

1405747 [2015] RRTA 316 (5 May 2015)

DECISION RECORD

RRT CASE NUMBER: 1405747
COUNTRY OF REFERENCE: Sri Lanka
TRIBUNAL MEMBER: Rowena Irish
DATE: 5 May 2015
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 05 May 2015 at 10:35am

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).

BACKGROUND

2. The applicant left Sri Lanka when he was [a small child] and moved to India with his family. He claims that he will be harmed if he was to return to Sri Lanka because of his [relative]s' role in the LTTE (which means he will be persecuted because of his imputed pro-LTTE political opinion and membership to the particular social group "relatives of his [relative]s"), he has no family in Sri Lanka which will make it difficult for him to obtain employment and for him to get someone to bail him if he is arrested, he has an injury which will prevent him from obtaining employment in Sri Lanka, he will return as a failed asylum seeker and he is a Tamil with LTTE connections.
3. The applicant was born in [Jaffna] on [date] (an untranslated copy of his birth certificate was provided). He lists his ethnic group as "Tamil" and religion as "Hindu". His father is deceased, his mother and [a sibling] live in India and another [sibling] lives in [another country] (at the time of application). He states that he fled to India in 1992 (although he later revised this to 1990) where he remained living until coming to Australia. In support of this he has provided a copy of his family Sri Lanka Refugees Identity Register Camp identity cards from 2005 and 2010. In India he worked as [occupations].
4. The applicant, who claims to be a citizen of Sri Lanka, arrived in Australia as an Irregular Maritime Arrival [in] June 2012. He was interviewed for the purposes of a Biodata interview [in] June 2012 (notes of this interview appear on the Departmental file at folios 74-75). He was again interviewed for the purposes of an Entry interview [in] November 2012 (notes of this interview appear on the Departmental file at folios 76-90). He applied for the protection visa [in] April 2013 and was interviewed by the delegate [in] September 2013 (a recording of which appears on the Departmental file at folio 132 which the Tribunal has listened to) and the delegate refused to grant the visa [in] March 2014. A copy of the decision was provided by the applicant to the Tribunal for the purposes of the review and the applicant is taken to be on notice of the delegate's findings and reasons.
5. The applicant appeared before the Tribunal on 9 February 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil (Sri Lankan) and English languages. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. Following the hearing the Tribunal agreed to allow extra time for submissions to be made and submissions were received, after the date due for submissions, on 24 February 2015. The applicant's representative had previously made submissions dated 15 September 2013 and 6 February 2015 which the Tribunal has had regard to.

Attached to the submission dated 6 February 2015 was a copy of the applicant's mother's refugee identity cards from 2005 and 2010.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The law upon which the findings below are based is set out in Attachment 1.
8. On the basis of the applicant's consistent evidence since arrival in Australia, birth certificate and Sri Lankan refugee ID cards, the Tribunal finds that the applicant is a citizen of Sri Lanka. For the reasons set out in the delegate's decision, the Tribunal accepts that the applicant no longer holds refugee status in India as a result of having left illegally and not having reported at his allocated camp. Therefore there is nothing in the evidence before the Tribunal to suggest that the applicant has a right to enter and reside in any country other than Sri Lanka. Therefore the Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act. As the Tribunal has found that the applicant is a national of Sri Lanka, the Tribunal also finds that Sri Lanka is the applicant's "receiving country" for the purposes of s.36(2)(aa).

Refugee criteria

9. The applicant has made a number of claims about why he fears returning to Sri Lanka. The Tribunal has considered each of these individually and cumulatively but is not satisfied that the applicant has a well-founded fear of persecution for a Convention related reason, for the reasons discussed below.

LTTE connections

10. The applicant left Sri Lanka when he was [a small child]. He does not claim to have any personal involvement with the LTTE or that his family has had any involvement with the LTTE since they left Sri Lanka in 1990. The applicant's claims are primarily focused on his [relatives]' roles in the LTTE prior to 1990. The applicant stated at the hearing that his mother has [a number of relatives]. He initially referred to two of these [relative]s being involved with the LTTE but then also to a third [relative] who he claimed was also involved. He stated that [Mr A] [relative] and [Mr B] [relative] (who he claims were both in the LTTE) are missing, one [relative] is in India, one [relative] is in [another country] and [another relative] (whose name he does not know) is living in an unknown location. He then stated that [Mr A] [relative] was not missing but had passed away as a result of [a medical condition] or disease in about 2012 in India, after moving there in 2007 or 2008. He was disabled as a result of an injury sustained in around 2005 during a battle. He stated that [Mr B] [relative] was in the LTTE and in 2005 they were told that he went missing and they do not know what happened to him. He stated that the third [relative] who was involved with the LTTE was [Mr C] [relative] who is still living in India and with whom the applicant's father was living before he died. However, the Tribunal found the applicant's evidence in relation to this to be inconsistent, vague and unpersuasive.
11. First, as stated in the delegate's decision, at the entry interview the applicant did not refer to his family's connections to the LTTE. The delegate's record states that when the delegate asked him why he had not referred to such connections he replied that he knew there were some problems but it was only after he spoke with his mother that he

really got the details. However, this is significantly different to the explanation provided to the Tribunal for his failure to refer to his family connections. At the Tribunal hearing when asked why he failed to refer to his family connections to the LTTE at the entry interview he stated that he was afraid that if he told the Australian authorities that he had connections with the LTTE then something bad would happen to him. Given the significantly different explanations provided for why he failed to refer to any family connections to the LTTE at the entry interview (ie whether he only found out the details after the entry interview or whether he was too afraid to reveal the details), it raises concerns in the Tribunal's mind as to whether the applicant has been truthful in relation to his family's LTTE connections.

