

1300825 [2013] RRTA 889 (17 October 2013)

DECISION RECORD

RRT CASE NUMBER: 1300825
DIAC REFERENCE(S): CLF2012/198333
COUNTRY OF REFERENCE: Sri Lanka
TRIBUNAL MEMBER: Hilary Lovibond
DATE: 17 October 2013
PLACE OF DECISION: Melbourne
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 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 (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, a citizen of Sri Lanka, applied to the Department of Immigration for the visa [in] 2012 and the delegate refused to grant the visa [in] 2012.
3. The applicant is a [certain age] Tamil fisherman originally from [Village 1] in the North-Western province of Sri Lanka who claims that he and his wife have been subjected to increasing harassment by Sinhalese police who damaged his house and his work equipment and frightened his family. He and his wife have lived for fifteen years in [Village 2], where [description deleted]. He can't return to [Village 1] as he can't make a living there because his boat is too small to fish in the open sea and he can't get registration to return there. He claims that since he left Sri Lanka illegally the police have gone to his house looking for him and threatened that if his wife did not hand him over, they would take his remaining son. He owes seven lakhs to the man who organised his travel; this man is threatening to bring Sinhalese people and beat them.
4. The delegate accepted he would face harm if he returned to [Village 2] but she found that he could return to [Village 1] and make a subsistence living there. She found that he was not at risk of serious harm for reason of his race or imputed political opinion. She also accepted that the man who lent the applicant money may have been seeking to recover it and may have had links to the CID but found that as the applicant's family had not been harmed, despite receiving threats, it was not "more likely than not" he would be harmed in the future. The delegate refused the application because she found the applicant's fear of harm was not well-founded and there was not a real risk he would be significantly harmed if he returned to Sri Lanka.
5. The applicant appeared before the Tribunal on 27 March and 15 May 2013 to give evidence and present arguments. The Tribunal hearings were conducted with the assistance of interpreters in the Tamil (Sri Lankan) and English languages.
6. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

RELEVANT LAW

7. 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

8. 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).

9. 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.
10. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.
13. 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.
14. 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.
15. 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.

16. 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.
17. 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

18. 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’).
19. ‘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.
20. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

21. 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

22. The issue in this case is whether the applicant has a well-founded fear of persecution or faces a real risk of significant harm. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Has the applicant established his identity and background?

23. The applicant's evidence regarding his identity and origins in [Village 1] has been consistent throughout. Copies of the applicant's identity card, birth certificate, fishing pass and expired passport are contained on the Department's file. The Tribunal accepts on the evidence before it that the applicant+ was born in [Village 1] and is of Tamil ethnicity and Hindu religion. The applicant's evidence regarding his residence and work in [Village 2] has also been consistent and the Tribunal accepts that he lived and worked as a fisherman in [Village 2] for 15 years before his departure from Sri Lanka. The Tribunal accepts that the applicant's wife and adult daughters live in [Village 1] and that his son is working in [Country 3]. The Tribunal also accepts on the applicant's evidence that his adopted son went missing in 2010 while en route [to work] and has not been heard of since.

Country of reference

24. On the basis the applicant's evidence and copies of documents on his file, the Tribunal accepts that the applicant is a national of Sri Lanka. There is no evidence before the Tribunal to indicate that the applicant has the right to enter and reside in a third country and the Tribunal finds that s.36(3) does not apply. The Tribunal has therefore assessed the applicant against Sri Lanka as his country of reference and receiving country.

Credibility

25. The applicant's evidence overall has been straightforward and unembellished. His evidence regarding the circumstances that led to his departure and what he fears would happen if he returns has been mostly consistent and the Tribunal finds that he is overall a credible witness. Specific difficulties are dealt with below as they arise.

Home region

26. The applicant has claimed that he lived with his wife at [Locality 4] near [Village 2, some] kilometres north of [Village 1], where [description deleted]. His evidence in relation to this has been mostly consistent; he has claimed that [Village 2] is a Sinhalese village but he clarified at hearing that he lived at [Locality 4], that [Village 2] is a Muslim area and [Locality 4] is the Sinhalese area. He has claimed that he moved there to improve his business prospects as he was able to make a better living there. He has claimed that he lived on the beach in close proximity to Sinhalese people. The Tribunal notes that the *Population Atlas of Sri Lanka* indicates that the [division] of Puttalam District, in which [Village 2] is located has a majority Muslim population of about [number]%, a Sinhalese population of about [number]% and a Tamil population of about [number]%. The Tribunal has not been able to locate [Locality 4] or a locality with a similar name. However, the Tribunal accepts on the evidence before it that the applicant lived in the [Village 2] area and that [description deleted]. The Tribunal finds that [Village 2] is the applicant's home region.

Has the applicant been harmed in the past?

