

**1215128 [2013] RRTA 53 (7 January 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1215128

**DIAC REFERENCE:** CLF2012/173715

**COUNTRY OF REFERENCE:** Sri Lanka

**TRIBUNAL MEMBER:** Ms Philippa McIntosh

**DATE:** 7 January 2013

**PLACE OF DECISION:** Sydney

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

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Sri Lanka, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2012.
3. The delegate refused to grant the visa [in] September 2012, and the applicant applied to the Tribunal for review of that decision.

### RELEVANT LAW

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

#### Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. 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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 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.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

### **Complementary protection criterion**

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal [in] November 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages.
21. The applicant was represented in relation to the review by his registered migration agent, [name deleted: s.431(2)].
22. The applicant claimed to be a citizen of Sri Lanka, a Hindu and ethnically a Tamil. He provided the DIAC with copies of some pages of his passport and national identity cards.
23. He claimed that he did not hold the citizenship of any other country or have a current right to enter and reside in any other country (claims that were accepted by the delegate).
24. From his birth in [year deleted: s.431(2)] until [year deleted: s.431(2)] he had lived in Jaffna district in north Sri Lanka, from [years deleted: s.431(2)] he had lived in Kilinochchi district in the north, for [time period and year deleted: s.431(2)] he had lived in Vavuniya district in the north, from [years deleted:s.431(2)] he gave as his address [address deleted: s.431(2)] in

Jaffna province and from [time period deleted: s.431(2)] said he had been living [in] Thiruvannamalai district in Tamil Nadu in India.

25. Of his relatives in Sri Lanka currently the applicant referred to his parents, sister, wife, son and daughter. His wife and children were currently residing in Colombo, his wife working in a [shop]. He also had a sister who was an Australian citizen.
26. The applicant claimed that he had visited India on three occasions, entering lawfully on a tourist visa and then residing in a [camp]. His most recent visa for India, which was submitted to the delegate, was a tourist visa issued [in] March 2011 and expiring [in] June 2011. He overstayed this visa in India by approximately 10 months. He said he had never registered with the office of the UN High Commissioner for Refugees.
27. He provided detailed written claims to the DIAC and, with the assistance of a Tamil-speaking interpreter, was interviewed by the delegate [in] August 2012.
28. He claimed to fear that he would be arrested and detained by the Sri Lankan authorities if he returned to Sri Lanka. He would be persecuted because he was a Tamil from northern Sri Lanka. He had a massive [wound] and had been suspected of being a supporter of the Liberation Tigers of Tamil Eelam (LTTE).
29. The applicant claimed that in 1997, when he was aged about [age deleted: s.431(2)], his family had been displaced three times by the war between the Sri Lankan government and the LTTE. In June 1997 he had been working in a [shop] when he was badly wounded [details deleted: s.431(2)] by shrapnel. He was hospitalised for two months as a result.
30. He himself had never been a member of the LTTE or been involved with its activities. He said that one of the owners of the [shop] was a member of the LTTE and that some of the proceeds from the business went to the LTTE.
31. His Sri Lankan passport was issued [in] February 2008 at the passport office in Colombo.
32. In 2008 in [Region 1], when the Sri Lankan Army (SLA) was in control of the area, two men in civilian clothes came to the shop and told him to accompany them to the army camp about 300 metres away. There they said he was from Vanni, had a wound [details deleted: s.431(2)] and was therefore a member of the LTTE. He denied this. He was beaten and interrogated for about three hours. He was then released with a warning not to leave the area and to report if called.
33. About a week later two men came to the applicant's home and searched for weapons. One of the men was in [uniform] and one in plain clothes. The man in plain clothes told him they had information that the applicant had a weapon at his home. They found nothing incriminating, but subsequently often came on the same pretext to his home and to the shop. They were also calling him in for further questioning, then letting him go.
34. Fearful, the applicant took his family to India in 2008, departing via the airport in Colombo. Because his children became ill three months later they returned home to Sri Lanka, entering via the airport in Colombo, after a family member reassured them things were okay again.
35. The war ended in May 2009. In late 2009 or early 2010 the SLA was calling people in for investigation. As so few were being released the applicant again became frightened, and his wife encouraged him to go back to India. Therefore, a year after the war's end, he again went

to India lawfully through the airport in Colombo. There he lived in a [camp] for six months, from May to November 2010.

36. He again re-entered Sri Lanka through the airport in Colombo, and resumed employment in the shop. His brother-in-law [later corrected to sister-in-law] had now taken it over. Within a week he was called in again by the Criminal Investigation Department (CID). He was accused of knowing where the LTTE had been hiding weapons. He denied knowing anything of this. He was beaten with a baton and kicked and punched before being released the same day. He left [Region 1] and went to his parents' home in a suburb of Jaffna city where he remained for 10 months, living in fear and rarely going out. He went alone because if his whole family had accompanied him they would have had to register out of [Region 1] and into Jaffna city,, enabling him to be located. His wife and children visited him occasionally but the family could not continue living that way and in March 2011 his wife and children accompanied him to Colombo airport from where he left to return to the [camp] in India.
37. He left Sri Lanka again ("legally") [in] March 2011 through the airport in Colombo on a three-month tourist visa, overstayed it and remained in the [camp] for about 14 months until April 2012. After the first four months he paid Rs.100,000 to a man who said he could get the applicant to Australia. However the man disappeared with the money. When the opportunity arose again through another man the applicant obtained a loan from his bank and left India for Australia [in] April 2012.
38. He said his wife and children were in Colombo because they could no longer live in [Region 1]. His wife's mother was with her looking after the children while his wife worked. The applicant said that his sister-in-law was in London and was paying the interest only on the loans he had arranged with the bank.
39. Of the future he said that he feared he would be arrested and detained as soon as he arrived in Sri Lanka and would be persecuted because he was a Tamil. The authorities at the airport would arrest him because he was a Tamil from the North, having lived in the Vanni, because his passport clearly showed he was born in Jaffna, because he had a massive wound [details deleted: s.431(2)], because he had been suspected of being an LTTE supporter, and because the shop in which he had worked in the Vanni "belonged to the LTTE". He also said he feared the authorities because he would be returned to Sri Lanka after having left for India in 2011 on a visa only valid for six months. He did not think there was anywhere in Sri Lanka where he could be safe and did not believe the authorities could or would protect him because they were the ones of whom he was terrified.

