

0905013 [2010] RRTA 461 (4 May 2010)

DECISION RECORD

RRT CASE NUMBER: 0905013

DIAC REFERENCE(S): CLF2009/38471 CLF2009/38478
CLF2009/43930

COUNTRY OF REFERENCE: Sri Lanka

TRIBUNAL MEMBER: Ms Christine Long

DATE: 4 May 2010

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being a member of the same family unit as the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who are citizens of Sri Lanka last arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention and that both applicants have not met “the prescribed criterion for the grant of a Protection (Class XA) visa”.
4. The applicants applied to the Tribunal for review of the delegate’s decisions.
5. The Tribunal finds that the delegate’s decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a ‘member of the same family unit’ as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that ‘member of the family unit’ of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
15. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
16. 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.

17. Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
18. 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.
19. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file relating to the applicants including the independent country information, and other information, sent by the applicants in support of their claims and also the delegate's decision record. The Tribunal also has had regard to the material referred to in the delegate's decision. The Tribunal also has before it the applicants' application to this Tribunal for review including the materials sent to the Tribunal in support of the applicants' claims. The Tribunal also consulted various sources of country information in relation to Sri Lanka as noted below.

Application for protection visa

21. In the application for protection visa the first named applicant states that he was born in Area A in Sri Lanka in the 1940s and he is Tamil and Hindu. He indicates that he was married in City B in Sri Lanka in the 1970s. He states that he was a pensioner prior to coming to Australia. The first named applicant indicates that he lived at the same address in City C in Sri Lanka for the 13 years prior to coming to Australia and was educated in Area A and at University A. He indicates that he was employed in various jobs at various employers for over 30 years. The first named applicant states that his son and one sibling lives in Australia and he has another sibling who lives in Sri Lanka. He indicates that he left his country legally and travelled to Australia a year ago using a passport in his name issued in City D in Sri Lanka. He indicates that he previously travelled to Australia a few years ago and returned to Sri Lanka a few months later.
22. In the statement attached to his application for protection visa the first named applicant states that he was born in Area A in Sri Lanka and has experienced numerous difficulties in his country for over 30 years due to the ethnic conflict there. He describes anti Tamil violence that occurred in City D and Area A and states that 30 years ago his house in City E was burned down by Sinhalese gangs. He states that in the early 1980s he and his wife moved to Area A and his house was raided by the armed forces and a year after that he and his wife were questioned. He said that at the same time there was violence against Tamils in City D and in other parts of Sri Lanka and Sinhalese people starting killing Tamils. Many Tamils left

the country and went to other countries. The applicant describes violence at that time in Area A involving the LTTE and states that at that time he was taken for questioning and treated badly by the army and accused of being a Tiger supporter. The applicant describes further violence against Tamils for six months during the late 1980s when there was a peace accord signed and Indian forces took control of Area A as peace keepers. The applicant states that after fighting broke again he was asked to speak on behalf of young people who were rounded up in offensives against the LTTE. He states that in the early 1990s fighting broke out between the Sri Lankan government and the LTTE after peace failed and his house was destroyed in City F, Area A. They had to leave Area A because of the deteriorating situation there and because they had lost all their belongings and go to City D to resettle in the early 1990s. The applicant states that they had difficulties getting to City D and there he was accused of supporting the LTTE and he was pulled over at check points and questioned by the Army because of his Area A identity card. He was also treated badly and abused by security forces in the early 2000s when Location D was bombed. In the mid 2000s security checks increased and since that time as there have been suicide attacks by the LTTE in the capital. Tamils who came to City D and lived in lodges were rounded up and sent to Area A. Location A was attacked in the mid 2000s, Location B was attacked a year later, Location C was attacked a few months after that and Location D was again attacked by the LTTE a month before. Tamils were targeted by security forces in City D and security increased; he and his wife were subject to numerous search and identity checks, they were treated harshly and abused physically and verbally. They were interrogated about their children. As they are Brahmins they were treated more harshly than others. When City D was attacked by air in the mid 2000s lots of Tamils in City C where they lived were rounded up and questioned; the applicant was assaulted and abused and accused of supporting the LTTE and harbouring Tamils from the North. When Location E was attacked in the mid 2000s their house was again raided and they were questioned; they lost jewellery taken by officers. These events increased their fear in City D and a month later they were fortunate to be able to leave and visit their son in Australia. They returned 3 months later as they believed they could live safely as they were older Tamils. The applicant said that he maintained close relationships with past colleagues who often visited him at his home in City C. Search and round up operations became more prevalent in City D a couple of years ago and security forces entered their home and questioned the applicant and his wife about complaints in relation to Tamil men visiting them. The applicant and his wife were pushed and threatened with being taken away in a white van if they did not give the officers money which they did ten days later when the officers returned to collect it. They warned the applicant and his wife not to go to police or human rights organisations or they would be killed. Another group of armed personnel in police uniform came to their house around the same time claiming there were complaints about Tamil people visiting their house and the police demanded money, were abusive and threatening and damaged their home. When they refused to pay them the money they physically attacked them and accused them of supporting the LTTE. They said they should have no trouble getting money when they learned that the applicant and his wife had a son in Australia; they returned to the house six times and demanded money. These threats will not stop even though they paid these people money. Complaints made to the police were refused and they were told they could not make complaints against police officers.