27. The applicant has claimed that the local Sinhalese fishermen were resentful of him fishing in their area because he is Tamil and that the younger Sinhalese men yelled abuse and insults at him, Sinhalese fishermen used grappling hooks to rip his net and release his catch and that while he was at sea, local Sinhalese harassed his wife by verbally abusing her and making sexual advances. He has claimed that a few months before he left he started to experience problems with local Sinhalese people coming to harass his wife and family while he was out fishing at night. This occurred a few times in the month before he left then one night in [2012] when out fishing his net was cut by Sinhalese fishermen after they deliberately cast their nets on top of his.
28. The applicant has claimed that when he returned to shore, close to his house and where their boats were also on the shore he asked why they cut his net and they beat him up; there were five of them and they also beat his wife. He has claimed that they hit him with sticks causing bruising and sore ribs and hit his wife on the head causing slight bleeding and swelling. He has claimed that later that day he made an oral complaint to the police in [Village 2]; he knew one of the men, [name deleted], and told the police there were five altogether and the police brought them together in a meeting. The Sinhalese people brought the local elected leader of the fishermen's association. They came to a compromise; they were advised not to quarrel and that's how the matter concluded.
29. The applicant has claimed that he went to work that night and the army and police came to the house and asked about him. He has claimed that they tortured his wife and tore her clothes; when he came back at six in the morning she was hiding in the forest and crying and saying it wasn't safe and they had to leave. Asked whether his wife was at home alone when this occurred, he said she was; his younger son was staying in [Village 1] with his sister as her husband was away. In a post-hearing submission the applicant's representative advised that the applicant had instructed that he had given some incorrect information during the hearing, and that the correct information was as he stated at the DIAC interview, that his son was initially present when this happened but ran away and has said no more about what occurred that night. It was submitted that whether or not his son was present was not material to the applicant's claims but that that the applicant explained this by saying he was very tense during the hearing.
30. The applicant has also claimed that the army came to his house on a regular basis to check identity and round people up. Asked how often this happened and when it started, he said it was at least once a month; they checked the identity of the Tamil people. They went to his house and his brother's house. It started during the period there were problems with the LTTE and it was ongoing; they came even after the war was over. The Tribunal accepts that the applicant was subjected to regular identity checks as a Tamil.
31. As noted above, the applicant's evidence in relation to these events has been consistent overall, relatively simple in its facts and unembellished in its telling. At hearing, he recounted convincingly what happened when he made a complaint to police. The Tribunal notes that the applicant lived in the [Village 2] area without obvious problems for fifteen years but despite this, finds the applicant's evidence plausible. The Tribunal accepts that in the months before he left Sri Lanka the applicant experienced harassment from local Sinhalese and that his wife was harassed while he was out fishing. The Tribunal accepts on the applicant's evidence that his net was cut by Sinhalese fishermen and that he and his wife were attacked when he subsequently questioned this, beaten with sticks causing bruising to

his ribs and head injury to his wife. The Tribunal accepts on the applicant's evidence that his complaint to local police resulted in a meeting involving him and [a few] Sinhalese people and an informal caution to all concerned.

32. The Tribunal finds that the applicant's inconsistent evidence regarding the whereabouts of his youngest son when his wife was attacked detracts from the reliable detail of his evidence regarding what occurred that night. However, the Tribunal notes that the applicant himself was not present either and that if, as the delegate speculated was possible on the applicant's evidence, his wife was raped, the events were sufficiently traumatic to provide some explanation for inconsistencies in his evidence. The Tribunal also accepts on the applicant's evidence that the police and/or military came to his house the next night and severely assaulted his wife.

Has the applicant been pursued in relation to the money he owes?

33. The applicant has also claimed that he owes money for his passage to Australia, that his wife has been harassed in relation to this and that he fears he will be harmed for this reason if he returns. In his entry interview the applicant claimed that he had paid three lakhs to [Mr A], also known as [another name], who organised his travel and they wanted another seven lakhs but he did not have it. He has claimed that [Mr A] worked with a Sinhalese MP called [Mr B] who has a good relationship with the CID and he brings the CID to threaten them. He has claimed that both the police and [Mr A] and [Mr B] have harassed his wife. He has claimed that the police have been asking his wife about where he is and have threatened that if she doesn't surrender him they will take his younger son. Asked at hearing about the police visits he said they went to [Village 1] and enquired about him with his wife; the police and army have visited three times [twice in] 2012 and [once in] 2013. Asked how they would know to look for his wife in [Village 1] if they were registered in [Village 2] the applicant said because they were born in [Village 1] the police have those details and it is all on the ID card; [Village 1] is a small village and only [some] kilometres from [Village 2] so the [Village 2] police would communicate with the [Village 1] police.
34. At his Protection visa interview, the applicant said that [Mr B] was a former UNP member representing [Area 5] in the provincial government for Puttalam District in 2010. At hearing, he said [Mr B] is a UNP member of the District Assembly from [Area 5]. The Tribunal noted that if he was a current member it should be possible to find some information about him. In a post-hearing submission the applicant's representative submitted that she had tried unsuccessfully to locate independent reference to the local member called [Mr B] (or [spelling variations]) but that it was not implausible that a local official should be involved in people smuggling activities and referred to Australian news articles indicating that a senior Sri Lankan government official and naval personnel have been linked to people smuggling.
35. Asked when [Mr A] and [Mr B] visited his wife he said he left in the sixth month and they came in the eighth month; he was told they came twice. They asked for the money he agreed to pay before he came; five lakhs. He stated that he gave three lakhs on the day of departure; he paid two lakhs earlier. Asked if he had paid any money since he had been in Australia he said no; they have threatened him. Asked what threats they made, he said if they don't get the money they will not let him return. If he returns they will kill him. Asked if there is any link between [Mr A] and [Mr B] and the police, the applicant said there appears to be a link between them and the CID; [Mr B] may have links to the CID because of political affiliations.