#### Evidence before the Tribunal

40. A detailed submission dated [November] 2012 was provided by the applicant's representative. It summarised his claims, set out arguments and providing supporting evidence regarding the treatment of Tamils in Sri Lanka. It referred the tribunal in particular to evidence from the UN Committee Against Torture (8 December 2011) which noted ongoing serious abuses perpetrated by the Sri Lankan authorities of suspects in custody in order to extract confessions and for other reasons. The committee was concerned that torture and ill treatment perpetrated by state actors, both military and the police, had continued in many parts of the country and was still occurring in 2011. The tribunal was also referred to reports from Freedom from Torture and Human Rights Watch, among others, which reported the torture of a number of Tamils who had been returned by the United Kingdom to Sri Lanka, or had returned voluntarily. Freedom from Torture observed that "the fact that an

individual did not face adverse consequences in the past because of their actual or perceived association with the LTTE at any level is not decisive now in assessing risk on return ..."

(Although this report indicated that the risk of people returning from the UK was largely because of LTTE activity and support in the UK).

41. At the Tribunal hearing, the applicant said of his Sri Lankan passport that it was currently in the possession of his wife's uncle, with whom the applicant had lived in India for 15 months in a [camp]. He added that this uncle was a registered refugee in India, while the applicant himself was not. He said he had no copies of any pages of the passport other than those already submitted in evidence.
42. He said that his wife and children were still living in a rented room in Colombo. As to why they had moved to Colombo, he said they could not remain in [Region 1] as he and his wife had been worried about their daughter. In [2012] the body of a child had been found on school grounds, having been raped and killed (in evidence he submitted a report dated [date & publication deleted: s.431(2)], a Tamil newspaper). He did not think this attack was politically motivated but had thought that the EPDP was probably responsible for it. These crimes were common in [Region 1]. For that reason his wife had taken the children to Colombo around March 2012.
43. As to why his wife had moved to Colombo in particular he said that Colombo did not have many problems while other places did. However neither he nor his wife had had friends or relatives in Colombo. He said that at present his parents, who had previously been living in Jaffna city, were with his wife, having moved there just to help her out. His wife's parents were currently in [Region 1] and all her other relatives were in India.
44. As to how his wife was managing to work in Colombo and his children to study, he said that she only spoke Tamil but was working in a Tamil-owned [shop] in a Tamil area. His children were learning Sinhala because they were attending a school where it was spoken.
45. As to if his wife and children had had to register their presence with the police in Colombo, he said he assumed that their landlord would have registered them but did not know.
46. As to his other family members, he said that he had been running his shop, and then his wife's [sister] had taken over running it but had since closed it. She was about to get married so was not working now. His wife had another sister in the UK. He himself had a sister who had been living in Sydney for the previous seven years or so. Her husband had come to [Australia]. He said that the latter's circumstances had no bearing on his own.
47. I told him of reports that the Sri Lankan president had plans to turn [Region 1] into a tourist destination, and asked him what his friends and family in [Region 1] were telling him about life [in Region 1] these days. He said that his wife's parents had told him there were still problems in that area. [Details deleted: s.431(2)]. The [organisation deleted: s.431(2)] and EPDP both had a presence there. The [armed forces] were establishing a [base] there. They were not giving ordinary people any problems, "just people like me". Asked if his parents-in-law were telling him this, he indicated that they were, saying they were telling him that there were some disappearances and people were being abducted. These were people who had come from the Vanni and had worked with the LTTE in the past, and also reporters who had reported these abductions. As to the activities of the EPDP, he said that his wife's [relative] had been stabbed by EPDP members when the LTTE was in control. However since the end of the war the situation was not so serious. They abducted people, although not in [Region 1]

itself. They just committed crimes in [Region 1]. He added that after the end of the war youngsters were bashed and some were arrested. After that whoever criticised the EPDP was targeted. One person had also been shot dead in Jaffna for doing so.

48. He confirmed that he had lived [in Region 1] and had been twice detained for several hours in 2008 there. I told him I understood that there was a [battle near] [Region 1] in December 2007 and that the government in 2008 were trying to prevent LTTE [movement]. I asked him if in 2008 many Tamils living [in Region 1] were picked up, harassed and questioned as he had been and he confirmed that was so. Asked if his problems in 2008 were caused by the security situation arising from the battle, he indicated it was not simply that, saying he thought he was picked up because he was born in the Vanni, had had a shop owned by a member of the LTTE and had a serious leg wound which may have led to suspicions he had been with the LTTE in the past.
49. As to whether he had had any further contact with members of the security forces after the second period of detention before he went to India in 2008, he said that every couple of days the army came to his house and checked for weapons. They threatened him saying that he knew where arms were being hidden. They also had come to his shop. Although they did not detain him again they remained suspicious of him.
50. I told him of evidence that at this time the security forces were arresting and sometimes "disappearing" Tamils believed to be involved with the Tamil Tigers and asked him why he thought they had not done this to him. He responded that they had repeatedly harassed him and asked him if he was involved with the LTTE. They had implied there was an informer against him, to which he had challenged them to go ahead and bring this person forward. I told him that I inferred from this that they believed him in the end. He responded that he would not say so, and that even now they were suspicious of him.
51. I suggested to him that it appeared, however, they had no serious suspicions about him at the time. In response he said they would never do anything [in] [Region 1], only if a person left there. The [armed forces] was there and the EPDP would not harm him while he was [in] [Region 1].
52. I noted that after the end of the war he returned to Sri Lanka in November 2010 and resumed working in the shop in [Region 1], by then being run by his sister-in-law. He did not dispute this, adding it was in his wife's name since he took over in 2003 but that he owned it. He confirmed this was the shop in which he had been working when he was detained and beaten up by the army in 2008, and the same shop at which the army had later visited him.
53. He went on to say that he had been working as the manager in a shop in the Vanni from 1998 to 2002. It was owned by the LTTE. As manager he was required to hand the profits to the LTTE. Asked if anyone had known he did this he said that the [armed forces] in [Region 1] did not know about it and that no one knew about it.
54. I asked him why he thought he had been picked up by the CID in [Region 1] in November 2010, given that the war was over. He responded that there was a new CID intelligence head at that time, so many people in [Region 1] were questioned under those circumstances. While other people were being questioned by the CID at the time, he had been treated differently in that they had taken his photograph and made a file on him. To his knowledge they had only done this with one other person. Asked if they had told him why he had been treated



differently, he said they had told him it was because they suspected he was connected with the LTTE.