23. The first named applicant continues in his statement that out of this fear and knowing they could not rely on the police to act upon their complaints they made an application for visa to come to Australia a couple of months after the security forces entered their home and a month later it was granted. They had difficulties getting tickets as it was peak season. They wanted to leave Sri Lanka and go to any country but as their son was living in Australia he wrote a

letter to support their application to come to Australia. Two months after the visa was granted six or seven people came to their house and accused them of being LTTE supporters; they ransacked the house and took valuables and money. They were assaulted and their assailants demanded that they have one million rupees ready when they returned next time. The applicant states that the last three months before they left their country was a very worrying time for them and during that time they experienced greater scrutiny at security checkpoints and the applicant was treated more harshly when he produced his Area A ID card; he was accused of being a Tamil Tiger and asked to give officers money if they wanted to leave quickly. On at least two occasions his wife had to give her jewellery to officers. It is unsafe for him and his wife to return to Sri Lanka because of the resurgence of violence there.

24. Attached to the application for protection visa and sent in support of the application are numerous articles of country information, including reports from Human Rights Watch, Amnesty International, UNHCR, printouts from Tamil Net, and ABC news articles, about the situation of Tamil people, and human rights abuses of Tamil people, in Sri Lanka.
25. Also attached to the application are copies of the applicants' passports and a document described as a certified copy of their marriage certificate. There is also a psychologist's report for both applicants both noted as requested by the applicants' migration agent. The reports essentially refer to the claims made by the first named applicant in the application for protection visa; the section headed "recent incidents" refers to visits to the applicants' apartment in Sri Lanka by armed men searching for terrorists who have demanded money and jewellery from the applicants and who demanded more and more money from them when they found out that their son has a good job in Australia. The psychologist's reports conclude that both applicants are suffering from "post traumatic symptomatology including hyper vigilance, anxiety and depression" as they have lived through years of abuse because of their ethnic background and because they have resided in areas of conflict.

Application for Review

26. In the applicants' application for review they essentially make no new claims.
27. The Tribunal received a submission from the applicants' advisor essentially setting out the claims made in the first named applicant's statement. The submission also adds that the group that raided the applicants' house a year ago and found a hidden receipt given to them by the LTTE when that group took contributions/jewellery from them in the early 1990s. It submitted that in that raid one of the raiders told the first named applicant that they had discovered that he was the brother of a person who was arrested in the late 1990s for links with the LTTE and hence he had to contribute more to their fund to track down Tigers. They said that the applicants could easily do this as their son in Australia can pay the money; they gave the applicants two weeks to pay the balance of Rs.1 million.
28. It is submitted that the applicants returned to their country previously including in the late 2000s as the harassment they had incurred was similar to that suffered by many Tamils from Area A but at that time they had not been detained, ransom demands had not been made and they thought the situation would improve, especially considering their age. They were treated more severely than others however because of their Brahmin caste. It is also submitted that after their complaint about the raid a couple of years ago was refused by City C police they did not pursue it further as it is known that the police and others have connections with the perpetrators of such actions. It is also submitted that the applicants delayed leaving their country after getting their visas for Australia a month after that raid as they were trying to get

tickets to leave and also it is submitted that the most grave threat to them came 2 months after they were granted their visas when they were awaiting their tickets. The submission attaches a document described as a letter from their travel agent confirming that as it was peak season for travel to Australia tickets for two people were only available to fly out of Sri Lanka 4 months after being granted their visas.

29. It is further submitted in the submission sent to the Tribunal in support of the applicants' claims that anybody against whom there is the slightest suspicion of being a sympathiser/supporter of the LTTE or of having links with the group is targeted regardless of age or gender and persons who are in influential professions are more likely to be suspected because of their connection with other Tamils. In the applicants' case although they had lived in City D not the North for a long time and although the first named applicant had been a worker in City D they could still come under suspicion at any time depending on the circumstances; the applicants in this case did not come under serious suspicion until the time of the raid a couple of years ago. In answer to the delegate's comments that the actions of police and security particularly cordon and search operations were usually in response to LTTE attacks and bomb blasts and that suspicion of Tamils will decrease because the end of the war means that such events will no longer occur, it is submitted that the government has declared that LTTE members remain in City D and are apprehensive they will regroup and the government has announced it does not intend to lessen its high security surveillance and vigilance. It is submitted there are reports even after the war of searches and cordon operations in and around City D without there being attacks by the LTTE or bomb blasts; this is a preventive security measure adopted by police and security forces and has been going on for years and continues. Even after the war Tamils have been arrested all over Sri Lanka and weapons and bombs are being discovered throughout the country.
30. The submission concludes that the applicants have a well founded fear of being persecuted because of their imputed political opinion as supporters of the LTTE, their Tamil ethnicity and because they belong to a particular social group, namely Brahmin, Area A Tamils who have an LTTE family association and who have contributed to the LTTE.

