

071295385 [2007] RRTA 109 (20 June 2007)

DECISION RECORD

RRT CASE NUMBER: 071295385
DIAC REFERENCE(S): CLF2007/19886
COUNTRY OF REFERENCE: Sri Lanka
TRIBUNAL MEMBER: Phillippa Wearne
DATE DECISION SIGNED: 20 June 2007
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship refusing an application by the applicant for a Protection (Class XA) visa. The applicant was notified of the decision under cover of a letter, and the application for review was lodged with the Refugee Review Tribunal (the Tribunal/ RRT).

The applicant is a citizen of Sri Lanka. She most recently arrived in Australia on another type of valid visa and applied for a Protection (Class XA) visa.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s. 411(1)(c) of the *Migration Act* 1958 (the Act). The Tribunal finds that the applicant has made a valid application for review under s. 412 of the Act.

RELEVANT LAW

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. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and, generally speaking, has protection obligations to 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.

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 and *Applicant S v MIMA* (2004) 217 CLR 387.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

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.

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 persecution 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.

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.

Whether an applicant is a person to 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.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department of Immigration and Citizenship (the Department) case file CLF2007/19886, which includes the applicant's original protection visa application (PVA) and the delegate's decision record. The Tribunal has had regard to material referred to in the delegate's decision, and other material available to it from a range of sources. The Tribunal has also before it the applicant's RRT file 071295385.

The applicant claims fear of persecution in Sri Lanka because her family there, and particular family members, F, treat her badly. She also claims that the Sri Lankan government cannot provide adequate care and assistance for the elderly.

Application for visa to enter Australia

Departmental movement records show when the applicant arrived in Australia and on what type of visa and when she left. She returned to Australia several months later on a valid visa. The applicant's previous travel to Australia was declared in her PVA.

The Protection Visa Application (PVA)

According to the PVA, the applicant is now an elderly widow from City 1, Sri Lanka. She has completed a stated period of formal education. She has family members who live in Sri Lanka, and another family member who lives in Australia.

The applicant's claims in the PVA can be summarised as follows:

- She has a medical condition requiring ongoing medication.
- After her husband's death no-one looks after her in Sri Lanka.
- She lives with her family members in Sri Lanka. One family member is unemployed and cannot support her. Her other family members live and work in City 2. She is a liability to them. Her family members, F, treat her badly and want to get rid of her.
- Her family in Sri Lanka do not provide appropriate meals or assist her with her medication. They hardly speak to her. She is depressed and unhappy about this poor treatment. Her health deteriorated to such an extent when she was in Sri Lanka that she was almost paralysed.
- She fears that family members, F, may even poison the food. She fears that she may end up in a mental institution or die of starvation.
- Her monthly widow's pension amount is hardly enough to sustain her even for a few days. Sri Lanka is highly populated and has a high cost of living, with a high unemployment rate.
- There is no welfare system, there are no aged care facilities and there is no consideration for the elderly. She says that: "discrimination for people old like me is at its highest level."

- Hospitals are in chaotic condition with no adequate room for the patients. There are not enough doctors or nursing staff. They have limited food and medicines available.
- She feels that the government would like it if many people died, especially the old to ease the country's economy.
- The Sri Lankan government will not protect her.
- The ethnic war is eating the country's economy and there is starvation among the poorer classes. The tsunami of 2004 caused great destruction and damage and sickness.
- A family member, M, who is a permanent resident in Australia is willing and able to care for her.

The following documents were on the Department file:

- Birth certificate of applicant; marriage certificate of applicant; death certificate for the applicant's husband (dated),
- Rate notice addressed to applicant's family member, M, and another person, P, and was dated.
- Various medical reports and notes regarding applicant indicating various medical treatments for a number of conditions and the years when the treatments took place.
- Handwritten list of the dates of the visits by M to Sri Lanka and her financial support to the applicant and from which year.

A letter from the applicant's family members in Sri Lanka is referred to in the PVA. It is described by the applicant as:

“stating regretfully their inability to look after [the applicant] or support her in any way, due to their poor living standards, poor wages, unable to even support themselves and their families. (One [family member] living in [City 1] unemployed) and also due to the high cost of living after the Tsunami in the [City 1] District. Possible marriage break [sic] up too, due to strained [family] relationships. Arguments etc ([other family members] being helpless).

This letter appears not be on the file. However, the Tribunal accepts the applicant's description of the letter as evidence in support of her claim.

The applicant was not represented in regard to the review.

The hearing

The applicant appeared before the Tribunal to give evidence and present arguments. The applicant's family member in Australia, M, also attended the hearing. The Tribunal also received oral evidence from Person P who attended the hearing to give evidence. An interpreter in the Sinhalese language assisted the Tribunal in taking evidence from the applicant.

