

1301805 [2013] RRTA 431 (19 June 2013)

DECISION RECORD

RRT CASE NUMBER: 1301805

DIAC REFERENCE(S): CLF2011/212490

COUNTRY OF REFERENCE: Sri Lanka

TRIBUNAL MEMBER: Christopher Smolicz

DATE: 19 June 2013

PLACE OF DECISION: Adelaide

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

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Sri Lanka, applied to the Department of Immigration for the visa on 13 December 2011 and the delegate refused to grant the visa on 21 January 2013.
3. The applicant appeared before the Tribunal on 22 May 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages, however, the applicant chose to give most of his evidence in the English language.

RELEVANT LAW

4. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the '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.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 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).
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. 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.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

9. 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.
10. 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.
11. 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.
12. 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.
13. 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.
14. 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

15. 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').

16. '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.
17. 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.

CONSIDERATION OF CLAIMS AND EVIDENCE

Background

18. The applicant is a [age] year old single male from [Town 1], Sri Lanka. He declared his ethnic group to be Tamil and his religion Roman Catholic. The applicant's parents and [brother] remain in Sri Lanka. He claims [another sibling] resides in [another country] and he has no family in Australia.
19. The applicant first arrived in Australia on 6 April 2008 as the holder of a [student] visa seeking to study in the school sector. The applicant entered Australia on a valid Sri Lankan passport. The applicant was accompanied by his mother who departed Australia [later in] 2008. On 7 April 2010 the applicant was granted a subsequent [student visa] permitting him to remain in Australia until 15 March 2012.
20. The applicant departed Australia [in] January 2011 and returned to Sri Lanka. He returned to Australia [in] February 2011. [In] November 2011 the applicant's [student] visa was cancelled because he ceased studying and was found to have breached his visa conditions. The applicant resided unlawfully in Australia [in late 2011].
21. The Tribunal finds the applicant is a citizen of Sri Lanka and no other country. In reaching this finding the Tribunal relies on the bio data details in the applicant's Sri Lankan passport, a copy of which was provided with his protection application. His claims for refugee status are therefore assessed on the basis Sri Lanka is his country of nationality. The Tribunal also finds Sri Lanka is the "receiving country" for the purpose of s.36(2)(aa) of the Act.
22. The applicant's substantive claims at the time of his protection visa application can be summarised as follows:

- His family are Tamils, although after the independence of Sri Lanka his parents lost their ethnic identity and assimilated with the majority Sinhalese. He and his parents are fluent in the Tamil language.
 - His family has always supported the UNP [United National Party] and his father was very active in politics.
 - Since 2006 his area was frequently cordoned off by police and the security forces for possible LTTE (Liberation Tiger of Tamil Eelam) infiltrators and sympathisers. His family's loyalty was questioned and they were frequently harassed by the police and the security forces.
 - Many of his relatives were taken away by people connected to the government and put to death. One of his [uncles] who supported the LTTE and UNP was shot and killed by people who came in a white van. His father and [brother] were frequently taken to the police station for interrogations and beaten.
 - His father was very concerned about him and his [brother] so he decided to send them overseas to protect their lives.
 - While studying in Australia he has become acquainted with many Tamils and has many Tamil friends and participated in many of their cultural and sporting events.
 - He dated [Ms A] while studying in Australia. The applicant was [age] years old at the time. When her parents disapproved of the relationship he became very depressed and neglected his studies.
 - His association with Tamils in Australia was viewed by the Sinhalese in Australia with suspicion and contempt. A Sinhalese school friend of [his] was furious about his association with Tamils and strongly disapproved of his relationship with his Tamil girlfriend.
 - [His friend's] father is a highly influential person in the Sri Lankan government and he informed the authorities in Sri Lanka about his alleged activities.
 - The applicant claims his father was recently taken by Sri Lankan police and interrogated.
 - His mother told him not to return to Sri Lanka because he and his [brother] have been accused by the police of working for the LTTE.
 - He does not want to return to Sri Lanka as he fears he may be implicated with the LTTE or the Tamil cause and be seen as a traitor. He fears he could be imprisoned and perhaps killed.
23. The delegate did not accept that the applicant's fear of persecution in Sri Lanka was well founded.
24. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