Tribunal Hearing

31. The applicants appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's son, Person A. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages. The applicants produced their Sri Lankan passports to the Tribunal and copies are placed on the Tribunal file. The first named applicant also produced another ID card for Area A marked as issued in the late 1990s and further country information about the situation in Sri Lanka for those with LTTE connections.
32. The applicants were represented in relation to the review by their registered migration agent.
33. The Tribunal first spoke with the first named applicant. In answer to questions from the Tribunal he said that he obtained his current passport because his previous passport had expired. He had no difficulties getting the passport as he had a previous one and that made it easier to get another. He said that he has not travelled outside Sri Lanka except to come to Australia and he has been to Australia about five times altogether. He first came once for a conference and the other four times he has visited Australia is to see his son. He said that he has never had a difficulty getting a visa for Australia and no trouble leaving or re entering his country. He said that he applied for his visa for his last trip to Australia a month after the raid

a couple of years ago through an agent and it was granted 2 months later. The Tribunal asked him why he applied for the visa at that time. He said that the serious events that were happening in Sri Lanka caused him to decide to come to Australia as his son is here. He said that he then had serious problems 2 months after he got the visa and his life was in danger and they asked for an exorbitant amount of money as ransom and said they would kill him.

34. The Tribunal asked the applicant about his family in Sri Lanka and Australia. He said that he has a sibling in Sri Lanka and another in Australia; he explained the one in Australia came after their spouse was taken away, beaten and later died. The applicant said that one of his sons is in Australia but another son died. He said that his own brother who is not in City D was arrested and detained as a Tiger supporter in the late 1990s and both his brother and his brother's wife were implicated. He said that his brother is Brahmin caste. He said that his own ID card identifies him as a Brahmin. He said that Tamils from Area A who are Brahmin face more atrocities. He explained that his name is a Brahmin caste name and they are suspected as being involved in the struggle for a separate Tamil homeland and of helping the LTTE. He explained that there are various rules that Brahmins follow including the tying of the holy thread which is never removed. He said that once when he was taken by the Army the thread/necklace was torn off and once it is broken because it is holy the person is not allowed in the Temple. He said this happened to him after infrastructure was attacked by the Tigers in the mid 2000s.
35. The applicant explained that just before he left to come to Australia he was living in City C at the address he gave in his application for protection visa; this area is a suburb of City D. He said his house in City D is rented and his house in the North was destroyed. He said he had lived with his wife at the City C address for many years. He said that he retired in the later 1990s but has lived on a pension and he received a lump sum on his retirement. His wife is also retired and gets a pension.
36. The Tribunal asked the applicant when he made the decision not to return to his country and he said it was after he came to Australia. He said that he learned about the availability of protection visas the last time he was in Australia a few years ago when he had problems and there were incidents in Sri Lanka. When he contacted about applying for a protection visa he was told he was not eligible as what was happening to him then was happening to all Tamils. But things happened to him later after he returned that threatened his life and there was the extortion and the ransom and he and his wife were beaten and his wife was dragged by her hair. The Tribunal asked the applicant whether he feared harm in his country when he went back there a couple of years ago. He said that after they retired things became worse in City D; bombs blasted and there were suicide squads in places. People were abducted in white vans and those people were killed. The applicant said however that when they went back at that time he did not fear for his safety; no one had demanded ransom/money from them then; they thought the situation would change and they were old. He said they first started to fear for their lives about 6 months later when a huge sum of money was demanded from them for the first time. The Tribunal asked the applicant why this would happen for the first time 6 months after they went back. He said that the LTTE conscripted people to their movement and policemen came and said that Tamils were visiting them. The applicant said he told the police that he worked with the Tamils; he explained that he used to give them advice. The Tribunal asked him when he started doing this at his house and he said it was after he retired in the late 1990s. The Tribunal asked him why then he would be targeted to pay money as the advice giving had been going on for a long while and he had been living there at the same address during that time. He said at that time the Karunna group intensified its recruiting At

that time people came in Army uniforms with guns to extort money but it was not clear whether they were from the Army. Also they had learned that his son was in Australia. The police came and pushed him to the ground and pushed his wife too. When he said that he did not have money they said they knew his son was abroad. They did not come about the LTTE; they came to extort money. They told him not to tell the police. When they came 6 months after demanding money they came in civilian clothes and it was not clear whether they were paramilitaries or from the Army. The Tribunal asked the applicant again why he thinks they came to him the first time asking for money. He said that they could have also gone to others as well. He said that he did not go to the police about the first attack because they had threatened him if he did so. Also these groups all work together with the government/police. They could have been paramilitaries who obtained their information from the police. When they came 6 months after demanding money they showed them a newspaper cutting and beat them and dragged his wife and threatened her; they also took household items. .

