

1219049 [2013] RRTA 478 (19 July 2013)

DECISION RECORD

RRT CASE NUMBER: 1219049

DIAC REFERENCE(S): CLF2012/200510

COUNTRY OF REFERENCE: Sri Lanka

TRIBUNAL MEMBER: Josephine Kelly

DATE: 19 July 2013

PLACE OF DECISION: Sydney

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependent.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Sri Lanka, applied to the Department of Immigration for the visa on 9 September 2012.
3. The delegate refused to grant the visa on 26 October 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Ministerial Direction No. 56

19. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – to the extent that they are relevant to the decision under consideration.

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
21. The applicant appeared before the Tribunal on 24 January 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages.
22. The applicant was represented in relation to the review by his registered migration agent who attended the hearing.

The entry interview

23. The applicant was first interviewed [in] June 2012 [in location] with the assistance of a Tamil interpreter. The interview record is on the departmental file.

The application

24. The applicant provided the following information in his application. A migration agent helped the applicant with his application. The applicant speaks and reads Tamil and speaks English a little. He is a citizen of Sri Lanka.
25. As a self-employed fishermen from [year] until June 1999, the applicant earned Rs.3000 a month. When he worked in [Country 1] he earned Rs.15,000 a month. From January 2002 until 2012 he again worked as a fisherman in Sri Lanka, earning Rs.10,000 a month
26. [Some of his siblings] are living in Sri Lanka and one brother is living in [another country].
27. The applicant's travel document has expired and is in Sri Lanka with his family. He has no documentary evidence to support his claim for protection. He contacts his relatives in Sri Lanka by telephone.
28. The applicant has held a national ID card, a birth certificate and a passport that were issued by Sri Lanka.
29. In his statutory declaration sworn on 9 September 2012 at [location], the applicant made the following claims. He remains very worried for his family's safety. As a Tamil, he has suffered. He has been denied his personal rights and entitlements in Sri Lanka throughout his life.
30. [In] 2010, the Sri Lankan authorities introduced a system of fishing passes to enable him and others to fish. He had to give his personal ID to the authorities to obtain the pass. He had to return the pass by 10 am to get his personal ID back. If he was late, he would face interrogation about the reason for his lateness. If he was late, there were times, depending upon the officer, when he had to pay a monetary bribe and/or have part of the fish catch confiscated.
31. An incident occurred [in] April 2011 when the applicant commenced his work at around 4 am. He forgot to take his personal ID or seek a formal pass from the authorities as he was running late. He began fishing in the [Village 2] area. At 6 am a small boat with three officers stopped him and sought his work pass which he did not have. He explained the reasons. They asked the applicant to leave his boat and get into their vessel, which he did. They said that they would take him back to the shore but they did not. They took him a further 100 metres from where he had been and forced him to jump into the sea and swim back to the shore as punishment for not having his ID or pass. The applicant swam back to his boat and sailed back to shore with the fish he had caught.
32. The officers who issued the passes were asleep on many occasions. They did not undertake their duties correctly. Many fishermen remained in long lines waiting for their passes. This created much heartache for the applicant who started fishing without the formal documentation on many occasions. On many occasions he travelled to small areas to fish where the passes were not required however the fish there were not as abundant. He remained very concerned and fearful of further repercussions from the authorities who

consistently were present and checking. This remained a burning issue for the applicant and he remains very scared that another incident with the authorities would lead to further abuse and potential harm against him. Before he escaped there were many occasions when fellow fishermen had ventured far outside the limits and were detained by the authorities.

33. The applicant was concerned for his safety and further potential harm from the Sri Lankan authorities led him to decide and discuss his fears with his wife and family, who supported his decision to leave and seek a safe country for himself where he could live like a human, free, person. He sought the assistance of a smuggler.
34. The applicant fears that the police, CID, EPDP, and the Sri Lankan Navy will arrest and kill him on suspicion of his past and take revenge against him. The applicant has heard that he will be killed by those groups if he returns to Sri Lanka because of that mentioned incident.
35. The authorities will not protect him because he is a Tamil. The police are Sinhalese. The government comprises the EPDP, SLA and Sri Lankan navy that had previously sought him and remain seeking him and his family.
36. The applicant does not consider that it is safe in Sri Lanka because he is a Tamil and his family were suspected of assisting him to escape due to the mentioned incidents.
37. He cannot relocate anywhere else because he is being sought by the groups already mentioned.
38. As a Tamil fisherman he is perceived as a sympathiser and associate to the LTTE which could result in death.