36. The applicant's claim in summary is that his wife has been visited by both the police or CID and [Mr B] and [Mr A] and that all the visits are related to the money he owes for his passage to Australia. Notwithstanding the lack of corroborative evidence regarding [Mr B]'s identity, the Tribunal notes the independent evidence cited by the applicant's representative regarding the implication of government officials in people smuggling operations and finds it is plausible that a former local politician would be involved with people smugglers and would be connected with the police or CID. The Tribunal notes that the applicant did not mention these concerns in his Protection visa application but that he did in his entry interview. Overall, the applicant's evidence in relation to these matters has been consistent and the Tribunal accepts that on several occasions since he has been in Australia the people who organised his passage to Australia, or their agents, and representatives of the police, army and/or CID have visited the applicant's wife to ask for the money he owes and to threaten harm if this money is not paid.

Is there a real chance the applicant will be seriously harmed in the future?

37. The applicant has claimed to fear harm for reason of his race as a Tamil, his real or imputed political opinion arising from his race and his former residence in a predominantly Tamil region, his membership of the particular social group of Tamils who have fled Sri Lanka illegally and have unsuccessfully made claims for asylum in Australia and because of his illegal departure and what would be his involuntary return. He has also claimed that he owes seven lakhs to the man who organised his travel who is threatening to bring people to beat them.

Political opinion

38. The applicant has claimed to fear harm for reason of his real or imputed political opinion arising from his race and his former residence in a predominantly Tamil region. The applicant has not claimed to have any connection with the LTTE or to have any other political connections or involvement; asked at hearing whether there were any reasons he may be singled out for adverse treatment on his return to Sri Lanka the applicant referred to the incident when he was fishing and the visits to his wife since his departure. The applicant has not claimed to have been accused or suspected of membership of or support for the LTTE in the past. The Tribunal does not accept on the evidence before it that all Tamils are imputed with pro-LTTE or anti-government opinion because of their ethnicity. The Tribunal notes that on his own evidence the applicant was born and lived for most of his life in [Village 1], a Tamil village within a majority Sinhalese district in a majority Sinhalese Province. For the last decade of the civil war and thereafter, the applicant lived in an almost exclusively Sinhalese area in close proximity to a majority Muslim town in the same district and province. The Tribunal does not accept, on the evidence before it, that the applicant would be imputed with pro-LTTE or anti-government political opinion for reason of his former residence in a predominantly Tamil region. The Tribunal finds on the evidence before it that there is not a real chance the applicant would be seriously harmed for reason of his real or imputed political opinion should he return to Sri Lanka now or in the reasonably foreseeable future.

"Tamils who have fled Sri Lanka illegally and have unsuccessfully made claims for asylum in Australia"; Illegal departure from Sri Lanka and involuntary return

39. The applicant has stated that he left Sri Lanka illegally and fears harm for this reason if he returns and as a result of the processing to which involuntary returnees are subjected. His

representative has submitted that he fears harm for reason of his membership of the particular social group of Tamils who fled Sri Lanka illegally and have unsuccessfully made claims for asylum in Australia. At hearing, the Tribunal outlined to him the re-entry processing arrangements and the criminal charges, bail and remand procedures and penalties on conviction, including a fine and a prison term of between one and five years described in the most recent country information concerning returned asylum-seekers who departed Sri Lanka illegally from the Department of Foreign Affairs and Trade.^{1,2} The Tribunal explained that the country information also indicates that the courts have discretion and a prison term may not be imposed and additionally, that the country information does not suggest that the Sri Lankan authorities would actually seek to convict and imprison potentially thousands of returned asylum-seekers.

