted for such extrajudicial abduction, torture, and sexual violence based on their actual or perceived connection to the LTTE or opposi-

tion political groups. *Tainted Peace* at 9, 19 (individuals tortured included those associated with a political opposition group or “with a real or perceived association” with the LTTE); *Sexual Violence against Tamils* (similar); U.S. Dept. of State, Sri Lanka 2016 Human Rights Report 1 (recognizing “arbitrary arrest, lengthy detention, surveillance, and harassment of . . . persons viewed as sympathizers” of the LTTE), *available at* <https://www.state.gov/documents/organization/265760.pdf>; U.S. Dept. of State, Sri Lanka 2015 Human Rights Report 1-2 (similar).

49. Indeed, regardless of whether they are specifically tied to the LTTE or opposition political groups, those who are deported to Sri Lanka after seeking asylum abroad face extreme risk of arrest, torture, and sexual violence upon arrival in Sri Lanka. *See Gaksakuman v. U.S. Atty. Gen.*, 767 F.3d 1164, 1170 (11th Cir. 2014) (vacating denial of asylum because applicant had submitted evidence that “as a ‘failed asylum seeker,’ he would be subject to torture upon his return to Sri Lanka,” where the government would deem him a traitor for having fled the country); *Tainted Peace* 26, 29 (documenting multiple cases of Tamils arrested at the airport and tortured); *Sexual Violence against Tamils* (similar); *see also Thayaparan v. Sessions*, 688 F. App’x 359, 371 (6th Cir. 2017) (following *Gaksakuman* and agreeing that background materials “tended to prove that failed asylum seekers were at the risk of being detained and tortured regardless of whether they were actually Tamil with ties to the LTTE”); The Guardian, *UN condemns Australia’s forced return of asylum seeker to Sri Lanka*, Dec. 22, 2017 (“Asylum seekers returned to Sri Lanka are routinely arrested at the airport. . . .”), *available at* <https://www.theguardian.com>.

com/world/2017/dec/22/un-condemns-australias-forced-return-of-asylum-seeker-to-sri-lanka.

50. Government agents in Sri Lanka have come to Mr. Thuraissigiam's house and his mother's house repeatedly since he was kidnapped, asking for his whereabouts.

ADMINISTRATIVE DECISIONS

51. Petitioner was issued an expedited removal order after the government determined that he did not have a credible fear of persecution. The process that led to this expedited removal order was wholly inadequate.

52. The asylum officer violated his duty "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). For example, the officer never asked Mr. Thuraissigiam whether he had been involved in political activities. If asked, Mr. Thuraissigiam would have told the officer about his political activities on behalf of a Tamil-affiliated political party and candidate. That information would have been both relevant and useful in light of the widely known country conditions evidence indicating that there is a widespread pattern of government abduction and torture of Tamils in Sri Lanka. *See, e.g.*, ¶¶ 46-49.

53. There were also communication problems throughout the interview. The translator and the asylum officer often misunderstood Mr. Thuraissigiam; these communication issues affected the interview throughout, in violation of the regulations governing the credible fear interview process. *See* 8 C.F.R. § 208.30(d)(2) (asylum

officer must determine that applicant “has an understanding of the credible fear determination process”); 8 C.F.R. § 208.30(d)(1) (“If the asylum officer determines that an individual “is unable to participate effectively in the interview because of illness, fatigue, or *other impediments*, the officer may reschedule the interview.” (emphasis added)).

54. The negative credible fear determination also resulted from a number of legal errors. For example, and critically, the asylum officer failed to consider relevant country conditions evidence, as he was legally required to do. *See* 8 U.S.C. § 1225(b)(1)(B)(v) (asylum officer must take into account “such other facts as are known to the officer”); 8 C.F.R. § 208.30(e)(2) (same); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010) (holding, in Convention Against Torture case, that “[t]he failure of the IJ and BIA to consider evidence of country conditions constitutes reversible error”).

55. In particular, the asylum officer should have been aware of the widespread country conditions evidence that Tamils are subject to systematic persecution and torture by the government. *See, e.g.*, ¶¶ 46-49. The asylum officer knew that Mr. Thuraissigiam was Tamil and had been abducted from his home in a van and severely beaten. And the country conditions materials amply corroborate what happened to Mr. Thuraissigiam, and place it within a context of frequent government persecution of Tamils. Like many other documented cases, he was a Tamil abducted by government intelligence agents from his home in a van and tortured. *See, e.g., Tainted Peace* at 28 (documenting dozens of such kidnappings, overwhelmingly of Tamils, in which victims “described a form of abduction by armed men

from the street or their homes, who blindfolded or hooded them and took them in ‘white vans’ to unknown locations”); *Sexual Violence against Tamils* (documenting many accounts of abductions of Tamils by government officials in vans). The officer did not take account of that country conditions evidence, as was required to do.