12. Second, the applicant was unable to provide much detail about his [relative]s' roles in the LTTE, as discussed by the delegate in the decision record and acknowledged in the applicant's representative's post hearing submission which states that "[d]uring the Tribunal hearing, [the applicant] was not able to provide detailed information about his family". The applicant stated that his [relative] [Mr A] [relative] had told the applicant before he passed away that he was in the LTTE and injured in battle. When the Tribunal asked what [Mr A] [relative] had told the applicant about his involvement in the LTTE the applicant stated that he was scared to look at [Mr A] [relative] and did not talk to him much. When the Tribunal put to him that he said he had a discussion with [Mr A] [relative] in which [Mr A] [relative] told the applicant that he was in the LTTE, the applicant stated that he just said he was in the movement but did not give any details. The Tribunal asked whether his mother had told him anything about [Mr A] [relative]'s role he stated that she did not. The applicant stated that he was aware that the delegate had refused his application for protection partly on the basis that he was unable to provide details of his [relative]s' roles in the LTTE. He stated that he had spoken to his mother after this and asked her for details. He initially stated that she replied that when her [relative] joined the movement they left Sri Lanka so she did not bother to get any details. However he later changed his evidence and stated that she refused to provide any details because it was too stressful for her to do so.
13. He stated that he had told his mother how important this information was to his protection visa application but she said she did not have any evidence. However later in the hearing the applicant stated that because of the torture and torment his family went through his mother did not want to discuss the issue and when he told her that the Australian officials were asking for details about the roles of his [relative]s in the LTTE she would not talk about it because of the stress and experience she had undergone. When the Tribunal asked whether the applicant had tried to contact [Mr C] [relative] to get more details (given that he is still living in India) the applicant stated that he did not have [Mr C] [relative]'s contact details. However, he agreed that his mother had [Mr C] [relative]'s details and does speak with [Mr C] [relative] but did not provide any explanation for why he had not asked for [Mr C] [relative]'s details and contacted [Mr C] [relative] directly to get more information about his family's involvement in the LTTE.
14. The Tribunal found the applicant's evidence about why he had been unable to obtain further details about his [relative]s' involvement in the LTTE to be inconsistent and unpersuasive. It appears to the Tribunal that the applicant had avenues open to him to find out more information, for example speaking with his [relative] or obtaining a statement from his [relative], which would have enabled the Tribunal to make a more

accurate assessment of what role, if any, his [relative]s played in the LTTE and what risks this created for the applicant if he was to return to Sri Lanka. The applicant had further time following the hearing to obtain additional information or evidence but has not provided any. The applicant's failure to obtain further details, and his unpersuasive explanation for that failure, raises concerns in the Tribunal's mind about whether his [relative]s were involved in the LTTE at all.

15. In the representative's post hearing submission it was stated that the lack of detailed information was a result of the family's dysfunctional relationships. However, the Tribunal does not accept that this was the reason for why the applicant had not sought out further information as he did not suggest that his [relative] would be unwilling to talk to him and indeed stated that his mother is in continuing contact with [Mr C] [relative] in India. The submission also states that members of the LTTE of high rank would be reluctant to divulge information about their role for fear of reprisal from the Sri Lankan authorities. Again the Tribunal does not accept that this explains the applicant's inability to provide recent information given that one [relative] is now deceased, another has been missing for an extended period of time and the third lives in India, suggesting that there is no risk of additional harm to them from the Sri Lankan authorities. The post hearing submission also refers to the applicant's mother's reluctance to provide details about why the family fled or their persecution in Sri Lanka. The submission states:

[The applicant] instructs that his mother may have been subjected to torture, including gender based violence. [The applicant] instructs that he has not and would not discuss this matter with his mother due to the stigma associated with such crimes.

[The applicant] cannot be certain of the nature of the persecution his mother suffered; however, he instructs that his father's estrangement towards his mother and the dysfunctional nature of his family leads him to suspect it would be plausible to assume that his mother may have been subjected to such cruel treatment by the Sri Lankan authorities.

...

It is submitted that given the availability [of] overwhelming evidence in relation to gender based crimes and sexual violence in Sri Lanka it would be unusual not to assume that sexual violence was not utilised against [the applicant's] mother by the Sri Lankan authorities.

We submit that [the applicant's] mother's reluctance to return to Sri Lanka after the end of the war and her estranged relationship with her family and her husband could be as a result of extreme trauma or suffered experience while she resided in Sri Lanka.

16. The Tribunal did not find this explanation to be persuasive, firstly because it appears to the Tribunal to be purely speculative and while the Tribunal accepts that the country information suggests widespread use of sexual violence by Sri Lankan forces it does not accept that this means it would be "unusual" to assume that a Tamil woman was not subject to it. Secondly, the applicant did not raise any concerns about this at the hearing and it was only raised in post hearing submissions following an oral submission made by the applicant's representative at end of the hearing that this could be a possible explanation for the applicant's mother's failure to provide any information about his [relative]s or their past treatment in Sri Lanka. Thirdly, the applicant's evidence at the

hearing was not that his mother was estranged from her family but rather that she used to visit her [relative] [Mr A] [relative] frequently before he died and that she is still in regular contact with [Mr C] [relative]. Finally, the Tribunal considers that this fails to address why the applicant did not seek further information from his [relative] (who would appear would be able to provide more details given the applicant's claims that [Mr C] [relative] was himself in the LTTE also).

17. The post hearing submission also states that:

...his [relative] was an aggressive and disciplined person... it would be reasonable to assume that he held a high rank in the LTTE due to his character, mannerisms and the years his [relative] served in the LTTE .. from approximately 1988 until 2006.

18. The Tribunal is not willing to speculate that the applicant's [relative] was a high ranking member of the LTTE merely on the basis that he was an aggressive and disciplined person (a submission also made orally at the hearing). The applicant has not provided any credible evidence that his [relative] was in the LTTE from 1988 until 2006 (particularly as he stated at the hearing that his [relative] was disabled from 2005) and therefore the Tribunal does not find this submission persuasive.