25. The Tribunal accepts the applicant is of Tamil ethnicity, born, in [Town 1] Sri Lanka and that he travelled to Australia with his mother on a student visa. The Tribunal accepts the applicant's evidence that while he was in Australia he developed a relationship with, [Ms A], a [Tamil girl]. [Ms A]'s parents did not approve of the relationship because the [age of the applicant and their daughter]. The relationship became volatile and [Ms A]'s father assisted his daughter to obtain an Intervention Order in September 2010 and the relationship ended. The applicant's [school friend] also did not approve of the relationship and this caused tension in their friendship. He returned to Sri Lanka in January 2011 and spent time with his family before returning to study in Australia in February 2011. The applicant suffered stress and depression as a result of the breakdown of the relationship and feelings of homesickness and this affected his studies and as a result his student visa was cancelled. He remained in Australia unlawfully until he applied for his protection visa on 13 December 2011.
26. Beyond these issues, however, the Tribunal does not believe any of the claims made by the applicant or that he genuinely holds fear of any harm should he return to Sri Lanka.
27. The Tribunal does not accept that the applicant has suffered harm in the past or will suffer harm in the reasonably foreseeable future in Sri Lanka because:
- of his family's involvement in the UNP in Sri Lanka
 - of his imputed political opinion as a supporter of the UNP and anti-government
 - of his imputed political opinion as a sympathiser and collaborator of the LTTE because he associated with the Tamil community in Australia and dated a Tamil girl
 - his friend's father is a highly influential person in the Sri Lankan government who will cause him serious harm because he has associated with LTTE members in Australia
 - his father was interrogated by the Sri Lankan police in 2012
 - he has supported the LTTE cause and openly associated with members of the LTTE in Australia
 - his picture has appeared on [a social networking site] with supporters and members of the LTTE in Australia.
 - [work undertaken by the applicant].
28. In making its decision, the Tribunal has significant concerns about the credibility of the applicant, and finds that he gave inconsistent and conflicting evidence at different stages of the visa process. The Tribunal found the applicant's evidence vague and implausible. The Tribunal also finds that the applicant participated in activities in Australia after he lodged his protection claim with the sole purpose of strengthening his claim. The Tribunal's credibility concerns are detailed below.

Political opinion

29. In his written claims the applicant described his father as “very active in politics”. He claims relatives were taken in white vans by people connected to the government and “put to death” He claims his uncle was shot and killed and his father and brother were frequently taken to the police station and arrested and interrogated. However when questioned about the persecution faced by his family in Sri Lanka the applicant was unable to explain his claims. He provided no evidence about his uncle or relatives that had been allegedly harassed by security forces, interrogated and some put to death. When questioned about his father’s political work the applicant claimed his father was not paid for his political work and took part in protests against increases in fuel prices. He claimed [a sibling] escaped to [another country, under suspicion] of being involved with the LTTE but was unable recall when [this sibling] departed or to provide further detail in support of the claims.
30. The applicant could not describe the incidents when his father was arrested. He did not know which elections his father was involved with in Sri Lanka and was unable to provide any convincing evidence about his father’s activities. After further questioning the applicant admitted that he did not know much about what his father did. The applicant said he had no interest in politics and did not discuss his father’s activities because he was young at the time. The Tribunal acknowledges that the applicant left Sri Lanka at the age of [age] however, the Tribunal would have expected the applicant to be in a position to discuss significant incidents such as the interrogation of his father, the shooting of his uncle and the death of relatives at the hands of the Sri Lankan government. Having found the applicant’s evidence vague, lacking in important detail and general in nature the Tribunal does not accept:
- His family’s loyalty was questioned and they were frequently harassed by police and security forces: [22]
 - His uncle who supported LTTE and UNP was shot and killed by people in a white van: [22]
 - His father and [brother] were frequently taken to the police station for interrogations and beaten: [22]
 - He and his [brother] have been accused by police of working for the LTTE: [22]
31. The Tribunal also finds that the applicant’s evidence inconsistent with the correspondence claiming his father was an active member of the UNP since 1978 in Sri Lanka and worked for [a certain Member of Parliament]. The Tribunal asked the applicant if he could provide more information about his father’s activities in Sri Lanka. The applicant was unable to provide any further information. The Tribunal places no weight on the letter in light of the applicant’s inability to provide coherent evidence about his father’s involvement in the UNP and country information¹ which suggests that forged documents can be easily obtained in Sri Lanka. The Tribunal raised these concerns with the applicant at the hearing.
32. In summary, having considered the applicant’s vague and inconsistent evidence the Tribunal has significant concerns about the veracity of his written claims and oral evidence. Having rejected the applicant’s assertions that his family in Sri Lanka were

¹ UK Border Agency Sri Lanka Country of Origin Information Report March 2012 p.293

involved in the UNP, and imputed to have political opinions supportive of the LTTE and, the Tribunal is also not satisfied the applicant would be imputed with a political opinion opposed to the government in Sri Lanka. As such the Tribunal concludes that there is less than a real chance he would be imputed to have a political opinion opposed to the government if he returns to Sri Lanka now or in the reasonably foreseeable future. The Tribunal is not satisfied that the applicant's fear of harm from the Sri Lankan authorities is well-founded.

