

0808237 [2009] RRTA 421 (25 May 2009)

DECISION RECORD

RRT CASE NUMBER: 0808237

DIAC REFERENCE(S): CLF2005/74386

COUNTRY OF REFERENCE: Sri Lanka

TRIBUNAL MEMBER: Irene O'Connell

DATE: **25 May 2009**

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Sri Lanka arrived in Australia [in] July 2005 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] September 2005. The delegate decided to refuse to grant the visa [in] December 2005 and notified the applicant of the decision and his review rights.
3. The applicant sought review of the delegate's decision and the Tribunal, differently constituted, affirmed the delegate's decision [in] February 2006. The applicant sought review of the Tribunal's decision by the Federal Magistrates Court and [in] February 2008 the Court set aside the decision and remitted the matter to the Tribunal to be determined according to law.
4. [In] May 2008 the Tribunal (differently constituted) affirmed the delegate's decision. The applicant sought review of the Tribunal's decision by the Federal Magistrates Court and [in] November 2008 the Federal Magistrates Court made consent orders remitting the matter to the Tribunal to be determined according to law.
5. The matter is now before the Tribunal for the third time.

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. 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'

9. 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.

10. 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.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. The meaning of the expression ‘for reasons of ... membership of a particular social group’ was considered by the High Court in *Applicant A*’s case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:
... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the

first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...

17. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.
18. 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.
19. 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.
20. 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.
21. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of "practicable", to expect him or her to seek refuge in another part of the same country. What is "reasonable" in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* [2007] HCA 40 and *SZFDV v MIAC* [2007] HCA 41, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

CLAIMS AND EVIDENCE

22. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has before it the previous Tribunal files N05/52898 and 0800927 and the current Tribunal file 0808237.

Claims as set out in the protection visa application

23. The applicant is a 23 year old single male. He states that he was born at Periyakallar in Batticaloa. He lists his religion as Hindu, his ethnicity as Tamil and his occupation as Computer Instructor. He lists 14 years of education but does not provide details of any qualifications. He states that he worked as an Instructor for [College 1] from April 2002
24. The applicant provided with his application a copy of his passport and birth certificate, a photocopy of his Sri Lankan identity card and a photocopy of the certificate of his father's arrest and detention for a three month period in 1986 under the Prevention of Terrorism Act (POTA)
25. He also provided a statement setting out the following. He states that when he was just four years of age his father was detained on suspicion of aiding the LTTE and never returned home.
26. He states that throughout his school years he experienced threats and intimidation from the LTTE and that an attempt to forcibly recruit him and other school children was foiled by the authorities.
27. He states that on completion of his schooling he commenced study at [College 1] and that he then worked for them. He states that they offered him the opportunity to travel to Singapore and that he travelled to Colombo to acquire his passport but was arrested on the return trip at a check point. He states that this event occurred in December 2001.
28. He states on release he resumed working for [College 1] but was approached by the LTTE to provide them with computer training and when he resisted the LTTE detained him in their camp at Tharavai. He states that he escaped and returned home but then came under suspicion of the authorities and was arrested for a second time.
29. He states that following the tsunami his mother feared that as the circumstances between LTTE and the authorities worsened he would face harm and she approached an agent to arrange for him to come to Australia.

Claims as set out in Tribunal file N05/52898

30. [In] January 2006 the applicant's adviser provided a submission to the Tribunal setting out reasons why the applicant would be unable to relocate within Sri Lanka to avoid the harm that he fears as was proposed by the delegate in its decision record.
31. The adviser submits that as the applicant has no relatives in Colombo, is not from Colombo, speaks only Tamil and not Sinhalese the applicant would not be free from harm in Colombo and that there is no part of Sri Lanka where he would be safe from the persecution which he fears.
32. Following the hearing before the first Tribunal, held [in] February 2006, the applicant's adviser provided extensive country information from the US Department of State, BBC News Reports and Amnesty International on the treatment of Tamils in Sri Lanka. The adviser submits as follows:

There is a real chance that the review applicant would be detained by the Sri Lankan security forces for reason of his race (Tamil from the East) and the political opinion

imputed to him for reason of his race (support for the LTTE) if he returned to Sri Lanka now or in the reasonably foreseeable future as Tamils whose National Identity card show they are from the North or East were at risk of being detained at checks or round-ups than other Tamils.