19. Third, the applicant's evidence in relation to his [relative] [Mr B] [relative] was inconsistent. As referred to above at the hearing the applicant stated that they were told that [Mr B] [relative] had gone missing in 2005. However, as put to the applicant at the hearing this does not appear to be consistent with his written statement (dated 22 April 2013) in which he states:

I understand a little about why my family fled Sri Lanka. In the early 1990s my mother's [relatives] were associated with the LTTE. Because of her relationship with her [relatives], the Sri Lankan Army would question and harass my mother about her [relatives]. My mother has always been too frightened to return to Sri Lanka because she fears harm from the State authorities because of her [relatives]' activities.

My eldest [relative] disappeared shortly after we arrived in India and has not been seen or heard from for over 20 years. My remaining [relative] died recently in India. He lived his whole life in camps.

20. The applicant confirmed at the hearing that the reference to his "eldest [relative]" was referring to [Mr B] [relative] who is his only [relative] who is missing. The Tribunal put to the applicant that in his statement he claimed that [Mr B] [relative] had not been seen or heard from for over 20 years and disappeared shortly after they arrived in India (which was in 1990), which appeared to be inconsistent with his evidence that [Mr B] [relative] went missing in 2005. In response to this the applicant denied having said what is in the statement but did not provide any explanation for how then this information appeared in his statement. The applicant stated at the beginning of the hearing that the statement had been read back to him using an interpreter and that he was confident it was all correct. Therefore the Tribunal finds that the information in his statement was provided by him to his representative. The Tribunal considers that this is significantly inconsistent with his evidence to the Tribunal about his [relative]'s background and the applicant has not provided a satisfactory explanation for this.

21. Fourth, the applicant claims that he had a third [relative], [Mr C] [relative], who was involved with the LTTE. He stated at the hearing that he does not know much about [Mr C] [relative]'s role because he came to India earlier (although the delegate's

decision states that the applicant said at interview that this [relative] had gone to India in 1990 which is the same year as the applicant). This [relative] is not referred to in the applicant's written statement which only refers to his mother having [relatives] in the LTTE. Furthermore, as stated in the delegate's decision the applicant referred to this [relative] at the Departmental interview as [a different name]. However at the Tribunal hearing he stated that this [relative]'s name was [Mr C] [relative]. When the Tribunal put to him that he had used a different name at the Departmental interview he replied that his [relative] used to be called [a different name] but the applicant had now checked and found out that his name is [Mr C] [relative]. The Tribunal did not find this persuasive and considers that the applicant would have referred to his [relative] consistently by the name he knew him as. Finally, the applicant's evidence in relation to the family's contact with this [relative] was not persuasive. He stated that after coming to India the family did not have any contact with [Mr C] [relative] because there were so many conflicts in the family and the relationship was not harmonious. However, he separately stated at the hearing that his father had lived with [Mr C] [relative] while he was ill and that his mother continues to have contact with [Mr C] [relative]. The Tribunal found the applicant's evidence about the involvement of a third [relative] in the LTTE to be unpersuasive.

22. Like the delegate, the Tribunal did not find the applicant's evidence in relation to his [relative]'s involvement in the LTTE to be persuasive and is not satisfied that he has been truthful in relation to their roles. The Tribunal is not satisfied that the applicant's [relative]s held leadership roles in the LTTE that would lead to there being a real chance that the applicant would be imputed with a pro-LTTE profile on the basis of his relationship to them (ie as a member of the particular social group "relatives of his [relative]s" even if such a group exists) if he was to return to Sri Lanka.

Tamil

23. The applicant's representative has submitted that:

The Tamils of Sri Lanka continue to experience significant levels of violence and discrimination in contemporary Sri Lanka. Since the end of the Sri Lankan Civil War, they have suffered social and economic marginalisation, including expropriation of land, denial of religious and cultural rights, and an inability to access avenues of redress, allowing agents of Sri Lanka's security services to carry out abuses with impunity. These circumstances of abuse and prejudice are unlikely to be mitigated within the reasonably foreseeable future.

24. The applicant's representative has provided a submission setting out country information including reports from the UK Home Office, DFAT, UNHCR, Human Rights Watch, International Crisis Group, Tamils Against Genocide, Sri Lanka Campaign for Peace and Justice, US Department of State, Freedom House, Amnesty International, Integrated Regional Information Network (IRIN), Minority Rights Group International, Bar Human Rights Committee of England and Wales, Swiss Refugee Council, Freedom from Torture, International Crimes Evidence Project, Internal Displacement Monitoring Centre, media reports and past decisions of the Refugee Review Tribunal. The Tribunal has taken into account all of this information although it notes that some of the information refers to Tamils in circumstances not relevant to the applicant such as political activists and decisions relating to applicants who had lived in Sri Lanka during the civil war. The Tribunal accepts that there are reports of ongoing persecution and violence in Sri Lanka of certain persons, including Tamils

with particular profiles, and that the Sri Lankan authorities remain paranoid about the possible resurrection of the LTTE. However, the question for the Tribunal is whether the applicant has a profile that would make him of adverse interest to the Sri Lankan authorities. The Tribunal has not accepted that there is a real chance of the applicant being harmed because of his [relative]s' past LTTE involvement. However, it accepts that the applicant is Tamil and has therefore considered whether there is a real chance of him being harmed as a result of this.