Association with Tamil community and LTTE members in Australia

33. The applicant said he feared for his life because most of his friends in Australia are Tamils and he would be persecuted if he returns to Sri Lanka because of his associations in Australia. The Tribunal referred the applicant to the December 2012 *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* and noted that being associated with people of the Tamils race alone was not something that would in isolation result him being persecuted in Sri Lanka.
34. The applicant claimed he was an LTTE supporter and had many friends in Australia who were LTTE supporters and fighters. He claimed he had donated money to the LTTE in Australia. The Tribunal explained to the applicant that the LTTE was a banned terrorist organisation and it was surprised he would be donating money for such a cause in Australia. After further questioning the applicant changed his evidence and said he had no interest in politics and was not an LTTE member but he had many Tamil friends who were members of the LTTE. He claimed he only gave \$1 or \$2 donations for education purposes but could not provide any evidence to support his claims. The Tribunal finds the applicant's evidence about his involvement with the LTTE in Australia inconsistent, vague and lacking credibility. Tribunal finds the applicant was unable to explain his political beliefs and admitted that he had no political views when he came to Australia in 2008. He said he was [age] years old and came to Australia with his mother to study. The Tribunal accepts the applicant had Tamil friends in Australia but does not accept his evidence that they were members or associates of the LTTE. The Tribunal does not accept the applicant was a member or associate of the LTTE or donated money to their cause in Australia. As such the Tribunal concludes there is less than a real chance he would be imputed to have a political opinion supportive of the LTTE or opposed to the government if he returned to Sri Lanka now or in the reasonably foreseeable future.
35. The applicant provided the Tribunal with a number of photographs which he claims were taken in [Australia] in [2013] at a celebration in honour of [an LTTE fighter] and associate of the LTTE founder Velupillai Prabhakaran. The Tribunal finds that the photographs comprise new evidence that had not been presented to the Department. The Tribunal notes that the photographs depict the LTTE flag and a picture of [the LTTE fighter] in the background. The applicant identified himself in the photos and said that the people in the photograph were all Sri Lankan Tamils and some were LTTE supporters. He said some of the people were [people he knew] in Australia. He said a friend "tagged" him in [a social networking site] in one of the photos and it appeared on his [social networking] site. The applicant said that when he found out about the photograph he untagged it from his site because he was worried the photo would be seen in Sri Lanka. The applicant was able to demonstrate his evidence at the hearing

using his mobile phone and accessing his [social networking] site. He said he was worried that people in Sri Lanka may have seen the photographs.

36. The Tribunal referred the applicant to the photographs depicting him next to the LTTE flag and a picture of [the LTTE fighter] in the background and explained to the applicant that under Australian migration law if it believes he has engaged in conduct while in Australia in order to strengthen his claims to be a refugee it must disregard that conduct in assessing his claims. The applicant agreed the photos were taken in [date] 2013 after he lodged his protection visa application and after his interview with the delegate. The applicant claimed that if the photographs were taken to strengthen his claims why would he un-tag the photos and remove them from his [social networking] page when he could have left them on the page to be seen by everyone. The applicant provided vague and unconvincing answers about the location depicted in the photographs or why the LTTE flag was present.
37. The Tribunal has assessed the photographs provided by the applicant and finds that they have been staged to ensure that the LTTE flag is visible in the background of the photographs. The photographs appear to be choreographed, posed and are not taken inadvertently. The Tribunal finds the photographs were taken after he lodged his protection visa application. The Tribunal does not accept the applicant's evidence that the photographs appeared on his [social networking] site without his knowledge.
38. The Tribunal has considered the applicant's explanation about the photographs and the circumstances in which they appeared on his [social networking] site, and finds that the applicant's conduct was undertaken in Australia solely for the purpose of enhancing his protection visa claims. The Tribunal has disregarded this conduct pursuant to section 91R(3) of the Act.