55. He said that the [armed forces] also required photographs of all family members to be displayed in people's houses, but the above treatment of him was not part of that process.
56. He confirmed that he had gone to stay with his parents in Jaffna city in November 2010 and had left for India in March 2011. As to if, in that four-month period, he had had any contact with the security forces, he said he had not because no one knew he was there. He also said that they had not made contact with his wife in [Region 1] in his absence.
57. Noting that his last problem with the security forces was about two years ago and that he was last in Sri Lanka over 18 months ago I asked him what had happened since then. He said nothing had happened, and that his wife's parents in [Region 1] would have told him if anyone had come looking for him.
58. I noted that he had previously expressed the following fears if he returned to Sri Lanka: that he would be arrested and detained as soon as he arrived in Sri Lanka and would be persecuted because he was a Tamil. The authorities at the airport would arrest him because he was a Tamil from the North, having lived in the Vanni, because his passport clearly showed he was born in Jaffna, because he had a massive wound [details deleted:s.431(2)], because he had been suspected of being an LTTE supporter, and because the shop in which he had worked in the Vanni "belonged to the LTTE". He agreed with all this, with the exception that the authorities did not know he had worked in the LTTE-owned shop in the Vanni. He agreed therefore that this was not a risk factor for him.
59. I noted that he had had a passport issued in February 2008 during the war, and had travelled unhindered in and out of the airport in Colombo using it, both during and after the end of the war. He was saying that now he would be arrested at the airport if he returned. Many Tamils had travelled by boat to India undocumented, and I asked him to explain why, if he was trying to escape the Sri Lankan security forces, he had instead applied for a Sri Lankan passport and chosen to exit the country through the international airport. This was not consistent with having a fear of ongoing harm. The applicant responded that if you paid an agency you could leave. He had paid extra money for the passport to an agent. He did not know what the agent had done to obtain a passport. I suggested to him that nevertheless his willingness to get the passport and leave through the airport showed a measure of confidence about his safety. He responded that if he had travelled alone he would have had problems so he had gone with his family to India. The authorities did not suspect a person if they were travelling with their family.
60. I asked him why in his opinion he had been issued with a passport and allowed to travel in and out of the country unhindered. He responded that he had re-entered Sri Lanka twice, on both occasions at night. On the first occasion he had re-entered with his family and on the second occasion his family had met him at the airport. The agent had also been present. If you paid an agent they could get you out of the airport. He believed that he could do that now if he returned but asked what the point was. If he returned to his own place he would have the same problems again.
61. I told him I strongly doubted that merely travelling with his family, having an agent's help or being met by his family at the airport would have protected him if he were suspected by the authorities of being involved with the LTTE. He responded that they had no evidence he was

a member of the LTTE but they suspected him. That was why he had had problems in [Region 1].

62. Asked why he had not brought his passport with him to Australia, he said if there had been an accident at sea he would have lost it. I asked him if he would ask his uncle in India to send him the passport to enable him to re-enter Sri Lanka using a proper travel document if he was unsuccessful with his protection visa application. He responded that he did not know if he could do that but would do it if he could.
63. I told him I accepted he would be questioned at the airport because there was evidence that everyone who had been returned from Australia was questioned, and asked him why he might be arrested now if he was not arrested on the previous occasions. He responded that he did not know but did not think the police in [Region 1] would say anything to the authorities in Colombo. They would let him return to [Region 1] first. He agreed that the police also had never given him any problems so had no adverse record about him. But in [Region 1] it would be hell for him. I asked him if he was saying he was not so fearful about what might happen immediately on re-entry at the airport in Colombo but was fearful of what might happen to him subsequently, and he confirmed that to be the case.
64. Of the argument put by his representative that seeking asylum in a western country or returning to Sri Lanka as a failed asylum seeker could put the applicant at risk of torture on return as he would have at the very least a perceived association with the LTTE, I told him that the Sri Lankan government regarded some returnees as the victims of smugglers and many people had been returned to Sri Lanka about whom there were no reports of ill treatment, so I did not consider the government automatically suspected returnees of being LTTE just because they had sought asylum. The applicant responded that he agreed not everyone had been imputed with this, but in his case he had already been suspected of it.
65. I noted his evidence that his wife and children were living in Colombo and his wife was earning an income there and there was a Tamil community in Colombo. I suggested to him that he did not need to go back to [Region 1]. He was an enterprising person who had never been harassed outside [Region 1] and there appeared to be no reason why he would be harassed in Colombo and why he could not settle there. He responded that if they suspected him in Colombo he would be targeted.
66. Invited to add anything further he wished he said that he had tried to remain in Sri Lanka with his family on two occasions. He had been unable to live peacefully there. That was why he had left. He could not live without fear there.
67. The applicant's representative made oral submissions. He submitted firstly that it should not be assumed that the death of the girl [in Region 1], which had led the applicant's wife to leave there, had occurred only for criminal reasons. The reasons for the death were unknown and the applicant could not be expected to know what they were. He just knew his wife was sufficiently frightened by this incident to move to Colombo.
68. Secondly he submitted of the applicant's returns from India to Sri Lanka that, while he had had no problems at the airport, shortly after arriving in [Region 1] he had been in trouble. It was not known why he was but it was significant that it was [armed forces] intelligence, in other words the authorities, that had suspicions about him in relation to the LTTE. His real fear arose from being marked out already, and he could not be sure the authorities would not resume their interest in and mistreatment of him.