25. The Tribunal accepts that the independent evidence indicates, at least until the end of the civil war in 2009, that Sri Lankan citizens of Tamil ethnicity suffered disproportionately at the hands of the Sri Lankan authorities in what was a lengthy, brutal and bloody war. The evidence indicates that the LTTE was formed in 1976 with the main aim of establishing an independent Tamil state and they pursued this aim through a military campaign against the Sri Lankan government which lasted, apart from a ceasefire from 2002 to 2006, until May 2009.¹ The Tribunal accepts there is evidence of continuing atrocities against some Tamils even since the end of the war² and that, as set out in the country information referred to by the representative, there continue to be instances of human rights abuses against some Tamils including the use of sexual violence, arrests, detention, disappearances, torture, extrajudicial killings, discrimination, attacks on media and violations of housing, land and property rights. As set out in the representative's submission, the Tribunal accepts that the Sri Lankan authorities have broad powers under the *Prevention of Terrorism Act* (PTA) which may be used against Tamils in a discriminatory manner. However, balanced against this country information is information which suggests that it is Tamils with particular profiles who are targeted rather than all Tamils in Sri Lanka. DFAT has assessed that as of October 2014 the LTTE does not exist as an organised force and any former LTTE members within Sri Lanka would have only minimal capacity to exert influence on civilians or those returning from abroad. It has also reported that since the civil war ended in May 2009 there has been considerable change in the security situation such that the risk of harm to Sri Lankan citizens on the basis only of their Tamil ethnicity has substantially reduced.³ The Thematic Report concludes:

DFAT assesses that those Tamil civilians who were not members of the LTTE, including those who may have provided a low-level of support to the LTTE, may be monitored by Sri Lankan authorities, but are at a low risk of being detained or prosecuted.⁴

26. While the applicant's representative has submitted that the DFAT reports are flawed for a number of reasons and "must be treated with caution as a reliable source of evidence in this field" the Tribunal considers that it is compiled from a range of sources after detailed analysis and is reliable. Furthermore, the Tribunal has set out in this decision other reports and country information supporting the conclusions reached by DFAT.

¹ DFAT Thematic Report, *People with Links to the Liberation Tigers of Tamil Eelam*, 3 October 2014; DFAT Country Report on Sri Lanka, 3 October 2014.

² For example a July 2014 report by Amnesty International also indicates that persistent surveillance, intimidation and monitoring of former LTTE members by the security forces continues to restrict their freedom of movement and association - see Amnesty International 2014, *Ensuring Justice: Protecting Human Rights for Sri Lanka's future*, ASA 37/011/2014, September, p. 11.

³ DFAT Thematic Report, *People with Links to the Liberation Tigers of Tamil Eelam*, 3 October 2014; DFAT Country Report on Sri Lanka, 3 October 2014.

⁴ DFAT Thematic Report, *People with Links to the Liberation Tigers of Tamil Eelam*, 3 October 2014.

27. The Tribunal notes that in December 2012 the United Nations High Commission for Refugees (UNHCR) issued guidelines which stated that: “In light of the improved human rights and security situation in Sri Lanka there is no longer a need for group-based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country.”⁵ Much of the country information and reports referred to in the applicant’s representative’s first submission relate to 2012 or earlier. However the Tribunal considers that there has been a significant number of reports since this time. These include information from the Department of Foreign Affairs and Trade Thematic and Country Reports of October 2014 and February 2015⁶, UNHCR Guidelines⁷ and the United Kingdom’s Upper Chamber on Immigration and Asylum decision⁸ which discuss the changing political situation in Sri Lanka. Information referred to in the Upper Chamber decision indicates that the Sri Lankan government’s objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan State. The Upper Chamber identifies persons at risk to be those who are perceived to be a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have significant role in relation to post conflict Tamil separatism. In response to this information the applicant stated that the authorities will look at his family’s details and know that for 20 years none of his family have returned to Sri Lanka and this will arouse suspicion. Independent information before the Tribunal suggests that there are significant numbers of Tamils who fled Sri Lanka as a result of the civil war and that there are a range of reasons that they have chosen not to return including loss of former homes and problems relating to water and sanitation, education, and integration of children born abroad.⁹ For example the Immigration and Refugee Board of Canada referred to information stating that there were approximately 100,000 Sri Lankan Tamil refugees living in India in 2010.¹⁰ In light of these numbers and the reasons that Tamils are choosing not to return to Sri Lanka, the Tribunal does not accept that merely because his family fled Sri Lanka in 1990 and have chosen not to return, they would be imputed with an LTTE profile. Indeed the Tribunal considers the applicant’s absence from the country during his adolescence and adulthood would result in a reduced likelihood of him being imputed with an LTTE profile.
28. The Upper Chamber decision also indicates that the Sri Lankan authorities are aware that many Sri Lankan Tamils travelled abroad as economic migrants and everyone in LTTE dominated areas had some level of involvement with the LTTE during the civil war. The UNHCR Guidelines indicate that certain persons have “risk profiles” which generally refer to those who have a reasonable level of LTTE links.¹¹ Similarly, DFAT

⁵ United Nations High Commission for Refugees *Eligibility Guidelines, Sri Lanka* 2012.

⁶ DFAT 2014, *DFAT Country Information Report: Sri Lanka*, 3 October; DFAT 2015, *DFAT Country Information Report: Sri Lanka*, 16 February.

⁷ UNHCR *Eligibility Guidelines Sri Lanka*, 2012.

⁸ Upper Tribunal (Immigration and Asylum Chamber) United Kingdom Country Guidance Decision in *GJ v Secretary of State for the Home Department (post-civil war: returnees) Sri Lanka* CG [2013] UKUT 319 (IAC).

⁹ ‘SRI LANKA: Tamil refugees slowly return from India’ 2012, *IRIN News*, 11 January <<http://www.irinnews.org/report/94622/sri-lanka-tamil-refugees-slowly-return-from-india>> Accessed 4 June 2013 <Attachment>

¹⁰ Immigration and Refugee Review Board of Canada “Sri Lanka/India: Status of Sri Lankan Tamil refugees in India, including information on identity documents, citizenship, movement, employment, property, education, government aid, camp conditions and repatriation (2008 - January 2010)”, 3 February 2010 ZZZ103357.E

¹¹ Those persons include persons suspected of certain links with the LTTE, including persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of the northern and eastern provinces of Sri Lanka; former LTTE combatants or cadres; former

refers to high risks for high profile former members of the LTTE who may be detained, arrested and prosecuted, and rehabilitated and intensely monitored after their release.¹²

The Tribunal discussed with the applicant the country information suggesting that Tamils as a group no longer required international protection and that while there were reports of some Tamils being persecuted, such as those with links to the LTTE, Tamil civilians who do not have a pro-LTTE profile were at low risk of being detained or persecuted. In response he stated that he had nothing to say and had given his reasons for fearing returning.