The applicant brought her passport to the hearing. It indicated when and where it was issued in Sri Lanka.

The applicant appeared to be nervous and frail. She was very upset at times in giving evidence, and she cried several times. She told the Tribunal: "if I go back I will die." She told the Tribunal that she wanted M to stay with her while she gave evidence. The Tribunal agreed to this.

In Australia, the applicant is staying with M, who is a professional person. They are very close. M wants to look after the applicant, and told the Tribunal that she is able to do that. She is deeply concerned about the applicant's welfare should she have to return to Sri Lanka.

In Sri Lanka the applicant lives in a rural village in the City 1 District. This district is located in a particular part of Sri Lanka, some distance from City 2.

The applicant said the date her husband, H, died, while she was visiting M in Australia. She returned to Sri Lanka immediately. Before her last visit to Australia, she had looked after him for many years. He had been bedridden after suffering an illness. She had not been able to afford for him to stay in hospital and so she had cared for him at home.

The applicant told the Tribunal that she is unwell and requires on-going medical care. She has a condition and requires daily treatment. She is also on medication for other conditions. She also has vision problems.

The applicant lives with her family members in City 1. After H died, the family members, F, have been trying to get rid of her so that they can have the house for themselves. They are angry that she remains in the house. She has no doubts that they want her out of the family home.

In Sri Lanka, her family do not look after her. She needs medical care and attention. Instead of caring for her, her family treat her as if she is a liability. After H died her family treated her even worse than before. The applicant gave an example of this poor treatment. She was sick and was bedridden for some months. Family members F know that she has medical conditions, and should avoid certain foods. They prepared soup for her, but they had added particular ingredients to it. She could not eat it. She had to go without food. The Tribunal asked the applicant if she had reported this or tried to get help from anyone. She replied that she had not.

According to both M and Person P, the applicant was very malnourished and underweight when she arrived in Australia. M agreed that the applicant had not received proper care in Sri Lanka. She said that she considered that the applicant was badly treated and not cared for by her family.

The applicant said that there is no aged care welfare, support or protection or facilities in Sri Lanka. There is a very high cost of living. There are no community helpers or government support. Things have been particularly difficult since the 2004 tsunami which caused a lot of damage and destruction to the area where she lives.

The Tribunal asked the applicant what she had meant by her statement that discrimination for elderly people in Sri Lanka is at the "highest level". She said that it was difficult to get medication. The hospitals did not distribute medication and it was extremely difficult to

obtain unless you paid a lot of money. There were long, long waits at the hospital in queues. There were far many more patients than could be treated in hospitals. She said that she had to wait “until I faint... There is no way of getting treatment or medication. I have to go too far. One trip cost me [a large sum of] rupees. To get medication from outside costs a lot. Hospitals will not give [medications]. I have to go to pharmacies.” Ambulances are not usually available unless a big sum of money is involved. There are no paramedics available. The applicant said that the hospitals were in a very bad state. Hospital patients are put under the beds and in corridors. She said this is why so many people died in the hospitals when the tsunami hit.

The applicant said that the authorities of Sri Lanka “cannot protect me in anyway.” The government has never had any program or any organisation to care for the elderly. They did not provide clothing, shelter or medical help or rehabilitation programs.

The Tribunal asked the applicant if she thought being a woman made her situation more difficult or was it because she was elderly. She replied it was because she was elderly. She said that elderly people are not looked after by the government.

The applicant is a Buddhist, and she told the Tribunal that she can practice her faith without interference in Sri Lanka.

The applicant said that she receives a widow's pension which is hardly enough even for a few days. She receives a stated monthly amount and M stated its equivalent in Australian dollars. The applicant said that this is not sufficient as the cost of living is very high especially after the tsunami.

For many years the applicant has relied on M to send her money and food. M has also travelled to Sri Lanka to be with her and help her. M confirmed that and she told the Tribunal how many visits she had made to Sri Lanka to see the applicant since coming to Australia many years ago.

M said that when H suffered an illness it was very difficult to get medical attention for him. She had tried to arrange for an ambulance to get him to hospital. It was difficult. He remained in a corridor of the hospital. The hospital told her that they could only admit H if the family paid a large amount of money. H had to return home because they could not afford the amount. There was no welfare, no physiotherapy, and no government help. The applicant looked after H at home for several years. M could not get H into a nursing home. Instead she paid a young man to assist with the care of H.

