

1403517 (Refugee) [2016] AATA 3922 (1 June 2016)

**DECISION RECORD**

**RRT CASE NUMBER:** 1403517  
**COUNTRY OF REFERENCE:** Sri Lanka  
**TRIBUNAL MEMBER:** Josephine Kelly  
**DATE:** 1 June 2016  
**PLACE OF DECISION:** Sydney  
**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 01 June 2016 at 2:55pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 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).
2. The applicant, who claims to be a citizen of Sri Lanka, applied for the visa [in] April 2013 and the delegate refused to grant the visa [in] January 2014.
3. The applicant appeared before the Tribunal on 2 June 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.
4. Because the matter was reconstituted to another member, a further hearing was held on 1 October 2015, again with the assistance of an interpreter in the Tamil (Sri Lankan) and English languages.
5. The applicant was represented in relation to the review by his registered migration agent.

### SUMMARY OF THE LAW

6. 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.
7. 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).
8. 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.
9. 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').

10. 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.

## **CONSIDERATION OF CLAIMS AND EVIDENCE, AND FINDINGS**

### **The issues in this case**

11. The issues in this case are whether the Tribunal accepts as credible the claims for protection the applicant makes and, if so, whether he satisfies either of the protection criteria.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

### **Background**

13. The following findings are not contentious and are made based on written information the applicant has provided, including the copy of the delegate's decision record. Some matters were clarified during the course of the hearings.
14. The applicant was born on [date] at [his home village in] [District 1], in the Northern Province of Sri Lanka. His ethnicity is Tamil and he follows the Catholic religion. He is a citizen and national of Sri Lanka. He has never held a passport.
15. In about 1989, he and his family were displaced by the civil war and forced to live in a hut by the sea to avoid the conflict. In about [early 1990's] they were forced to flee to India where they lived in a refugee camp in Tamil Nadu, from about [specified year] to [year]. His parents decided to return home then because peace talks were in progress. Apart from that period, the applicant lived in the [District 1] area of Sri Lanka which was under the control of the Liberation Tigers of Tamil Eelam (LTTE) until March 2009.
16. Between [year] and 2004, the applicant worked as a fisherman in [District 1]. The war continued and life was difficult. He could not attend school because he decided to help his father fish to support their family. Shelling and bombing attacks occurred almost daily.
17. In about 1995, the applicant was fishing in [District 1] with two friends when the Sri Lankan Navy (the SLN) began shooting. He suffered a bullet wound to his [body part]. One of his friends was killed.
18. He married [in] June 1999 in [District 1].
19. In 2004 a tsunami hit Sri Lanka. The applicant lost his [many specified] relatives. The applicant and his remaining family members lived in a camp run by a non-government organisation in [District 1] for about a month and then returned to their home in [his home village].

20. The applicant and his family were forced to relocate to a refugee camp in Jaffna from [2009] when the war intensified, to [2010], and then stayed with relatives in [another town] on the Jaffna peninsula until about May 2010 when they returned to [his home village] where the applicant remained until leaving for Australia. His wife and [children] continue to live there.
21. He was a fisherman all his life.
22. The applicant left Sri Lanka illegally by boat [in] July 2012 and arrived in Australia [in] August 2012. He attended a departmental interview [in] December 2012. A copy of the recording is before the Tribunal. He provided a copy of the delegate's decision record dated [in] January 2014 which includes information provided at the interview.