29. The Tribunal accepts, as outlined in the applicant's representative's submissions, that there are reports relating to human rights violations in Sri Lanka, torture of some detainees, kidnappings of some Tamils, the detention of terrorism suspects, interference with the media, problems with the judiciary and the monitoring of returnees. However, the Tribunal notes that much of the information in these reports relate to Tamils who have actual or suspected connections with the LTTE. The applicant in this application left Sri Lanka when he was [a small child] and could not reasonably be assumed to have taken any part in the civil war or the LTTE in Sri Lanka and for the reasons advanced above the Tribunal does not accept that he would be imputed with a pro-LTTE because of his [relative]'s activities. He stated that neither he nor his family have been involved in any political activities since leaving Sri Lanka. This suggests to the Tribunal that he does not have a pro-LTTE profile in Sri Lanka and would not be considered to be a threat to the Sri Lankan authorities or a person interested in reviving the LTTE if he was to return to Sri Lanka now or in the reasonably foreseeable future.
30. Also, many of the reports of the torture and mistreatment of Tamils including LTTE members and supporters or those suspected of being so, date from the years immediately after the end of the civil war in May 2009. Independent information indicates that the situation is improving; this would seem to be supported by the return to Sri Lanka of more than one thousand asylum seekers from Western countries since 2012, with few credible reported cases of returnees having been subjected to persecution or significant harm on return, unless the individuals concerned had actual or suspected LTTE connections or activity, or were involved in criminal activity.¹³ The Tribunal does not accept that being a Tamil, young, from the north and/or a male would

LTTE supporters who may have never undergone military training who were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE; LTTE fundraisers and propaganda activists and those with, or perceived as having had links to the Sri Lankan diaspora that provided funding and other support to the LTTE; Persons with family or who are dependent on or otherwise closely related to persons with those profiles. The UNHCR Guidelines also indicate that other persons who may be at risk include certain opposition politicians and political activists; certain journalists and other media professionals; certain human rights activists; certain witnesses of human rights violations; women in certain circumstances; lesbian; gay, bisexual, transgender individuals

¹² DFAT Thematic Report, 2014, *People with Links to the Liberation Tigers of Tamil Eelam*, 3 October. Lower risks are associated with former low profile LTTE members or former LTTE members living outside of Sri Lanka whom the Sri Lankan authorities may monitor depending on their risk profile; close relatives of the LTTE who are wanted by the Sri Lankan authorities may be subject to monitoring. DFAT also indicates that people with "conflict related scarring" are more likely to be the subject of adverse attention by the Sri Lankan authorities, but the cases raised from the end of the war until October 2014 do not indicate that people have been detained due to conflict related scarring

¹³ See, for example, evidence cited in GJ & Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC); DFAT Thematic Report, *People with Links to the Liberation Tigers of Tamil Eelam*, 3 October 2014; *DFAT Country Report: Sri Lanka*, 3 October 2014; *DFAT Country Report: Sri Lanka*, 16 February 2015

mean that the applicant is imputed with a pro-LTTE profile as the country information does not support such a conclusion.

31. The Tribunal does not accept that the evidence establishes that Tamils are at risk of serious harm on the basis of their ethnicity alone. Whilst the Tribunal accepts that there continues to be persecution of persons with certain profiles, such as persons who had LTTE connections, the Tribunal does not accept that the applicant has any particular profile such that there is a real chance that he will suffer serious harm for reason of his ethnicity as a Tamil, because he is a young Tamil male or because he originally comes from the Northern Province. Accordingly, the Tribunal is not satisfied that the applicant had, or has, any anti-government political profile (imputed or otherwise) or that there is a real chance he will be subjected to serious harm because he is a Tamil, a Tamil from the north and/or a young Tamil man.

Failed asylum seeker/returnee

32. The applicant refers in his statement to fearing returning to Sri Lanka because he “would be returning as a failed asylum seeker”. The Tribunal accepts that this is the case and has considered these claims below. However, the applicant’s representative’s submissions tie these claims in with claims relating to the applicant returning after leaving the country illegally and suggest that he would be prosecuted (and detained) for breaching Sri Lankan immigration laws. However, the applicant left Sri Lanka when he was [a small child] and has documentation showing that he arrived in India [in] 10/90 (as shown on the Sri Lanka Refugees Identity Register Camp card provided with his application for protection). As discussed with the applicant at the hearing the country information before the Tribunal states that the legal age for criminal responsibility in Sri Lanka is 8 years old. The *Penal Code* of Sri Lanka includes, in ‘Chapter IV – General Exceptions’, the following provision:

75. Nothing is an offence which is done Act of a child by a child under eight years of age. [sic]¹⁴

33. (The inclusion of the words “Act of a child” in this text appears to be a printing error, repeating these words from a neighbouring annotation. An earlier version of the Penal Code, including amendments to 1998, words Article 75 as “Nothing is an offence which is done by a child under eight years of age”.¹⁵)
34. An article published in *The Sunday Leader*¹⁶ in November 2011, referring to the minimum age of criminal responsibility as eight years, states that a child of less than eight years is “considered incapable of possessing ‘mens rea’. (guilty intention)” [sic].¹⁷

¹⁴ *Penal Code* (Sri Lanka) 1885, UNHCR Refworld, 1 January
<<http://www.refworld.org/docid/4c03e2af2.html>> Accessed 3 June 2013

Refworld comments that this version is the consolidated version up to Act No. 16 of 2006, provided by LawNet – Sri Lanka’s Legal Information Network and information on Sri Lanka’s Government Press website indicates that there have been no amendments since 2006

¹⁵ *Penal Code* (Sri Lanka) 1885, University of Minnesota, 1 January

<http://www1.umn.edu/humanrts/research/srilanka/statutes/Penal_Code.pdf> Accessed 3 June 2013