The Tribunal asked the applicant whether she was aware of the Sri Lankan *Protection of the Rights of the Elders Act 2000*. She said that she had not heard of it. She said that she did not know that she could apply to the Board constituted under that Act to obtain financial assistance from her family members. She said that she doubted whether this Act operated in her area, and even if it did, she doubted whether anyone knew about it.

Person P told the Tribunal that he was an old family friend. He said that he had assisted with the PVA. He said that the applicant’s case was a “pathetic situation”. He said it was very sad to see M crying while on the phone whenever she spoke to the applicant in Sri Lanka. He said that the applicant had asked M to save her life. He and M referred to the situation of “even animals in need” being assisted in Australia. Here was a situation where M was very willing

to assist the applicant in need. The applicant should be allowed to stay in Australia and be properly cared for by M.

Independent information

While Sri Lanka has introduced a number of measures to assist in providing for the ageing population, there is limited information available about their implementation. Resource constraints due to the continued conflict in Sri Lanka, and the magnitude of the 2004 Boxing Day Tsunami have greatly hindered social welfare services.

The 2001 National census found that roughly 9.2% of Sri Lanka's population was made up of persons aged 60 years and older. Life expectancy has increased to 75 years for women and 70 years for men, and is expected to increase further. The fertility rate of the population has declined sharply following family planning initiatives. The proportion of elderly people in the Sri Lankan population has increased. The gender gap in life expectancy means that many of the older people are women. (Asian Development Bank 1999, Country Briefing Paper: Women in Sri Lanka, May; United Nations 2002, 'Sri Lanka: Statement by H.E. Mr. Chandra Wickramasinghe', Address by the Head of Delegation at the Second World Assembly on Ageing, UN Second World Assembly on Ageing website, 11 April <http://www.un.org/ageing/coverage/srilankaE.htm> – Accessed 23 May 2007); <http://www.un.org/ageing/coverage/srilankaE.htm> – Accessed 23 May 2007

The treatment of the elderly in Sri Lanka is not covered in the more commonly cited Government or NGO reports on human rights. Advocacy groups for the elderly (such as HelpAge International) have noted that, despite the fact that aged persons have been identified as a "vulnerable group" in Sri Lanka and other developing countries, little progress has been made and older people's issues are still not being addressed. According to HelpAge Sri Lanka, "Some of the key problems faced by senior citizens in Sri Lanka are poverty, immobility, isolation, loneliness, dependency, ill health and lack of nutrition" ('HelpAge Sri Lanka homepage' (undated), HelpAge Sri Lanka website <http://www.helpagesl.org/> – Accessed 23 May 2007).

In April 2002 the United Nation's Second World Assembly on Ageing was held in Madrid. In preparation, a regional meeting of South Asian countries was held in India in August 2001. The report from this meeting includes the following information on the elderly in Sri Lanka:

Mrs. N.J.Pathirana, Director, Department of Social Services, Sri Lanka indicated that the traditional family support for the elderly is diminishing and more and more seniors are seeking accommodation in institutions. This is true even in cases of senior women, in spite of the fact that many elder women continue to take care of their grand children while their daughters migrate to neighbouring countries for economic reasons.

Sri Lanka established a National Committee on Ageing in 1982. Its objective is to take policy initiative in order to create healthy environment for older persons within the cultural mores and religious practices. The strategies employed are, to create awareness about population ageing, promote appropriate housing, transportation and living environment, provide access to continuous education and training, counselling services, social and economic protection, cater to the cultural and spiritual needs, conduct research and disseminate information, provide legal protection to the elders and ensure services for older persons in special circumstances.

The government has taken initiative in implementing certain programmes for the welfare of the elders. They are, creating awareness through media, pre-retirement training, home nursing, starting day care centres, conducting medical clinics and eye camps, providing intra ocular lenses, training of staff on issues of ageing and maintaining data bank.

Protection of the Rights of the Elders Act, 2000, ensures protection and welfare of older persons in Sri Lanka. This bill was passed unanimously, indicating the recognition of the importance of this topic for the State initiative. While ageing is one of the major issues of concern for most of the political parties, the government has incorporated several social security schemes, like pension, provident fund, gratuity, and public assistance to the destitute, TB, Leprosy and cancer patients. 9 (<http://www.un.org/esa/socdev/ageing/waa/saarcrep1.htm> – Accessed 23 May 2007).