37. The applicant told the Tribunal that they applied for their visas for Australia a month after the money extortion attempt. The Tribunal asked the applicant whether they applied for visas then because of the money extortion attempt. He said that the atrocities were increasing gradually and the demands for money were increasing. The Tribunal asked him if anything specifically happened to cause him to apply for the visas a month later. He described again what happened in when money was demanded from them and said that he was told if they did not pay the money they would come for them in white vans. They came back about six times and he gave them 1 lakh instead of the 10 lakhs they requested; when they came back he became more fearful. They told him not to go to the police but he did go to the police and he was sent to the sub inspector. He told the sub inspector that the police came and extorted money. He was told that was impossible and he was chased away and could not complete the police report. He did not go to the police sooner, after the incidents, as these people were returning and told him not to go to the police. Between the time of the money extortion incidents and when he applied for the visa he had his ID checked and was kept in the scorching sun while this happened and he was told that they would get information about him but these things on the streets happened to everyone. He was not targeted after the money extortion incidents before he applied for his visa and no one came to his house between the last extortion incident and when he applied for his visa; however they felt the violence was just getting worse and as they did not have anyone in City D to help them so they became more fearful.
38. The Tribunal asked the applicant why he waited 3 months after the visas were granted to leave City D. He said that it was peak time to come to Australia then and they wanted tickets together on the same flight. The agent could not get them immediately and they rang him frequently but then it was the school holidays and after several days the agent went to India. They went to other agents who said they could get tickets in different flights but his wife could not go by herself; it was risky at the airport
39. The applicant said that a group came to them again 6 months after the first extortion attempt and demanded 1 million rupees and they could not give them the money but said they would get it from their son. They came again 2 weeks later and took the money that the first named applicant was able to give them. They warned him if they did not pay the balance in two months they would get rid of them. Apart from this incident they were hassled on the streets and did not go out of the house unnecessarily because of this. They were scared and thought they might be arrested and sought assistance from a retired customs officer who was next

door. There was always the possibility that something would happen to them; anything could have happened to them. The incidents all gave rise to their being afraid.

40. The Tribunal asked the applicant what he feared would happen if he returned to his country. He said that he would be fearful for his life and even at/around the airport he could be taken and killed. He said they asked him for 1 million rupees and he only gave them a small amount and they will take their revenge. He said that he will only live for a short time longer and he wants to live in peace for the last stages of his life.
41. The Tribunal asked the applicant if he thinks things would be any different for him if he went back to his country than they were before he left there. He said even though the war against the LTTE is over until every element of the LTTE is done with the situation will exist; if they are suspected of any links with the LTTE they will lose their lives.
42. The Tribunal asked the applicant why he thinks he will be targeted if he returns to Sri Lanka given that he is a retired person who has lived in City D for many years and given that his profile may not fit the profile of others who have been targeted in Sri Lanka. The applicant said that once a person is suspected as one who is related to the LTTE, no matter how long they have lived in City D and regardless of age and their gender they can be killed; it all depends on the mentality of those who do the checking and those who approach them. Paramilitaries say they have information about them obtained from the police and this is with a view to extorting money from them. Age does not matter and there are news items to this effect.
43. The Tribunal next spoke with the second named applicant. In answer to questions from the Tribunal she said that until they returned to Sri Lanka from Australia a couple of years ago they did not fear for their lives but then 6 months after the first money extortion attempt the receipt from the Tigers in relation to the land recovery fund was discovered and the first named applicant's brother was accused of supporting the LTTE. She explained that they made the payment to the Tigers in the early 1990s; they had to give this money as they had to get past the Tigers if they wanted to go to City D and they were thinking of leaving Area A then. Their assailants shouted at them and beat and kicked the first named applicant when they discovered the receipt as they concluded they were Tiger supporters and they demanded 1 million rupees; they took the money they had for their journey to Australia and said they would return to get them in a white van. She said she and her husband started to become afraid when these people visited them and started to refer to abduction and white vans. The Tribunal asked the applicant who she thought these people were. She said that firstly they came in Army uniform, then they had police uniforms and then the next time they came they were dressed in civilian clothes; she thinks they were paramilitaries affiliated with the government. She and her husband left Sri Lanka before these people returned.
44. The second named applicant said that she thinks that they were targeted the first time as there were concerns that Tamil youths were coming and going to the house and although this had been happening for some time the war intensified at this time.
45. The second named applicant said that the war is only over in words; even now there are operations going on to root out people in the LTTE movement and it is taking place with intensity. Even though the war is over the emergency regulations are still in place and there are check points and search operations going on.