¹⁶ *The Sunday Leader* is a privately owned English-language Sri Lankan Sunday newspaper. See: ‘About’ n.d., *The Sunday Leader* <<http://www.thesundayleader.lk/about/>> Accessed 28 November 2012

¹⁷ Keerthisinghe, LI 2011, ‘Some Thoughts On The Reformation Of The Criminal Justice System Of Sri Lanka’, *The Sunday Leader*, 27 November <<http://thesundayleader.lk/2011/11/27/some-thoughts-on-the-reformation-of-the-criminal-justice-system-of-sri-lanka/>> Accessed 3 June 2013

35. In light of this country information the Tribunal is not satisfied that the applicant would be prosecuted for having left the country illegally when he was only [a small child]. When this information was put to the applicant at the hearing he stated that this may be correct, he does not know but he cannot go back to Sri Lanka without his family support (a claim which is considered below).
36. The Tribunal has therefore considered whether there is a real chance of him being subjected to harm as a failed asylum seeker.
37. The representative's submission refers to a number of country reports and compilations that outline difficulties faced by returning asylum seekers to Sri Lanka and claimed examples of returnees who have been tortured or harmed on their return, including reports by Tamils Against Genocide, Freedom from Torture, media reports, Human Rights Watch, the Immigration and Refugee Board of Canada, Swiss Refugee Council, Bar Human Rights Committee of England and Wales, UNHCR, Human Rights Law Centre and the Edmund Rice Centre. The Tribunal has considered all of these reports, although it has placed little weight on reports which are now dated and refer to the situation shortly after the end of the war (eg the Edmund Rice Centre's press statement in 2010). The Tribunal accepts the representative's submission that the applicant would be likely to be identified by the Sri Lankan authorities as a failed asylum seeker. The Tribunal accepts that some reports suggest that there remains a real chance of serious harm for returnees who are suspected of, or known to have, LTTE connections. However, as discussed above, the Tribunal is not satisfied that the applicant has a pro-LTTE profile in Sri Lanka. He has not claimed to be involved in any political activities while in India or Australia. It is in this context that the Tribunal has considered the country information in relation to returnees and failed asylum seekers.
38. The Tribunal accepts that there are some reports that Sri Lankan Tamils returned from overseas suffered abuse. However, the cases in relation to returnees overwhelmingly involve persons who have had some reasonable level of connection with the LTTE or who are suspected of such linkages, or persons who have criminal connections. The information from DFAT also indicates that allegations of mistreatment of returnees (including failed asylum seekers) without such links have not been substantiated.¹⁸ The Upper Tribunal concluded that reports by Amnesty International claiming that failed Sri Lankan asylum seekers faced harm upon their return "lacked substance".¹⁹ The Tribunal has considered media reports of Tamils returned from Australia or other countries being tortured or mistreated. However, these reports do not refer to the profile of such persons²⁰; refer to persons who have a political profile in Sri Lanka²¹, to persons involved in people smuggling²² to cases of Tamils who were returned prior to

¹⁸ DFAT 2013 *Country Information Report Sri Lanka*, 31 July paragraphs 3.4, 3.64,

¹⁹ UK Home Office 2012, *Country Policy Bulletin – Sri Lanka*, October, pp.1-8.

²⁰ For example "Beaten and spied on, asylum seekers reveal oppression of being returned", *The Guardian*, 6 August 2014 referred to in the representative's submission which refers to Sri Lankan Tamils returned without having lodged a protection visa application and does not indicate their background (other than referring to some of the failed asylum seekers who had a political profile).

²¹ For example "I don't sleep at night for fear I will disappear", Ben Doherty, *Sydney Morning Herald*, 21 March 2013

²² For example the case of three Sinhalese men reportedly abused after returning to Sri Lanka who were crew members of a people smuggling boat – "Torture, rape and ill-treatment suffered by Sri Lankans who return home" *Human Rights Law Centre*, "Re-examine claimed safety of refugee returnees, AI appeals to Australia", *TamilNet*, 3 September 2010, "Failed asylum seekers allegedly beaten" *Lateline*, ABIC, 21 April 2011.

protection visa applications being lodged²³ or refer to those persons being detained but do not refer to their treatment during detention or their period of detention²⁴.

39. Whilst there are reports claiming that Tamil returnees have been harmed on return to Sri Lanka,²⁵ and the 2015 report by Human Rights Watch states that it has continuing concerns about the treatment of failed asylum seekers,²⁶ other sources contest or clarify these claims. In 2012, the UK Home Office noted that many of the allegations of harm lack substance and detail and that:

The principal focus of the authorities continues to be, not Tamils from the north (or east) as such, but persons considered to be LTTE members, fighters or operatives or persons who have played an active role in the international procurement network responsible for financing the LTTE and ensuring it was supplied with arms.²⁷

40. This is consistent with some of the country information referred to by the applicant's representative, such as the September 2012 report from Freedom from Torture which documents 24 cases of Tamils who faced torture upon voluntary return to Sri Lanka from the UK. Freedom from Torture states that:

It is a *combination* of both residence in the UK and an actual or perceived association *at any level* with the LTTE which places individuals at risk of torture and inhuman and degrading treatment in Sri Lanka.²⁸

41. A number of other reports referred to by the representative in the various submissions received also suggest that persons returning to Sri Lanka with particular profiles are targeted. For example the representative refers to a Human Rights Watch report about a Tamil who participated in protests in France being tortured upon his return to Sri Lanka and the report by Freedom from Torture which refers to Tamils who had an association with the LTTE being tortured upon their return to Sri Lanka.
42. The report from Human Rights Watch suggests that persons who have been politically active abroad or have links to the LTTE may be subjected to torture upon return. A paper prepared by Tamils Against Genocide (TAG) in May 2012 and referred to in the representative's submissions asserted that "failed asylum seekers are at risk of persecution upon return simply by virtue of the fact that they sought asylum abroad and also because of imputed political opinion regarding involvement with or sympathy for the LTTE". However the TAG report cites only one specific case of an asylum seeker having experienced serious mistreatment, where no additional reasons - other than his status as an asylum seeker - were put forward for the mistreatment. Otherwise, the report suggests, consistently with other information, that the risk of mistreatment or

²³ For example David Corlett, "Turned Back to Torture?" *SBS Dateline* 30 September 2014, available at <http://www.sbs.com.au/news/dateline/story/turned-back-torture> and referred to in the representative's submission

²⁴ This is consistent with country information before the Tribunal which suggests that persons who left illegally would be detained on remand and prosecuted for having left illegally, but that they would then be released on bail and later have a fine imposed on them.