40. The Tribunal notes information contained in a *Sydney Morning Herald* article of December 2012 and cited by the applicant's representative in his submission of 7 May which indicates that those remanded pending a bail decision may spend several days in jail and then, according to a lawyer "...who regularly represents asylum seekers..." in the Sri Lankan courts, are released to reappear in court in several months, when they will likely be fined between 50,000 and 100,000 Sri Lankan rupees (AUD880-1760).³
41. The applicant has claimed that he will be tortured or killed on return and that and that given his age he would not be able to withstand prolonged detention or torture. The Tribunal has considered independent evidence indicating that returned asylum-seekers, in particular from the UK, have reported being tortured on return; according to the September 2012 *Freedom from Torture* report, the majority of those affected were Tamil.⁴ The Tribunal considers that the country information, including the UNHCR 2012 *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*⁵, indicates on balance that those singled out for adverse treatment on or after return have to date been predominantly Tamils suspected of having links to the LTTE or those wanted for other reasons including outstanding criminal charges. The Tribunal has found that there is not a real chance the applicant would be seriously harmed for reason of his real or imputed political opinion; it follows that the Tribunal finds also that there is not a real chance that he would be targeted on return to Sri Lanka for reason of perceived past links with the LTTE.
42. The applicant's representative has submitted that the applicant's return from Australia would place him at risk because of voices within the Australian media and politics critical of Sri Lanka. As discussed with the applicant, the country information indicates that returnees at risk of harm are those suspected of involvement with the LTTE, people smuggling, repeat offenders and those wanted for outstanding offences. In his circumstances, the Tribunal does not accept that there is a real chance the applicant will be seriously harmed as a result of his return from Australia.

¹ DFAT Report 1478, 2013, MRT/RRT Information Request LKA41452, 28 February

² DFAT Report 1479, 2013, MRT/RRT Information Request LKA41452, 4 March

³ *Sydney Morning Herald* 2012, "Asylum denied, a penalty awaits at home", 8 December, <http://www.smh.com.au/world/asylum-denied-a-penalty-waits-at-home-20121207-2b0qi.html>, Accessed 2 May 2013

⁴ Freedom from Torture 2012, *Sri Lankan Tamils tortured on return from the UK*, 13 September, http://www.freedomfromtorture.org/sites/default/files/documents/Freedom%20from%20Torture%20briefing%20-%20Sri%20Lankan%20Tamils%20tortured%20on%20return%20from%20the%20UK_0.pdf Accessed 4 April 2013

⁵ UN High Commissioner for Refugees 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December, <http://www.unhcr.org.refworld/docid/50dla08e2.html>, accessed 3 January 2013

43. The Tribunal accepts that the information provided in the DFAT reports of February and March 2013, together with media reports indicates that as an asylum-seeker who departed Sri Lanka illegally, the applicant will be questioned at the airport on his return, where he may be held for up to 24 hours while investigations take place. The Tribunal outlined this information for the applicant at hearing. The Tribunal notes that this information was referred to in the July 2013 DFAT *Country Information Report* for Sri Lanka. The applicant responded that he may be released at the airport, granted bail and so on but he fears they may visit his home in the night and he may be detained on some charges and it is a hundred kilometres away; no-one will know what happened to people like them. They would come to his house and take him away.
44. The Tribunal notes also country information cited by the applicant's representative which, it is claimed, indicates that involuntary returnees remain at risk of serious harm after their release into the community, citing information contained in the UNHCR *Guidelines* regarding visits and interviews with returnees in their home villages and the fact that there is no systematic monitoring of Tamil returnees. The Tribunal has considered the information provided but notes that the *Guidelines* do not indicate that any harm eventuated from the visits and interviews mentioned. The Tribunal does not accept, on the evidence before it, that there is a real chance the applicant will be seriously harmed after his return to Sri Lanka and release into the community.
45. The applicant's representative has submitted that it is during the on-arrival series of interrogations or the period of remand that the applicant is at risk of convention-related persecution or other significant harm and suggests that the recent Human Rights Watch report *We will teach you a lesson: Sexual Violence against Tamils by Sri Lankan Security Forces* illustrates the treatment likely to be afforded Tamil returnees. The Tribunal acknowledges that this report documents horrific and systematic sexual violence against individuals suspected of involvement with the LTTE. The Tribunal notes also the information contained in the September 2012 Human Rights Watch UK press release referred to by the applicant's representative in his submission of 1 April 2013. However, as the Tribunal has found that the applicant would not be suspected of involvement with the LTTE, the Tribunal does not accept that there is a real chance that the applicant would be seriously harmed in this way in the course of his re-entry processing or after his return. The Tribunal finds on the evidence before it that the applicant's background or profile does not suggest that he would come to adverse attention for any other reason in the course of this re-entry processing.
46. The Tribunal accepts that on the evidence available, the applicant will be arrested by the CID and charged under the *Immigrants and Emigrants Act* (the I&E Act) with the offences of leaving from other than a proclaimed port and leaving without a valid passport.⁶ Section 47A(2) of the I&E Act (as amended in 2006) stipulates that bail shall be granted by a Magistrate where there is no express provision made in respect of the granting of bail for an offence under the I&E Act. As explained to the applicant at hearing, other evidence before the Tribunal, including the DFAT advice and the *Sydney Morning Herald* article also indicates that these areailable charges and that unless suspected of people smuggling or of being a repeat offender, returned asylum-seekers who departed illegally are being bailed on personal recognisance and without any requirement that bail monies be paid.