46. The Tribunal next spoke with the applicant's son who attended the hearing. He said that there was a delay between when the applicants obtained their visas and their departure and they did not tell him how serious the situation was. He said that he himself tried on line to get tickets for them but he could not get the tickets either however they did get weight listed. He said that when the armed forces found out that he was in Australia this was trouble for them. He said that he left Sri Lanka in the late 1990s to work in Country A. He then came to Australia in the early 2000s on a skilled migration visa and became a permanent resident in the mid 2000s. He said that he has only been back to Sri Lanka for his brother's funeral. He cannot go back to his country to protect his parents and they have no one there to help them. The war is finished but the government has intensified its attacks on those with any suspected links with the LTTE. Cordon operations are still going on in Sri Lanka. There is no law and order and paramilitaries are not answerable to anyone in Sri Lanka. Even if someone does not fit the profile if someone is suspected it does not matter about their age. His parents are suspected because Tamil youths have been seen coming to the house, the LTTE emblem was on the receipt that was found, the first named applicant's brother was arrested in the past for connections with the LTTE. The applicant's son continued that friends who have returned to Sri Lanka to try to trace people who were taken cannot go to anyone; lawyers are reluctant to help as they may be targeted. He said that he cannot help his parents as he would have no guarantee about his own security in Sri Lanka. More troops are to be put out. Even if there is small connection with the LTTE his parents will be taken and there is no one there who can help them. The war is ended but the focus is now on clearing out LTTE supporters.
47. The Tribunal next spoke with the applicants' advisor. He referred to the psychologist's reports sent to the Tribunal in support of the applicants' claims. He also submitted that the government in Sri Lanka is scared of suicide bombers and they suspect all Tamils from Area A; the applicants do have a profile in that they are Tamils from Area A. Paramilitaries are operating in Sri Lanka and are involved in eliminating LTTE supporters and suspicion of that support is enough in Sri Lanka. [Information deleted: s.431]. The applicants' delay in leaving their country can be explained by the fact that the agent went away to Country B for three weeks, as the applicants could not get a seat to fly out as it was peak time to fly to Australia. The applicants fear serious harm including because of extortion, threats of abduction and they fear they could be killed. This is because of their ethnicity and their political opinion. The persecution that they fear involves systematic and discriminatory conduct. They have a well founded fear of persecution in Sri Lanka.

COUNTRY INFORMATION

48. In addition to country information referred to by the delegate and the applicants the Tribunal consulted the following-

DIAC Country Information Service 2009, *Country Information Report No. 09/75 – Treatment of Tamils – Colombo airport, search operations, disappearances, checkpoints and residency*, (sourced from DFAT advice of 12 October 2009), 14 October. (CISNET Sri Lanka CX234989)

UK Home Office 2009, *Report of Information Gathering Visit to Colombo, Sri Lanka 23-29 August 2009*, August

UN High Commissioner for Refugees 2009, 'UNHCR eligibility guidelines for assessing the international protection needs of asylum-seekers from Sri Lanka', UNHCR website, April <http://www.unhcr.org/refworld>.

UN High Commissioner for Refugees 2009, *Note on the Applicability of the 2009 Sri Lanka Guidelines*, UNHCR Refworld website, July <http://www.unhcr.org/refworld>.

Hotham Mission Asylum Seeker Project 2006, *Hotham Mission field trip to Sri Lanka: Security, protection and humanitarian concerns and implications for Sri Lankan asylum seekers in Australia*, 15 November. (RRT Library General Papers)

International Crisis Group 2010, *The Sri Lankan Tamil Diaspora after the LTTE, Asia Report no. 186, 23 February*.

US Department of State 2010, *2009 Human Rights Report: Sri Lanka*, 11 March –:

Human Rights Watch 2010, *Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka*, February.

49. Both the UNHCR guidelines and the Hotham Mission report indicate that Tamils originating from the north are likely to be imputed with a pro-LTTE profile (UN High Commissioner for Refugees 2009, ‘UNHCR eligibility guidelines for assessing the international protection needs of asylum-seekers from Sri Lanka’).
50. Country information indicates that those most likely to come to the adverse attention of the Sri Lankan forces and authorities are young Tamil males originating from the north and east of the country. However, according to UNHCR, “Tamils who were born in the North or the East and are outside of the region, in particular those who reside in or seek to enter Colombo”, are also among those most likely to be suspected of LTTE affiliations, and are, therefore, at significant risk of suffering serious human rights violations (p. 22). UNHCR further states: “Given the wide range of profiles of the victims of reported incidents, it is not possible to identify particular categories of Tamils from the North who would not have a reasonable possibility of experiencing serious harm” (p. 29). UNHCR notes that human rights violations against Tamils in and from the North have affected men and women of all ages (p. 28). The UK Home Office fact-finding mission report indicates that in general young male Tamils originating from the north and east of the country are most likely to come to the adverse attention of Sri Lankan authorities. The report also lists other factors which would render a Tamil person in Colombo of interest to authorities including: those without employment or “legitimate” purpose for being in Colombo, those without ID, those recently returned from the West (UN High Commissioner for Refugees 2009, ‘UNHCR eligibility guidelines for assessing the international protection needs of asylum-seekers from Sri Lanka’).
51. According to information in the UK Home Office fact-finding mission report and the October 2009 advice from DFAT, security measures have not lessened in Colombo since the end of the conflict. The Emergency Regulations continue to be renewed and media articles continue to report on fears of terrorism in Sri Lanka, and associated searches and arrests especially in Tamil majority suburbs.
52. As regard extortion of Tamils in Sri Lanka the possibility that returnees to Sri Lanka becoming targets for extortion for reasons of assumed wealth is mentioned in the report published in 2006 by the Hotham Mission Asylum Seeker Project. The report considers the way returnees to Sri Lanka are perceived by the broader community, commenting that returnees “are assumed to be bringing back large amounts of money and assets” and that, in at least two instances, returnees had been required to pay bribes to immigration officials. The

report offers the conjecture that, given certain businessmen had been targeted for abduction for ransom because of their perceived wealth, returnees may be likewise targeted. According to the report-

Hotham Mission found that the asylum seeker issue is not discussed in the Sri Lankan media unless people trying to flee are caught. The implication of this is that there is no community understanding of the experiences had by asylum seekers abroad in countries such as Australia. Returned asylum seekers are presumed to be returning migrants, who have spent their time abroad making money and living well. They are assumed to be bringing back large amounts of money and assets, and may be looked to for support rather than being able to access any welfare support themselves...

