

071196773 [2007] RRTA 91 (22 May 2007)

DECISION RECORD

RRT CASE NUMBER: 071196773

COUNTRY OF REFERENCE: Sri Lanka

TRIBUNAL MEMBER: Jennifer Ellis

DATE DECISION SIGNED: 22 May 2007

PLACE OF DECISION: Melbourne

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

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).

The applicant, who claims to be a citizen of Sri Lanka, arrived in Australia in the early 2000s and applied to the then Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights.

The applicant sought review of the delegate's decision and the Tribunal, differently constituted, affirmed the delegate's decision. The applicant sought review of the Tribunal's decision by the Federal Magistrates Court and the Court set aside the decision and remitted the matter to the Tribunal to be determined according to law.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The matter is now before the Tribunal pursuant to the order of the Federal Magistrates Court.

RELEVANT LAW

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.

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 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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.

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.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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

CLAIMS AND EVIDENCE

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.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Sinhalese and English languages.

The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

Application for Protection

The applicant's claims were first outlined in answer to questions on the Protection Visa application form. He was then differently represented. The claims can be summarised as follows:

The applicant left Sri Lanka due to the death threats, significant detriment and selective harassment directed against him by the unruly elements of the SLFP (Sri Lanka Freedom Party) which is the main constituent of the UPFA, currently in power in Sri Lanka. He is an active member of the UNP (United National Party) and supported the UNP candidate Nimal Peiris. He claims that supporters of the UPFA approached him and requested him to support their candidate but he refused and they threatened to destroy him. He received anonymous telephone calls at work. He had to resign from his job. On one occasion he was bundled into a van at gunpoint and to a place where he was made to kneel and a gun was pointed at his head. He was threatened and bashed. When he regained consciousness he realised he was in a cemetery. He was told not to inform the police. He managed to go to a house and was helped and found out he was in City A. On another occasion, unidentified people came to his house and said they were from the police and needed a statement. They took him away in a vehicle and he realised that they were not police. The persons in the jeep started bashing him; they took him to a couple of houses and then they left him in a "lonely spot" whence he found his way home.

After the UNP lost the elections some people pretending to be police officers went to his place but he was not at home; he had moved to a relative's place in City B. He moved a number of times and stayed with friends for fear of serious harm. He had then to seek the assistance of a "lady whom he knew" to get out of the country under a different name. He came to Australia as the situation worsened because of the escalation of the death threats against him.

He fears he will be killed if he returns. The UFPA is capable of causing serious harm and death and he has no protection from the authorities. No action has so far been taken in respect of complaints of political harassment and threatening activities lodged by him following the elections. His fear of persecution arises because of his political opinion.

He also stated that he arrived in Australia in the early 2000s. [Information about the applicant's history has been deleted in accordance with s.431 as it may identify the applicant].

Application for Review

The applicant applied for review of the delegate's decision. In the early 2000s he cancelled the nomination of his authorised recipient.

The applicant sent the following statement to the first Tribunal:

[Information about the applicant's statement has been amended in accordance with s.431 as it may identify the applicant].

1. I am making this statement in order to supplement my claims already on record, in relation to persecution that I will face if I return to Sri Lanka. My previous claims remain true and relevant to my current claims as a refugee. I am currently the holder of a Bridging Visa,

2. I was born in City C, Sri Lanka in the late 1970s.

3. [Information about the applicant's history has been deleted in accordance with s.431 as it may identify the applicant].

4. I fear returning to Sri Lanka as a result of the political persecution I have documented in my initial statement. I have had an extensive involvement with the United National Party during my time in Sri Lanka. Because of this, I am a target for opposition parties and I have suffered persecution in the past. I joined the UNP because of our family for generations had been affiliated with this party and so it was logical for me also to actively support them. As a member of the UNP, I was able to help the poor people in my electorate, which for me was a very worthy thing to do. I strongly supported the important work of the UNP, as it was this party who provided the supply of good water for the Colombo district; constructed roads properly, provided access to electricity for remote places, organized playgrounds for children, and supplied gas instead of fire to cemeteries for the incineration of corpses. I also joined the UNP it was helpful to gain employment.

5. In Sri Lanka, I was very involved in the work of the UNP, which had singled me out as a strong and active UNP member. My role in the UNP was the organiser of Village E of Colombo district. [Information about the applicant's history has been deleted in accordance with s.431 as it may identify the applicant]. Additionally, I[sic] in charge of going to the poor people in the village on behalf of the UNP and assisting them to fill out forms which enabled them to have some asbestos sheeting for their houses. This sheeting was provided to all the people, regardless of political affiliation, if they were poor. In my role, I was very careful not to discriminate against anyone on the basis of political opinion - if they were poor, then I tried to provide them with what they wanted. I was also responsible for selecting children in need in my village so that they would be provided with all the necessary exercise books they required during their studies. This was done with the UNP's assistance, following the chief

organiser's advice. Another thing that I was in charge of in my village was overseeing the implementation of small pathways from main roads and putting signs on the paths.