69. Thirdly his well-founded fear of being persecuted was not restricted to [Region 1]. He had lived in the Vanni, now under government control, Jaffna city and [Region 1]. It was the North West and the East where he was also at risk potentially.
70. Fourthly, in relation to relocation, he submitted that, as the potential persecutors were the authorities, the question of whether relocation was reasonable was not relevant. In a country the size of Sri Lanka, if he went to Colombo or somewhere further south he could still be found. It was true his wife and children had been safe and moved to Colombo, but the authorities had shown in [Region 1] that he was the person of principal interest to them. Thus if he were to return to Sri Lanka and be subject to the control of the authorities they may harass him.
71. For the submissions relating to Complementary Protection, he referred the tribunal to the existing written submissions.
72. The applicant submitted a letter from a pastor in Jaffna ([name deleted: s.431(2)], [church deleted: s.431(2)], undated, unsigned). The author described the applicant as a "baptised believer" and a member of this church. The applicant had told the author that he had suffered a lot of hardship and had gone to India in fear for his life. Asked about this letter the applicant readily confirmed that the author just knew of the applicant what the applicant himself had told him. The applicant also confirmed that, while his wife and children had converted to Christianity, he himself had not yet done so. He made no claims to fear harm in relation to this issue.

#### Evidence from other sources

73. Sri Lanka has been scarred by a long and bitter civil war arising out of ethnic tensions between the majority Sinhalese and the Tamil minority in the north and east. After more than 25 years of violence the conflict ended in May 2009, when government forces seized the last area controlled by Tamil Tiger (LTTE) rebels, but recriminations over abuses by both sides continue (2012, BBC News South Asia, Sri Lanka profile, 23 November, <http://www.bbc.co.uk/news/world-south-asia-11999611>, accessed 27 November 2012).
74. The growth of assertive Sinhala nationalism after independence fanned the flames of ethnic division, and civil war erupted in the 1980s against Tamils pressing for self-rule. Army and Tamil separatists fought a long conflict involving air raids, roadside blasts, suicide bombings and land and sea battles. Most of the fighting took place in the north, but the conflict also penetrated the heart of Sri Lankan society, with Tamil Tiger rebels carrying out devastating suicide bombings in the capital Colombo in the 1990s. (ibid)
75. The violence killed more than 70,000 people. International concern was raised about the fate of civilians caught up in the conflict zone during the final stages of the war, the confinement of some 250,000 Tamil refugees to camps for months afterwards, and allegations that the government had ordered the execution of captured or surrendering rebels. (ibid)
76. A UN report published in 2011 said both sides in the conflict committed war crimes against civilians. The Sri Lankan government rejected the report, describing it as biased (ibid)
77. In December 2012 the UNHCR identified current "Risk Profiles", in Sri Lanka. These included "Persons Suspected of Certain Links with the Liberation Tigers of Tamil Eelam (LTTE)". The report stated that, at the height of its influence in Sri Lanka in 2000-2001, the

LTTE controlled and administered 76% of what were now the northern and eastern provinces of Sri Lanka. Therefore all persons living in those areas, and at the outer fringes of the areas under LTTE control, necessarily had contact with the LTTE and its civilian administration in their daily lives. Originating from an area that was previously controlled by the LTTE did not in itself result in a need for international refugee protection in the sense of the 1951 Convention and its 1967 Protocol. However, previous (real or perceived) links that went beyond prior residency within an area controlled by the LTTE continued to expose individuals to treatment which might give rise to a need for international refugee protection, depending on the specifics of the individual case (UN High Commissioner for Refugees 2012, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, 21 December 2012, HCR/EG/LKA/12/04, <http://www.unhcr.org/refworld/docid/50d1a08e282.html>, accessed 2 January 2013) The nature of these more elaborate links to the LTTE could vary, but might include people with the following profiles:

- 1) Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what were now the northern and eastern provinces of Sri Lanka;
- 2) Former LTTE combatants or “cadres”;
- 3) Former LTTE combatants or “cadres” who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, “computer branch” or media (newspaper and radio);
- 4) Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
- 5) LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE;
- 6) Persons with family links or dependent on or otherwise closely related to persons with the above profiles.

78. The report referred to information documenting cases of mistreatment and torture of women and men in detention (police custody or other forms of detention), for reason of their or their family members’ alleged former links with the LTTE. Killings had been reported which appeared to be politically motivated, targeting persons believed to be LTTE sympathisers. Sexual violence, including but not limited to rape, against Tamil men in detention had also been reported recently, including reports of cases perpetrated in the post-conflict period. Persons of the above profile were, depending on the individual circumstances of the case, likely to be in need of international refugee protection on account of their (perceived) political opinion, usually linked to their ethnicity (ibid).
79. The report also noted that within these risk profiles there was an ethnic dimension to vulnerability. Whereas persons belonging to the Sinhalese majority might fall within them, generally members of the minority Tamil and, to a lesser extent, Muslim communities were reportedly more often subjected to arbitrary detention, abductions or enforced disappearances. (ibid).
80. The International Crisis Group has observed that “The discrepancy between what UN and humanitarian agencies are saying in public and what those working with the displaced – both Sri Lankan and international – will say in private is striking” (ICG 2010, *Sri Lanka: A Bitter Peace*, Asia Briefing no.99, 11 January, p.8

[http://www.crisisgroup.org/library/documents/asia/south\\_asia/sri\\_lanka/b99\\_sri\\_lanka\\_\\_\\_a\\_bitter\\_peace.pdf](http://www.crisisgroup.org/library/documents/asia/south_asia/sri_lanka/b99_sri_lanka___a_bitter_peace.pdf) – accessed 13 January 2010).

81. The Freedom from Torture submission to the UN Committee Against Torture concluded, based on evidence in medico-legal reports, that “torture perpetrated by state actors within both the military and police has continued in Sri Lanka after the conflict ended in May 2009 and is still occurring in 2011.” It also found that those at particular risk of torture included Tamils who had an actual or perceived association with the LTTE. The law prohibited arbitrary arrest and detention but in practice such incidents frequently occurred. In the east and the north military intelligence and other security personnel, sometimes working with armed paramilitaries, were responsible for the documented and undocumented detention of civilians suspected of LTTE connections. Detention reportedly was followed by interrogation that frequently included torture. There were reports that detainees were released with a warning not to reveal information about their arrest or detention, under the threat of rearrest or death. Widespread impunity persisted, particularly for cases of police torture, corruption and human rights abuses. Reports continued throughout 2011 of army registrations in the north. Tamils throughout the country, but especially in the north and east, reported frequent harassment of young and middle-aged Tamil men by security forces and paramilitary groups (2012, US Department of State, 2011 Country Reports on Human Rights Practices, Sri Lanka, 24 May).