Relationship with Australian Tamil girl

39. The applicant said that he had a relationship with [Ms A] while he was a student in Australia. The applicant claimed that [Ms A]'s father was an ex-LTTE soldier in Sri Lanka. The applicant claimed he would be persecuted in Sri Lanka because he went out with a Tamil girl and because her father was involved in the LTTE. However when questioned he admitted that [Ms A]'s father never told him he was a member of the LTTE and he only suspected this because that's what people in the Tamil community were talking about. He said he did not know if he was in fact a soldier and said he did not know what his role was but would regularly see him turn up to [different events]. He admitted that [Ms A]'s father left Sri Lanka in the 1980's, was an Australian Citizen and could not have been involved in the Sri Lankan civil war. The applicant subsequently claimed that [Ms A]'s father was [dangerous gangster] about 20 years ago. The Tribunal asked the applicant to explain how [Ms A]'s father would cause problems for him in Sri Lanka. The applicant was unable to provide a coherent explanation. The Tribunal put to the applicant that it appeared that [Ms A]'s father disapproved of his relationship with his daughter who was [age] at the time. The Tribunal notes that an Intervention Order was taken out to prevent him from having any contact with [Ms A] by the [Court]. The Tribunal put to the applicant that it did not see how this was relevant to him being persecuted if he returned to Sri Lanka. The Tribunal does not accept the applicant's evidence that [Ms A]'s father is a member or associate of the LTTE and/or [gangster] to be credible. The Tribunal is not satisfied that the

applicant's fear of harm from the Sri Lankan authorities because of his relationship with [Ms A], is well-founded.

40. The Tribunal put to the applicant the delegate found he did not have a profile in Sri Lanka according to the UNCR guidelines and would be of no interest to the authorities. He was able to depart Sri Lanka on a valid passport in 2008 and return in 2011 with no problems from the authorities. The Tribunal noted that he left as a boy [age] with no political profile and has been studying in Australia since 2008. The Tribunal noted that the civil war had ended and political climate has changed in Sri Lanka and Tamil people did not face the same persecution as they did in the past.
41. The applicant claimed there was a Sinhalese person called "[Mr B]" who would "hang around" his [sports club]. He said he thought he was a captain in the Sri Lankan Army. He did not understand why he spent time with Tamil players. He claimed that [Mr B] was closely associated with [his friend]. He said that [his friend] told him not to associate with the Tamil community in Australia and he did not approve of his relationship with [Ms A]. The applicant claimed that [his friend] would tell [Mr B] about his association with Tamils and the relationship and [Mr B] would tell the authorities in Sri Lanka. However when questioned about the basis of his belief the applicant admitted that he did not know if they in fact talked and was only guessing that this could happen. The Tribunal finds the applicant's fears of being persecuted because of his association with a person called [Mr B] and [his friend] is not well-founded.
42. Pursuant to s.424AA of the Act the Tribunal formally put to the applicant that it has access to information on the Department's file that confirmed that [his friend] was born in [year], his father was a Tamil fisherman in Sri Lanka and not highly influential Sinhalese person within the Sri Lankan government.
43. The Tribunal explained to the applicant that, subject to what he had to say, the information would be the reason or part of the reason for affirming the decision under review. The Tribunal explained to the applicant that the information was relevant because it was inconsistent with his claims that [his friend]'s father had a connection in the government and would inform the Sri Lankan authorities about his association with the Tamil community in Australia. The Tribunal explained to the applicant that as a consequence it may find that he has not been a credible witness and may disbelieve his evidence and affirm the decision under review.
44. The applicant did not ask for time before responding to the information. He said that his English language skills were not very good and he struggled to express himself during the interview with the delegate. The applicant admitted that [his friend]'s father was a fisherman and worked as a courier driver and agreed he was not involved in politics but has powerful friends in the government. The Tribunal asked the applicant why he feared that [his friend]'s father's friend would have any interest in a Sri Lankan student who has been studying in Australia since 2008. The applicant said that he suspects that [his friend] would have told his father about his relationship with [Ms A] and that he has Tamil friends in Australia. He admitted that he did not know if [his friend] told his father but was only guessing. The Tribunal finds that the applicant's fear of being persecuted by [his friend]'s father's friends in Sri Lanka is not well-founded.