Identification information

39. Copies of the applicant's Sri Lankan identity document, driving licence, marriage certificate and [register of birth documents], mostly in a language the Tribunal could not understand, pages from his passport that expired in 2004 and documents relating to his time in [Country 1], were on the departmental file.

Representative's submission

40. The applicant's representative lodged a submission dated 18 September 2012. This admission summarised the applicant's fear of persecution because Sri Lankan government security agencies and affiliated paramilitary organisations suspect that he is linked with the LTTE. He has faced constant denial of opportunities to work at his profession as a fisherman by the Sri Lankan Navy and other agencies. The introduction of the fish pass in [2010] for Tamil fishermen with small boats has further encroached upon his capacity to work and to provide sustenance for his family. He was forcibly required to jump into deep water more than two kilometres from the coast by the Sri Lankan Navy [in] April 2011 which is a form of torture and trauma that he has survived. He has escaped from the country illegally by boat that places him in a perceived group of Tamil departees whom the President of Sri Lanka has underlined as being supporters/sympathisers of the LTTE and who will face the wrath of the country's laws on return for an imputed political opinion.
41. The applicant is a Tamil, he is a member of particular social groups comprising Sri Lankan Tamils and Tamils from the north or east of Sri Lanka and his real and imputed political opinion arise from his race and his former residence in a predominantly Tamil region.

42. The submission included country information in support of the submissions made.

Departmental interview

43. The Tribunal listened to the departmental interview held [in] September 2012 which included the representative's oral submission.

The Tribunal file

44. The applicant provided a copy of the delegate's decision with his review application.

The hearing

45. The applicant provided the following relevant information to the Tribunal at the hearing. Before fishing passes were introduced in 2010, he used to wake up by 4 am to go to sea. After the fishing passes were introduced he used to get up at 1 am to go and stay in the line. He did not have enough time.

46. He had a [rowing boat]. He loaded the net into his boat. The net was 500 metres long and 10 metres wide. When piled into his boat it was half a metre high. It was made of nylon thread. He went out to sea up to three kilometres in any direction from where he launched his boat. He said that the navy determined the three kilometre boundary before 2010. It took him about half an hour to go out three kilometres. After laying his net, he left it in the sea for one hour. During full moon he went out in the evening to lay the net and the next day brought the net in. He only fished from October to April. After that he cannot go to sea because of the monsoon.

47. During the other six months he did not go out as frequently, but once in a while, depending on the weather conditions.

48. He would have reached the fishing location and laid the net by 5 am. After bringing in the net, it would take him about 1.5 hours to reach the shore. With the fish and the wet net which was very heavy, it was hard to row. He got back to shore between 7.30 and 8 am. If it was windy, it was hard to row back to shore. If the weather conditions were alright, it was easier. On shore, he took the fish from the net and sorted them. He then took the fish to the wholesale market which was 1.5 kilometres away by bicycle. If he had a lot of fish, he had to make a couple of trips to the market. His boat was 150 metres from his house.

49. His work was finished when he had sold the fish. Sometimes he can sell the fish in 15 minutes, and sometimes it took an hour to sell.

50. He goes fishing at 4 am because if he goes in the daytime, he cannot get the fish into the net.

51. The applicant contacts his wife, mother and brother on the telephone in Sri Lanka twice a week. His wife and mother live in [different places]. His brother who came back from [Country 1] when the applicant was on [location], stays with their mother. His brother went back to [Country 1] for a month and then returned to Sri Lanka. He is not working in Sri Lanka. He returned there to get married.

52. The applicant travelled to Australia by boat because he does not want to live in Sri Lanka because of the trouble he faced. They tried to kill him in the sea. He met a person in his town who told the applicant they were taking people to Australia, and asked if the applicant

would like to come. That person asked him to pay three lakhs. That person lives in the town where the applicant lives.