The statement made at the April 2002 Second World Assembly on Ageing by the head of the Sri Lankan delegation, H. E. Mr. Chandra Wickramasinghe, details the social and economic problems facing Sri Lanka as a result of the ageing population and the changing demographics of the country. According to Mr. Wickramasinghe, the proportion of elderly people is increasing exponentially and women will constitute the majority as their life expectancy is higher than for men (currently 75 years for women, 70 years for men). Mr. Wickramasinghe also noted that the historical, religious and cultural background of Sri Lanka meant that older people were traditionally cared for at home by family members. Elders in villages still mainly lived within this traditional extended family setting, whereas:

...in urban families most of the elderly people have to live alone and face loneliness and other accompanying problems stemming from insufficient family incomes coupled with a high cost of living (United Nations 2002, 'Sri Lanka: Statement by H.E. Mr. Chandra Wickramasinghe', *Address by the Head of Delegation at the Second World Assembly on Ageing*, UN Second World Assembly on Ageing website 11 April <http://www.un.org/ageing/coverage/srilankaE.htm> Accessed 23 May 2007).

Despite Sri Lanka's resource constraints as a developing country, the information presented indicates that Sri Lanka has introduced a number of measures to assist in providing for the ageing population. Mr. Wickramasinghe outlined some of the steps taken in Sri Lanka to ensure the welfare of the elderly, including: National Committee on Ageing; National Policy on Ageing; NGO Participation; Legislation for the Elderly; Identity Cards for Elderly People; Income Security; Day Care Centres and Home Nursing Service. These measures are detailed in his Address to the Assembly, which is included as an attachment. The "strong religious and social mores which cast compelling moral obligations on the younger generations to treat the elderly with due care, respect and dignity" were also pointed out during the Address (United Nations 2002, 'Sri Lanka: Statement by H.E. Mr. Chandra Wickramasinghe', *Address by the Head of Delegation at the Second World Assembly on Ageing*, UN Second World Assembly on Ageing website, 11 April <http://www.un.org/ageing/coverage/srilankaE.htm> – Accessed 23 May 2007).

Protection of the Rights of the Elders Act

The Protection of the Rights of the Elders Act No. 9 of 2000 was certified on 4 May 2000, and commenced two years later. According to an article by Dharmapala Senaratne, "an elder' for the purposes of this Act has been defined to be 'any person who has passed the age of sixty years'".

Sri Lanka has a fast ageing population...

The causes are many. Improved health care schemes, increased life expectancy, rate of the birth in the country having decreased are some of the factors.

...Undoubtedly, the elders deserve and are entitled to be so looked after. It is in that light that the *Protection of the Rights of the Elders Act No. 9 of 2000* should be viewed. Certified on 04th May, 2000, the implementation of it commenced two years thereafter and so the Act is in operation as at present.

...What is of significance is the Boards established under the provisions of this Act. Each Board consists of 5 members. ...Incidentally, 'an elder' for the purposes of this Act has been defined to be 'any person who has passed the age of sixty years'.

...In terms of section 25 of the Act, 'an elder who has a child or children and who is unable to maintain himself may apply to the Board for an order that one or more of his children pay him a monthly allowance or any other periodical payment or a lump sum for his maintenance.

However, my view about this law is not quite a favourable one. While in developed countries, the state has adopted diverse welfare measures for the benefit of their senior citizens, Sri Lanka has shirked that responsibility, in my view, and attempted to impose responsibility on the poor progeny of the elders who themselves are struggling to keep their home fires burning.

(Senaratne, D. 2006, 'Welfare of elders Our duty to look after parents', *The Nation On Sunday*, 13 August <http://www.nation.lk/2006/08/13/events.htm> – Accessed 23 May 2007).

An undated Progress Report for 2006, included on the Sri Lankan Ministry of Social Services & Social Welfare website, lists some of the welfare measures for Senior Citizens which are in the process of being implemented. The following is taken from this Progress Report:

7. P.-17 Respected Senior Citizens programme

I will not allow senior citizens who have devoted their lives for the children and the country, to be lonely.

Action: National Policy on Older persons Elders Charter is ready for submission to the Cabinet.

10 Mn has been allocated for refurbishing elder's homes in collaboration with Provincial Councils.

8. A deduction of 50% of the fares as levied by public sector transport operators will be offered to senior citizens who are above 70 years of age.

A free railway warrant will be issued once a year to senior citizens to go on a pilgrimage.

Action: Action is being taken to have discussion with Minister of Transport.

Relevant data and other information are being collected to prepare a proposal for additional allocation.

9. Homes for the Aged for the benefit of destitute senior citizens with the assistance of NGOs and private sector.

Action: New proposal to establish 25 homes in all 25 districts are almost ready for implementation.

(‘Progress Report on Mahinda Chintana’ (undated), Sri Lanka Ministry of Social Services and Social Welfare website http://www.socialwelfare.gov.lk/edit_news_events.php?id=16 – Accessed 23 May 2007).