Tamil ethnicity and imputed political opinion as a suspected LTTE associate

45. In assessing the applicant's claim of persecution based on his imputed political opinions and ethnicity, the Tribunal has had regard to the December 2012 *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*. The Tribunal notes the guidelines are not exhaustive and all claims must be considered on their merits.
46. The UNHCR stated in its eligibility guidelines that there is no longer a presumption of protection for reason of simply being of Tamil ethnicity.

At the height of its influence in Sri Lanka in 2000-2001, the LTTE controlled and administered 76% of what are now the northern and eastern provinces of Sri Lanka. Therefore, all persons living in those areas, and at the outer fringes of the areas under LTTE control, necessarily had contact with the LTTE and its civilian administration in their daily lives. Originating from an area that was previously controlled by the LTTE does not in itself result in a need for international refugee protection in the sense of the 1951 Convention and its 1967 Protocol.

However, previous (real or perceived) links that go beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment which may give rise to a need for international refugee protection, depending on the specifics of the individual case.²

47. Country information indicates an improved situation for the Tamils since the end of the war. The following groups however may be at risk:

Persons Suspected of Certain Links with the Liberation Tigers of Tamil Eelam (LTTE) – in particular, those who held senior positions within the LTTE civilian administration, former LTTE cadres, former LTTE supporters who provided material assistance, LTTE fundraisers and propaganda activists, and persons with familial links or are otherwise closely related to individuals with the above profiles.

Certain Opposition Politicians and Political Activists – a small number of individuals have allegedly been detained for political reasons.

Certain Journalists and Other Media Professionals – reports indicate instances of “harassment, arbitrary detention, threats and physical intimidation of journalists and other media professionals, allegedly perpetrated or condoned by officials or pro-government forces”.

Certain Human Rights Activists – human rights defenders, trade union activists and lawyers have reportedly been subject to threats and attacks.

Certain Witnesses of Human Rights Violations and Victims of Human Rights Violations Seeking Justice – individuals seeking justice following alleged mistreatment by authorities have reportedly “been harassed and received threats, in an attempt to make them withdraw their cases”.

Women in certain circumstances – high-levels of sexual and gender-related violence reportedly continue to be documented “in the post-conflict phase, including in parts of the country not directly affected by the conflict” Such violence is thought to remain “under-reported and, if reported, inadequately investigated “. Further,

² UNHCR 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (21 December 2012), pp.26-27

different sources indicate that state protection is not necessarily available or accessible to all women in Sri Lanka.

Children in certain circumstances – former child soldiers reportedly face difficulty reintegrating in society, child abuse and trafficking are rife throughout the country, cases of underage marriage continue to be reported as do cases of child labour. State protection is not necessarily available or accessible to all children in Sri Lanka.

Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Individuals in certain circumstances – while ‘homosexual conduct’ is criminalised in Sri Lanka, few cases have been prosecuted. Despite this, “blackmail, violent threats, employment discrimination, rejection by friends, family, the police and society at large are regularly reported”. Further, negative societal attitudes “are reported to affect Sinhala, Muslim and Tamil members of the LGBTI community”.³

48. The Tribunal accepts that the authorities in Sri Lanka have dealt harshly with people they consider in opposition to them and this has included Tamils associated with the LTTE and sympathisers. However, having considered the applicant’s evidence and his personal circumstances the Tribunal does not accept that he has a profile with the Sri Lankan authorities due to his Tamil ethnicity or religion, his imputed or actual involvement or support for the LTTE, either directly or via association with family members, as well as by virtue of prolonged departure from Sri Lanka. Therefore on all the evidence before the Tribunal, it considers that the chance of the applicant being targeted for reasons of his race, religion or imputed or actual political opinion is not real, but is rather remote.

Mother’s letter

49. The Tribunal asked the applicant to provide evidence about his mother’s letter dated 14 March 2012 warning him not to come back to Sri Lanka because his father was involved in a protest over the government raising oil prices. The applicant said that he did not know anything about what happened to his father because he was in Australia. He said he was not worried about the issues raised by his mother and they were matters relevant to his father. The Tribunal has considered the applicant’s evidence and does not accept that the applicant’s father was targeted by the army and suffered physical injury and his life was in danger. The Tribunal notes that the applicant had no knowledge of what happened to his father and how this would impact in his safety in Sri Lanka. The Tribunal finds that if his father’s life was in danger and his mother sent a letter advising him of the dangers the applicant would have discussed the issue with his mother and father. Even if the applicant’s father was involved in protests, the Tribunal finds it implausible that someone who has been absent from Sri Lanka since early 2008, apart from short visit in 2011, would be targeted by the Sri Lankan authorities because his father was one of several thousand individuals who opposed the government’s increase in fuel prices in 2012.