6. [Information about the applicant's history has been deleted in accordance with s.431 as it may identify the applicant]. As part of this social club, we organised sporting events and other social activities for the young people of our area. Members of this club came from all political parties, not only members from UNP party but other factions all working together to develop the village. I was careful not to show any preference to people on political affiliation. Person 1 was a local government official who was very helpful in the development of my village. He was voted in by the people of my area. He also offered me a government position within the Colombo district but I could not accept this. This was something that all people who were active organisers of the UNP were offered. At this time I didn't want to accept it as I thought I could serve my people better without this.

7. I have numerous documentation which demonstrate the extent of my involvement with the UNP. [Information about the applicant's history has been deleted in accordance with s.431 as it may identify the applicant].

8. I was asked to contest the Council elections in the early 2000s as a candidate for the UNP but I was not able as I did not have the financial resources and so I recommended someone else.

9. From the early 2000s onwards, my problems with other political parties started. It was around this time that I started strongly supporting Person 7 as a candidate in the Local elections. In the lead up to the elections, I aided him through household campaigning for him and organised political meetings for him. As I was well-known and liked by the youth in my village, I was an influential figure in the community.

10. I want to clarify some of the Sri Lankan political situation mentioned in my initial statement. There are two elections in Sri Lanka, one for the President and the other for the Parliament. In Sri Lanka, the executive President has all the power. Although the UNP won the Parliamentary elections in 2001, and so gained the majority in Parliament, the real power rested with the President from the People's Alliance Party (coalition of SLFP and other parties). In 2003, the President took three important ministries under her power from the UNP; those were media, defence and interior affairs which included police.

11. I was approached by the UPFA in the early 2000s (a few months before elections) in order to support their candidate. A number of people came to me at first, requesting my support and offering in exchange to help me in politics. I think that the telephone calls, which I have mentioned in my initial statement, that I received at work were as a result of my refusal to endorse the UPFA's candidates. My strong support for the UNP generally and also specifically in these elections gave rise to my several incidents wherein I was persecuted. In the early 2000s I received lots of harassment calls abusing me and telling me I would be killed if I did not quit politics. Many people were trying to convince me not to be involved in politics as they feared for my safety. The manager of the company where I was employed also harassed me. He tried to undercut me and make work difficult for me. I think he did this for political reason. The people in my workplace knew about my political ties. The company also received telephone threats directed at me and were concerned about my safety. They thought I should stop work and look after myself. It was for these reasons that so I called the company and told them that I could not work there any longer. I was unemployed for a while and then eventually sought employment elsewhere.

12. It was in the early 2000s, the incident after my friend's party occurred. I was ambushed whilst walking towards my house. A car stopped me to ask for the address of someone and forced me into the car. There were a few people in the car. In the car, my attackers beat me and threatened to burn my house if I didn't stop politics. The beatings were so severe that I was bleeding from my gum and I feared for my life as I thought they would kill me. I did not know where they were taking me in the car. I have detailed what happened in my initial statement. Once they finished beating me, they abandoned me in what I soon realised to be City A. I then had to walk for several hundred metres in order to get help. The first house I approached would not open the door to help me however the people in the next house let me use their telephone to call my friend to pick me up. The friend who came to pick me up urged me to go to the police station. I did not want to go as I was afraid of what would happen to me if I did, as my attackers had directly warned me not to inform the authorities. I feared that they would carry out the threats to burn my house or attack me again and cut my legs and hurt my family. I did not go to the police as I knew that they didn't give any protection. The police tend not to want to get involved in political conflicts and I was more afraid of the consequences of informing them and the harm that would come as a result of this.

13. Another incident, which is also detailed in my initial statement, occurred whereby people came to my house and pretended to be the police. They said that they needed to take my statement so I had to go with them in their vehicle. Before long, I realised that these people were actually not the police but People Alliance supporter as they started to beat and punch me, hitting me with a leather belt. They tied me up, blindfolded me and took me into a house, where they continued to bash me. During the beatings, a person came into the house and told my attackers that it would be a sin to kill me. As a result of this man's intervention, they let stopped beating me. I do not know what would have happened had this man not come. My attackers then took me to an abandoned spot and left me there. Clearly, these attacks were politically motivated and are examples of how my political involvement has put me at risk.