53. Some days the applicant earned 2,000 Rupees and some days 10,000 to 15,000 rupees. In six months he can earn two to three lakhs.
54. The person asked him in April. The applicant met him in the street, stopped him and told him they were taking people to Australia are you interested. His cousin was doing this. That person did not say anything about Australia and the applicant did not know anything about Australia. He thought he would be safer here. People told him before if he came here he will get some protection for his life. That is the only reason he came.
55. Before he came to Australia, the applicant was supporting his wife and [children] and his in-laws who were staying with them. He had been supporting his in-laws for two years then. They are about [age]. He said they are staying at their son's house. After the Tribunal commented that it understood that when a man married in his community, he lived in his wife's house and looked after his in-laws, the applicant said that it was not like that. They did not have to look after them for life. In some places they do that. His in-laws have an obligation to look after him and his wife for one year. If they have sons, they might live with sons. When they are older he and his wife look after them. Currently, his in-laws are staying with his wife.
56. When asked was he not concerned about leaving those people he supported, the applicant said he has to be alive to look after his family.
57. When asked how he thought he would sustain himself in Australia the applicant said that he was only looking for safety. Somehow he will get protection. He did not come to Australia to earn money or to work.
58. He is seeking protection because his main problem is that he cannot live in his town. He cannot do his work properly. He is living in a small village. There are Sinhalese areas around them. It is a very tough life there. They are surrounded by Sinhalese people. Wherever they go they face problems.
59. He went to sea one day without taking his pass. Around 6 am after laying the net, he was waiting for fish to come. Three people in a navy boat asked for his pass. He told them he did not have it. They asked him to get into their boat. He cannot argue. They are Sinhalese. They took him 100 metres further and asked him to jump into the sea and told him to swim to shore and left. He tried to swim. It was very hard. He could not do it. But his boat was a short distance away and he managed to swim to it. He took up the net and rowed back to shore about 10 am. He was really scared after that. This type of torture was very hard. He does not want to go through this torture. The Sinhalese on either side of his village do not have a pass system. It is only for his small village. They cannot argue with them. They will shoot "us".
60. Since the pass has been introduced, he has to start work by 4 am but has to get up at 1 am to get the pass. He has to stand in the queue. It takes him half an hour to reach the place where he gets the pass.
61. He and the other Tamil people in his village do not know why the pass was introduced. They have moved Sinhalese into this area.

62. The pass system was introduced for big boats in 2006. That is big boats that go to sea and stay there for a month and then come back. The pass is for Tamil people. He does not know whether the pass is required in other areas. He only knows that it is required in his village.
63. Being a Tamil he could not work there peacefully. That is the main reason he came to Australia, because of the pass system.
64. When asked what the earliest time was that they could get the pass to go fishing, the applicant said that they had to go and wake up the people who issued them. They had to provide their ID card to get the pass. If they needed to get a pass permanently, they had to pay the authorities money. He did not do that.
65. The boat he travelled in to Australia left from [location]. The [number] people who caught the boat were from different places. He knew two people. He did not know how long it would take to travel to Australia. They did not tell him. It took 18 days. He knew it was a risky trip. Instead of being killed in his village, he will make this trip. If he has to die in the sea, he has to die.
66. He paid three lakhs before leaving Sri Lanka. After he got here, they asked for 10 lakhs from his family. They have got seven lakhs from his family. That is, a total of 10 lakhs has been paid.
67. The applicant had to return the fishing pass before 10 am.
68. During the incident when he was told to swim to shore, the navy people spoke Sinhalese. He cannot speak to them in Sinhalese. He can understand a bit of body language.
69. The passport he travelled on to [Country 1] has expired. His ID card is in his village.
70. When asked about the three kilometre boundary which he mentioned has been in place after they introduced the fishing pass, the applicant said that they are small fishermen and that is as far as they can go out. When he returned from [Country 1] he only ever went out three kilometres from shore.
71. When asked what will happen if he is not granted a visa and has to return to Sri Lanka, the applicant said that the Tribunal would not believe him, but after he came out of the camp and came to Sydney, five people in a white van went searching for him at his home in Sri Lanka. They went twice at midnight in October on one Wednesday and one Saturday. They asked if this person had come back home and asked his name to his in-law. They spoke Sinhalese. His father in-law speaks Sinhalese.
72. He does not know why they are searching for him. There will be lots of problems; if he wants to work. He came here without a pass. They will punish him. They will ask "us" to go to the camp. If they do not go, they will have problems. There is a big navy camp in his area which was built around [number] years back.
73. When asked directly if he came to Australia to earn a better standard of living, the applicant said that he did not come for that.
74. When the Tribunal said that he had talked about one incident which was not significant or serious harm, the applicant said that he thinks it is torture. After they found out he did not

have a pass, they should have taken him to the shore and given him some punishment, not made him swim back to the shore.