In fact rather than being supported on return, returning asylum seekers may instead be vulnerable to corrupt immigration officials or criminals. Hotham Mission has heard of at least two incidences wherein people returning were cornered into paying bribe money to immigration officials in order to pass through the airport unhindered. Abductions for ransom of wealthy business people are occurring nationwide, so people returning from overseas may be a target, as it will be assumed that they have money (Hotham Mission Asylum Seeker Project 2006, Hotham Mission field trip to Sri Lanka: Security, protection and humanitarian concerns and implications for Sri Lankan asylum seekers in Australia, 15 November.)

53. UNHCR states that continuing LTTE attacks have placed Tamils in Colombo under suspicion, particularly those originating from the north -

As a result of the ongoing LTTE attacks on Government and civilian targets in the country, which have included suicide attacks by Tamil men and women, Tamils, in particular those originating from the North and East have been under suspicion. Wide scale arrests and detention of Tamils have been reported throughout the country. As in the North and the East, they are frequently associated with cordon and search operations and frequently follow bombings or other attacks by the LTTE. Tamils who are without proper identity documents are more likely to be arrested and detained in these operations.

In Colombo and the surrounding areas, heightened security measures have been implemented to prevent LTTE attacks. Cordon and search operations, roundups and arrests of Tamils, in particular Tamils from the North and East, are regularly reported in Colombo. In the fall of 2008, all citizens coming to Colombo and the Western Province from war affected regions, including all those who arrived within the past five years, were required to register with the police. The Colombo police have just announced a further registration for all residents from the North and East who were not registered in the earlier exercises and have stated that they intend to carry out a massive search operation after the deadline to identify and prosecute those who fail to register. The Government has stated that the registration exercises are necessary to ensure security in the capital, including the security of Tamils, and that all of the bombs and devices thus far intercepted have been located in Tamil areas of the capital.

The Government has been heavily criticized for the high number of Tamils who have been subjected to arrest and security detention, particularly on the basis of information gathered in registration exercises and questioning at cordons and road

checkpoints in and around the capital. In October 2008, Sri Lanka's Deputy Minister of Vocational and Technical Training, P Radhakrishnan, accused the police of arresting "five to 10 Tamil people" every day in Colombo and its suburbs using information from the registration exercises in Colombo. He claimed that there were over 1,000 Tamils already in security detention and that anybody carrying identity cards with addresses from rebel-held areas was immediately arrested (UN High Commissioner for Refugees 2009, 'UNHCR eligibility guidelines for assessing the international protection needs of asylum-seekers from Sri Lanka', UNHCR website)

UNHCR further states

The significant majority of reported cases of human rights violations in Sri Lanka involve persons of Tamil ethnicity who originate from the North and East. These individuals are at risk within these regions, and in other parts of Sri Lanka, by Government actors, the TMVP and other pro-Government paramilitary groups as well as the LTTE, because of their race (ethnicity) and/or (imputed) political opinion.

In Government-controlled areas, Tamils who originate from the North and the East, which are, or have been under LTTE control, are frequently suspected as being associated with the LTTE. For this reason, Tamils from the North and the East are at heightened risk of human rights violations related to the implementation of anti-terrorism and anti-insurgency measures. While this risk exists in all parts of Sri Lanka, it is greatest in areas in which the LTTE remains active, and where security measures are heaviest, in particular the North and parts of the East, and in and around Colombo.

Because of the heavy reliance of the LTTE on support and assistance of Tamils in areas which they have administered or controlled, which has included mandatory military training and recruitment of men and women and children, the use of civilians, including women in suicide attacks, and the requirement that civilians provide financial and other support for LTTE activities, few Tamils from these regions are without ties to the LTTE. Those who are vulnerable to suspicion of having LTTE ties are, therefore, not limited to individuals who are presently actively engaged in LTTE activities and/or carrying out acts related to the armed conflict. Categories of Tamils from the North and East who are most likely to be suspected of LTTE affiliations, and are, therefore, at significant risk of suffering serious human rights violations, include, but are not limited to:

- Young Tamil males, in particular those who are not able to establish their affiliation with the TMVP, or one of the other pro-Government Tamil groups
- Tamils, male or female, who were trained by the LTTE, in particular those who have served with LTTE fighting forces
- Tamils who are not in possession of proper civil documentation, such as National Identity Cards
- Tamils who have had contacts with the political offices that the LTTE opened in several areas of the North and the East after the signing of the Cease Fire Agreement of 2002

- Tamils who were born in the North or the East who and are outside of the region, in particular those who reside in or seek to enter Colombo.