⁶ Sri Lankan *Immigrants and Emigrants Act*, <http://www.lawnet.lk/process.php?st=1981Y10V245C&hword=&path=5> Accessed 1 May 2013

47. The applicant's representative has submitted that as the applicant is a fisherman of more than 40 years' experience from an area where many boats have departed for Australia it is possible he would be seen as organising boats to leave Sri Lanka and seen as somebody with rank in the people smuggling business. As the applicant has stated that he fished in the lagoon and his boat was too small to go onto the open sea, and as he lived for the fifteen years prior to his departure from Sri Lanka in a majority Sinhalese area, the Tribunal does not accept, on the evidence before it, that the applicant would be suspected of being a people smuggling organiser. The Tribunal finds that there is nothing in his circumstances to suggest the applicant is likely to be suspected of being a repeat offender. The Tribunal finds on the evidence before it that the applicant has not been convicted of any other offences in Sri Lanka and has no outstanding charges against him. The applicant has not claimed any association with the LTTE and the Tribunal has found above that there is not a real chance that he would be suspected of involvement with the LTTE or persecuted for reason of his real or imputed political opinion. The applicant has also stated that he has family members still living in Sri Lanka. Having regard to the information referred to above from the lawyer who represents returned asylum-seekers, the Tribunal finds that the applicant would be eligible to be bailed on personal recognisance and finds that his family members would be able to facilitate his release on bail.
48. The applicant's representative has submitted that the relevant provisions of the I&E Act have only been implemented since November 2012 and as far as is known, no-one has been charged, meaning that it is not possible to conclude that no-one will be prosecuted in the future. It was submitted further that the fact they have decided to implement the law means it is more likely than not, or that there is a real chance that people who breach the law are likely to be sentenced to jail because that is what the law provides for. The Tribunal considers that it may also be concluded that this decision was intended rather as a deterrent, and that it was taken in the context of increasing international and diplomatic concerns about the growing exodus from Sri Lanka. The Tribunal considers that in the face of a grossly overcrowded and under-resourced prison system,⁷ it is unlikely on balance that the Sri Lanka authorities would imprison every person found to have breached the law. The Tribunal does not accept that the relatively recent move to start implementing this provision means that it is more likely than not that people who breach the law will be imprisoned.
49. The applicant's representative has submitted that if imprisoned, the applicant is likely to be mistreated, particularly because he is Tamil and that together with the poor prison conditions in Sri Lanka this would lead to a real risk he would be subjected to significant harm. While this claim has not been advanced specifically in relation to the applicant's claims under the Convention, the Tribunal considers that it arises on the facts and has therefore considered it accordingly. As above, the Tribunal accepts that the prison system in Sri Lanka is overcrowded and under-resourced. However, the Tribunal has found above that the applicant would be bailed after his initial charging with the I&E Act offences discussed above and that if convicted, he would be fined but not imprisoned. Therefore, the Tribunal finds that the applicant would spend a weekend, at most, within the prison system while on remand. The Tribunal does not accept, on the evidence before it and having regard in particular to the Tribunal's earlier findings with respect to his circumstances, including his age, that this

⁷ US Department of State 2012, *Country Reports on Human Rights Practices in 2011 – Sri Lanka*, 24 May, Section 1, <http://www.state.gov/documents/organization/186687.pdf>, Accessed 27 June 2013; UK Foreign and Commonwealth Office 2011, *Human Rights and Democracy: The 2010 Foreign and Commonwealth Office Report – Sri Lanka*, 31 March <http://www.unhcr.org/refworld/country,,,LKA,,4d99aa7e5 a,0.html> Accessed 27 June 2013

would give rise to a real chance that the applicant would be mistreated to the extent that his treatment would amount to serious harm within the meaning of s.91R.