75. The Tribunal said that it had difficulty accepting the white van story, the applicant said that his wife told him. He is not lying.
76. The applicant had heard about white vans in Sri Lanka and people being threatened before he came to Australia. He had heard that people had been abducted and killed. He knows two people who were taken away and did not return back and who are still missing.
77. The representative asked the Tribunal to raise with the applicant whether the difficulties other people have suffered with the pass system increases his fear. The applicant said that he did not want to say anything about that.
78. The applicant had collected some articles about what is happening to Tamils in Sri Lanka on a USB stick. They were in Tamil. The Tribunal said that it cannot read Tamil and would only accept material in English.
79. The applicant does not know how he will be killed. There are many chances. He does not know why the people in the white van came searching for him. He will encounter more problems getting the fishing pass.
80. The representative made the following submissions. [Village 2] is an enclave of Tamils. It was not in the area of civil conflict. However during the civil conflict, the authorities believed there was smuggling of weapons from [Village 2]. For that reason, they are suspicious of Tamils and fishing restrictions were imposed and a navy base established. The pass system means that the Tamils have a lot of contact with the authorities. The restrictions and the pressure on Tamil fishermen is a Convention reason. The restriction does not apply to anyone else. Sinhalisation is going on. There is pressure on Tamils. This is not merely a case of discrimination or harassment. It goes beyond that. It is persecution. The past suspected links with the LTTE is an imputed political opinion. The continuing contact with the authorities means the applicant is facing a risk, fear of harassment and abuse. He was thrown overboard and feared for his life. He fears it could happen again.
81. The representative said that the applicant was reluctant to discuss his fears. People from some cultures find it difficult to express their fears in detail.
82. Anecdotally, the representative was on a task force and went to detention facilities. Nearly everyone feels oppressed in that environment of discrimination or persecution. The applicant fears being thrown off his boat and losing his life every time he goes out to fish. There has been an attack on his ability to earn a living, getting up early to get the pass which Sinhalese people do not have to get. There is Convention nexus.
83. Complementary protection is satisfied by his being forced to leave his boat in middle of the ocean. He feared for his life. It was degrading punishment.
84. When asked whether he had ever had any of his fishing catch confiscated, the applicant said that once the navy passed the area where he had laid his net and they damaged it. He thought it was done on purpose. The fishermen always hold up a torch and indicate the area where the net is. He was alone. When asked whether he could indicate a distance 500 metres away, the applicant said that he could show half of the net. He had a powerful torch.

85. The Tribunal repeated the question. The applicant said that “we” only catch small fish. Some days, after they arrive on shore, the authorities have taken the fish. He does not know why. “If they ask, we give it”. If they do not give it, the next day when they go to get the pass, they will detain and beat “us”.
86. When the Tribunal commented that he had not mentioned that before, the applicant said the Tribunal did not ask before. When asked how often the authorities came and took the fish from him for no reason, the applicant said that he cannot say when they will; sometimes once a week, sometimes once in a month.
87. The applicant had no other problems.
88. He said that he was never late returning his pass. He then said that he thought the Tribunal was talking about an expired pass.
89. When asked about the claims that if he returned his pass late, he would be interrogated and further monetary bribes or fish confiscated, the applicant said he misunderstood. He thought the question was about the expired pass. If after 10 am they had to face inquiries.
90. When asked how often he returned his pass after 10 am, the applicant said that he did not return the pass after 10 am. Interrogation, confiscation and bribes did not happen to him because he did not return his pass late. He saw it happen to other people. He has seen it happen to many people with a small boat with an engine if there was a problem with the engine and they got back late. Their boats were eight to nine feet long. His boat was eight feet long.
91. When asked whether he had any difficulties getting a pass and returning it, the applicant said that nothing like that has happened to him.
92. The Tribunal said that it accepts that the incident occurred when he was forced into the sea. The applicant said that incident is the reason.

FINDINGS AND REASONS

93. The applicant claims protection in Australia for the following reasons:
 - He is an ethnic Tamil from the north or east of Sri Lanka whose real and imputed political opinion arises from his race and former residence in a predominantly Tamil region.
 - He is an ethnic Tamil from [Village 2] who faced constant denial of opportunities to work as a fisherman by the Sri Lankan Navy and other agencies and whose ability to fish and earn money was further restricted by the requirement for a fishing pass that was imposed on Tamils in [2010], which meant he had to get up much earlier than previously each day to get his pass, and had to return his pass by 10 am each day which caused him to start fishing without documentation and to travel to small areas to fish where passes were not required and where fish were less abundant which has impacted on his capacity to subsist.