33. The adviser refers to Tribunal decisions where the Tribunal found that there is a real chance of persecution, within Sri Lanka, for Tamils, particularly young Tamils from the North or East.

Claims as set out in Tribunal file 0808927

34. In a submission, dated [in] March 2008, the applicant states that since his arrival in Australia his mother and sister have been subject to investigation by the authorities and he is concerned for their safety. He states that he is keen to travel to either Singapore or India to try and organize for his mother and sister to leave Sri Lanka but he cannot do this until he is granted his protection visa.
35. The Tribunal (differently constituted) took evidence from the applicant at a hearing held [in] April 2008. The Tribunal has listened to a recording of this hearing.
36. This Tribunal wrote to the applicant [in] April 2008 inviting the applicant to comment on or respond to the concerns of the Tribunal about aspects of the applicant's evidence provided to the Department. [In] May 2008 in a letter dated [in] February 2008 the applicant provided his comments.

Claims made out to the current Tribunal

37. The applicant made a brief written submission to the Tribunal in which he set out the following. He states that he fears harm from the LTTE as he believes that they believe he may seek to provide information to the police about the LTTE.
38. He also states that he fears harm from the Sri Lankan security forces because they suspect him to be associated with the LTTE. He states that he believes that he has been imputed with a LTTE profile because he is "a young Tamil from the east of the country" and persons with his profile have been imputed with an LTTE political view and subject to arrest and mistreatment in detention.
39. He states that his father was arrested and subsequently disappeared following arrest by the security forces.
40. He states that he cannot relocate within Sri Lanka because he does not speak Sinhalese. He goes on to state that: "Importantly I will be arrested in Colombo because I am a young male from the north and east of the country. Authorities will think that I belong to the LTTE."
41. He states that there are many cases in which young Tamils from the north and east of Sri Lanka have been granted refugee status by the Tribunal. He provides a list of such cases sourced from the AustLII Database. He also provides a number of news items sourced from TamilNet in relation to incidents in Batticaloa.

Claims as stated at the hearing

42. The applicant appeared before the Tribunal [in] March 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages. The applicant's adviser was present at the hearing.
43. The Tribunal informed the applicant that it had read submissions made to the previous Tribunals and listened to the recordings of his hearings before the previous Tribunals. The Tribunal asked the applicant whether there were changes to his circumstances since his last appearance at the Tribunal. The applicant stated that killings and atrocities had increased in Sri Lanka. He stated that Tamils are regularly arrested under POTA.
44. The Tribunal asked the applicant about his activities in Australia. He stated that he was studying but no longer does so. He stated that he has some casual work. He stated that he did undertake a course in Computing Networking at TAFE in 2008. He presented to the Tribunal a certificate issued by TAFE indicating that the applicant had achieved a Certificate IV in Information Technology.
45. In response to questions about his education in Sri Lanka he stated that he had completed the Advanced Level Certificate, equivalent to the HSC. He stated that he attended school at Central College in Periyakallar. He stated that all his education was in Tamil and that after he completed school he did a short course of three month duration in computing at a private college, [College 1] and that he then worked for them.
46. He stated that the college had its head office in Colombo but a branch in Batticaloa which closed down after the tsunami in December 2004. He stated that he worked and studied in Batticaloa.
47. The applicant stated that his mother and sister reside in Sri Lanka and his father has been missing since he was four years of age. In respect to his extended family he stated that he has uncles, aunts and cousins and that they are dispersed in many places including India and Dubai. He stated that his father's parents have passed away but that his mother's parents are still living.
48. When asked about contact with his mother and sister he stated that he rings them weekly and that they have been questioned by the authorities. He referred to an incident in which the authorities took people to the local temple and separated the males and females. He provided a copy of this news item to the Tribunal.
49. The Tribunal discussed with the applicant his passport and noted that it had expired. The applicant stated that he had gone to the Consulate and renewed it for a period of one year but had not had it renewed since then. The Tribunal noted that his passport was first issued in December 2001 and asked the applicant why it was that in July 2005 he sought to come to Australia. The applicant stated that his life was in danger and that his mother organised through an agent for him to leave the country.
50. The Tribunal noted that as he had a passport from 2001 onwards then clearly the agent's services weren't sought for this. The applicant stated that his mother used the services of an agent to get his visa to come to Australia. The Tribunal asked the applicant whether the agent was sought to get a visa to Australia in particular. The applicant stated that they just asked the agent to get a visa to go anywhere.