The Tribunal also consulted the International Crisis Group's statement as follows (*International Crisis Group 2010, The Sri Lankan Tamil Diaspora after the LTTE, Asia Report no. 186, 23 February.*)

While the situation has improved since the end of the war, a climate of fear still pervades the Tamil community in Colombo. Many are routinely subjected to arrest or humiliating searches. Young men still "disappear" – often after being picked up by government security forces not only in the country's north and east but also in the capital. [noting a March 2008 HRW report: *Recurring Nightmare: State Responsibility for "Disappearances"*] While some may be members or supporters of the LTTE, this does not justify their secret detention without due process. Most of the missing Tamils are feared dead. Simply put, many do not see Colombo as home. Even if forced to return there is little incentive for the repatriated to stay; it is likely that they would simply migrate once more.

While some Tamil migrants flouted asylum procedures by fabricating grounds for flight, a majority were legitimate asylum seekers. This is underscored by the large Tamil populations in the West, comprised of thousands of people whose asylum cases withstood intense scrutiny.

According to Human Rights Watch study of abduction and extortion in Sri Lanka; Human Rights Watch 2010, *Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka*, February, p.6:

The military and police frequently use native Tamil speakers, often alleged to be Karuna group or EPDP members, to identify and at times apprehend suspected LTTE supporters. In several cases reported to Human Rights Watch, families said that they were first visited and questioned by the military, and then, usually several hours later, a group of Tamil-speaking armed men came to their house and took their relatives away. On other occasions, the Karuna group and EPDP seemed to be acting on their own – settling scores with the LTTE or abducting persons for ransom – with security forces turning a blind eye.

The US Department has noted similarly; US Department of State 2010, *2009 Human Rights Report: Sri Lanka*, 11 March –:

A separate commission set up under retired Supreme Court justice Tillekeratne to investigate abductions, disappearances, killings, and unidentified bodies completed its mandate on December 31 with a final report to the president due in early 2010. In November the commission told the press that in many cases relatives of disappeared persons had not filed reports with the local police, hampering investigations. Other observers commented that this was likely due to mistrust of local security forces and a belief that, at best, the local police were unlikely to be of any assistance.

FINDINGS AND REASONS

54. The Tribunal finds that the delegate's decision about the applicants is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.
55. Essentially the first named applicant claims that he left his country and fears to return there because he was and will be harmed there, including by paramilitaries, police, members of the security forces and others who have threatened and ill treated him and his wife and have extorted money from him, because he is a Tamil, originally from the North of Sri Lanka, and because he is perceived to support, and accused of supporting, the LTTE. He claims that he and his wife are retired and following his retirement he has given advice to Tamil youths over

the years at his home. He claims that the extortion attempts upon him and his wife were exacerbated by the discovery by those raiding his house a year ago of evidence linking the applicants to the LTTE and by the knowledge of those involved in the extortion that the applicants have a son who is working in Australia. He claims he was threatened and ill treated a couple of years ago and also again 6 months later when security forces/police/armed personnel in police uniform questioned him and his wife at their home about complaints in relation to Tamil men visiting them; they were accused of being LTTE supporters. The applicant also claims that as they are Brahmins they were/will be treated more harshly than other Tamils. He claims that he cannot get protection against the harm he fears in his country.

56. The Tribunal accepts that the applicants are nationals of Sri Lanka, are Tamils, Hindu Brahmins and are who they claim to be; they produced their Sri Lankan passports to the Tribunal and copies are placed on their Tribunal file. The Tribunal is satisfied that the second named applicant is the first named applicant's wife.
57. The Tribunal finds that the applicants travelled to Australia from Sri Lanka on several occasions since the early 2000s; including a visit to Australia for one year a few years ago after which they returned to Sri Lanka. Both applicants last arrived in Australia a year ago. The Tribunal bases this finding on the entries in the applicants' passports and their oral evidence to the Tribunal.
58. The Tribunal accepts that the first named applicant was born in City F, Area A in the North of Sri Lanka; this is noted on his passport issued in Sri Lanka a couple of years ago. The Tribunal also accepts that the first named applicant and his wife, the second named applicant, lived and worked in and around City F, Area A in Sri Lanka until they resettled in City D in the early 1990s due to the deterioration of the security situation for them in Area A. The Tribunal also accepts the first named applicant's evidence that he worked for a government department in Area A and that he worked in City D until he retired in the late 1990s; he also produced his Area A employment card to the Tribunal.
59. The Tribunal accepts that the applicants experienced the general harassment and problems that they describe as having in the North of Sri Lanka over the years they lived and worked there before they moved to live in City D; this is consistent with the country information available to the Tribunal about those of Tamil ethnicity living in the North of Sri Lanka at that time. The Tribunal also accepts that before they travelled to Australia a few years ago the applicants experienced the general harassment, difficulties and apprehension about the security situation in City D, due to the escalating violence there, that they describe; country information consulted by the Tribunal supports these claims. The Tribunal finds that the applicants did not personally fear harm in their country before they returned there a couple of years ago; the first named applicant told the Tribunal that although after they retired things became worse in City D- he said that there were bomb blasts, suicide squads in places, abductions and people were killed -when they returned from Australia they did not fear for their safety as no one had demanded ransom/money from them then and they thought the situation would change and also they were getting old.
60. The first named applicant claims that he and his wife first started to fear for their lives 6 months after returning to Sri Lanka when a huge sum of money was demanded from them for the first time because he was accused of connections with the LTTE due to the fact that Tamils were visiting him; they applied for their visas as they were becoming more and more fearful. They claim that it was some months after they were granted their visas for Australia that the most serious threat to them occurred. The Tribunal has some doubts about the