### **The applicant's claims for protection**

23. The applicant made the following claims for protection in his application:
  - The LTTE combatants would forcibly recruit Tamil civilians to fight as well as to assist in their administration and operations. In about 2004 the LTTE intensified their civilian recruitment.
  - In about 2005 the applicant was forced to undergo compulsory self-defence training and to assist the LTTE. The LTTE forced Tamils aged between 18 and 60 years to complete the training. They issued permits to each participant. 'We were called the "people's army" to provide further support for their activities'. They were not allowed to work or continue their village daily lives without the permit.
  - The compulsory self-defence training included physical training and survival skills. It did not include weapons training. However they were taught how to defend themselves in the event the fighting escalated. The training was for two days a month for about four to five months.
  - Between about 2005 and 2009 the applicant was forced to assist the LTTE by doing tasks such as [specified duties].
  - In the period when the war intensified in March 2009, his [Relative A] and some of his friends were injured and/or killed.
  - Although the war ended in May 2009, the applicant's family decided to remain with relatives in Jaffna until May 2010 because the Army continued to harass and monitor the people in [District 1]. Furthermore, the army did not allow people to return to their homes until about May 2010.
  - At that time the applicant's family returned to their home village. The International Committee of the Red Cross (ICRC) offered Rs.100,000 to families displaced by the war to rebuild their homes.
  - However because of the applicant's forced involvement with the LTTE, the Army was suspicious that he was a former LTTE combatant. The army began harassing him at home or sent one of their officers to tell him to attend their camp in [District 1]. If he did not attend, they would either call him or come to his home in harass him.

- When he attended their camp, they interrogated him about his involvement with the LTTE at gunpoint. They verbally abused him and threatened him with harm if he did not confess. He would usually be interrogated for about two hours on each occasion. He would be released but on the condition that he would return for a further investigation.
- The interrogations continued until he fled Sri Lanka. He could no longer endure that treatment and decided to flee.
- About one week after he left Sri Lanka, the Army came to his home and asked his family where he was. His wife said she did not know. The Army advised her to inform them when he returned.
- In about October 2012 the Criminal Investigation Department came to his home asking where he was. His wife said that he had gone to Australia by boat. The CID threatened to harm him if he returned.
- The applicant fears that he will be arrested, detained, beaten, tortured/and/or killed if he returns to Sri Lanka.
- The applicant fears being harmed / mistreated by the Sri Lankan authorities, including the Army and CID.
- The applicant claims that he will be harmed / mistreated if he returns to Sri Lanka because:
  - of his race (ethnicity) as a Tamil;
  - of his imputed political opinion as a supporter of the LTTE; and
  - of membership of a particular social group “failed asylum seeker”, and
  - because he has lived in an LTTE stronghold, the authorities would not protect him.

### **The departmental interview**

24. In addition to his claims in his visa application, at the departmental hearing, the applicant claimed that he feared harm because:
- He was a member of the [Organisation 1] in [District 1]. Some Sinhalese fishermen were using [specified equipment] to fish which gave them an unfair advantage because Tamil fishermen were not allowed to use a [specified equipment]. The applicant represented the fisherman in his village and complained to the authorities but the CID targeted him and took him for interrogation, told him he had no right to speak out, and threatened to kill him if he continued to complain. The applicant told the delegate the incident occurred [number] weeks before he departed Sri Lanka.

### **Documents**

25. The applicant provided copies of the following documents with his visa application:

- His national ID card, birth certificate, marriage certificate and Sri Lankan driver's licence.
26. He provided the following to the Department later:
- Letter from [Person 1] to [a local official in] [District 1], dated [in specified month] 2012 in English;
  - Various documents, mostly in a script the Tribunal does not understand, but sometimes including some English words, apparently birth and death certificates, and one letter on the letterhead of [Organisation 1];
  - A "Return Form" dated [in] 2010 on letterhead including the logo of the UNHCR and some other organisation, containing information about the applicant and his family in the [specified] refugee camp, Jaffna.
  - Letter from the Parish Priest, [named church], [District 1], dated [in] August 2012;
  - A letter in English from The President, [District Organisation 1] dated [August] 2012;
  - A photograph apparently of the applicant, his wife and [children];
  - A translation of a letter dated [in] December 2013 on [Organisation 1].

### **Submissions**

27. The representative provided to the Tribunal a 30 page submission dated 20 May 2014 which addressed the factual bases of the applicant's claims, the applicant's credibility, the characterisation of his claims against the refugee and complementary protection criteria, and supporting country information.