2004 Tsunami

The 2004 Boxing Day tsunami (Indian Ocean earthquake of 2004) greatly hindered the operation of social services. The applicant is from City 1 which was profoundly affected by the Tsunami: http://en.wikipedia.org/wiki/2004_Indian_Ocean_earthquake (Accessed 27 May 2007); http://www.usatoday.com/news/world/2005-12-08-sri-lanka-train_x.htm (Accessed 27 May 2007).

Information gathered after the tsunami suggests that the elderly in Sri Lanka remain an especially vulnerable group.

Older people, often neglected in normal circumstances are even more vulnerable in disasters. Despite international protocols such as the Madrid International Plan of Action on Ageing and the Sphere guidelines the research confirms that in the tsunami they were not specifically targeted and in some cases, the relief effort discriminated against them. In many cases older men and women were unable to access health care, food and cash support due to discrimination, lack of information or support mechanisms (HelpAge International 2005, *The impact of the Indian Ocean tsunami on older people*, June, Global Action on Aging website <http://www.globalaging.org/elderrights/world/2005/emerg.pdf> – Accessed 22 May 2007).

In October 2005 a national workshop was held in Colombo on the impact of the tsunami on “vulnerable groups” and women in Sri Lanka. The subsequent report notes the findings that more women than men had suffered the adverse impact of the disaster, and the elderly were particularly vulnerable. It was also noted that “there was uneven delivery of services” which affected “vulnerable groups” the most, and that “[o]lder persons often felt that nobody had shown concern for them.” The report states:

Women suffered disproportionately, particularly the elderly, and were more vulnerable in terms of livelihood opportunities, abuse and having more responsibilities (UNESCAP 2005, *Report on the National Workshop on the Impact of the Tsunami on “Vulnerable Groups” and Women*, 20-21 October, p. 11. Cited on Global Action on Aging website <http://www.globalaging.org/armedconflict/countryreports/asiapacific/tsunamiwork.pdf> – Accessed 23 May 2007).

Women

The latest US Department of State report on human rights in Sri Lanka includes the following information on discrimination against women:

Women have equal rights under national, civil, and criminal law; however, questions related to family law, including divorce, child custody, and inheritance, were adjudicated by the customary law of each ethnic or religious group. (US Department of State 2007, *Country Reports on Human Rights Practices for 2006 – Sri Lanka*, March, Section 5).

A 1999 Asian Development Bank (ADB) briefing paper on women in Sri Lanka notes that the increasing number of ageing women will require specific attention. The paper states:

Two new vulnerable groups have emerged in recent years. A recent study found that due to changes in the demographic structure and the increasing aging population and rising female life expectancy (which is higher than male life expectancy at 74 years for female compared to 70 years for male), a higher proportion of widows and elderly poor women have become more impoverished. As a result, over half the inmates in the Elders' Home in the study were women, and majority of these women were there because there was no one to look after them at home. It was also found that the human and material resources of low-income families were insufficient to care adequately for aging women. Likewise, geriatric care and homes for the aged are totally inadequate to meet the needs of low-income families (Asian Development Bank 1999, *Country Briefing Paper: Women in Sri Lanka*, May).

The ADB paper also states that:

In the transition years following colonial rule, Sri Lankan policymakers introduced a social policy package of free health and education services and subsidized food, which dramatically improved women's quality of life. Compared to the rest of South Asia, Sri Lankan women are very well off, enjoying high life expectancy (74 years), nearly universal literacy, and access to economic opportunities, which are nearly unmatched in the rest of the subcontinent.

Widows

According to a number of sources, widows in Sri Lanka suffer from marginalisation or discrimination and are regarded as inauspicious or "bad luck" in a community (Johnston, N. 2003, UNSC Resolution 1325 – South Asian Women's Perspectives, International Alert website, June, p. 19.)

In 2001 the United Nations Division for the Advancement of Women (DAW) published a paper on widows in developing countries. According to DAW:

It can be said that there is no group more affected by the sin of omission than widows. They are painfully absent from the statistics of many developing countries, and they are rarely mentioned in the multitude of reports on women's poverty, development, health or human rights published in the last twenty-five years. Growing evidence of their vulnerability, both socio-economic and psychological...now challenges many conventional views and assumptions about this "invisible" group of women.