- [In] April 2011 he went fishing without his pass, was stopped by three officers while at sea who took him 100 metres away from his boat, forced him into the sea and directed him to swim to shore which was a form of torture and trauma.
 - He is concerned for his safety and fears harm in the future from the Sri Lankan authorities including the EPDP, SLA and Sri Lankan navy who have previously sought him, remain seeking him and his family and are suspicious of his past and will take revenge and kill him – white van incident.
 - As a Tamil fisherman he is perceived to be a sympathiser of the LTTE which could result in death.
 - He is a Tamil who escaped illegally by boat and is perceived as a member of a group of Tamil departees who are perceived to be sympathisers of the LTTE, and will be arrested at the airport and if he goes home he will be kidnapped.
94. The Tribunal accepts that the applicant is a citizen and national of Sri Lanka based on his expired passport details, the claims he has made in his application and the documents the Tribunal can understand that are in English, including his Sri Lankan driver's licence and identity document. It also accepts that he is a Tamil who was born near [Village 2] in the North Western province of Sri Lanka in [year] and lived there until his departure for Australia [in] May 2012, apart from the period he worked in [Country 1] from 1999 until 2002. From his return until he left the country [in] May 2012, he worked as a fisherman in [Village 2].
95. The Tribunal accepts the representative's submission that [Village 2] is an enclave of Tamils and was not in the area of conflict during the civil war. [Village 2 description].¹ It does not accept that the applicant is from the north or east of the country as claimed. The Tribunal finds that those areas refer to the areas where the civil war was fought, the Northern and Eastern provinces. Therefore the Tribunal does not accept the claim that because the applicant is from the north and east of Sri Lanka his real and imputed political opinion arises from his race and former residence in a predominantly Tamil region.
96. The Tribunal has not found or been provided with any country information about fisherman in the North Western province, including [Village 2], that supports the applicant's claim that the fishing pass system for his kind of fishing was introduced in [2010] and that he had to give his personal ID to authorities in the morning to get his fishing pass and which was retained until he returned the pass before 10 am.
97. There was a report [in] February 2009 on the [website] about [Village 2]. It reported that a pass system for boat owners had recently been introduced and the comments of a fisherman who said that [they had to carry their national identity cards as well as the fishing passes]”²
98. The 2012 UNHCR eligibility guidelines for asylum-seekers from Sri Lanka refer to fishermen in many areas of the north having to submit their civil documentation when going out on the water:

¹ [Citation]

² [Citation]

In many areas of the north, including parts of Jaffna, Mullaitivu, and Mannar districts, a special permit must be obtained from the naval authorities to access coastal waters, and fishermen must submit their civil documentation on a daily basis when going out on the water.³

99. Each of the areas referred to in the report is in the Northern province.
100. However, giving the applicant the benefit of the doubt, the Tribunal accepts that from [2010] he was required to obtain a fishing pass each day upon showing his identity document, which was retained while he fished and returned to him when he returned the pass before 10 am.
101. The Tribunal accepts that the applicant had to get up earlier than he had before the pass regime was imposed and that he had to return before 10 am.
102. The Tribunal finds, on the applicant's evidence at the hearing, that he never had any difficulty getting a pass and returning it before 10 am. Contrary to the claims in his application, interrogation, confiscation and bribes did not happen to him because he did not return his pass late. He saw it happen to people whose boat had an engine. He had a rowing boat.
103. The applicant gave evidence at the hearing in response to questions about whether authorities confiscated his fish. His first response was that one night a navy vessel passed and damaged his net, which he thought was deliberate. When the Tribunal asked the question again, the applicant said that some days the authorities have taken the fish when they return to shore, he does not know why, and if the authorities asked, they gave them the fish. He also said if they did not give it, the authorities would detain them and beat them when they went to get their pass the next day. Given his evidence that he never had any problems getting his pass, the Tribunal finds that he never refused to give the authorities fish when the request was made, which he said was sometimes once a week and sometimes once a month. He said that he had no other problems. The Tribunal finds that the applicant complied with the requirements of the pass system, except on one occasion in April 2011.
104. Given the unqualified nature of the applicant's evidence at the hearing, the Tribunal is not satisfied that the pass system caused him to start fishing without documentation and to travel to small areas to fish where passes were not required and where fish were less abundant which has impacted on his capacity to subsist, as claimed in the application.
105. The Tribunal accepts that from time to time the applicant gave the authorities fish when requested but finds that it had an insignificant impact on his capacity to earn a living. That he made no claim about the loss of fish to the authorities in his application is inconsistent with such loss impacting to any significant extent on his capacity to earn a living. He did not claim otherwise at the hearing.
106. The Tribunal accepts that the authorities may do the same in the future and the applicant would comply with the request to avoid having difficulties getting his pass the next day. It is not satisfied that people are beaten or detained if they do not give the authorities fish, but does accept that they may suffer delays in having the pass issued the next morning. The Tribunal accepts that such conduct is discriminatory but does not accept that the conduct of

³ UN High Commissioner for Refugees 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December, p. 24
<<http://www.unhcr.org/refworld/docid/50d1a08e2.html>> Accessed 24 December 2012 <Attachment>

the authorities is systematic, based on the applicant's evidence that he cannot say when it will happen, sometimes once a week, sometimes once a month. The Tribunal is therefore not satisfied that the conduct is serious harm (s.91R(1)(c)). The Tribunal is also not satisfied that it is significant harm (s.36(2A)).