Police report

³ UN High Commissioner for Refugees 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December, pp.26-37
<<http://www.unhcr.org/refworld/docid/50d1a08e2.html>>

50. The Tribunal referred the applicant to a police report provided to the Department from the [Town 1] Police station dated [September] 2011 claiming that his mother was threatened by “Tamil people” in Sri Lanka. The applicant said he knew very little about the report because he was in Australia at the time. He did not know why his parents were attacked or who the attackers were. He thinks it may have been the Sri Lankan authorities because he has links to the LTTE in Australia. The Tribunal found the applicant’s explanation of the police report and its relevance to his claims to be vague and lacking in detail. The Tribunal places no weight on the report in light of the applicant’s inability to provide coherent evidence about its relevance to his claims and country information⁴ which suggests that forged documents can be easily obtained in Sri Lanka. The Tribunal raised these concerns with the applicant at the hearing.

[Work undertaken]

51. [Specific details of work removed]. The Tribunal does not accept that there is a real chance the applicant could be recognised by failed asylum seekers in Sri Lanka. The Tribunal finds the applicant’s evidence that he will be recognised by a Sri Lankan person from his village was vague and lacking in detail. The applicant agreed that he was not recognised during his [work] in Australia. The Tribunal does not accept there is a real chance the applicant would be associated with [the return] asylum seekers back to Sri Lanka. The Tribunal therefore finds that his claim to fear harm because he would be recognised by failed Sri Lankan asylum seekers not to be well-founded.

Fear due to Tamil ethnicity

52. The Tribunal considered the applicant’s claim that he faces serious harm because of his Tamil race or ethnicity.
53. At the hearing, the applicant claimed if he went back to Sri Lanka he would be viewed as Sinhalese but his parents are viewed as Tamils and this will cause problems for him. The Tribunal noted that his evidence was inconsistent with his statement where he said that after independence of Sri Lanka his parents lost their ethnic identity and assimilated with the majority Sinhalese and are classified as Sinhala people in the census. The Tribunal does not accept the applicant’s claim that he will be persecuted in Sri Lanka because of his Tamil parent’s is well-founded.
54. On the question of Tamil ethnicity in Sri Lanka, the UK Border Agency states:

Throughout the conflict, minorities suffered disproportionately – including at the hands of the now defeated Liberation Tigers of Tamil Eelam. The political rights of minorities, a key driver of the conflict, continued to be restricted in 2010. Tamil representatives continued to report discrimination from the government and security forces. Tamil civilians in Colombo were asked to register their presence with their local police station in July [2010], and throughout 2010 arrests under the Emergency Regulations and Prevention of Terrorism Act primarily affected Tamils.

Both local and Indian-origin Tamils maintained that they suffered long-standing, systematic discrimination in university education, government employment, and other matters controlled by the government. According to the SLHRC [Sri Lanka Human Rights Commission], Tamils also experienced discrimination in housing. Landlords were required to register any Tamil

⁴ UK Border Agency Sri Lanka Country of Origin Information Report March 2012 p.293

tenants and to report their presence to the police, although in practice many landlords did not comply. Tamils throughout the country, but especially in the conflict-affected north and east, reported frequent harassment of young and middle-age Tamil men by security forces and paramilitary groups.

...

News articles published by Tamil Net regularly document harassment and beatings committed by security forces and attempts to forcibly relocate Tamil communities. For example, articles in 2012 reported that the Sinhala army and police “brutally attacked a number of Tamil youths below the age of 25, who were passing by the road” in Vanni²⁷ and that “A gang of more than one hundred fifty Sinhalese who were brought to Channaar village in Mannaar district [...] by a government minister had threatened resettled Tamil families to leave the village immediately to give room for the majority community”²⁸. Chatham House reported in October 2011 that “Tamil men and women continue to be arbitrarily arrested, while an unspecified number remain in custody in detention centres to which the International Red Cross and domestic human rights organizations have no access”.⁵