²⁵ Freedom from Torture, *Sri Lankan Tamils tortured on return from the UK*, 13 September 2012; Amnesty International, *Sri Lankan Asylum Seekers tortured after being forcibly returned from Australia*, 3 September 2010

²⁶ Human Rights Watch, *World Report 2015 - Sri Lanka*, 29 January 2015, available at: <http://www.refworld.org/docid/54cf837e15.html> [accessed 25 March 2015]

²⁷ UK Home Office, 2012, *Country Policy Bulletin – Sri Lanka*, October

²⁸ Freedom from Torture, *Sri Lankan Tamils tortured on return from the UK*, 13 September 2012, available at: <http://www.refworld.org/docid/505321402.html> [accessed 25 March 2015]

torture on return is heightened for suspected LTTE supporters. It suggests that having claimed asylum overseas, or having been present in a country where the Tamil diaspora is under suspicion of fundraising and other pro-LTTE activities (citing the UK specifically) may give rise to an imputed profile as a LTTE sympathiser, but the Tribunal does not consider that in the present case there exist the kind of factors that would result in the applicant being suspected of supporting the LTTE simply because he has also sought asylum in Australia.

43. The Tribunal accepts that persons with particular profiles may be subjected to serious harm if they are returned to Sri Lanka. However, there is no credible information before the Tribunal to support a finding that failed asylum seekers (including those who are also Tamils and those returning from western countries such as Australia) are, for those reasons alone, imputed with a pro-LTTE opinion, or suspected to have been involved, previously or currently, in supporting the LTTE. Independent information from a range of sources supports this conclusion.²⁹ Furthermore, the UNHCR Guidelines referred to above suggest that Tamils from a particular area are no longer imputed with a pro-LTTE opinion and harmed for that reason alone.
44. There is country information to suggest that there may be some follow up by authorities or agencies when returnees return to their local area. Information suggests that some Tamils may be monitored upon return to their home area but unless they have a particular profile the risk of them being detained or prosecuted is low. For example, DFAT has assessed that “Sri Lankan authorities may monitor any member of the Tamil diaspora returning to Sri Lanka, depending on their risk profile”.³⁰ However it concludes that “Tamil civilians who were not members of the LTTE ... are at a low risk of being detained or prosecuted”.³¹ This is consistent with the findings of the UNHCR when they monitored returnees to Sri Lanka and found that about 75% of returnees were contacted in their home area by the military or police (some on more than one occasion) but the UNHCR does not report any further harm occurring to those returnees and has not included returnees from western countries as a group requiring international protection.³² This is also consistent with the information referred to above which suggests that returnees who are subjected to serious harm, including at the airport, in remand and in their home area, are those with a particular profile.
45. DFAT has looked at the situation for returnees/failed asylum seekers and states that:

DFAT is aware of a small number of allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka. Verifying these allegations is complicated by the fact that many have been made anonymously, often to third parties.

However, there have been thousands of asylum seekers returned to Sri Lanka since 2009, including from Australia, the US, Canada, UK and other European countries, but relatively few allegations of torture or mistreatment (see also ‘Treatment of Returnees’, below). Although DFAT does not routinely monitor the situation of returnees, DFAT assesses that the risk of torture or mistreatment for the great

²⁹ DFAT Country Report on Sri Lanka, 3 October 2014; DFAT Country Report on Sri Lanka, 16 February 2015; UNHCR *Eligibility Guidelines*, 2012; UK Home Office Operational Guidance Note, July 2013

³⁰ DFAT Thematic Report, *People with Links to the Liberation Tigers of Tamil Eelam*, 3 October 2014

³¹ DFAT Thematic Report, *People with Links to the Liberation Tigers of Tamil Eelam*, 3 October 2014

³² UNHCR *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Sri Lanka*, 21 December 2012.

majority of returnees is low, including those suspected of offences under the *Immigrants and Emigrants Act*. Under the previous government, DFAT assessed that the risk of torture or mistreatment for returnees was greater for those who are suspected of committing serious crimes, including people-smuggling or terrorism offences. This was due mostly to the greater exposure these returnees will have to authorities on their return which generally includes extended periods of pre-trial detention. It is too early to make an assessment as to whether this will change under the Sirisena government.³³

46. When this country information was discussed with the applicant at the hearing he stated that he did not agree and that he was afraid that he would be arrested and there will not be anyone to bail him out in Sri Lanka. However, as discussed above the Tribunal is not satisfied that there is a real chance of the applicant being prosecuted for having left the country illegally and the Tribunal is not satisfied that there is any credible evidence before it to suggest that he would be required to be bailed out for any other reason.
47. In light of the applicant's lack of a pro-LTTE or anti-government profile, the Tribunal is not satisfied on the basis of the evidence before it that there is a real chance that the applicant will be subjected to serious harm at the airport or in his home area as a failed asylum seeker, including from a western country such as Australia.