[Country Information on Region 1 deleted: s.431(2)]

82. [Reference deleted: s.431(2)].

83. [Reference deleted: s.431(2)].

84. Of the EPDP, UNHCR notes that paramilitary groups had been accused of torture, extrajudicial killings, kidnapping for ransom and extortion. Pro-government paramilitary groups including the EPDP continued to operate and were reported to perpetrate serious human rights violations and engage in criminal activities such as extortion, attacks, kidnappings and ransom collection. The EPDP was reported to be primarily active in Jaffna in the north as well as in Mannar, Vavuniya and Colombo.” Several reports indicated that there were still close links between it and government security forces (UNHCR 2012).

Vanni

85. The Vanni is a commonly used term for the country’s northern former war zone. For years the Vanni was cut off from the rest of the country. It was the main battleground during two and half decades of civil war, as the LTTE rebels fought successive governments (2012, “Analysis: Sri Lanka’s long road to reconciliation”, Integrated Regional Information Network (IRIN) - United Nations, 9 November <http://www.irinnews.org/Report/96737/Analysis-Sri-Lanka-s-long-road-to-reconciliation>, CX298890). The Vanni region was under LTTE control until 2009. The entire population was displaced from this region during the final phase of the war. The region is now under the control of the SLA (2011, Transcurrents, “Threats, harassments and restrictions on former detainees and their families in Vanni”, CX299878, 12 March, <http://transcurrents.com/news-views/archives/424>).

Exit procedures at the airport in Colombo

86. A UK Home Office COI report cites an August 2008 letter from the British High Commission (BHC) in Colombo which notes the lax security at Colombo Bandaranaike Airport and states that there are “concerns about corruption amongst staff at all levels, the quality of the staff conducting checks, screenings and searches, and the amount of training that they receive”. The BHC also reported:

As far as we have been able to establish, Immigration officers are notified [of bail/reporting conditions] only when court decides to impound the suspect’s passport or an arrest warrant is issued, and there is no other mechanism to ensure that the Immigration Officers are aware of such instances. Apart from these Court powers, Immigration Officers have no power in law to prevent persons embarking. The other method, which is rare and case specific, is that the State Intelligence Service (SIS) can inform Immigration Officers of individuals suspected of terrorist activity and those on a wanted list. Without court sanction the Immigration officers are powerless to put an individual in detention if they are otherwise satisfied that they have a right to enter or live in Sri Lanka (UK Home Office 2009, *Country of Origin Information Report: Sri Lanka*, June, Section 33).

87. This remained the case in 2011 (UK Home Office 2011, *Country of Origin Information Report – Sri Lanka*, 4 July, pp.142-144).
88. The UK Home Office reported in 2009 that the Department of Immigration & Emigration had access to an alert list which contained “information relating to court orders, warrants of arrest, jumping bail, escaping from detention as well as information from Interpol and the SIS computer system” There was an alert system on the DIE database based on this list which indicated that staff must refer the passenger to the police Criminal Investigations Unit (CID) or the SIS, although it did not provide any detail on the reason for the alert (UK Home Office 2009, *Report of Information Gathering Visit to Colombo, Sri Lanka*, UNHCR Refworld website 23-29 August, p.7 <http://www.unhcr.org/refworld/docid/4ae066de2.html> – accessed 24 August 2011). Nevertheless the same source noted in April 2009 that “there is no firm evidence that everyone who has ever been detained by the police or army is likely to be on the database” (UK Home Office 2009, *Operational Guidance Note – Sri Lanka*, April, p.14; Immigration and Refugee Board of Canada 2010, *LKA103344.E – Sri Lanka: Security controls at the international airport and ports*, 28 January).

#### Returnees

89. In August 2009 the UK Foreign and Commonwealth Office undertook a substantial survey of the views of a number of commentators on the situation at Colombo airport with regard to the manner in which Tamil returnees were processed. The survey reported as follows:

Sources agreed that all enforced returns (of whatever ethnicity) were referred to the Criminal Investigations Department (CID) at the airport for nationality and criminal record checks, which could take more than 24 hours. All enforced returns were wetfingerprinted. Depending on the case, the individual could also be referred to the State Intelligence Service (SIS) and / or Terrorist Investigation Department (TID) for questioning.

Anyone who was wanted for an offence would be arrested. Those with a criminal record or LTTE connections would face additional questioning and may be detained. In general, non-government and international sources agreed that Tamils from the north and east of the country were likely to receive greater scrutiny than others, and that the presence of the factors below would increase the risk that an individual could encounter difficulties with the authorities, including possible detention:

- outstanding arrest warrant
- criminal record
- connection with LTTE
- illegal departure from Sri Lanka
- involvement with media or NGOs

- lack of an ID card or other documentation (UK Foreign and Commonwealth Office 2009, Report of Information Gathering Visit to Colombo, Sri Lanka 23-29 August 2009, August, p.5).