55. Human rights observers have noted a number of improvements in the overall situation in Sri Lanka for the Tamil communities living in the North and the East.⁶ Reports of human rights abuses in the Northern and Eastern provinces have reportedly decreased and in these areas “there have been no cordon and search operations since the end of the conflict in May 2009”.⁷ Large numbers of Tamils displaced by the fighting have been allowed to leave the camps in which they were being held. Roads linking Colombo to the North and East have been reopened creating increased opportunities for trade and development, and allowing for the return of former residents, visiting relatives, and even tourism.⁸ For example, between April 2009 and the end of November 2012, the total number of returnees to the Northern Province was estimated to be 482,000.⁹
56. The Tribunal notes country information (above) suggests whilst there is evidence of past significant discrimination and harm inflicted on persons of Tamil ethnicity, the situation for Tamils in Sri Lanka has improved significantly since cessation of hostilities between the Sri Lankan government and LTTE. It also notes and accepts the conclusion of the UNHCR in its December 2012 “*Guidelines*” for assessment of refugees in Sri Lanka, that there is no longer a need for group-based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity. Those guidelines list a series of profiles which, whilst not intended to be exhaustive, indicates those categories of person the UNHCR considers may need international refugee protection, depending on the individual circumstances of the case. The Tribunal accepts and relies on those guidelines, and finds the applicant does not fall into any of the identified profile types. The Tribunal does not accept the applicant is an associate or member of the LTTE or will be perceived as such if he returns to Sri Lanka. The Tribunal finds the applicant left Sri Lanka in April 2008 as [a] young man

⁵ UK Home Office 2012, *Sri Lanka: Operational Guidance Note*, April, p.10

⁶ Department of Foreign Affairs and Trade 2012, *DFAT Report 1446 – RRT Information Request: LKA 40999*, 22 October.

⁷ United Kingdom: Home Office, Country of Origin Information Report - Sri Lanka, 18 February 2010, 4.23 in: <http://www.unhcr.org/refworld/docid/4b8bdb0c2.html>

⁸ <http://www.csmonitor.com/World/Asia-South-Central/2010/0226/Sri-Lanka-ambitious-plan-to-rebuild-ground-zero-in-war-with-Tamil-Tigers>

⁹ *Ibid* p.8

with no political profile or affiliations. It is also not satisfied there is any other evidence to support a conclusion that the applicant faces a real chance of persecution if returned to Sri Lanka now or in the reasonably foreseeable future for reason of his Tamil ethnicity alone. The Tribunal therefore finds the applicant's claim to fear harm on return to Sri Lanka because of his Tamil ethnicity is not well-founded.

Delay

57. The Tribunal referred the applicant to the delegate's decision and noted the delegate had concerns about the significant delay of over eight years between the time he came to Australia and the time he lodged his protection visa application. The applicant said that when he came to Australia he did not have any problems in Sri Lanka. He knew nothing about politics and did not come to Australia because he was in fear. The applicant said his mother told him to concentrate on his studies and not waste his time applying for a protection visa. The Tribunal finds the applicant's evidence was inconsistent with his statement where he claimed that he fled Sri Lanka because his family were harassed by the police, his father arrested and interrogated, relatives were taken by people in white vans and put to death. The Tribunal finds that if the applicant was genuinely sent to Australia to protect his life he would have sought asylum in Australia with the assistance of his mother soon after his arrival.

The Tribunal also notes that the applicant voluntarily returned to Sri Lanka in January 2011. The Tribunal finds that the applicant's travel back to Sri Lanka is not consistent with his claims that his family have been persecuted, relatives killed and his father arrested and interrogated and that he feared he would be suspected of being an LTTE sympathiser. The Tribunal finds that if the applicant genuinely held such fears he would not have returned to Sri Lanka and would have made enquiries about seeking asylum in Australia at the first available opportunity.

Psychological report

58. After the hearing the applicant provided a copy of a further psychological report dated 22 May 2013. The Tribunal notes that the psychologist concluded that the applicant meets the diagnostic criteria of "Adjustment Disorder with Mixed Anxiety and Depressed Mood" within the diagnostic classification of DSM-IV-TR. However, the psychologist found that although the applicant portrayed some symptoms of a Major Depressive Episode and generalised Anxiety Disorder as well as PTSD, he did not meet the full diagnostic criteria within DSM-IV-TR. The Tribunal has had regard to the psychologist's diagnosis when assessing the applicant's evidence at the hearing. The Tribunal is conscious that the applicant presented as a person who exhibited anxiety at the prospect of having to return to Sri Lanka. The Tribunal also notes that the psychologist concluded that the applicant's anxiety and depression seems not only to relate to his belief he will be persecuted in Sri Lanka but the symptoms are related to the fact he has not achieved his educational goals in Australia due to relationship difficulties and because he failed his parents in not completing his course set out in 2007.