107. The Tribunal finds that the three kilometre boundary was the distance a fisherman could row to fish and return to market the fish and not a limitation imposed by the fishing pass. The applicant said at the hearing that they were only "small fisherman", that is as far as they can go, and when he returned from [Country 1], he only ever went out three kilometres from shore. That is, from 2002 until the introduction of the fishing pass [in] 2010, the maximum distance he travelled from shore was the same as when the fishing pass was in force. This limitation was a physical one related to the size and power source of the boat and not one imposed by the fishing pass.
108. The Tribunal accepts that in April 2011 the applicant was stopped by Sri Lankan authorities while at sea, taken 100 meters away from his boat, and forced into the sea. Giving him the benefit of the doubt, it accepts that he was able to understand Sinhalese to the extent that he understood that he was told to swim to shore. The Tribunal finds that in the circumstances, it was clear that his boat was 100 metres away and that he would swim to it rather than to the shore, if his boat were closer, which he did. That was the only action the officers took. They did not confiscate his fish, or take any action to prevent or limit his fishing thereafter. The applicant said that he tried to swim, but was very hard, he could not do it, but his boat was a short distance away and he managed to swim to it, took up his net and rowed back to shore about 10 am.
109. The Tribunal does not accept that the applicant suffered serious or significant harm as a result of that incident. In making that finding the Tribunal has taken into account the definitions of torture and cruel or inhuman treatment or punishment in s.5(1) of the Act. The Tribunal is not satisfied that severe pain or suffering, whether physical or mental, was inflicted on the applicant. It is also not satisfied that the applicant was subjected to degrading treatment or punishment as defined in s.5(1). It is not satisfied that forcing him into sea in the circumstances already described caused or was intended to cause, extreme humiliation which was unreasonable.
110. In making those findings the Tribunal has taken into account that the applicant had been a fisherman, rowing a small boat up to three kilometres off-shore six days a week to fish from [year]. He was very familiar with the sea and the forces it could unleash. It also takes into account that he continued fishing after the incident without further incident and did not leave Sri Lanka until more than 15 months later. It is the only such incident he has reported.
111. Taking all those matters into account, the Tribunal is not satisfied that there is a real chance that the applicant will suffer serious harm from such an incident in the reasonably foreseeable future if he returned to Sri Lanka or that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm from such an incident.
112. The Tribunal is not satisfied that any authority, including the EPDP, SLA and Sri Lankan navy sought him out from the time of the incident in April 2011 until he left Sri Lanka in May 2012. More than a year elapsed after that incident until the applicant left for Australia. He made no claim in his application made in September 2012 to have been pursued by the authorities after that incident.

113. The applicant claimed at the hearing that after he had left detention in Australia, his wife told him five people in a white van went searching for him at his home twice in October 2012, asking for him in Sinhalese. He said that he did not know why they were searching for him. He did not say who they may be.
114. The Tribunal is not satisfied that any such incident occurred. The applicant said he did not know why they are searching for him. He did not speculate as to who they might be, although the Tribunal notes the formulation of the claim referring to the authorities specified in paragraph 112. The Tribunal is not satisfied that any authority would have been searching for him as a consequence of the incident in April 2011 or for any other reason, given that nothing had occurred from that time until he left Sri Lanka more than a year later. For those reasons, the Tribunal is also not satisfied that he will be of any interest to any authorities in Sri Lanka in the future because of the 2011 incident. The Tribunal is not satisfied that there is a real chance that the applicant will suffer serious harm if he returns to Sri Lanka in the reasonably foreseeable future or that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm, for that reason.
115. The Tribunal has taken into account the country information provided to the Tribunal about abductions and white vans. It finds, based on that information, that the reports of people being abducted by people in white vans since the end of the civil war relate mostly to incidents in the Northern province and Colombo. The Eastern province and southern Sri Lanka were also referred to generally as locations where abductions and enforced disappearances have been reported. A specific report referred to the reason authorities were interested in an individual. A man was kidnapped in Colombo in February 2012 two days before he was to testify implicating senior police officers in his torture.⁴
116. No report was provided of any abduction by or threats from people in white vans in the [Village 2] area or the North Western province. The Tribunal is aware of a report of an abduction of a man in [Village 2] by an armed group in [year].⁵ The report said that the man escaped and fled to India. The Tribunal gives the report little weight because it occurred during the civil war and no background was provided about the person who was abducted as to why that person may have been of interest to authorities.
117. Leaving aside the applicant's claims about leaving Sri Lanka illegally and returning as a failed asylum seeker which are addressed later in this decision, the Tribunal is not satisfied that there is a real chance that the applicant will be abducted and killed in a white van incident in the reasonably foreseeable future if he returns to Sri Lanka or that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Sri Lanka, there is a real risk that he will be abducted and killed in a white van incident. The Tribunal makes those findings based on its findings about the country information considered above.
118. The Tribunal is not satisfied that because he is a Tamil fisherman the applicant is perceived to be a sympathiser of the LTTE which could result in death or other serious or significant harm. He fished in [Village 2] during the civil war from 2002 to May 2009 without incident. The first time he claims his fishing was affected was after passes were introduced in [2010].