50. The applicant's representative has also submitted that DFAT does not monitor court processes or outcomes and that this would reasonably account for their not receiving any allegations of mistreatment. The representative submitted that DFAT appeared dismissive of reports of human rights abuses by agencies such as Human Rights Watch and quoted at length the February 2013 Human Rights Watch Report *We will teach you a lesson: Sexual Violence against Tamils by Sri Lankan Security Forces*. It was submitted further that having regard to this evidence, the Tribunal "cannot rule out as insubstantial or remote the likelihood that the applicant will be subjected to serious penalties for his illegal departure from Sri Lanka". However, having considered carefully the evidence before it and noting that the evidence referring in most detail to the serious mistreatment of returnees relates to individuals associated in some way with the LTTE, the Tribunal does not accept that the applicant will be subjected to serious penalties for his illegal departure from Sri Lanka.
51. The applicant's representative has submitted that if convicted under the I&E Act the applicant would be subject to imprisonment and a fine, stating that these are not alternative sanctions, and that he would therefore face at least one year in prison. The Tribunal accepts on the evidence before it that the offences with which the applicant would be charged carry penalties of a fine and imprisonment, as provided by s.45(1)(o) of the I&E Act (as amended in 2006). However, the Tribunal notes that the lawyer cited in the *Sydney Morning Herald* article of December 2012 stated that those convicted of such charges would likely be fined. The Tribunal regards this as objective evidence from a knowledgeable professional source. As discussed at hearing, it is the view of the Tribunal that the 2006 amendments to the I&E Act indicate that the courts have discretion and a custodial sentence may not be imposed. Additionally, on the evidence before it, the Tribunal is not satisfied that the Sri Lankan authorities would seek to convict and imprison thousands of returned asylum-seekers. The Tribunal finds that if convicted of the I&E Act offences, there is not a real chance the applicant would be given a custodial sentence. The Tribunal finds on the evidence before it that if convicted, the applicant would be subjected to the alternate financial penalty available to the courts.
52. When the Tribunal discussed this during the hearing, the applicant made no claim that he would not be able to pay a fine. When asked at hearing what work he would do if he returned to Sri Lanka the applicant said it would be difficult to do any work in [Village 2] or [Village 1] and explained the difficulty in terms of his inability to get a pass to fish in [Village 1]. As set out by the applicant's representative, the abolition of the pass system means this is no longer an issue. As set out in more detail below, the Tribunal has found above that the applicant would be able to return to work in [Village 1]. The Tribunal finds that the applicant would be able to meet the fine which may be imposed as a penalty for the offences with which he is charged under the I&E Act. On the evidence before it, the Tribunal finds that while the processes involved may well be stressful and difficult for him, if he returned to Sri Lanka now or in the reasonably foreseeable future there is not a real chance that the applicant would face serious harm as a result of his illegal departure from Sri Lanka, or as a result of his involuntary return. On the evidence before it, the Tribunal finds that there is not a real chance the applicant would be seriously harmed for reason of his membership of the particular social group of Sri Lankans who fled Sri Lanka illegally and have unsuccessfully made claims for asylum in Australia.

Outstanding debts

53. The applicant has claimed that the people who have visited his wife and made threats against him will kill him if he returns and cannot pay the money he owes. The Tribunal put to the applicant that it didn't seem logical that they would kill him if he did not provide the money, as that would definitely prevent him from doing so. The applicant said they usually threaten like that. If his case is rejected and he cannot make the payment they may do that. Asked if he would be able to make the payment he said he has to go personally and pay but he cannot borrow the money; he would have to earn it. Asked if anything has happened to any members of his family in relation to this, he said no; they only spoke to his wife. The Tribunal has found that the applicant would be able to return to work in [Village 1] and finds that he would thus be able to make some repayment of the money he owes. On the evidence before it the Tribunal does not accept that there is a real chance the applicant would be seriously harmed for reason of his outstanding debt, now or in the reasonably foreseeable future.
54. He has also claimed that he fears they will carry out their threat to kidnap his younger son as his adopted son was kidnapped previously. At hearing, the applicant claimed that after his wife was threatened his youngest son went to [Country 3] in [2012]; he is working there and has a visa for two and a half years. On the applicant's evidence the Tribunal does not accept there is a real chance the applicant's son would be kidnapped in the reasonably foreseeable future for reason of the applicant's outstanding debts as he is in [Country 3] and at this stage he has a visa to remain there until [2015].

Tamil race

55. The Tribunal discussed with the applicant the fact that while it accepted on the country information before it that human rights abuses continue in Sri Lanka, that discrimination against Tamils may continue in some circumstances and that some Tamils including those suspected of involvement with the LTTE, who have other political profiles or are wanted for outstanding offences have been singled out for adverse attention from the authorities, particularly on return to Sri Lanka after seeking asylum overseas, the issue for the Tribunal was whether there was anything that would cause the applicant to be seriously harmed if he returned to Sri Lanka. The applicant responded that there is no protection for Tamils; they cannot live in any part. Sinhalese control the country; they kidnap and harass. Tamils are persecuted and tortured and have to live in that environment but cannot make any complaint. People die in these circumstances; he has lost one son.
56. The Tribunal notes that the UNHCR *Guidelines* for Sri Lanka for 2012 do not indicate that Tamils as a group are in need of protection⁸ and that Tamil ethnicity *per se* does not constitute a risk profile in that assessment. The Tribunal notes the delegate's finding that the applicant did not face a real chance of serious harm amounting to persecution for reason of his Tamil race and her reference to country information including the UNHCR *Guidelines* for 2010, the US DOS *2011 Country Report on Human Rights Practices* for Sri Lanka and media reports indicating that Tamils were no longer regarded as in need of protection as a group and that political and/or criminal reasons were more commonly the motivation for harm experienced by Tamils in Sri Lanka today.