... Neglected by social policy researchers, international human rights activists and the women's movement, and consequently by Governments and the international community, the legal, social, cultural and economic status of the world's widows now requires urgent attention at all levels of society, given the extent and severity of the discrimination they experience. This urgency is increased by the fact that, in all countries, North and South, widows far outnumber widowers, due to longer life expectancy and the frequent age disparity between partners. Therefore, the ageing trend of the population globally implies that the majority of the elderly in all countries will be made up of females, many of them widows requiring support (UN Division for the Advancement of Women 2001, 'Widowhood: invisible women, secluded or excluded', *Women2000*, December, pp. 2-3 http://www.un.org/womenwatch/daw/public/wom_Dec%2001%20single%20pg.pdf – Accessed 22 May 2007).

In February 2002 a South Asian Conference, “Capacity Building of Marginalized Women: Widows”, was organised. The subsequent report includes testimonies from South Asian widows. The testimonies from two Sri Lankan widows are included below:

Wickrama Dulin Nona De Silva made the presentation for Sri Lanka, “I am a widow but I have never been starved, or ever discriminated against.”

...

In our country there has been death and destruction of thousands of women due to the highly unstable political scenario since the past many years. In Batticaloa alone there are 1000 widows; 400,000 women live in shelters across the country.

On one hand the status of women is high, but if you look at the decision making powers, Sri Lankan women have none. There is differentiation in property rights. As in other countries of South Asia a widow is considered inauspicious, not part of any social functions and seeing a widow’s face in the morning is assumed to bring bad luck. Other male members consider a woman without a man, unprotected and subject her to unnecessary harassment. Remarriage in some communities is accepted; a man can enter a relationship with a widow. (Widows International 2002, ‘Conference Report II’, *South Asian Conference Capacity Building of Marginalized Women: Widow, Grief & Renewal* website, February <http://griefandrenewal.com/report4.htm> – Accessed 23 May 2007).

FINDINGS AND REASONS

The Tribunal accepts that the applicant is a national of Sri Lanka. Her passport was issued in her name in City 2 on a stated date.

The PVA makes mention of a claim for the applicant on humanitarian grounds (Department file). However, the only role for the Tribunal is to determine whether the definition of “refugee” applies to the applicant’s circumstances. A consideration of her circumstances on other grounds is a matter solely within the Minister’s discretion.

The Tribunal does not consider that there are issues of credibility in this application. The Tribunal accepts the claims that the applicant is not getting the care that she wants and needs from her family in Sri Lanka. It accepts that M is genuinely concerned about the applicant’s welfare and would care for her if she were to remain in Australia.

The Tribunal will consider the applicant’s fear of persecution on the basis of her membership of a particular social group. It will also consider her claim of harm from non-state forces in the form of neglect by her family and also that family members, F, may try and poison her.

Membership of a particular social group

The meaning of the expression “for reasons of ... membership of a particular social group” was considered by the High Court in *Applicant S*, where the following summary was made of the principles for the determination of whether a group falls within a particular social group:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, [*Applicant A & Anor v MIEA & Anor (1997) 190 CLR 225*] per Dawson J at 242, a group that fulfils the first

two propositions, but not the third, is merely a "social group" and not a "particular social group". (*Applicant S v MIMA* (2004) 217 CLR 387 at [36] per Gleeson CJ, Gummow & Kirby JJ.)

The first question for the Tribunal to determine is whether there is a relevant social group of which the applicant is a member. If so, the next question for the Tribunal is whether the persecution that the applicant fears is for reasons of membership of the group.

The definition of "particular social group" is wide and flexible. In the 1992 Federal Court case *Morato v MILGRA*, Justice Lockhart stated:

The interpretation of the expression "particular social group" calls for no narrow definition, since it is an expression designed to accommodate a wide variety of groups of various descriptions in many countries of the world which, human behaviour being as it is, will necessarily change from time to time. The expression is a flexible one intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons.

...

In my opinion for a person to be a member of a "particular social group" within the meaning of the Convention and Protocol what is required is that he or she belongs to or is identified with a recognizable or cognizable group within a society that shares some interest or experience in common. I do not think it wise, necessary or desirable to further define the expression. ((1992) 39 FCR 401 at 416.)

Although widely drawn, the concept of persecution is not to be used in defining "particular social group." Justice McHugh stated in the *Applicant A* case:

The concept of persecution can have no place in defining the term "a particular social group". ... Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the "particular social group" ground to take on the character of a safety-net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of "fear of persecution", "for reasons of" and "membership of a particular social group" in the definition of "refugee." (*Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 242 per McHugh J.)

However, Justice McHugh considered that the actions of the persecutors may serve to identify or cause the creation of a particular social group in society:

[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group. (*Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 264 per McHugh J.)

The question of whether or not a particular social group shares a unifying characteristic that makes them "cognisable in society" must be considered separately from whether or not its members share persecution in common. The issue is whether there is something other than persecution which makes the group cognisable as a particular social group.