14. The UNP lost the elections in the early 2000s. I was campaigning actively for the UNP during these elections. After this electoral loss, the situation got worse. I went to live with a family member several kilometres away for fear of my safety. I would still come to my village occasionally, in order to attend party meeting and assist the Party in other ways. I suspected that the UNP would lose the elections and so I was very afraid of what retribution I would receive from my political opponents. Indeed, the harassment increased after the elections. People came to my house to threaten me, but luckily I was in hiding already. I went from hiding straight to the airport upon receiving my Australian visa.

15. Even if I return now, I fear I will have to go into hiding again. My village is not safe for me. I telephoned home occasionally and I have heard from my mother the situation is bad there and that she still is very fearful for my safety if I had to return. Even since I have been in Australia, the family has received threatening telephone calls from my political opponents on different occasions. They knew that I was in Australia and they threatened that if I ever returned, they would find me and kill me. I fear if return now, they will still carry out these threats.

16. All of Sri Lanka is not safe for me. It is not possible for me to remain in hiding for long as the country is fairly small and it is easy for people to find out where people they are looking for are. It is therefore not safe for me to relocate to another area of Sri Lanka. There is a thriving underworld and it is common for people to pay the underworld to kill someone. A friend of mine, who had come to help me after I was beaten, has been killed as a result of his political involvement. He was a member

of UNP and a canvasser. Our roles within the party were similar and we worked closely together. He was getting into his car when he was killed. They took him to hospital and he died as a result of the wounds. As a result of the wounds my friend suffered greatly before his death. There was only conducted a brief investigation into his death. Common occurrence in political underworld for people to be killed in this manner. The police do not like to interfere in such matters. They fear that if they actually do their jobs properly, there may be political retribution from the party in power. Similarly, a powerful minister in the former UNP government is now in jail.. He is in jail as a result of corruption and he also attempted to influence the judiciary.

17. Whilst I never held an elected position within the UNP, nonetheless the work I did was so extensive that it has still placed me in a position where I am a target for the opposition. I was a known figure in my community and had clear associations with elected representatives such as Person 1. My association with Person 1 is such that I frequently visited him at City F and been in the company of Person 1 openly. My political opponents have seen me together with Person 1 and hence know about this connection. My alliance to the UNP was unwavering. If I were to return to Sri Lanka, I will still try to help the UNP in their campaigns from hiding. I do not think I can be too publicly involved as I fear for my safety.

18. I would like to say that in Sri Lanka the political situation is such, that no person who is involved in politics can be guaranteed their personal safety. My government cannot protect me as they cannot provide individual protection in cases like mine nor do they have any power to stop the organised crime. It has happened that people involved in politics have been assassinated publicly and there is little the authorities prevent this. This is why the Sri Lankan government is unable to protect me.

First Tribunal Hearing

The applicant gave oral evidence to the first Tribunal. The Tribunal refers to that Tribunal's decision where it sets out the applicant's evidence regarding his claims:

At the Tribunal hearing the applicant stated that he had been member of the UNP since the late 1990s and that the party does not give membership cards. He stated he did voluntary work in the area and in the early 2000s Person 1 asked him to contest the local council election but he did not have the financial resources to do this. The Tribunal put to the applicant the significant discrepancies between the different iterations of his claims in relation to dates, employers and employment periods, whether he had gone to the police or not, which in turn cast doubt on the veracity of those claims. The applicant replied that he wrote the story in his language and the translation had not been done. He came to know of the translation after he signed the statement in the early 2000s.

When asked what he thought would happen to him if he were to return to Sri Lanka he replied that they tried to kill him twice, in the early 2000s. When asked to explain who were the 'they' to whom he was referring, he stated that it is people from the PA (People's Alliance, a component of the UPFA coalition). He described the City A incident in the early 2000s where he was blindfolded, bashed and left near a cemetery and the incident a few months later where he was taken away by persons posing as policemen, again he was bashed and would have been killed until someone said not to kill him; he was taken near a hospital and told not to report this to the police if he wanted to stay alive.

The applicant described how the police can be bought and although the UNP was in power the executive power belongs to the President who is from the SLFP. He did not go to the police.

The applicant recounted the good works he had done for his village by his ability to obtain finance from the decentralised budget. He stated that he was a recruiter for the UNP and went from house to house; he worked mostly in the afternoon or weekends; he never held an official position in the UNP.

In the early 2000s FM held that the first Tribunal had failed to deal with the applicant's claim that a friend was murdered in circumstances where he had a similar role and profile to the applicant within the UNP and where that friend was associated with him because he had helped the applicant after he was beaten up on one occasion. Accordingly the decision of the first Tribunal was set aside and it was remitted to the Tribunal for reconsideration.

Proceedings before the Current Tribunal

By letter the applicant was invited to attend a hearing and to give oral evidence to the Tribunal. His representative requested that the hearing be adjourned and the hearing was adjourned until a week later.