### **Consideration and findings**

28. The Tribunal accepts that the applicant has suffered hardship and tragedy in his life in Sri Lanka. He lived under the control of the LTTE during the civil war, having to flee to India for a year in [year] with his family. He was shot by the Sri Lankan Navy in 1995 and saw two friends killed. He suffered during the 2004 tsunami, including the deaths of many members of his family, including a child. He fled from the intensifying civil war in March 2009 to live in a refugee camp in Jaffna for a year before returning to his home in about May 2010. The question to determine is whether there is a real chance that he will suffer serious harm or a real chance that he will suffer significant harm if he returns to Sri Lanka.
29. The Tribunal accepts that the applicant was questioned twice by the Army or CID in 2010 after he returned to his home area of [his home village], the first time a few days after he returned in May 2010 and the second time a month or so later. The first time he was questioned for two or three hours and the second time for about half to one hour. He did not claim to be harmed during the questioning and the Tribunal does not accept that he was harmed. The Tribunal accepts that at least all males were questioned when they returned to the area and there was a process developed such that the Army's request for people to come for questioning was conveyed by [a local official], once that position was filled. The first time, the Army asked him to go directly but the second time, the request was conveyed

through the [local official]. The Tribunal accepts that the applicant was asked about having links with the LTTE which he denied. He also denied that any members of his family had any such link and told the questioners that most of his family had died in the tsunami. The Tribunal accepts that he was asked questions about his scars, some of which it observed on his [body]. It accepts that he told them that he had obtained the scars from the shooting in 1995 and during the tsunami.

30. The Tribunal accepts that he thought about leaving the country but did not get a passport because that involved going to Colombo and the CID had told him that he could not leave the area where he lived. Another factor was that the [local official] would not give him a letter to get a passport because CID had taken him for questioning. That is why he came by boat.
31. When the Tribunal asked if he has been questioned another time, the applicant talked about the dispute with the Sinhalese fishermen. He claimed that the Sinhalese used a net of a type that caught small as well as large fish, such that it had the effect of depleting fish stocks. The applicant claimed that such a net was illegal in Sri Lanka. The applicant gave a different reason for the dispute when interviewed by the departmental delegate. At that time he said that the Sinhalese used [other specific equipment].
32. The letter from the Parish priest, [District 1] dated [in] August 2012 is typed in English. The letterhead appears to be in two different scripts, including English. The priest refers to the applicant's religion and his good character, and says that the applicant was affected by the tsunami and the ethnic conflict. The priest says that the applicant had difficulties and crept "in your country seeking shelter safety and security of his own life. If you allow him to stay in your country it will be of great help for him."
33. The letter dated [August] 2012 on the letterhead of [District Organisation 1] says that the applicant is a member of the [Organisation 1] which is a branch of [District Organisation 1]. It talks about his loss of fishing equipment and his family during the 2004 tsunami and that later he was offered replacements "and did fishing not as early. He is a hardworking fisherman". The Tribunal accepts that the document is genuine. It does not support his claim that he has suffered harm in recent years from the Sri Lankan army or any Sri Lankan authority or anyone else. The original letter is in English. The letterhead is in English.
34. The letter dated [in] December 2013 from [Organisation 1] is not written in English. The letterhead is written in three different scripts, including English. The translation states the following. The applicant "has been functioning efficiently as the [office bearer] of our [organisation]". It describes how in recent times many Sinhalese families settled "in our areas transgressing all rules". They brought over 100 boats, and were fishing in certain areas "which affected our fishing business". "All societies got together and spoke to the army" who told them that "the Sinhalese fishermen would be carrying out their trade in this area and they cannot be sent away". The letter described how the applicant argued with the army during the societies' representations. He said that the Sinhalese fishermen should be sent away "and our work must be performed in accordance with the rules and regulations". "The following day the investigation division of the army conducted an investigation and threatened him. Because of this threat he feared that his life may be in danger and lived in fear". "He has gone to Australia by sea in order to protect his life. The army has inquired about him since his departure."
35. The Tribunal accepts that the applicant did speak out about the inroads Sinhalese fishermen were making on the livelihood of fisherman in [his home village]. It accepts that he was

questioned by CID as a result. It also accepts that the Army and/or the CID have inquired of his wife and/or his [a relative] about his whereabouts since he left Sri Lanka. Whether that was because he left Sri Lanka illegally or because of his activities in relation to the Sinhalese fishermen is not apparent.