⁴ <http://reliefweb.int/report/sri-lanka/torture-sri-lanka-when-arbitrariness-prevails>

⁵ [Citation]

The Tribunal does not know why the passes were introduced at that time for fisherman such as the applicant and not during the civil war.

119. The representative claimed that the applicant had faced constant denial of opportunities to work in his profession as a fisherman in Sri Lanka by the Sri Lankan Navy and other agencies and claimed that the fishing pass was introduced because the authorities suspected there was smuggling of weapons from [Village 2]. The Tribunal does not accept that the applicant's evidence supports the submission that he has faced constant denial of opportunities to work as a fisherman. The Tribunal was unable to identify any country information that supported the assertion that the fishing pass was introduced because the authorities suspected weapons were being smuggled from [Village 2]. Further, the passes for the type of vessel the applicant used were introduced more than 18 months after the end of the civil war. It seems unlikely that the smuggling of weapons was an issue at that time. The Tribunal is not satisfied that was the reason the fishing pass was introduced in [2010]. The Tribunal does not know why it was introduced then. For the reasons already given, the Tribunal accepts that the incident in April 2011 occurred and that the applicant gave fish to authorities when he was asked.
120. The Tribunal accepts that the fishing pass system caused the applicant inconvenience, frustration and was discriminatory and systematic (s91R(1)(c)). That system will have the same impact on him in the future until the fishing pass system is ended. He had to get up earlier than he had before and line up. Apart from the incident in April 2011 considered above, the applicant said that the only problem he had was the taking of the fish "sometimes". He never returned his pass late and so was not interrogated, did not have to pay bribes and did not have his fish confiscated for that reason. Apart from the authorities sometimes taking his fish, the Tribunal is not satisfied that it impacted adversely on his ability to earn a living.
121. The Tribunal is not satisfied that the impact of the fishing pass system involved serious harm to the applicant in the past (s91(1)(b)). It is not satisfied that there is a real chance that the applicant will suffer serious harm for that reason in the reasonably foreseeable future. The Tribunal is also not satisfied that the applicant has suffered significant harm as a consequence of the fishing pass system or that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm for that reason (s.36(2A)).
122. After the 2011 incident, the Tribunal finds that the applicant continued fishing until he came to Australia in May 2012. He was not killed or otherwise harmed because he was a Tamil fisherman who was perceived to be a sympathiser of the LTTE. The Tribunal is not satisfied that he will be so perceived for that reason and killed or otherwise harmed if he returns to Sri Lanka.
123. That Tribunal is not satisfied that because he is a Tamil who escaped illegally by boat, he is perceived to be a member of a group of Tamil departees who are perceived to be sympathisers of the LTTE, and will be arrested at the airport and if he goes home he will be kidnapped. It does not accept that as a Tamil failed asylum seeker returning to Sri Lanka, he will be perceived to be an LTTE sympathiser or supporter and suffer harm for that reason.
124. The Tribunal has taken into account the country information referred to in the written submissions and in the delegate's decision. It has also taken into account the following country information. The UNHCR's most recent Eligibility Guidelines for Assessing the

International Protection Needs of Asylum Seekers from Sri Lanka⁶, do not include Tamils or Hindus, or Tamil Hindus, *per se* as being at risk of persecution, while groups at risk include persons suspected of having links with the LTTE.