The applicant's representative provided a submission in which it was stated that the applicant feared persecution on account of his political involvement with the UNP. It was stated that he had provided evidence in a clear and consistent manner describing incidents of serious past persecution and evidence from various people associated with the UNP. It was submitted that country information was consistent with the applicant's subjective fear and that the current human right situation in Sri Lanka was extremely poor and there were widespread human rights abuses. The coalition government was controlled by the UPFA which was the successor to the People's Alliance or PA which has been the main opposition to the UNP.

In relation to the applicant's credibility it was submitted that he had presented his case in a consistent manner and that any errors in his initial statement were as a result of his previous migration agent and the fact that the statement was not an accurate English translation of his original statement. It was stated that given the strength of the applicant's political views it was likely that he would engage in future political activities and it would be wrong to require him to repress his legitimate political activities in the future to avoid persecution.

The following documents were attached to the submission:

A reference from Person 1, stating that the applicant is an active member of the UNP and has been working as the area Organizer for City D electorate. It was stated that he was an ardent supporter of the UNP who had worked at the last election and as area Organizer but that identity cards were not issues to area Organizers;

A reference from Person 2, stating that the applicant was an active leader of the UNP and was involved at the last election and had received death threats;

A reference from Person 3, stating that the applicant was an active leader of the UNP and was involved at the last election and had received death threats;

A reference from Person 4, stating that the applicant was an active Member of the UNP and was politically victimized and threatened when the government changed in the early 2000s;

A reference from Person 5 stating that the applicant is an active member of the UNP and has been working as the area Organizer for City D electorate. It was stated that he was an ardent supporter of the UNP who had worked at the last election and that after the defeat of the UNP he had been the victim of death threats and harassment from opposition groups;

A reference from Person 6 stating that the applicant had contributed with projects for the UNP and was involved in the early 2000s election and that he had been subject to death threats;

The applicant told the Tribunal that his initial statement given to the Department had been translated from Sinhalese into English and contained inaccuracies. However his subsequent statutory declaration to the first Tribunal was accurate. He stated that he lived in Village E which was part of Colombo and that he came to Australia in the early 2000s because he had received threats and believed he would have been killed had he remained in Sri Lanka. He said his father was dead while his mother and siblings lived together in Colombo. He talked to them occasionally. He said after he left Sri Lanka his mother had received threatening phone calls. He said his family were all members of the UNP but not actively as he had been. His father had been involved but he had died in the early 1990s at a time the UNP was in government. The applicant told the Tribunal that his father had been actively involved with the UNP society within his place of employment.

The applicant told the Tribunal that he had finished his schooling in the early 1990s and had been employed since that time. He gave details of his subsequent employment details. [Information about the applicant's history deleted in accordance with s.431 as it may identify the applicant]. The applicant told the Tribunal that he joined the UNP in the late 1990s in the area where he lived and became an area Organizer in the early 2000s. His role was to distribute books to poor children, help poor families repair their houses, help repair roads and other infrastructure and ensure clean tap water to villages. In the early 2000s he was also involved with the UNP. Person 1 had given him his position as area Organizer and he used his weekends to fulfil this role.

The applicant told the Tribunal that his difficulties began in the early 2000s. He was asked to stand for the elections but could not because he did not have enough money and suggested Person 7 who he worked for. At that time the SPLF party put pressure on him to work for them instead and he refused. He started to receive threatening phone calls from people he assumed were organizers of the SPLF. He changed his telephone number and the calls stopped for about a month then resumed. He said that he was involved in Parliamentary and local elections in the early 2000s.

In the early 2000s he was still receiving threatening telephone calls and said that was because of his work for poor people in his village. [Information about the applicant's history has been deleted in accordance with s.431 as it may identify the applicant]. In the early 2000s he attended a friend's birthday party and was walking back to his house having been dropped off by friends when he was attacked by a number of people and put in a vehicle and left in a cemetery. He was then released and did not go to police because he had been threatened if he did so. He stopped work for a few months. He subsequently detailed the later incident in terms consistent with his statutory declaration. He said he believed that people from the same village who were organizers with the PA were behind the second attack.

The applicant told the Tribunal that in the early 2000s he was told that a friend of his, Person 8, who was also a provincial organizer in the UNP, had been shot. Person 8 had received the

same threatening phone calls and had worked as an area Organizer in the same district as him. He was injured. He was unable to speak as a result of his injuries and eventually died. Nobody had ever been charged with his death. [Information about the applicant's history deleted in accordance with s.431 as it may identify the applicant] He knew that person as well but he was not a friend of his. He said Person 8 had a very similar role to his as an area Organizer. Person 8 ran a small business and they had known each other for several years. He said deaths of organizers were most common just before an election and were generally not reported in the newspaper.