truthfulness of these claims for two reasons; firstly the first named applicant told the Tribunal that he was advised about the availability of protection visas when he came to Australia a few years ago but he was advised at that time that he would be ineligible for a protection visa because nothing had happened to him personally in his country and that he had experienced what all other Tamils had experienced. Secondly, the first named applicant's evidence is that he had lived in City D for many years giving Tamils advice since his retirement in the late 1990s and had not been targeted as he claims he was a couple of years ago and again 6 months after that. The Tribunal considered whether the first named applicant was fabricating his evidence about his personal experiences at that time to assist his application for protection in Australia in accordance with advice he had been given about protection visas a few years ago when he was in Australia. The Tribunal concluded that if that were the case he could have made these claims when he was in Australia a few years ago; he did not do so but returned to Sri Lanka with his wife.

61. The Tribunal also has concerns about why the applicants would wait several months to leave their country if they had the serious troubles they claim and they had their passports and visas. The Tribunal accepts however that they could have had trouble at that time getting tickets to enable them to travel together to Australia; the Tribunal considers that the applicants' witness gave truthful evidence to it about his own difficulty in helping the applicants get a flight together to Australia before they eventually did so several months after the visas were granted.
62. The Tribunal considers that the applicants have embellished their claims before the Tribunal. They claimed for the first time, in a submission sent to the Tribunal shortly before the hearing, that those raiding their house 6 months after the initial extortion attempt discovered information which linked them with the LTTE, namely a receipt given to them by the LTTE when that group took contributions/jewellery from them in the early 1990s and a connection with the first named applicant's brother who was arrested in the late 1990s for links with the LTTE. In the Tribunal's view if these claims were genuine the applicants would have made them earlier given the importance of this evidence for the applicants' application for protection visas.
63. Nevertheless, having regard to all of the evidence before it, including the country information about the serious difficulties faced by many Tamil people in Sri Lanka, including in City D, both during and following the war with the LTTE, which generally supports the applicants' claims, the Tribunal gives the benefit of the doubt it has about the evidence to the applicants. The Tribunal notes that the country information indicates that it is not only young male Tamils who are targeted in Sri Lanka; as noted above UNHCR indicates that given the wide range of profiles of the victims of reported incidents, it is not possible to identify particular categories of Tamils from the North who would not have a reasonable possibility of experiencing serious harm. The Tribunal also notes that the psychologist's reports about the applicants are consistent with their evidence about what they have experienced in their country. Not without some doubt about the matter as expressed above the Tribunal accepts that the first named applicant was targeted for extortion and threats of harm in Sri Lanka a couple of years ago and then 6 months after that because he was accused of connections to the LTTE for the reasons that he claims and that he fears further harm in his country for that reason.
64. Given the above findings the Tribunal cannot exclude the reasonable possibility that the first named applicant could suffer harm amounting to serious harm from paramilitaries, security personnel, police and others in Sri Lanka for the reasons that he claims, namely because of

his ethnicity and his imputed political opinion if he returns to Sri Lanka; it is clear from the country information consulted by the Tribunal that he could not get protection from the harm he fears in Sri Lanka.

65. The Tribunal considers that the persecution which the first named applicant fears in Sri Lanka clearly involves 'serious harm' as required by paragraph 91R(1)(b) of the Migration Act in that it involves a threat to his life or liberty or significant physical harassment or ill-treatment. The first named applicant's imputed political opinion and his ethnicity/race is the essential and significant reason for the persecution which he fears, as required by paragraph 91R(1)(a). Further the Tribunal considers that the persecution which the first named applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason, namely his race and imputed political opinion.
66. The Tribunal finds that the first named applicant is outside his country of nationality, Sri Lanka.
67. For the reasons given above, the Tribunal finds that the first named applicant has a well-founded fear of being persecuted for reasons of his imputed political opinion and his race if he returns to his country now or in the reasonably foreseeable future. The Tribunal finds that the first named applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of his country. There is nothing in the evidence before the Tribunal to suggest that the first named applicant has a legally enforceable right to enter and reside in any country other than his country of nationality. It follows that the Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

CONCLUSIONS

68. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.
69. The other applicant applied as a member of the same family unit as the first named applicant. The Tribunal is satisfied that she is the first named applicant's wife and is a member of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i). The fate of her application depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other applicant will be entitled to a protection visa provided that she meets the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

70. The Tribunal remits the matter for reconsideration with the following directions:
 - (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and

- (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being a member of the same family unit as the first named applicant.