90. According to a more recent DFAT report, (whose sources were primarily Sri Lankan government agencies), the government had procedures for identity and security checks at the airport for all returnees, regardless of the circumstances of their departure from Sri Lanka. This involved the returnee being interviewed by the Department of Emigration and Immigration (DIE), State Intelligence Service (SIS) and Police Airport Criminal Investigation Department (CID). Post were authorised to be present for interviews carried out with returnees on their arrival at the airport. DIAC or the International Organisation on Migration would sit in on interviews depending on whether the person returned voluntarily or involuntarily. If a person was known to be a non-voluntary returnee, Sri Lankan immigration authorities had a standing agreement to refer the person to both SIS and Police at the airport for questioning. There were standardised procedures for identity and security checks at the airport for returnees. Tamils returning to Sri Lanka were subject to the same entry procedures as other citizens. All arrivals at the airport were screened against an immigration database. Law enforcement agencies, including intelligence agencies, might place alerts against names in the immigration watch-list. A person with an alert against his or her name would be subject to further questioning at the airport. Where a person was not on the watch-list but was otherwise identified to be of security interest, such as if the person had been “removed/deported”, s/he was likely to be interviewed by Police CID, the SIS or both, regardless of ethnicity. The returnee would be checked against SIS intelligence databases. In the police interview, checks against police databases would be made, fingerprints would be taken and the person photographed. It would be common for the person to be held until checks were made with their local police station. (DFAT 2012, *DFAT Report 1446 – RRT Information Request: LKA40999*, 22 October).
91. In 2011 Amnesty International stated that "Sri Lanka nationals returning to the country after living abroad are at risk of being arbitrarily detained on arrival or shortly thereafter. Sri Lanka nationals who are failed asylum seekers are especially at risk and are likely to be interrogated on return" (Amnesty International, Sri Lanka: Briefing to Committee Against Torture, October 2011, “Torture and Ill-Treatment, Risk of Torture for Failed Asylum Seekers”).
92. The UK-based Freedom from Torture reported in 2011 that 35 people who had returned to Sri Lanka after a period abroad, regardless of whether they had left Sri Lanka legally or not, were detained and tortured. In five of these cases the episode of detention and torture occurred over a year and up to 7 years after return. However in nine cases the individual was detained within days, weeks or months of their return. Of these, six were detained in Colombo, either from their home, at checkpoints or from a lodging house. Others were detained at checkpoints elsewhere in the country or directly from the airport upon arrival (2011, Freedom from Torture, "Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka", 7 November).
93. A report by ACAT-France in 2012, with the Asian Legal Resource Centre, stated that torture was used by security forces across the country for multiple purposes (2012, ACAT-France, "Torture in Sri Lanka", executive summary, 12 June). Human Rights Watch reported in early 2012 that some Tamils who had been deported to Sri Lanka from the UK had been tortured soon after arrival. One was arrested by the CID soon after arriving in Colombo. Another was arrested at the airport and detained for a month by the CID. Another was tortured at police headquarters in Colombo until he agreed to sign a document in Sinhala, a language he did not

understand. Soldiers told him he had to work as an informer for the army to identify former LTTE cadres. Human Rights Watch noted that British officials had said they did not have the capacity to monitor the safety of returnees and that returnees may fear retaliation from the Sri Lankan government if they contacted the UK embassy. Human Rights Watch observed that meeting returnees at the airport and giving them a phone number had not prevented them from being wrongfully arrested and mistreated (2012, "UK: Halt Deportations of Tamils to Sri Lanka", Human Rights Watch, 24 February).

94. A respected Colombo human rights advocate (Ruki Fernando) was quoted in 2012 as saying that returnees were vulnerable to "persecution" by authorities - some more than others. 'Tamils broadly, but people who live or travel in the north, those people who had contact with the LTTE ... Even minor contact or if they were forcibly recruited, that person could face persecution. And anybody who is critical of the government'. He added that "there is a misconception about the ground situation in Sri Lanka. People don't know about the torture incidents by police, about the intimidation and threats from military, about the white van disappearances. This is all still happening" (Sujith, A. 2012, "Lure of good life dashed on Nauru's shores", 29 September). This article reported that all 18 Sri Lankans who had abandoned their asylum claims in Australia, three of whom were Tamils, were questioned at Colombo airport on arrival, some for up to five hours, by "Sri Lankan immigration officials, uniformed police, and the Criminal Investigation Department, over their reasons for going to Australia, their methods for getting there, and their decision to come back". This report also alleged that on a previous occasion two returning Sinhalese brothers had spent two years in jail awaiting trial, while a Tamil man had been arrested, interrogated and hung upside down and beaten with batons by police who alleged he had links with the separatist Tamil Tigers. (ibid).
95. UNHCR (2012) have noted that some sources report recent cases of former Sri Lankan ("in particular Tamil") asylum-seekers who were allegedly detained and ill-treated or tortured after having been forcibly returned to Sri Lanka upon rejection of their asylum claims or who voluntarily returned to Sri Lanka. The sources of this information were those referred to above - Human Rights Watch, Freedom from Torture, Amnesty International and the Asian Human Rights Commission. UNHCR added that there was no systematic monitoring after arrival in Sri Lanka of the treatment of Sri Lankans who were forcibly returned.
96. It is relevant to note that UNHCR (2012) also observes, in this case of returnees voluntarily repatriated, that they underwent a questioning session by Immigration Officials for 1-2 hours upon arrival, followed by security interviews by the SIS, which could take up to five hours. UNHCR was not permitted to remain in the interview room during this process. Although all these individuals had been allowed to proceed from the interviews to their destinations, UNHCR post-return monitoring data indicated that in 2011, upon arrival in the village of destination, "75% of the refugee returnees were contacted at their homes by either a military (38%) or police (43%) officer for further 'registration' 26% of these returnees were again visited at home for subsequent interviews, with a handful receiving a number of additional visits by the police or military".
97. A UK Home Office "Sri Lanka Policy Bulletin" issued in October 2012 observed that there was no evidence from UNHCR of any risk on return to Sri Lanka for Tamils *per se*. There was evidence also that the LTTE operated from India where they were listed as a terrorist organisation, yet despite the large number of Tamils from Sri Lanka in India and the evidence from UNHCR of questioning by the CID, there had been no reported detentions. This bulletin included the UK Border Agency's acceptance that torture did exist in Sri Lanka and that



certain categories of individual "by the fact of their profile, or by accumulative risk factors, might be at risk". The agency did not accept that Tamils in general would be at risk on return to Sri Lanka, particularly given that the reports of Tamils having been tortured provided by Human Rights Watch and Freedom from Torture accounted for a "minute fraction" of the total returns from the UK to Sri Lanka in the previous three years (2012, Country Specific Litigation Team, Operational Policy & Rules Unit, Strategy & Intelligence Directorate, UK Border Agency, October).