The applicant told the Tribunal that his election campaigning for the UNP began in the early 2000s when he went from house to house but often at night to avoid harassment. He said he participated in the largest campaign that was held in City D. The Tribunal asked the applicant why he had actively participated in the election campaign when he had previously been attacked twice. He stated that he did not like injustice and worked for poor people, that was his job. He said that in the first incident he had injuries to his lip and ear and was beaten on his spine but did not go to hospital because of the police units stationed in the hospital. He told Person 1 about the incident and he brought a doctor to his house to attend to the applicant. In the second incident he was beaten with a pole and his jaw was bruised but he did not seek any treatment. He showed the Tribunal how he still could not open his mouth properly. The Tribunal put to the applicant that Human Rights organisations had monitored the elections and said that they were relatively free of violence and he stated that the violence still occurred but was not reported in the press. He said whilst the violence was not as bad as in previous elections it still took place.

The Tribunal asked the applicant what he thought would happen to him if he returned to Sri Lanka. He stated that he would continue to perform his work for the UNP in trying to overcome poverty in the villages and that the same people would threaten him. He said Sri Lanka was a small country and would not be able to hide from them. He said there was still a civil war going on in Sri Lanka which meant that much of the police and defence forces were concentrated on Jafna and were unable to protect people like him in Colombo. He believed that he would be killed if he returned to Sri Lanka. The Tribunal asked him if he could relocate elsewhere and he replied that he did not think he should be asked to and that he would still continue on with the same political work elsewhere so would be at the same risk. He said the police were unable to protect him and they only really protected politicians.

The Tribunal put to him country information from 2001 that the UNP was four times more responsible for political violence than the PA and he responded that this was not the case in his village. The Tribunal also put to him that country information was that political violence was mainly confined to election times and his response that it may be more common then but his attacks had both occurred in the early 2000s and another election could be called at any time if the government dissolved parliament which was possible given the political situation.

The applicant's representative submitted to the Tribunal that parts of the initial statement and application were incorrect because they had never been interpreted back to the applicant when they were translated into English by the agent. He submitted that the Prime Minister and the president of Sri Lanka were currently both members of the UPFA or PA and it followed from that the authorities were controlled by those parties who were opposed to the UNP. He said the country information referred to above, from 2001, was out of date and not relevant today and that the UNP was not in power at the current time. He said that the violence that occurred to the applicant was in the early 2000s which was in the lead up time to the elections. He pointed out that the applicant's friend had died after the elections and it

could not be said that violence only occurred at election time. He said he would submit a copy of the transcript of the first Tribunal's hearing.

The applicant then added that after the UNP lost the elections a group of people pretending to be police came to his parent's house and checked the house searching for him. At the time he was staying at a family member's house and left for Australia in the early 2000s when he received the visa that he had applied for. He concluded that he had worked for the UNP and would continue to do so.

The applicant's representative submitted a copy of the transcript of the previous Tribunal hearing and the Tribunal received a copy of the sealed orders of the Federal Magistrates Court together with a CD enclosing the Departmental file.

COUNTRY INFORMATION

The United Nation Party (UNP) was founded in 1947 and claims to have 1.4 million members. It advocated the development of the country through free markets and inter-communal co-operation. The UNP formed government from 1947-1956 and from 1965-1970. In 1977 it secured a landslide victory, holding office for the next 17 years. The party lost power in 1994 to the People's Alliance (PA) led by Chandrika Kumaratunga, who is the current President, but regained power in the December 2001 elections under the leadership of Ranil Wickremasinghe (Country Information and Policy Unit, UK Home Office, *Sri Lanka Country Report*, October 2003, Annex A and B). It again lost power in the April 2004 general elections which took place after President Kumaratunga dissolved the Sri Lankan Parliament, following disputes between her and UNP Prime Minister Ranil Wickramasinghe regarding the peace process between the government and the Liberation Tigers of Tamil Eelam (LTTE) (*Early Violence in Sri Lanka poll*, www.bbc.co.uk, 27 February 2004 (CX90054)).