51. The applicant stated that the agent was based in Colombo but had sub- agents in his district and that his mother approached a sub- agent in his area.
52. The Tribunal noted that that applicant claims that he was twice detained by the SLA once in December 2001 and again in April 2004 and that he was held captive by the LTTE for a period of three months in January 2004. The applicant stated that this was correct. The Tribunal asked the applicant, in light of these experiences and given that he did have a passport, why he sought to flee the country in July 2005.
53. The applicant responded that he did not have avenues to move anywhere and that after the tsunami he did not have problems but that they started up again. The Tribunal noted that he did not seem to have had any further experiences after his claimed detention in 2004. The applicant stated that he was in fear and that he also feared for his mother and sister who would be questioned about him or detained instead of himself. He stated that he left Sri Lanka to save his life and his mother's and sister's lives. The applicant stated that he was in fear of harm from both the LTTE and the SLA.
54. The Tribunal noted that his passport listed his profession as a musician. The applicant stated that he was not a musician but that perhaps the agent had organised this as he had given his passport to his agent.
55. The Tribunal raised with the applicant information on the Department file and advised the applicant that it would be putting this information to the applicant in written form. The Tribunal noted that in his visitor's visa application it is stated that his father is a businessman and was providing adequate funds for the son's visit to Australia. The applicant indicated that the purpose of his visit was to see his grandparents in Australia and that he was at the time of his application completing a Bachelor's degree. The applicant stated that he knew nothing about these details and that his agent organised his visitor's visa and so he knew nothing about this information.
56. The Tribunal also noted that the Department records indicated that he had applied for an entertainment visa which fitted with the entry in his passport that he was a musician. The Tribunal noted that this was refused in May 2005 and that the applicant then applied for a visitor's visa. The Tribunal noted that this would indicate that he was not so much fleeing Sri Lanka to go anywhere but rather attempting to enter a particular country- Australia.
57. The applicant stated that the documents for his visitor's visa would have been manufactured by his agent and he knew nothing about them. The Tribunal indicated that the difficulty this raised or the Tribunal was that if documents were manufactured for his visitor's visa application they could equally be manufactured for a protection visa application.
58. The Tribunal also raised with the applicant medical evidence on the Department file. The Tribunal noted that the applicant provided a medical opinion from a GP dated 19/9/05 indicating that the applicant suffered PTSD, shoulder pain and scars as a consequence of assaults upon him. However at his medical examination by the Commonwealth Medical Officer in response to a series of question about his health he responded in the negative to any symptoms of depression anxiety or physical pains. The Tribunal noted that this medical examination was carried out through a friend acting as an interpreter and that all other details in the form in regards to his bio data was correct indicating that there was not a language barrier. The applicant stated that he could not recall this

59. The Tribunal asked the applicant if he was currently undergoing any medical treatment. The applicant provided to the Tribunal a letter from STARTTS dated October 2005 stating that there was a waiting list for appointments with them. The applicant stated that he did not pursue STARTTS further after this letter. He stated that he did see doctors but that he is hampered by the fact that he does not have a Medicare card.
60. The Tribunal discussed with the applicant whether Tamil was the only language he spoke. The Tribunal noted that his TAFE course was presumably in the English language. The applicant stated that he knew limited English. He stated that his education was in Tamil and that this was the only language he was conversant with.
61. The adviser queried the relevance of the language medium of the applicant's education. The Tribunal noted that before the first Tribunal the issue of relocation to Colombo was discussed with the applicant who had stated that as he only spoke Tamil he could not relocate to Colombo.
62. The Tribunal discussed with the applicant his fear of harm on return to Sri Lanka. The applicant stated that he believed that he would be arrested at the airport as a Tamil who had gone abroad. He stated that if arrested they would have records on him and he feared mistreatment by the authorities. He stated that Tamils are arrested daily in Colombo. He stated he feared that he would be killed. He stated that he also was fearful for his mother and sister.
63. The Tribunal asked the applicant if he had further issues to raise with the Tribunal. The adviser indicated that the applicant may wish to provide further information to the Tribunal but would do so in writing when responding to the section 424A letter to be provided to the applicant.
64. The Tribunal indicated that it did have concerns about the applicant's claimed experiences of past harm in light of conflicting documentation on his health form and visitor visa application. However, the Tribunal did accept that he was a young Tamil male and would need to also consider harm that the applicant might face as a young Tamil male on returning to Sri Lanka.