Further, it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reason of the membership of the particular social group

The Tribunal will now consider the applicant's position in the present case. Whether the group to which an applicant claims to belong is a "particular social group" for the purposes of the Convention is a question of fact for the Tribunal to determine. The Tribunal considers it possible that the applicant could be a member of several particular social groups which are: *elderly people in Sri Lanka* or *elderly women in Sri Lanka* or *elderly widows in Sri Lanka*. The shared fear of persecution is not the attribute common to all the members of any of these groups, and each group is cognizable within society. However, the Tribunal notes that the applicant said that being elderly was the reason for which she feared persecution rather than being a woman.

The Tribunal accepts the evidence that life is very difficult for the applicant in Sri Lanka. It accepts the claims that it is difficult and expensive to get medical, pharmaceutical and ambulance assistance. It acknowledges the issues of poverty, immobility, isolation, loneliness, dependency, ill health and lack of nutrition affect the elderly. It accepts the claim that the applicant finds it difficult to survive on her monthly pension amount, particularly as the cost of living has risen following the tsunami. It accepts that as an elderly person, or an elderly woman or an elderly widow, the applicant is vulnerable in Sri Lanka. The independent information referred to above points to the difficulties in providing social services in Sri Lanka, particularly because of the drain on resources because of the ongoing civil war and the effects of the 2004 Tsunami. It also identifies the elderly and elderly women in particular, as a vulnerable group in Sri Lanka. However, there are other vulnerable groups affected by these conditions as well. For example, there are orphans, youth, disabled people, and victims of the civil war and widows. These groups too would find life extremely hard in Sri Lanka with resources and government assistance limited.

Being in a position of vulnerability or defencelessness will not of itself bring the harm feared within the Convention. In *Omar Mohamud Mohamad v MIMA* [2000] FCA 109 the applicant claimed that he was subjected to selective harassment in the context of the clan warfare in Somalia because he was a member of a weak clan. The Court upheld Emmett J's reasoning at first instance that persecution of small or weak groups was not, of itself, persecution for a Convention reason. Emmett J stated:

Harm arising out of such a war may be disproportionately directed to those unable to defend themselves, whether they be individuals or smaller weak groups. A defenceless person in such circumstances, however, is not at risk by reason of membership of such a group but simply because he or she occupies the territory or has the resource which is sought by the persecutors. The fact that such a person is defenceless to resist the claim by the more powerful group and is unable to defend it does not render the conflict that might arise conflict for a Convention reason. It is a most unfortunate circumstance of human life that that be so. However, I do not consider that persecution of weak people in order to obtain what they have, because it is easier to recover what they have from them than from a stronger group, is persecution for a Convention reason ([1999] FCA 688 at [31]).

In another case, the Tribunal acknowledged that the young applicant could face danger if he returned to Afghanistan, and that he was particularly vulnerable because of his age. However, the Tribunal found that there was no real chance that he would face persecution by the Taliban. It found that even if children or unaccompanied young people could be said to be

particular social groups, the difficulty he would encounter would not be for a Convention reason. It would be “because of his youth and inexperience and so limited capacity to manage in a difficult environment and the generalised insecurity and hardship which prevails in his country”. The Full Federal Court held that the Tribunal had correctly appreciated the issue: *MIMIA v VFAY* [2003] FCAFC 191. While the Tribunal recognised that, as an unaccompanied child in Afghanistan, the applicant would be “vulnerable” to harm, certain groups, such as children, the sick and the elderly, would be less able to cope with the “generalised insecurity and hardship”. The Court stated that the fact that the general conditions in Afghanistan might have a differential impact on some groups does not show that the members of those groups will be subject to persecution because of their membership of a particular social group; *MIMIA v VFAY* [2003] FCAFC 191 at [60].

The next question for the Tribunal is whether what the applicant fears give rise to a well-founded fear of persecution for a Convention reason. This involves an inquiry as to whether the applicant faces a real chance of serious harm for the essential and significant reason of belonging to any of the particular social groups which the Tribunal has identified (*elderly people in Sri Lanka or elderly women in Sri Lanka or elderly widows in Sri Lanka.*) Although it is possible that the lack of access to affordable health and welfare service may result in “serious harm,” the Tribunal considers that this is not because of “systematic and discriminatory” conduct (or inaction) by the Sri Lankan authorities. The applicant claims that she feels that the government would like it if many people died, especially the old to ease the country economy. However, there is no evidence available that this is the case. The independent information referred to above indicated that the plight of the elderly is recognized by the government and there have been some measures put in place to attempt to alleviate hardship. For example, there is the *Protection of the Rights of the Elders Act No. 9 of 2000* (above, page 10) which became operational in 2002; also, the initiatives shown by the Sri Lankan Ministry of Social Services & Social Welfare (above, pages 10 and 11).