Politics in Sri Lanka is continuously marred by violence, particularly during election time when its intensity and frequency increases. As stated by Feizal Samath, a reporter for the Sunday Times:

Political Violence is not a new phenomenon in Sri Lanka but its scale and intensity have increased rapidly in recent years. Political analysts say political violence, especially during elections, has increased particularly after the birth of the bloody ethnic conflict in 1983 and two attempts by the JVP to oust the government. (The Sunday Times, 2000, *Never again those ugly scenes*, 14 May, \\NTSMEL\MELREF\INTERNET\SL Sunday Times\000514\plus7.html (Accessed 14/11/01))

In the same paper, Hiranthi Fernando reports that

Elections in Sri Lanka today are characterised by increasing violence against rival candidates and supporters, intimidation of voters, stuffing of ballot boxes and an intensified war for preference votes even between fellow party members. (The Sunday Times, 2000, *Clean politics pay dividends*, 15 October, \\NTSMEL\MELREF\INTERNET\SL Sunday Times\001015\news3.html (Accessed 14/11/01))

According to the Department of Foreign Affairs and Trade (DFAT) politics in Sri Lanka, particularly at the local government level, can be very vigorous and political violence crosses political boundaries (DFAT, 1996, Cable CL439, *Sri Lanka: Harassment of UNP Supporters:*

CIS Info Request LKA3920: Part A, (CX20894)) Members of both the UNP and the PA are known to have engaged in acts of political violence against each other and as part of their own internal struggles (DFAT, 1994, Cable CL36560, *Sri Lanka: Refugee Claims: Information request: Political Violence*, (CX1841)).) In February 1998 DFAT advised that its assessment in relation to political violence and the situation for UNP members and supporters had not changed since their last report in Cable CL439, referred to above. They advised that political violence takes place around election time and where it takes place other than at election time, it will be in retaliation to events associated with an election. In regard to ordinary supporters and officials, DFAT advised that such supporters and officials of political parties do not harass supporters and officials of other parties. Instead such actions are the work of thugs associated with particular politicians and both major parties are equally involved. DFAT reported that during that last year (1997) political violence had decreased because there had not been any elections in which the UNP and PA had been involved. (DFAT, 1998, Cable CL824, *Sri Lanka: Situation of UNP Members and Supporters – RRT Information Request LKA 21587 and 21591*, (CX29237)). In a more recent report on political violence, DFAT confirmed that such violence typically occurred around election time, mainly in the lead-up to voting, and ranges from ‘mischief to murder’, usually between groups putting up posters, banners and other political decorations and at large political rallies. It advised that the UNP was still the largest and best-organised political party in Sri Lanka, and some of the most prominent members of the Sri Lankan community were active supporters.

The Australian Department of Foreign Affairs and Trade (DFAT) advised in July 2003 that:

‘A.1 The incidence of political harassment or persecution in Sri Lanka is high. Though it peaks during election campaigns, politically motivated harassment is common at all times in the electoral cycle. There have been several recent reports of such harassment. It is likely that, if he was the target of persecution or harassment for his political beliefs in December 2001, the applicant could still be a target.

...

A.3 The operation of the police forces in Sri Lanka is often politicised. There have been recent reports of political figures interfering in police activities (to the point of entering police stations with armed supporters in order to threaten police).

A.4 Relocation would not necessarily present a large barrier to enemies that wished to target the applicant. If well-connected politically, the applicant’s enemies would not have great difficulty in tracing him.’ (DFAT Country Information Report No. 97/03, dated 23 July 2003, CX82788)

With regard to the availability of effective protection in relation to political persecution in Sri Lanka the Department had advised in 2001 that:

‘Our advice in the past has been that all citizens can avail themselves of the protection of law enforcement authorities. However, the reliability and efficacy of authorities in responding to or investigating complaints has been mixed.

Recent (very public) failures of police to respond to complaints are partly attributable to weaknesses of enforcement mechanisms but sometimes also linked to corruption or political pressure. There is a degree of politicisation of the police force in Sri Lanka. For example, during elections, police have been known to be used by the ruling party for political purposes and to turn a blind eye to acts of political violence against opposition parties.

Anecdotally at least, persons affiliated to opposition parties have occasionally found it difficult to obtain police protection or to access justice.’ (DFAT Country Information Report No. 243/01, dated 20 August 2001, CX56581)

In regard to whether the police support one or the other party around election time, DFAT advised that the expectation that the police force should support the government of the day is part of the political culture in Sri Lanka and that it was arguable that the police were sometimes reluctant to act in a way which would upset the government of the day because they were afraid of being ‘punished’ by being transferred to serve in a conflict area. They reported that in recent provincial council election, the police had been criticised for failing to take action against political thuggery. However, election monitors had also commended certain police officers for taking action against thugs (DFAT, 1999, Country Information Report No. 72/99, CX34305). More recently, DFAT confirmed that their advice in the past has been that all citizens can avail themselves of the protection of law enforcement authorities. However the reliability and effectiveness of authorities in responding to or investigating complaints has been mixed. They attributed such failures of the police to respond to complaints partly to weaknesses of enforcement mechanisms but also sometimes to corruption and political pressure. As in their report of 1999, they state that there is a degree of politicisation of the police force in Sri Lanka, which can manifest itself during elections when police have been known to be used by the ruling party for political purposes and to turn a blind eye to acts of political violence against the opposition (DFAT, 2001, Country Information Report No. 243/01, CX56581). The advice that all citizens can avail themselves of protection from the State was confirmed in the following response from DFAT dated 17 August 2004:

Our assessment is that Sri Lankan authorities are willing to provide protection for citizens or officials who are targets for possible attack. However, there is no guarantee that such protection would be effective. Throughout the war and the ceasefire, a number of officials (including in the police and army intelligence communities) have been killed. (DFAT Report 313, RRT Information request LKA23400)

According to Country Issues Paper May 2003, reporting on the political situation in Sri Lanka

During the parliamentary elections in 2001, violence and misconduct was widespread with the leading parties, the PA and UNP, accused of voter intimidation. The Sri Lankan army acted to prevent violence, including by elements of the LTTE in Tamil areas. The post election environment has witnessed a decrease in political violence with authorities taking an active role in pursuing individuals responsible for election related violence (Country Issues Brief, 2003, Sri Lanka Report – May 2003, CX79457).

The Centre for Monitoring Election Violence (CMEV) reported that after the December 2001 general elections, post election violence increased significantly compared to previous election of the 1970’s and early 1980’s. They reported that

Tables VI-X are self-explanatory, yet the story they tell marks a return to the earlier era of extensive post-election violence and revenge-seeking with impunity that even the more violent recent elections had eschewed. In the short space of one week after the election, a total of 422 incidents have been recorded by CMEV, of which as much as 259 (61.4%) are Major violations, including 08 Murders, 06 Attempted Murders, 20 acts resulting in Hurt, 07 in Grievous Hurt, 40 Assaults, 32 reports of Threat and Intimidation, 24 Robberies and last but certainly not least 122 acts of Arson [See

Figures 20 & 21]. The number of shops and houses burnt is most alarming since in the space of less than one week (and in a less than exhaustive coverage) this figure rivals the total for the entire five-week campaign (140). ...

The alleged perpetrators of the overwhelming majority of these incidents are supporters of the UNP who stand accused in 271 (64.2%), while the PA is allegedly responsible for 62 (14.7%) and persons of undeclared political affiliation for 82 (19.4%).

The UNP is allegedly responsible for over 4 times the number of incidents for which the PA stands accused... Thus, post-election violence reflects the mirror image of pre-election violence, with the party in power (or which just achieved access to power) wreaking the greatest damage.

CMEV reports indicate that, on the whole, the Police switched allegiance overnight, with many victims of post-election violence at the hands of UNP supporters being unable even to have their complaints recorded at police stations which prior to the election had been partisan towards the ruling People's Alliance! (Final Report On Election- Related Violence General Election 2001 - 5 th December 2001,' 2002, Centre For Monitoring Election Violence (CMEV), July (http://www.cpalanka.org/research_papers/CMEV_General_Election_2001.pdf - Accessed 16 December 2002 - Attachment 2).

The US State Department in its 2006 Background Note on Sri Lanka, describes the recent history of government in Sri Lanka (Site: <http://www.state.gov/r/pa/ei/bgn/5249.htm>):

The SLFP, the main party in the People's Alliance (PA) coalition, returned to power in 1994 for the first time in 17 years. The PA won a plurality in the August 1994 parliamentary elections and formed a coalition government with Chandrika Bandaranaike Kumaratunga as Prime Minister. Prime Minister Kumaratunga later won the November 1994 presidential elections and appointed her mother (former Prime Minister Sirimavo Bandaranaike) to replace her as Prime Minister. President Kumaratunga won re-election to another 6-year term in December 1999. In August 2000, Mrs. Bandaranaike resigned as Prime Minister for health reasons, and Ratnasiri Wickramanayaka was appointed to take her place. In December 2001, the UNP assumed power, led by Prime Minister Ranil Wickremasinghe. Chandrika Kumaratunga remained as President. In November of 2003, President Kumaratunga suddenly took control of three key ministries, triggering a serious cohabitation crisis. In January 2004, the SLFP and the JVP formed a political grouping known as the United People's Freedom Alliance (UPFA). In February, President Kumaratunga dissolved Parliament and called for fresh elections. In these elections, which took place in April 2004, the UPFA received 45% of the vote, with the UNP receiving 37% of the vote. While it did not win enough seats to command a majority in Parliament, the UPFA was able to form a government and appoint a cabinet headed by Prime Minister Mahinda Rajapaksa. Presidential elections were held in November 2005. Mahinda Rajapaksa became President, and Ratnasiri Wickramanayake became Prime Minister.

FINDINGS AND REASONS

In order to be a refugee under the Convention, it is necessary for the applicant to be outside of his country of nationality and for him to hold a well-founded fear of persecution for at least one of the five grounds listed in the Convention. The applicant claims to be a citizen of Sri Lanka and of no other country. He travelled to Australia on a valid Sri Lankan passport

and has made claims against no other country. Therefore for the purposes of the Convention the Tribunal has assessed his claims against Sri Lanka as his country of nationality.