Country Information

65. The UK Home Office Country of Origin Report for Sri Lanka (dated February 2009) provides the following background information relevant to the applicant's claims

Tamils

20.06 Approximately 8 to 9% of the population are ethnic Tamils (the combined total of Indian and Sri Lankan Tamils) – see paragraph 20.01 above. Jane's Sentinel Country Risk Assessments, Country Report, Sri Lanka, accessed 31 December 2008) observed that:

“Tamils comprise approximately 90 per cent of the population in the Northern Province and approximately 40 per cent of the population in the Eastern Province. Although these two provinces are considered by the Sri Lankan Tamils as constituting the traditional Tamil homeland in Sri Lanka, just under 50 per cent of Tamils actually live outside the Northern and Eastern provinces (although excluding the Indian Tamils, only 33 per cent live outside the two provinces)...The

overwhelming majority of Tamils speak Tamil and are Hindus.” [5a] **Demography**, 30 April 2008)

20.07 In Colombo district there were 247,739 Sri Lanka Tamils and 24,821 Indian Tamils out of a total population of 2,251,274 (figures from the 2001 census). The districts of Ampara, Gampaha, Kandy, Puttalam and Nuwara Eliya also had a high concentration of Tamils. However, data from Jaffna, Mannar, Vavuniya, Mullaitivu, Kilinochchi, Batticaloa and Trincomalee districts in which the 2001 census enumeration was not completed were not included. (Sri Lankan Department of Census and Statistics (Statistical Abstract 2007, Chapter II, tables 2.10 - 2.11, accessed on 17 September 2008) [58a]

Human Rights

7.03 As noted in the U.S. State Department (USSD), Country Reports on Human Rights Practices 2007, Sri Lanka, issued on 11 March 2008 (USSD 2007):

“The government's respect for human rights continued to decline due in part to the escalation of the armed conflict. While ethnic Tamils composed approximately 16 percent of the overall population, the overwhelming majority of victims of human rights violations, such as killings and disappearances, were young male Tamils. Credible reports cited unlawful killings by government agents, assassinations by unknown perpetrators, politically motivated killings and child soldier recruitment by paramilitary forces associated with the government, disappearances, arbitrary arrests and detention, poor prison conditions, denial of fair public trial, government corruption and lack of transparency, infringement of religious freedom, infringement of freedom of movement, and discrimination against minorities. There were numerous reports that the army, police, and progovernment paramilitary groups participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity. The situation deteriorated particularly in the government-controlled Jaffna peninsula. By year's [2007] end extrajudicial killings occurred in Jaffna nearly on a daily basis and allegedly perpetrated by military intelligence units or associated paramilitaries. There were few arrests and no prosecutions as a result of these abuses, although a number of older cases continued to make slow progress through the judicial system. Government security forces used the broad 2005 emergency regulations to detain civilians arbitrarily, including journalists and members of civil society.” [2f] (**Introduction**)

8.10 The Human Rights Watch (HRW) report ‘Return to War, Human Rights under Siege’, published on 6 August 2007, recorded that: “Over the past 18 months, the Rajapaksa government has detained an undetermined number of people reaching into the hundreds under the [emergency] regulations. The primary targets are young Tamil men suspected of being LTTE members or supporters, but the government has recently cast a wider net, arresting non-Tamils for allegedly supporting the LTTE. The overbroad and vaguely worded regulations allow for the detention of any person ‘acting in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services.’ The authorities may search, detain for the purpose of a search, and arrest without a warrant any person suspected of an offense under the regulations.” [21f] (**Summary**)

8.16 On 17 October 2008 the *Daily Mirror* reported that P. Radhakrishnan had accused the police of arresting "five to 10 Tamil people" every day in Colombo and its suburbs using the registration details and that anybody carrying identity cards with addresses from rebel-held areas was immediately arrested. Those figures were

corroborated by Chief Justice, Sarath N. Silva, who had previously told the media that nearly 1,400 Tamils are currently in custody. [11i]