⁸ UN High Commissioner for Refugees, 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December, <http://www.refworld.org/docid/50d1a08e2.html>, Accessed 9 July 2013

57. Asked at hearing if he had experienced any problems or disagreements with Sinhalese people in the area before the problems he described started, the applicant said he had no problems with them, but after the LTTE problem was over, this happened to him. The Tribunal explained it was trying to understand why this happened when it did and the applicant said he didn't know why they behaved like that, but they planned to get rid of the Tamils and as someone who lived there for fifteen years, he wouldn't have come but for these problems. Asked if he had any problems with the Sinhalese fishermen before they damaged his net he said no, but he thinks they did this because they wanted to get rid of him; it is their place and they don't want a Tamil there. Asked if he had retaliated in any way to the harassment which occurred before the net incident, he said he didn't know who the people were, so how could he do anything? He has claimed that the local police did not take his complaints seriously because he is Tamil and provided no protection.
58. The applicant has claimed that if he returned to [Village 2] he would be unable to subsist as he would be prevented from fishing by his Sinhalese neighbours. The applicant's evidence regarding the reasons for conflict which arose with his neighbours and the harm he experienced as a result was speculative and provided no insight into what may have prompted the Sinhalese people to act in this way when they did. Despite this, having regard to the findings above, the physical harm he and his wife experienced previously and the related threat to his livelihood and given the applicant's extended absence from [Village 2], the Tribunal finds it is reasonable to believe that if he returned to [Village 2] to work, there is a real chance he would be subjected to further harm which may be more serious and sustained than the harm he experienced previously.
59. The Tribunal has accepted that the applicant and his wife were physically assaulted and verbally abused by their Sinhalese neighbours and that after the applicant complained to the police his wife was seriously assaulted by the police and/or the military. Having regard to these findings the Tribunal finds that if they returned to [Village 2] there is a real chance the applicant and/or his wife would be subjected to further and more serious physical harm by local police and/or local Sinhalese fishermen and that the applicant may be prevented from working, leading to his being unable to subsist. The Tribunal finds that this would amount to serious harm as envisaged by s.91(R). On the evidence before it, the Tribunal finds that the essential and significant reason for this harm would be the applicant's Tamil ethnicity giving rise to conflict with local Sinhalese fishermen. As the Tribunal has accepted that the applicant's wife has previously been harmed by the police and/or military and found that there is a real chance he would be harmed in the future by the police, the Tribunal finds that state protection would not be available to the applicant, including in the event that non-state actors sought to harm him.

Could the applicant relocate?

60. The Tribunal finds that the real chance of harm to the applicant is localised, in that it derives from past events in the [Village 2] area and the applicant's relations with local Sinhalese fishermen and his complaint to the local police. The Tribunal finds that there would not be a real chance the applicant would be seriously harmed if he did not return to live and work in the [Village 2] area. The Tribunal has therefore considered whether the applicant could relocate to an area where there would not be a real chance of serious harm.
61. The applicant has claimed that he and his wife owned a house in [Village 1] which they gave to their youngest daughter as dowry when she married in 2004. He has also claimed that he cannot return to [Village 1] as he cannot make a living there because his boat is [description

deleted], that he cannot get registration in [Village 1] as he has been away for too long. At hearing, the applicant's evidence regarding why he could not return to live in [Village 1] was confused. Asked why he could not go to live in [Village 1], given he was born there and most of his family are now living there, the applicant said they came looking for him there after the [Village 2] incident; they kidnapped his son who went to work in a different place. It would be almost impossible to live there. Asked why his son's kidnapping was related to his inability to return to [Village 1] he said because he lived in [Village 2] for fifteen years they have come in search of him in [Village 1]; he would have problems if he went back there. As the Tribunal has found that there is not a real chance the applicant would be seriously harmed for reason of his outstanding debt, the Tribunal does not accept that he would have problems for that reason if he returned to live in [Village 1].

62. Asked whether he had concerns about being able to register to live in [Village 1] the applicant said it's not difficult for the army or police to come to [Village 1]; if there is a case the person will definitely be detained. The Tribunal noted he had said previously that he could not return to live in [Village 1] because he is registered in [Village 2] and asked if that was the case. The applicant said the fishing pass and everything is given for [Village 2]. Asked if he was concerned about his electoral or household registration, the applicant said there was no issue with that, it is only the pass which is the major problem; they can't do any work until they get the pass. Asked if he could change his [Village 2] pass for a pass for [Village 1] he said no. If he asks for a pass to work in another place, the navy control the area and if he works without a pass he will be detained. Asked if there were any other reasons he could not work in [Village 1], he said there were not.

63. In a post-hearing submission, the applicant's representative submitted that the
...issue regarding the Navy fishing pass system and the ability to obtain passes appears to have possibly become irrelevant since the hearing. The Sri Lankan government appears to have recently abolished the Navy fishing permit/pass system in North, North-West and East Sri Lanka (from 7 April 2013)."

She provided links to articles from the *Sunday Observer* and the embassy of Sri Lanka in the Netherlands.⁹ The representative submitted that despite this, violent harassment of Tamil fishermen may continue to be an issue as they continue to work in close proximity with the navy in [Village 1].