The Tribunal had some concerns with the veracity of some of the documentary evidence which has been produced to the Tribunal in support of the applicant's claims, in particular certain of the letters from various government officials which are in almost identical terms. The Tribunal also noted that there are some discrepancies in the applicant's statements and subsequent evidence in relation to the details of his employment. However the Tribunal does not regard the differences as significant such as that they taint the applicant's general credibility in relation to his claims for a protection visa. The Tribunal accepts the claim that his first migration agent did not interpret to the applicant his statement that accompanied his application for a protection visa and that this explains some of these discrepancies.

The Tribunal found the applicant to be a truthful witness. He was able to expand upon his evidence and to answer the Tribunal's questions in a way which convinced the Tribunal that he was telling the truth about his past involvement in the UNP and the persecution he has suffered as a result. The Tribunal accepts, in particular, that the applicant has been involved in the UNP since the late 1990s and that he began to be threatened in the early 2000s after he took on a more prominent role, namely as area Organizer. The Tribunal accepts that the applicant was threatened, attacked and abducted on a few occasions in early 2000s by his political opponents in the PA or by thugs associated with his political opponents. The Tribunal accepts that the applicant was unable to obtain adequate protection in accordance with international standards from the Sri Lankan authorities, in particular the police, in relation to these incidents. The Tribunal accepts that the applicant's parents received threatening telephone calls after he left Sri Lanka. The Tribunal accepts that a friend of the applicant, namely Person 8, was murdered. Person 8 was not only someone with a similar profile as the applicant within the UNP but he was also someone with whom the applicant was associated.

The central issue before the Tribunal now is whether the applicant faces a real chance of serious harm amounting to persecution for a Convention reason if he returns to Sri Lanka. As stated above the Tribunal accepts that the applicant was attacked on few occasions in the early 2000s as claimed and that these attacks amounted to serious harm. The Tribunal also gives significant weight to the fact that other area Organizers for the UNP, one who was a friend of the applicant and who was involved in a similar way with the UNP, were murdered and that their deaths appear to have been politically motivated. The Tribunal notes the authoritative country information referred to above that political violence is common in Sri Lanka and that such violence is often the work of thugs associated with particular politicians. As referred to above, advice from the Australian Department of Foreign Affairs and Trade confirms that the operation of the police forces in Sri Lanka is often politicised in the manner described by the applicant. The Tribunal also accepts that since the applicant has been in Australia his parents have received threatening telephone calls from political opponents.

The Tribunal has considered whether it would be reasonable for the applicant to relocate to another part of Sri Lanka but finds that in such a small country this would not be reasonable in all the circumstances. The advice from DRAT confirms that relocation would not necessarily assist the applicant, given that his enemies may be well-connected politically (DFAT Country Information Report No. 243/01, dated 20 August 2001, CX56581; DFAT Country Information Report No. 97/03, dated 23 July 2003, CX82788). Moreover the Tribunal accepts the applicant's evidence that if he were to move elsewhere in Sri Lanka he would once again become involved in politics in the same manner as he was before he left Sri

Lanka. The Tribunal therefore accepts that there is no part of Sri Lanka to which the applicant could reasonably be expected to relocate where he would be free from the real chance of persecution which he fears.

The Tribunal accepts, therefore, that there is a real chance that, if the applicant returns to Sri Lanka now or in the reasonably foreseeable future, he will once again be subjected to persecution for reasons of his political opinion. The Tribunal considers that the mistreatment to which the applicant was subjected clearly amounts to persecution involving 'serious harm' as required by paragraph 91R(1)(b) of the Act in that it involves a threat to his liberty and significant physical harassment and ill-treatment if not a threat to his life. The Tribunal considers that the essential and significant reason for the persecution which the Applicant fears is his political opinion as required by paragraph 91R(1)(a) of the Act. The Tribunal further considers that the persecution which the Applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason. There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality, Sri Lanka. The Tribunal therefore finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154).

The Tribunal finds that the applicant is outside his country of nationality, Sri Lanka. For reasons given above, the Tribunal finds that the applicant has a well-founded fear of being persecuted for reasons of his political opinion if he returns to Sri Lanka now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the Sri Lankan Government and that he is not excluded from Australia's protection by subsection 36(3) of the Act. It follows that the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicant satisfies the criterion set out in paragraph 36(2)(a) of the Act for the grant of a protection visa.

CONCLUSIONS

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) for a protection visa.

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.

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 *Migration Act 1958*.

Sealing Officer's I.D. Iward