Incidents between May and December 2007 - Colombo

8.19 The pro-LTTE website TamilNet reported a number of large-scale arrests of civilians in Colombo between May and July 2007. Those arrested (mainly for failing to prove their identity and the reason for their presence in a certain area) were almost exclusive young Tamil men mainly residents or natives of Trincomalee, Killinochchi, Jaffna, Batticaloa, and Upcountry. Many were released after proving their identity and satisfactory reasons for their stay in the location) but others were remanded in custody for further questioning. (TamilNet, 4 May 2007 [38i]; TamilNet, 2 June 2007 [38m]; TamilNet, 27 June 2007) [38p]; TamilNet, 9 July 2007) [38q]

8.20 In a letter dated 13 August 2007, the BHC in Colombo noted that “The cordon and search operations seem to target Tamils with casual employment and temporary accommodation. While most detained are released quickly, a proportion end up in more long term detention.” [15e]

8.21 The Minority Rights Group International briefing of December 2007 noted that:

“Following two suicide bomb attacks in late November 2007 the government arrested some 1,000 Tamils in Colombo and other southern towns. According to a statement by Tamil MP Mano Ganeshan, who is also the Convenor of the Civil Monitoring Commission, the military bundled Tamils into busloads regardless of age and sex, and took them for questioning. Some were detained in special counter-terrorism detention centres. Figures and details of those arrested are difficult to obtain, and international human rights groups have warned that due process is rarely met when these arrests and detentions occur... Many of the government detention centres are out of bounds and there is very limited information on the numbers of those arrested and detained under counterterrorism laws. Information on the status of the detainees is hardly ever made available. The country’s forces are also known to use methods of torture against detainees.” (Minority Rights Group International, ‘One year on: counter-terrorism sparks human rights crisis for Sri Lanka’s minorities’, December 2007) [62b] (p4-5)

8.22 As reported by the pro-LTTE website TamilNet on 2 December 2007:

“Sri Lankan armed forces have arrested around 1,500 Tamil men and women in wide scale cordon and search operations within the last 48 hours in Colombo and other districts in South, Tamil parliamentarians told media in Colombo on Sunday. 351 of the arrested persons in Colombo, currently detained at Boosa detention camp, complained that many of them were arrested despite documenting their identity and that they have not been provided proper food and drink for the last 48 hours. 51 of the detainees, at Boosa, were females... Tamil civilians were arrested in Modara, Grandpass, Gampaha, Ratmalana, Chilaapam (Chilaw). Arrests were also reported in Kotagala and Pusallawa areas in the Up-Country.” [38ab]

28.27 The BHC letter of 13 August 2007 further noted that:

“Staying in Colombo is difficult for Tamils who don't have adequate Sinhala language skills. Without Sinhala, if a Tamil person is stopped at a check point he cant [sic] express the reason for staying in Colombo, so they can be easily picked up & harassed. The cordon and search operations seem to target Tamils with casual

employment and temporary accommodation. While most detained are released quickly, a proportion end up in more long term detention... Under the law anyone can stay in Colombo without giving any prior notice to the Police or Security forces. The eviction of Tamils was justified by the IGP (Inspector general of police) who said that 'We evicted the people who are staying in Colombo without a valid reason'. But there is no legislation to support that except the High Security Zone rules, which would tend to exclude all civilians from certain areas. People who come to Colombo for administrative issues such as applying for visas, passports or taking exams stay in lodges, because its [sic] cost effective. The export processing zones also require large numbers of casual workers who tend to stay in places of multiple occupation to save money." [15e]

28.28 As reported by the *Daily Mirror* (Sri Lanka) on 29 November 2007:

"When the fundamental rights violation petitions filed against the eviction of Tamil lodgers from Colombo came up in Court, Counsel for the petitioners agreed to consider the court's suggestion [for an amicable resolution] in this matter, since the Prime Minister had tendered an apology. It was also explained that an interim order is in existence preventing the removal of persons without reasonable suspicion and a valid reason... Leave to proceed has already been granted for the alleged infringement of freedom from torture, right to equality and equal protection of the law as well as discrimination on the grounds of race, religion, language, place of birth etc, freedom from arbitrary arrest and detention and freedom of movement and of choosing his or her residence within Sri Lanka. The Supreme Court had already issued an Interim Order directing the IGP not to take any steps to evacuate Tamil persons from Colombo or to prevent them from entering and staying in any part of Colombo. The petitioners are seeking relief and effective redress in respect of infringement of the fundamental rights of a large section (Tamils) of the Sri Lankan society who have been and are being further discriminated against and gravely prejudiced." [11x]