Failed Asylum seeker/returnee

59. The Tribunal has also considered whether the applicant would be persecuted on his return to Sri Lanka as a failed asylum seeker.

60. The Tribunal notes that the Sri Lankan diaspora has a long history of seeking study and employment overseas with the aim of improving their economic well-being, and that of those remaining in Sri Lanka.¹⁰
61. The Tribunal finds that the applicant has been able to obtain a Sri Lankan passport and travel to Australia and return to Sri Lanka in 2011. According to the applicant's passport he departed Sri Lanka legally through a legitimate port of departure for study in Australia.
62. The Tribunal put to the applicant that his travel history would suggest that he is not of any interest to the Sri Lankan authorities because he was able to freely travel in and out of Sri Lanka. The Tribunal notes that the applicant still has a valid Sri Lankan passport and, in this regard, is no different than millions of other Sri Lankans who have travelled abroad for work or study. Having considered the country information and the applicant's migration history the Tribunal does not accept there is a real chance he will be persecuted because he will be identified by the Sri Lankan authorities as a failed asylum seeker/returnee to Sri Lanka.
63. Having considered the applicant's claims singularly and cumulatively, and for the reasons set out in the preceding paragraphs, the Tribunal finds that it is not satisfied the applicant faces a real chance of being targeted for, or experiencing, serious harm of the kind contemplated in s.91R(1)(b) of the Act for a Convention ground, now or in the reasonably foreseeable future, if he returns to Sri Lanka. The Tribunal therefore finds that the applicant's fear of Convention persecution is not well founded. The Tribunal therefore finds the applicant does not meet the requirement specified in s.36(2)(a) of the Act.

Complementary protection

64. The Tribunal has also considered the alternative criterion in s.36(2)(aa) and whether the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa). This requires a consideration of whether there are 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').
65. As detailed above, '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.
66. For the same reasons as detailed above the Tribunal does not accept the applicant will face significant harm from the Sri Lankan authorities because of his Tamil religion and race. The Tribunal does not accept the applicant's father was an active member of the

¹⁰ Asia Economic Institute n.d., *Impact of remittance's in Sri Lanka's economical development* <http://asiaecon.org/special_articles/read_sp/11990> Accessed 6 February 2013 ; International Labour Organization n.d., *Labour migration* <<http://www.ilo.org/colombo/areasofwork/labour-migration/lang--en/index.htm>> Accessed 6 February 2013

UNP and the applicant will be perceived as a member or supporter of the UNP and be seen as anti-government.

67. For the same reasons stated above, the Tribunal does not accept that the applicant will face significant harm in Sri Lanka because his father was involved in a protest over the price of fuel in Sri Lanka or because the applicant worked [in a certain industry].
68. For the same reasons as stated above, the Tribunal does not accept the applicant will be accused of being a LTTE sympathiser and collaborator because of his families association with the LTTE in Sri Lanka, because of his association with a Tamil friends in Australia or because he dated [a] Tamil girl or because his [friend] disapproved of the relationship and has told his father in Sri Lanka.
69. The Tribunal has had regard to the applicant's fears that he will face significant harm from the Sri Lankan authorities because a photograph depicting him together with a LTTE flag and portrait of [the LTTE fighter] was posted on [a social networking site] in January 2013. The applicant advised that he removed all references to his name as soon as he became aware of the photograph. There is no evidence that the photograph was sent to the Sri Lanka authorities or that the authorities in Sri Lanka have any interest in the applicant or have become aware of the photograph. Further, having considered the applicant's evidence and his migration history the Tribunal does not accept the he has a profile with the Sri Lankan authorities due to his Tamil ethnicity or religion, his imputed or involvement or actual support for the LTTE either directly or via association with family members. Therefore on all the evidence before the Tribunal, it considers that the risk of the applicant being targeted because a friend in Australia posted a photograph on [a social networking site] in [early] 2012 is not real, but is rather remote.
70. The Tribunal finds the applicant left Sri Lanka legally on a validly issued Sri Lankan passport with the intention to study abroad. The Tribunal finds the applicant has no adverse political or criminal history in Sri Lanka. For the reasons stated above the Tribunal does not accept there is a real risk he will face significant harm because he would be perceived as a failed asylum seeker and/or returnee from a western country if he were to return to Sri Lanka.
71. On the evidence before it and having considered all the claims, the Tribunal finds that there is no 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.
72. 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).
73. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
74. 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

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

Christopher Smolicz
Member