36. The Tribunal takes into account that the applicant has left Sri Lanka illegally and will be subjected to the treatment outlined in the Department of Foreign Affairs and Trade Country Information Report on Sri Lanka dated 18 December 2015 (the DFAT country report) at [5.27] to [5.36].
37. The Tribunal takes into account that the applicant has scarring to his body, including one from a bullet wound to his [body part], and the discussion of scarring in the DFAT Thematic Report – People with Links to the Liberation Tigers of Tamil Eelam (the Thematic Report) at [2.28]. The applicant has not suffered serious or significant harm in the past because of that scarring, despite being questioned by the Army and the CID, including about his links with the LTTE, on at least three occasions.
38. The Tribunal accepts the applicant's evidence that he does not claim protection on the basis of his Catholic religion. It accepts his evidence that none of his family members were involved with or linked to the LTTE, although he lived in an LTTE controlled area for many years.
39. The Tribunal accepts that the applicant has suffered serious and significant harm in the past because he was a Tamil fisherman when he was shot in the [body part] and his two friends were killed in 1995. It does not accept that he has suffered serious or significant harm since the end of the war in March 2009. It finds that he was not questioned by the Army or CID from November 2010 until about July 2012. That is supported by the written submission and his evidence at the second Tribunal hearing.
40. There were a number of inconsistencies between the applicant's claims and his evidence and some exaggeration. For example, his evidence and the submission did not support his original claim that the interrogations by the Army continued until he left Sri Lanka. However, the Tribunal finds that those inconsistencies and the exaggerated evidence do not undermine the applicant's evidence over all.
41. Taking into account all the evidence and the claims, the Tribunal is not satisfied that there is a real chance that the applicant will suffer serious harm or a real risk that he will suffer significant harm because of any one of the following;
  - He is a Tamil
  - He is a Tamil from the Northern Province
  - He is a Tamil from the Northern Province who has scarring on his body
  - He is a Tamil from the Northern Province who lived in an LTTE controlled area for many years and provided some assistance to the LTTE when required;
  - He is a Tamil fisherman from [District 1] who made representations on behalf of Tamil fisherman about the impact of Sinhalese fishermen in their area shortly before he left Sri Lanka;



- He will return to Sri Lanka as a failed Tamil asylum seeker having left illegally.
42. When the applicant's claims for protection are considered cumulatively, the Tribunal is satisfied that there is a real chance that the applicant will suffer serious harm in the reasonably foreseeable future for a Convention reason if he returns to Sri Lanka.
  43. All the applicant's characteristics identified in paragraph 41 will be closely scrutinised on his return by the Sri Lankan authorities, as described in the DFAT Country report referred to above, including by the CID at the airport. He left Sri Lanka illegally and will be subject to the legal consequences, including detention. Inquiries may be made in his home area which would disclose his role in standing up for Tamil fishermen against the inroads made by Sinhalese fishermen and that CID questioned him. He is Tamil and lived in the Northern Province in an area controlled by the LTTE for many years. He has scarring, including from a bullet wound caused by the Sri Lankan Navy. Those characteristics may lead the Sri Lankan authorities, including the CID, to perceive him to be an LTTE supporter.
  44. The Tribunal finds that as a consequence of the close scrutiny to which the applicant will be subjected on his return to Sri Lanka, there is a real chance that he will suffer serious physical harm during interrogation and detention from Sri Lankan authorities, including the CID, because of his Tamil ethnicity and imputed links to the LTTE.
  45. The applicant has a well-founded fear of persecution for a Convention reason if he returns to Sri Lanka. The essential and significant reasons for the persecution are the applicant's Tamil ethnicity and his imputed links to the LTTE. He cannot obtain State protection because arms of the State would be the persecutors. There is no suggestion that he has any right to protection in a third country.
  46. For the reasons given above, the Tribunal satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

#### **DECISION**

47. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Josephine Kelly  
Senior Member