28.29 A letter from the BHC Colombo dated 16 May 2008 expanded on the the issue of eviction of Tamils from lodges in Colombo:

"In June 2007, Inspector General of Police Victor Pereira said, 'Tamils who were loitering in Colombo were given transport to return home unless they had proof of employment there'. However, many people from the north, east and other regions of Sri Lanka who had checked-in at the lodges, were in Colombo for a variety of reasons. Many were coming to look for employment, or undertake studies, or to receive medical treatment, or intending to travel abroad, plus people came to obtain official documents like identity cards or passports. But heavily armed police officers had entered the lodges in the Wellawatte, Kotahena, Pettah and Wattala areas of Colombo and a total of 376 persons were evicted, 291 males/85 females. Only 186 have since returned. It remains that Tamils living in Colombo for short periods of time, particularly in multiple-occupancy residencies, are subject to intense police scrutiny. (Source of a majority of the above was Mr Kandaramy, Executive Director of the Centre for Human Rights Development – CHRDR)." [15r]

8.33 A letter from the BHC Colombo dated 16 May 2008 noted:

"During cordon and search operations in Colombo/Gampaha, a majority of persons who were arrested fell into 3 categories; those who had failed to produce their national identity cards; those who had failed to give a satisfactory reason as to why they were in the area if they emanated from another part of the country; and those arrested under Prevention of Terrorism Act/Emergency Regulations if they were suspected of being associated to the LTTE. Tamils form a vast majority of those

arrested, although several Muslims were also detained. There were no reports of Sinhalese being detained. The Government has allegedly 400 persons detained in Boosa detention camp, and another 300 held in police stations in Colombo and surrounding suburbs at any one time. These figures vary depending on the current security situation.” [15r]

8.34 The same letter continued:

“Invariably, the police target Tamils in the Colombo/Gampaha district given the present security situation. One must assume that they profile likely suspects based on risk assessment, e.g. male, Tamil, aged between 17-35, residing in low-budget, multi-occupancy housing etc. Frequent cordon and search operations, and swoops on lodgings are all centred on Tamils. However, there was at least one crackdown in Gampaha during 2006, when there was a reported chase of the Sinhala Tigers. The police have also reported that it was a Sinhalese woman accompanied by her mother who carried out the Dambulla bus bombing on 2nd February 2008, and that investigations showed that Ruwanwelisaya [temple] was the intended target.” [15r]

8.42 “In the great majority of cases documented by Human Rights Watch and Sri Lankan groups, evidence indicates the involvement of government security forces — army, navy, or police... Relatives frequently described uniformed policemen, especially members of the Criminal Investigation Department (CID), taking their relatives into custody before they ‘disappeared.’... The involvement of the security forces in ‘disappearances’ is facilitated by Sri Lanka’s emergency laws, which grant sweeping powers to the army along with broad immunity from prosecution. Several provisions of the two emergency regulations currently in force create a legal framework conducive to ‘disappearances.’” (HRW, ‘Recurring Nightmare - State Responsibility for ‘Disappearances’ and Abductions in Sri Lanka’, March 2008) [21d] (p4-5)

8.43 “No matter who is responsible for the ‘disappearances,’ the vast majority of the victims are ethnic Tamils, although Muslims and Sinhalese have also been targeted. The security forces appear to target individuals primarily because of their alleged membership in or affiliation with the LTTE. Young Tamil men are among the most frequent targets, including a significant number of high school and university students.” (HRW, ‘Recurring Nightmare - State Responsibility for ‘Disappearances’ and Abductions in Sri Lanka’, March 2008) [21d] (p6-7)

FINDINGS AND REASONS

66. The Tribunal finds that the applicant is a citizen of Sri Lanka who resides in Australia as a non-citizen. The Tribunal makes this finding on the basis of the applicant’s passport presented at the hearing.
67. The applicant’s claims may be summarized as follows. He claims that he is a young single Tamil male from eastern Sri Lanka. He claims that his family have experienced ongoing harm from the Sri Lankan authorities because of their Tamil ethnicity and imputed political opinion as LTTE sympathizers and associates. He claims that in 1986 his father was arrested by the authorities under suspicion of collaboration with the LTTE and that since that time his father has been missing presumed dead.