125. UNHCR's 2012 Guidelines cover the subject of "return of refugees and failed asylum seekers"⁷. The Tribunal does not consider that questioning at the airport by different agencies or visits from authorities upon their return home is serious or significant harm. The Tribunal accepts that some Tamils who have returned to Sri Lanka have been subject to harm that is serious and significant. However, the Tribunal finds that the vast majority of those returnees were people whom the authorities suspected had LTTE links before their departure or because of their activities overseas. The material does not suggest that being a Tamil who is likely to have sought asylum unsuccessfully in Australia will come under adverse scrutiny from Sri Lankan authorities. The representative's written submissions emphasise that Tamils perceived to have links with the LTTE are subject to wide-ranging oppression. The Tribunal is not satisfied that the authorities in Sri Lanka had any suspicion that the applicant has such links. His incident-free life fishing in [Village 2], as described above with one exception, supports that conclusion. The 2011 incident occurred because the applicant had not complied with a governmental requirement to have his fishing pass with him. He was not pursued thereafter. There is no evidence that he has undertaken activities that may link him with the LTTE while overseas.
126. The Tribunal is not satisfied that the white van incident occurred after the applicant left Sri Lanka as he claimed. The Tribunal has found that the Sri Lankan authorities had no suspicion that the applicant had LTTE links before he left Sri Lanka and has no basis for such suspicions arising from his activities in Australia. The Tribunal is not satisfied that the material before it supports a finding that people in a white van would be interested in a person such as the applicant who left Sri Lanka unlawfully.
127. The Tribunal accepts that recent and reliable information⁸ indicates that some people who left Sri Lanka illegally have been detained in uncomfortable conditions for several days, and charged under the Immigration and Emigration Act. They do not appear to have been harmed. The Tribunal accepts that there are official penalties for illegal departure from Sri Lanka under the Immigration and Emigration Act, including fines and imprisonment. However those charged to date have been released on bail and their cases have not yet been heard. It is therefore unknown what penalties they may face.
128. The Tribunal accepts that some deportees, both Tamil and Sinhalese, who left Sri Lanka illegally were detained for three nights in Negombo prison in late 2012 before being bailed. While the Tribunal is satisfied that many more have been returned to Sri Lanka without such treatment being reported, on the basis of the available evidence the Tribunal accepts that the applicant may be detained in cramped and unpleasant circumstances for up to 3 nights before being released on bail. However, it does not accept that such treatment is serious or significant harm.
129. The Tribunal's findings are supported by the decision made by the Upper Tribunal (Immigration and Asylum Chamber) in the United Kingdom on 3 July 2013 after nine days of

⁶ UNHCR Eligibility Guidelines for Assessing The International Protection Needs of Asylum-Seekers from Sri Lanka, United Nations High Commissioner for Refugees, 21 December 2012, HCR/EG/LKA/12/04

⁷ UNHCR 2012, p.8

⁸ 2012, Doherty, B. 'Asylum denied, a penalty waits at home,' Sydney Morning Herald, 8 December <http://www.smh.com.au/world/asylum-denied-a-penalty-waits-at-home-20121207-2b0qi.html>

hearing, and considering 5,000 pages of documentary evidence, oral evidence given by 17 expert and country witnesses and the written statements of four other experts. That Tribunal found:

(2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.

(3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.

(4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.

(6) There are no detention facilities at the airport. Only those whose names appear on a "stop" list will be detained from the airport. 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.

(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:

(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.

(b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.

(c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.

(d) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.

(8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.

(9) The authorities maintain a computerised intelligence-led "watch" list. A person whose name appears on a "watch" list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.

130. The Tribunal has considered all the applicant's claims individually and given its reasons for not accepting them. In summary, the applicant claims that he is a Tamil fisherman from [Village 2] who is perceived to be an LTTE sympathiser which could result in his death, and who has had to have a fishing pass since [2010], with the consequences described earlier in this decision, including but not limited to the incident in April 2011 and sometimes having his fish taken by Sri Lankan authorities, that he has been and will be sought after by people in a white van and killed, and who has escaped illegally by boat and is perceived as a member of a group of Tamil departees who are perceived to be LTTE sympathisers and will be arrested at the airport or kidnapped after he returns home. The Tribunal has also considered the implicit claim to be a Tamil who is a failed asylum seeker.
131. Considering all the applicant's claims cumulatively, the Tribunal is not satisfied that the applicant has suffered serious or significant harm in the past for the reasons he claimed or that there is a real chance that he will suffer serious harm in the foreseeable future if he returns to Sri Lanka or that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm, for those reasons.
132. For the above reasons, the Tribunal is not satisfied that there is a real chance that the applicant will suffer serious harm in the reasonably foreseeable future if he returns to Sri Lanka. It is not satisfied that the applicant has a well-founded fear of persecution for a Convention reason. He does not meet the refugee criterion (s.36(2)(a)).
133. For the above reasons, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm. The applicant does not meet the complementary protection criterion (s.36(2)(aa)).

CONCLUSIONS

134. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

135. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
136. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

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

Josephine Kelly
Member