98. A 2012 South Asia Terrorism Portal report noted that "[a] cause of concern for Sri Lanka through 2011 were the continuous reports of the overseas activities of cadres and sympathizers of the LTTE. Sri Lankan politicians, Armed Force officers, diplomats and intellectuals have been repeatedly emphasizing the clandestine agenda of overseas elements of LTTE and the potential threat they constitute to Sri Lanka" (SATP, 2012, "Sri Lanka Assessment 2012" <http://www.satp.org/satporgtp/countries/shrilanka/index.html>, accessed 19 November 2012). In another 2012 report SATP noted that Sri Lanka was planning to strengthen security in the country to prevent any resurrection of the vanquished LTTE, according to Defence Secretary Gotabhaya Rajapaksa. He observed that the LTTE, although defeated in the country, was still active overseas and groups sympathetic to the LTTE cause were attempting to revitalise their movement at international level. Though many LTTE-friendly groups and individuals functioned overseas separately, they had one common objective of dismembering Sri Lanka and establishing a separate State. The overseas LTTE groups trying to revive the vanquished terror group in Sri Lanka had used the personalised services offered by the postal authorities in Britain, France and Canada to make a mockery of those States where the terrorist group remained as a banned organisation. It noted that in March 2012 "media spokesperson for Sri Lankan Australians in Melbourne, Nagesha Wickramasuriya said that separatist activists and LTTE supporters are attempting to lobby support from federal Parliamentarians in Australia into making a statement and to pressurize the UNHRC to take action against Sri Lanka. These activists are trying to mislead politicians across the globe and are posing as human rights activists. These elements have also started a fund raising campaign ... The amount of money they are collecting annually is staggering. 'There is a misconception amongst some Sri Lankans that the LTTE have been finished. They are active in American, Canada, France, and London and even in Australia,' said Wickramasuriya" (SATP, Sri Lanka Timeline, <http://www.satp.org/satporgtp/countries/shrilanka/timeline/index.html>, accessed 19 November 2012).

## **FINDINGS AND REASONS**

99. Although the applicant does not have in his possession a Sri Lankan passport, his evidence indicates a familiarity with Sri Lanka consistent with his having been a long term resident of that country. In the absence of any evidence to the contrary, I am satisfied, and find, that the applicant is a national of Sri Lanka and of no other country.
100. I accept that he is ethnically a Tamil.
101. The applicant claims to have been born in Jaffna. That is consistent with the place of birth recorded in the photocopy of the identity page of his passport. I accept that he was born in Jaffna. Although there is no evidence apart from his own assertions I accept that he lived in Kilinochchi from [years deleted: s.431(2)]. He has provided medical records of "extensive wounds" [details deleted: s.431(2)] caused by "shell blast", sustained [in] 1997, and that he was treated in [the north]. I have seen significant scarring to [details deleted: s.431(2)] I

accept that he was injured, as he claims, during fighting between government forces and the LTTE. There is no evidence to suggest that he was an LTTE combatant and I accept that he was not. He has provided no documentary evidence that he was then the manager of a shop in the Vanni until 2002. However it is possible that he may have been and I propose to accept that he was. I am satisfied that he then ran his own small business in [Region 1].

102. Having regard to the evidence of [heavy fighting] [near] [Region 1] in late 2007, and the evidence of steps by security forces in early 2008 to secure [Region 1], it is highly plausible that many Tamils living [in Region 1] at the time would have been questioned by the security forces. The applicant has claimed that he was detained and interrogated for several hours in January 2008, and that his assailants told him they knew he was from the Vanni and that he had been wounded, on the basis of which they accused him of being a member of the LTTE. I agree with the delegate that this was likely to have been a "[expedition]", but am satisfied that his background may have led to his being treated with greater suspicion than some other residents.
103. I accept that the applicant was released after only a few hours, from which I infer that there were no immediate suspicions that he was involved with the LTTE. However I am satisfied that there was some residual suspicion about him by the [armed forces] at this time, as I accept that his home was searched for a weapon shortly after this. I am also satisfied that he was questioned at his home and at his shop frequently subsequently, again suggesting a continuing residual suspicion.
104. He claims that, after the end of the war, in late 2009 or early 2010 the Sri Lankan Army commenced investigations into Tamils [in Region 1], and that he was sufficiently fearful about this to return alone to India. I do not consider it implausible that the army were conducting these investigations at the time. In the absence of any other obvious reason for his decision to leave his business and home and travel to India, I accept that he feared being picked up again.
105. He claims that he returned to Sri Lanka around mid-2010 and shortly after was required to report to the CID in [Region 1], by whom he was accused of knowing where the LTTE had hidden weapons. Asked if they had told him why they had singled him out (along with one other person), he said they had told him it was because they suspected he was connected with the LTTE. He understood that the CID had new leadership at the time and that this renewed investigation was prompted by that change. Whether or not that is so, the fact that the CID must have been given his name by the SLA or [organisation deleted: s.431(2)] indicates that information about his background and previous suspicions about him had been passed on to them by the security forces [in Region 1].
106. There is abundant evidence on the basis of which I am satisfied that he would have been treated much more harshly if the authorities had any real evidence against him or indeed any strong suspicions about his support for the LTTE. I accept that they did not. However I do accept that there was a record held by the CID and the [armed forces] about him, and that the CID photographed him when they questioned and assaulted him in 2010.
107. I am satisfied that the applicant travelled in and out of Sri Lanka in 2008, being before the end of the war, and again in 2010, after it had ended. In some countries the ability to exit the country using one's own passport through an international airport would be a relatively reliable test as to whether an individual was of any adverse interest to the authorities. However the evidence indicates that Sri Lanka does not fall into this category. Firstly I accept

of exit procedures that the security at the airport was generally very lax at the time the applicant first left the country, and similarly when he left subsequently (UK Home Office 2009). I also accept that he was aware of that. Secondly, he did not fall into any category of person who would normally be prevented from departing. He was not on bail or reporting conditions, and was not suspected of terrorist activity by the State Intelligence Service or on a wanted list, a circumstance which in any case reportedly only rarely resulted in immigration officers at the airport being notified (UK Home Office 2009; UK Home Office 2011). Further, there is no reliable evidence that every person who was detained by the police or army was likely to be on the DIE database at the airport (UK Home Office 2009 p.14; IRBC 2010). For these reasons I do not infer from the applicant's ability to openly exit Sri Lanka unhindered twice that he was not on CID and other official records [in] [Region 1].