68. He claims that as a school child he was caught in a failed attempt by Tamil extremists to abduct him and other Tamil students and that a LTTE leader lectured them at school about the importance of involving themselves in the LTTE.
69. He claims that he worked as a computer instructor at [College 1] in [place name deleted: s.431(2)] from 2001 until December 2004 (when the college closed down because of the tsunami) and that some LTTE operatives attended the college to learn computer skills. He claims that the LTTE suspect him of giving information about their operations to the Sri Lankan authorities and that they forcibly detained him in an LTTE camp in January 2004 for a period of three months. He claims that he managed to escape when parents approached the camp and demanded the release of their children.
70. He claims that the authorities have on two occasions arrested him on suspicion of association with the LTTE on the basis of his ethnicity. He claims that he was detained in December 2001 for a period of two months and that he was detained again in April 2004 for a period of two weeks. He claims that on both occasions he was subject to mistreatment and torture by the authorities. He states that on his release he was subject to reporting conditions.
71. He claims that he fears that if he returns to Sri Lanka he will be subject to further arrests by the Sri Lankan authorities because of an imputed political opinion of an LTTE associate. He claims that he cannot relocate to an area such as Colombo because he only speaks Tamil and in any event his identity card indicates that he is a Tamil from the east and that this profile means that the authorities will consider him to be a LTTE associate.
72. He claims that since his arrival in Australia he and his family have been pressed by members of the Karuna faction to provide financial support to the organization.
73. The Tribunal finds as follows. The Tribunal accepts that the applicant is a Tamil from the eastern area of Sri Lanka. The Tribunal makes this finding on the basis of the applicant's passport, identity card and birth certificate (copies of which are located on the Department file) which indicate that the applicant was born in Periyakallar.
74. The Tribunal does not accept that the applicant has been subject to all the incidents of past harm that he so claims. In particular the Tribunal does not accept that the applicant has been twice arrested by the Sri Lankan authorities and subject to mistreatment and torture in detention. Nor does the Tribunal accept that the applicant was detained by the LTTE.
75. The Tribunal makes these findings on the basis of the applicant's oral evidence before the Tribunals which was unconvincing on several points. The Tribunal notes that the applicant has provided with his protection visa application a report from [a GP] (dated [in] September 2005) in support of his claim to have suffered torture and to be now experiencing PTSD thus inhibiting his ability to recall details of his past experiences.
76. The Tribunal notes, however, that the applicant underwent a medical examination [in] September 2005 through Health Services Australia Ltd as part of the visa application process. This medical report indicates that before the medical officer the applicant reported via an interpreter that he had never had anxiety, depression or nervous complaints requiring treatment, nor had he ever had pain in the back neck or joint. The applicant also indicated that he had not ever had any illness injury or medical condition lasting more than 2 weeks or any recurring condition. He also indicated that he had not had any medical, physical, psychological or other treatment over the past 5 years.

77. The Tribunal further notes that when the applicant applied for his Visitor's visa to come to Australia he provided evidence that his father was a successful businessman who was providing sufficient funds to support the applicant on his visit to Australia. This information provided by the applicant in his Visitor's visa application calls into question his claim set out in his protection visa application that his father disappeared when the applicant was four years of age and that the applicant, his mother and sister have struggled to survive on their own.
78. However, the Tribunal has formed the view that it is unnecessary to make definitive findings about all of the applicant's claims of past harm as the Tribunal is satisfied that as the applicant is a young Tamil male from the eastern region of Sri Lanka there is a real chance that he could face persecution for a Convention reason on his return to Sri Lanka.
79. The Tribunal makes this finding on the basis of the country information (set out above) which indicates that the applicant by reason of the fact that he is a young Tamil male from the east of Sri Lanka could be detained by the Sri Lankan authorities in a cordon and search operation or at a checkpoint. Whilst this of itself does not constitute persecution, the country information does indicate that upon arrest persons of the applicant's profile are not infrequently subject to prolonged detention and mistreated in detention. The Tribunal finds that this constitutes serious harm for a Convention reason –that of a particular social group– young Tamil male of the eastern or northern districts.
80. Accordingly, the Tribunal is satisfied that although the probability that the applicant would be detained and mistreated may be small, it is nonetheless a real possibility and as such there exists a real chance that the applicant could face persecution for a Convention reason should he return to Sri Lanka now or in the reasonably foreseeable future.

CONCLUSION

81. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

82. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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