Lack of family connections in Sri Lanka/Disability

48. In the applicant's statement he stated under the heading "Other reasons I cannot return to Sri Lanka: complementary protection" that he has no connections to support himself or contacts to assist him to get accommodation or employment. For the sake of completeness the Tribunal has considered whether the applicant's fears in relation to this raise any claims under the Refugees Convention, particularly as at the hearing the applicant referred to fears about returning to Sri Lanka without his family because of his disability.
49. The applicant states that he has a disability as a result of an injury to his leg in 2003 in India where he fell off his bicycle. [Details deleted]. He stated that he has difficulty walking long distances and that it would be a problem if he had to return to Sri Lanka because it means he cannot go back without his family. He stated that he had medical evidence in relation to this which he had received in Australia from Sri Lanka and requested additional time after the hearing to provide translations of these documents, which the Tribunal agreed to provide. However, no medical evidence has been provided in relation to the injury, nor any explanation for why the evidence or translations were unavailable. In light of this the Tribunal is unable to assess the extent of the applicant's disability.
50. The Tribunal notes that the applicant's disability occurred in 2003 yet he was able to obtain work in India as [occupations] after this. The applicant claims that his employer made allowances for him (eg allowing him to carry lighter loads). While this may be true, nevertheless the Tribunal is not satisfied that the applicant's disability would prevent him from obtaining employment in Sri Lanka as he was able to do in India.
51. The applicant did not refer to any fears about returning to Sri Lanka because of his disability in his written statement, which raises concerns for the Tribunal about whether

³³ DFAT Country Report on Sri Lanka, 16 February 2015

he holds genuine fears in relation to this. Furthermore, the applicant has been able to relocate here in Australia without his family and therefore does not accept that the applicant would be unable to relocate to Sri Lanka without his family because of his disability. When the Tribunal put this to the applicant at the hearing he stated that he did not know what to say in response.

52. In light of the above and as discussed with the applicant at the hearing the Tribunal is not satisfied on the basis of the evidence before it that there is a real chance that the applicant would suffer from serious harm as a result of his leg injury. The applicant had no response in relation to this.
53. As put to the applicant at the hearing the Tribunal considers that he was able to find employment in India despite his disability which suggests that he could find employment in Sri Lanka also. In response the applicant stated that he does not understand the language. However the applicant spoke at the hearing in Tamil and, as put to the applicant, there are significant Tamil communities in Sri Lanka where he would be able to live and communicate. In response to this the applicant stated that he does not have anyone in Sri Lanka and does not want to go there. The Tribunal accepts that the applicant does not want to return to Sri Lanka and that he would find it difficult to return to a country which he left when he was [a small child]. However, the Tribunal does not accept that he would be unable to find employment and accommodation. As discussed with the applicant at the hearing, the applicant's sister who now lives in [another country] has previously demonstrated a willingness to assist him financially when she paid for him to travel to Australia. This suggests to the Tribunal that she would be willing to assist him financially if he had to return to Sri Lanka. In response to this the applicant stated that his family overseas is not even helping his mother now. When the Tribunal put to him that his sister had paid for him to come to Australia he stated that this was because he begged them but they would not help him all the time. The Tribunal did not find this persuasive and considers that the applicant's family's past willingness and ability to provide him with financial assistance suggests that they would also be able to assist him if he was required to return to Sri Lanka while he found employment so he could support himself. Therefore the Tribunal is not satisfied that there is a real chance of the applicant suffering serious harm as a result of his lack of family in Sri Lanka.
54. Having considered the applicant's claims individually and cumulatively, for the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

Complementary protection

55. 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).
56. For the reasons discussed above the Tribunal is not satisfied that the applicant's [relative]s have the LTTE profile which he claims they have. For the reasons discussed above the Tribunal is not satisfied on the basis of the evidence before it that there is a real risk that the applicant will be imputed with a pro-LTTE profile because of his [relative]s' past activities. The applicant left Sri Lanka when he was [a small child] and has never been involved in the LTTE or political activities in Sri Lanka, India or

Australia. Although the Tribunal accepts that his family left Sri Lanka in 1990 and has not returned, as discussed above there are many reasons why Tamils have chosen not to return to Sri Lanka after the end of the war and the Tribunal is not satisfied that there is a real risk that the Sri Lankan authorities would impute the applicant with a pro-LTTE profile because of the length of time his family have been out of Sri Lanka and their continuing absence. Therefore the Tribunal is not satisfied that the applicant has a profile that would make him of adverse interest to the Sri Lankan authorities.

57. On the basis of the country information discussed above, and for the reasons discussed above, the Tribunal is not satisfied that the evidence before it supports a finding that there is a real risk that he will suffer significant harm because of his ethnicity as a Tamil, a young Tamil male (including from the north), a returnee or a failed asylum seeker at the airport or upon return to his home area. In light of his age at the time he left Sri Lanka the Tribunal is not satisfied there is a real risk that he would be charged with having left the country illegally. The Tribunal is not satisfied that the applicant has a profile that would put him at real risk of significant harm arising from his race, actual or imputed political opinion or being a young Tamil male if removed from Australia to Sri Lanka. The Tribunal is not satisfied that there is a real risk that the applicant will face significant harm because he has sought asylum in Australia or a combination of him seeking asylum in Australia and other factors, including his race and imputed political opinion. The Tribunal does not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm because of his Tamil race, because he is perceived to hold a pro-LTTE or anti-government political opinion, because he is a young Tamil male and/or because he has sought asylum in Australia.
58. The Tribunal agrees with the delegate's finding that there is no real risk of the applicant suffering from significant harm as a result of returning without connections or contacts. For the reasons discussed above, the Tribunal considers that the applicant would be able to find employment despite his disability, that he could live away from his family despite his disability and that he has family overseas who would be willing and able to support him financially while he found appropriate employment to support himself. The Tribunal is not satisfied that it has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm because of his disability or lack of family in Sri Lanka.
59. Having considered the applicant's claims individually and cumulatively, the Tribunal is not satisfied that it has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm for the reasons he has claimed. Nor is the Tribunal satisfied that the applicant would be exposed to significant harm for any other reason. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
60. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

61. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Rowena Irish
Member

ATTACHMENT 1 - RELEVANT LAW

1. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

Refugee criterion

2. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
3. 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.
4. 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.
5. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
6. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
7. 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.
8. 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.

9. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
10. 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.
11. 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

12. 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').
13. '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.
14. 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.

Section 499 Ministerial Direction

15. 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 – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.