The Tribunal does not accept that the evidence establishes that the applicant as member of any of the particular social groups that the Tribunal has identified will be denied services, assistance or benefits for reasons of her membership of the particular social group, or that they will be denied in the future for such a reason.

The Tribunal does not accept that the essential and significant reason for inaction against the applicant would be that she is a member of a particular social group of *elderly people in Sri Lanka or elderly women in Sri Lanka or elderly widows in Sri Lanka.* The Tribunal therefore does not accept that any harm which might result if she were to return to Sri Lanka would be for the essential and significant reason of the applicant’s membership of a particular social group or for any other Convention reason.

Harm from non-state forces

The applicant told the Tribunal that she fears harm from her family. The Tribunal accepts this. The first question for the Tribunal is whether the harm that she fears from her family is due to a Convention reason. Specifically, do they seek to harm her for reasons of her membership of any of the particular social groups: *elderly people in Sri Lanka or elderly women in Sri Lanka or elderly widows in Sri Lanka.* Additionally the Tribunal identifies one further social group of which that the applicant could be a member: *elderly family members in Sri Lanka.* The evidence available about her family in Sri Lanka points to a lack of interest to care for her. The Tribunal considers that this is because of their indifference, self-interest

or lack of available resources or all of these things - not because she is a member of any of the particular social groups identified.

The applicant claimed that she feared that her family members, F, may try and poison her. She said that they do not want her in the home and they want the home for themselves. The Tribunal asked the applicant whether she had taken any action about her fear in this regard to the authorities. She said that she had not. The Tribunal accepts that the applicant has this fear of harm from her family members, F however it considers that any harm done by her family members, F would not be motivated by a Convention reason. Their motivation is personal.

The next question for the Tribunal is whether any failure by the State to provide protection against the harm that the applicant fears is for a Convention reason. In *MIMA v Khawar* (2002) 210 CLR 1, the applicant feared harm from her violent husband. The Tribunal found that he was not motivated to harm her for a Convention reason; rather, his reasons for being violent towards her were personal. The applicant had also claimed that the police refused to provide her with protection against her husband's violence. A majority of the High Court agreed that the Convention test may be satisfied by the selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related. Comments by members of the High Court provide some guidance as to the circumstances in which a failure to protect might constitute persecution within the meaning of the Convention. The members of the High Court gave slightly differing analyses of the relationship between persecution and state protection. Chief Justice Gleeson considered that it would not be sufficient to show maladministration, incompetence, or ineptitude by local police; but if an applicant could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then the Convention test may be satisfied (*MIMA v Khawar* (2002) 210 CLR 1 at [26]). Justice Callinan commented that inactivity or inertia of itself does not constitute persecution (at [155]).

In the applicant's case the Tribunal does not consider that the circumstances give rise to an issue of the discriminatory and systematic withholding of state protection for a Convention reason. There is a national, civil and criminal law system in Sri Lanka. The latest US Department of State report on human rights in Sri Lanka states that: "The law provides for equal rights for all citizens, and the government generally respected these rights in practice; however, there were instances where gender and ethnic based discrimination occurred" (US Department of State 2007, *Country Reports on Human Rights Practices for 2006 – Sri Lanka*, March, Section 5). The independent information set out above indicates that there have been significant strains on infrastructure and resources for all Sri Lankan citizens because of the civil war in the country and the tsunami. The Tribunal considers that any failure to provide protection to the applicant is not because of her membership of any of the particular social groups that have been identified. There is evidence that the Sri Lankan authorities are taking steps to try and address the problems faced by the elderly. For example, following an application by the parent the State is empowered to order children to provide financial assistance to an elderly parent (above, page 10). The Tribunal acknowledges that it is possible that such an application would not be effective in the applicant's case if her family members were unable to provide financial assistance. However, the legislation setting up the scheme is indicative that the State would not systematically and discriminatorily withhold protection from the applicant against the harm feared for reason of her membership of any of the identified particular social groups or any other Convention reason.

The Tribunal considers that any failure by the State to provide protection against the harm that the applicant fears is not for a Convention reason.

The Tribunal does not accept that the applicant has a well founded fear of being persecuted for a Convention reason if she returns to Sri Lanka.

CONCLUSION

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s. 36(2)(a) for a protection visa.

The Tribunal has no jurisdiction to consider whether there may be other grounds upon which the applicant could apply to remain in Australia.

DECISION

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

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act</i> 1958. Sealing Officers ID: PRRTIR</p>
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