64. The applicant claimed in his Protection visa statement that [Village 1] is a Tamil fishing village. [Articles relating to Village 1]

65. The Tribunal finds that the applicant would not face a real chance of serious harm in [Village 1] due to his Tamil ethnicity or for any other convention reason. The Tribunal finds that he could return to work as a fisherman and make a basic living and on that basis, and as his adult children live there and his wife is currently living with their daughter in their former home, the Tribunal finds that it would be practicable, in the sense of reasonable, for the applicant to relocate to [Village 1].

66. The Tribunal has considered the applicant's claims both individually and cumulatively. The Tribunal finds there is a real chance that if he returned to Sri Lanka the applicant would be seriously harmed now or in the reasonably foreseeable future for a convention reason. However, the Tribunal has found that the applicant could relocate to avoid the harm that he

⁹[information deleted]

fears. Accordingly, the Tribunal is not satisfied that the applicant has a well-founded fear of persecution should he return to Sri Lanka now or in the reasonably foreseeable future.

Is the applicant owed complementary protection?

67. The Tribunal notes the explanation of the 'risk threshold' in the Complementary Protection Guidelines. However, in considering s.36(2)(aa) it has proceeded on the basis that the 'real risk' test imposes the same standard as the 'real chance' test applicable in the context of assessment of the Refugee Convention definition following the Full Federal Court decision in *MIAC v SZQRB* [2013] FCAFC 33.
68. The Tribunal has found above that there is a real chance that the applicant would be seriously harmed if he returned to [Village 2] for reason of his Tamil ethnicity. For the same reasons, the Tribunal finds that there is a real risk the applicant would be subjected by local Sinhalese fishermen and/or local police to cruel or degrading treatment or punishment amounting to significant harm as envisaged in s.36(2A) if he returned to [Village 2]. The Tribunal has found above that the real chance of serious harm faced by the applicant is localised to the [Village 2] area. For the same reasons, the Tribunal finds that real risk of significant harm faced by the applicant is localised to the [Village 2] area. The Tribunal has therefore considered whether it would be reasonable for the applicant to relocate to an area of Sri Lanka where there would not be a real risk that the applicant will suffer significant harm. The Tribunal has found above that the applicant could relocate within Sri Lanka to avoid the real chance of serious harm. For the same reasons, the Tribunal is satisfied that it would be reasonable for the applicant to relocate to [Village 1], where it finds there would not be a real risk that he will suffer significant harm.
69. The applicant has stated that he believes he will be tortured or killed if he returns to Sri Lanka, while in a submission to the Tribunal dated 7 May 2013 he has claimed through his representative that the harm inflicted on prisoners in Sri Lanka amounts to torture or cruel, inhuman and degrading treatment for the purposes of the Complementary Protection provisions of the Migration Act. The applicant's representative has also submitted that if imprisoned, the applicant is likely to be mistreated in a way indicated by reports of mistreatment of Tamil prisoners, and that prison conditions in Sri Lanka are such that together, these factors would lead to a real risk that the applicant would be subjected to significant harm. For the same reasons the Tribunal has found above that there is not a real chance the applicant will be seriously harmed for reason of his illegal departure from Sri Lanka, and that there is not a real chance he will be seriously harmed while held on remand, the Tribunal is not satisfied there is a real risk the applicant will be significantly harmed. The Tribunal finds that there are not substantial grounds for believing there is a real risk the applicant will be subjected to significant harm as envisaged by s.36(2A) for reason of his illegal departure from Sri Lanka.
70. In addition to the claims considered above, the applicant has claimed by way of his representative's written submission to DIAC that owing to the general oppression of Tamils, including pervasive human rights violations by the Sri Lankan authorities and systematic deprivation of cultural freedom, land rights and freedom of expression, there is a real risk he will face "one or more of the five types of significant harm set out in section 36(2A) of the Act." The applicant has not elaborated on these claims in any way. Asked at hearing whether there was anything else he wanted to tell the Tribunal about why he feared returning to Sri Lanka he said only the things he had already mentioned. On the evidence before it,

neither does the Tribunal does accept that there is a real risk the applicant will face significant harm as envisaged by s.36(2A) as a result of the general oppression of Tamils.

71. The Tribunal has found for multiple reasons that there is not a real chance the applicant will be harmed for reason of his real or imputed political opinion or his membership of the particular social group of “Tamils who have fled Sri Lanka illegally and have unsuccessfully made claims for asylum in Australia”. The Tribunal has found that there is not a real chance the applicant will be harmed for reason of his illegal departure from Sri Lanka or as involuntary returnee. For the same reasons set out above in relation to each of these claims, the Tribunal is not satisfied that there are substantial grounds for believing the applicant will be subjected to significant harm or that the risk of such harm is more than theoretical or speculative.
72. Having considered the applicant’s claims separately and cumulatively, the Tribunal finds that there are not substantial grounds for believing that as a necessary and foreseeable consequence of him being removed from Australia to a receiving country that there would be a real risk of the applicant suffering significant harm.

Conclusion

73. 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).
74. 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).
75. 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

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

Hilary Lovibond
Member