108. As to his re-entry to Sri Lanka on two occasions, I accept that he did so with his own passport and that he was screened against an immigration database like anyone entering the country. According to DFAT (2102) subsequent checks with the CID and/or the SIS are triggered on arrival when a person is on the watch list, or is otherwise of security interest, an example of which being a deportee from another country. In contrast I have accepted that the applicant was not on a watch list and that there would have been nothing to indicate that he was of security interest. I am satisfied that he appeared to be an ordinary citizen returning willingly from India.
109. As to his willingness to travel in and out of the country via the airport, he gave the impression that he did not consider at that time that this might pose any risk to him. The above evidence from other sources bears out that this was a realistic view. Therefore I do not infer from his willingness to do this that he did not have the claimed problems [in Region 1].
110. In short I do not consider the applicant's willingness and ability to exit and re-enter Sri Lanka through the airport in Colombo casts doubt on his claims to have been under some relatively minor suspicion [in Region 1].
111. I accept that his passport is not in his possession
112. In my view the applicant could probably have safely returned from India to Sri Lanka and relocated to Colombo with his wife. However, there are now additional risk factors for him which did not exist previously, if he is deported from Australia to Sri Lanka. Those factors arise from the evidence from DFAT (2012) that people who have been deported from Australia are routinely regarded as being of "security interest", so that under these circumstances the applicant would likely be interviewed by the Airport Police CID, the SIS or both. This would involve a check against police databases.
113. I have accepted that the applicant was born in, and has spent some years working in, areas controlled by the LTTE. I accept, as UNHCR has observed, that originating from an area that was previously controlled by the LTTE does not in itself give rise to a well-founded fear of being persecuted because of, for example, a political opinion imputed to the individual. I have regard, however, to UNHCR's further observation that "previous (real or perceived) links" that went beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment which might give rise to a need for international refugee protection, depending on the specifics of the individual case. I do not consider it likely that the applicant will face serious harm if he is returned to Sri Lanka, but because there are other factors in his background I do not consider the chance remote.

114. Those factors are:

- Tamils from the north and east of the country are generally likely to receive greater scrutiny than others (UK Home Office 2009) and are assumed to have had contact with the LTTE and its civilian administration in their daily lives (UNHCR 2012).
- There may be some suspicion about why the applicant has spent so long abroad, particularly given that he has been in India and Australia for a total of almost 2 years in a period when the Sri Lankan government is increasingly concerned to monitor and prevent support for the LTTE among the Tamil diaspora (SATP 2012; UNHCR 2012)
- Of greatest concern, the routine check by the police CID of its own records will very likely reveal the suspicions about the applicant [in Region 1] held by both the CID and the SLA as recently as 2010
- Against this background his extensive scarring may add to suspicions that he was not an innocent victim but was an LTTE cadre in the past, a suspicion already voiced by the SLA, although plainly at the time not seriously held

115. I am satisfied that, if the applicant were to be seriously harmed by the authorities because of these factors, the reasons would be a combination of political opinion imputed to him and his race. As noted by UNHCR these reasons are generally linked.

116. The evidence indicates that almost all Tamils returned to Sri Lanka have been allowed to leave the airport after being questioned. Both UNHCR (2012) and DFAT (2012) indicate that their international observers are present at the airport and either present or nearby when interviews are being conducted. The Sri Lankan authorities have authorised this (DFAT 2012; UNHCR 2012) and would be highly unlikely to ill-treat any returnee while observed. For that reason, while I am satisfied that the authorities may want to conduct further investigations on the basis of the applicant's profile, I do not consider that he will be at risk immediately on his return.

117. However I note the evidence from UNHCR (2012) that in 2011 75% of voluntarily repatriated refugee returnees were subsequently contacted at their homes by either a military or a police officer for further 'registration' and 26% of them were later visited at home for subsequent interviews by the police or military.

118. I consider that an involuntarily returned Tamil would be at least as likely, or even more likely, to be visited by police or military than the voluntary returnees referred to by UNHCR. I am satisfied that he would be required to provide his intended address to the authorities at the airport and that he would be visited there by police or military. This is the point at which the applicant would be most vulnerable.

119. As to how he might be treated under these circumstances, it appears inappropriate to be sanguine despite the limited number of reports of harm to deported Tamils. Firstly, as Human Rights Watch has noted (in this case of returnees from the UK), there is no monitoring of individuals once they have left the airport and there is a disincentive to report subsequent abuses in the form of "retaliation" As Human Rights Watch has commented - meeting returnees at the airport and giving them a phone number had not prevented them from being

“wrongfully arrested and mistreated” (Human Rights Watch 2012). Secondly, the International Crisis Group has observed that UN and humanitarian agencies are not always frank in public about the situation (ICG 2010).

120. I have had regard to the following evidence from UNHCR (2012) and the U.S. Department of State (2012), which not only indicates the potential for serious harm to the applicant, but also highlights that mere suspicion of or alleged sympathy for the LTTE is sufficient to give rise to it:

- Tamils remain reportedly more often subjected to arbitrary detention, abductions or enforced disappearances
- Tamils are known to be mistreated and tortured in police custody or other forms of detention for reason of their alleged former links with the LTTE. Killings have been reported targeting persons believed to be LTTE sympathisers. Sexual violence against Tamil men in detention has been reported as having occurred recently

121. I find that that treatment, of which I am satisfied the applicant has a well-founded fear, amounts to persecution.

122. UNHCR expressed the view in December 2012 that, where the agent of persecution was the state itself or was associated with it, no relocation was possible in Sri Lanka as the agent of persecution would be able to pursue the individual throughout the country (UNHCR 2012). That is relevant to the applicant’s case, and I have therefore not considered relocation as an option for him.

123. For the above reasons I find that the applicant has a well-founded fear of Convention-related persecution.

## **CONCLUSIONS**

124. The Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore he satisfies the criterion set out in s.36(2)(a).

## **DECISION**

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