56. Moreover, the country conditions in Sri Lanka with regard to Tamils are so extreme that Mr. Thuraissigiam should have prevailed even apart from his specific past persecution and circumstances. Widespread documentary evidence indicates that “a failed asylum seeker” from Sri Lanka is at extreme risk of being “subject to torture upon his return to Sri Lanka,” where the government would deem him a traitor for having fled the country—evidence which led the Eleventh Circuit to vacate a denial of asylum on this basis. *Gaksakuman*, 767 F.3d at 1170; *see also Thayaparan*, 688 F. App’x at 371 (same). The country conditions alone were enough for Mr. Thuraissigiam to prevail, but the asylum officer failed to consider them.

57. Mr. Thuraissigiam requested that an immigration judge review the asylum officer’s determination.

58. The hearing before the immigration judge was also procedurally and substantively flawed for many of the same reasons as the asylum officer’s interview and decision. The immigration judge, like the asylum officer, failed to take account of the widely known country conditions evidence that Petitioner would face persecution and torture if returned to Sri Lanka.

59. At both the asylum officer interview and immigration judge hearing, Mr. Thuraissigiam was extremely frightened and did not know whether information he offered would be shared with the Sri Lankan government.

60. Mr. Thuraissigiam twice requested a new credible fear interview, and he requested a new immigration judge review. All these requests were denied.

61. Based on the testimony Mr. Thuraissigiam provided to the asylum officer and immigration judge—testimony the decision makers accepted as credible—under a correct legal standard, Petitioner should have passed the credible fear stage.

62. Under the correct standard—which requires only that an applicant show a significant possibility there is a 10% chance of establishing eligibility for asylum, or a significant possibility of establishing eligibility for withholding of removal or CAT—Petitioner should have prevailed.

EXHAUSTION

63. There are no further administrative procedures that Petitioner is required to exhaust.

CAUSES OF ACTION**Count One****(Violation of the Immigration and Nationality Act;
the Foreign Affairs Reform and
Restructuring Act of 1998;
the United Nations Convention Against Torture;
the APA; and Implementing Regulations)**

64. All of the foregoing allegations are repeated and re-alleged as though fully set forth herein.

65. Respondents have violated Petitioner's statutory and regulatory rights by depriving him of a meaningful right to apply for asylum, withholding of removal, and Convention Against Torture ("CAT") relief under the governing statutes and regulations. *See* Immigration and Nationality Act ("INA") and implementing regulations, 8 U.S.C. § 1225(b)(1) (expedited removal), 8 C.F.R. §§ 235.3(b)(4), 208.30, and 1003.42; 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1231(b)(3) (withholding of removal); and the United Nations Convention Against Torture, implemented in the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231).

66. These provisions entitle Petitioner to a fair procedure to apply for asylum, withholding of removal, and CAT relief. Petitioner's procedural rights guaranteed by these statutes and regulations were violated.

67. The asylum officer and immigration judge also erred by applying an incorrect legal standard. Petitioner was ordered removed despite the fact that he can show a significantly possibility that he could establish

eligibility for asylum, withholding of removal, and CAT claims.

68. Petitioner should have prevailed in establishing a credible fear and would thus have been allowed to pursue his claims for asylum, withholding of removal and protection under the Convention Against Torture in regular Section 240 immigration proceedings.

Count Two

(Violation of the Due Process Clause of the Fifth Amendment to the United States Constitution)

69. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

70. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”

71. Petitioner, having effected entry into the United States by crossing the border, is indisputably present in the United States and entitled to the protections of the Due Process Clause.

72. Petitioner’s due process rights were violated by the asylum officer and immigration judge in not providing him with a meaningful opportunity to establish his claims, failing to comply with the applicable statutory and regulatory requirements, and in not providing him with a reasoned explanation for their decisions.

73. Under constitutionally adequate procedures, Petitioner would have prevailed on his claims.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays the Court to:

- a. Issue an Order directing Respondents to show cause why the writ should not be granted;
- b. Declare Petitioner's expedited removal order contrary to law;
- c. Enter an order directing Respondents to vacate the expedited removal order entered against Petitioner;
- d. Issue a writ of habeas corpus, an injunction, or a writ of mandamus directing Respondents to provide Petitioner a new opportunity to apply for asylum and other applicable forms of relief; and
- e. Grant such further relief as the Court deems just and proper.

Dated: Jan. 19, 2018

Respectfully submitted,

By: /s/ CODY WOFSY.
CODY WOFSY (SBN 294179)
Jennifer Chang Newell (SBN 233033)
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-0774
F: (415) 395-0950
cwofsy@aclu.org
jnewell@aclu.org

Lee Gelernt*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION IMMI-
GRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2616
F: (212) 549-2654
lgelernt@aclu.org

David Loy (SBN 229235)
ACLU FOUNDATION OF SAN
DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
T: (619) 232-2121
F: (619) 232-0036
davidloy@aclusandiego.org

Attorneys for Petitioner

*Application for admission pro hac
vice forthcoming