

**1103584 [2011] RRTA 1003 (22 November 2011)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1103584

**DIAC REFERENCE(S):** CLF2010/169520

**COUNTRY OF REFERENCE:** Sri Lanka

**TRIBUNAL MEMBER:** Charlie Powles

**DATE:** 22 November 2011

**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**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship (the delegate) to refuse to grant the applicant a Protection (Class XA) visa (the visa) under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Sri Lanka, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] November 2010 and applied to the Department of Immigration and Citizenship for the visa [in] November 2010. The delegate decided to refuse to grant the visa [in] April 2011 and notified the applicant of the decision.
3. 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.
4. The applicant applied to the Tribunal [in] April 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
  - owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. 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.
17. 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.

18. 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**

19. The Tribunal has before it the Department's file relating to the applicant (CLF2010/169520 - referred to below as D1). 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.

### **Visa application**

#### *Application forms*

20. The applicant provided the following information in support of his claims for protection with his visa application forms.
21. The applicant claims to be [Name A], born on [Date 1] in [Location 1], Sri Lanka. He claims to be of Tamil ethnicity and to be a Muslim. He also claims to speak, read and write Tamil. He claims to be a Sri Lankan citizen and not the citizen of any other country.
22. His father is deceased. His mother and [siblings] continue to reside in Sri Lanka.
23. He married in [Location 1] in 1989. His wife was born in [year deleted: s.431(2)] and is a Sri Lankan citizen. They have [a number of children], born [dates deleted: s.431(2)]. The applicant's wife and children currently reside in India.
24. The applicant worked as a self-employed [retailer] in Colombo (including, from 2005 to 2010, out of rented premises at [Location 2], in Colombo) and also in the [Location 1] area.
25. Between 2000 and 2005, the applicant lived at various addresses in [Location 3] and [Location 4] in Colombo. From 2005 to early 2010, he lived at [Location 2], Colombo and between April or May 2010 and May or June 2010 at other addresses in Colombo.
26. The applicant left Sri Lanka in May or June 2010 as the holder of a Sri Lankan passport. He travelled to Malaysia where he remained for several months. While in Malaysia, he contacted a people smuggler who retained his Sri Lankan passport and provided him with a false Malaysian passport in the name of [Name B].
27. The applicant then travelled to Singapore in approximately October 2010 and then travelled to Australia from Singapore, arriving in Australia [in] November 2010.
28. With his application, the applicant provided a statement dated [November] 2010 in English, made with the assistance of a Tamil telephone interpreter. In the statement, the applicant stated he was hospitalised on his arrival in Australia as a result of self-harm and that he was seeking protection in Australia because he fears for his life and had previously been targeted

in Sri Lanka. He stated he feared harm from the Sri Lankan Army (the SLA) and political factions in Sri Lanka because he is a Muslim Tamil and businessmen and stated that as a Tamil Muslim there was no protection available for him in Sri Lanka. He also stated that he intended to make a more detailed statement about his claims in the future.

29. He stated that he would attempt to obtain his Sri Lankan identity card and birth certificate.
30. The applicant appointed [name deleted: s.431(2)] (the representative), a solicitor and registered migration agent with [the representative's employer], as his migration agent and authorised recipient in relation to his visa application.
31. Departmental records (D1, folios 68 – 72) show that the applicant arrived in Australia on [a certain date in] November 2010 as the holder of a Malaysian passport in the name referred to at [26] above. The passport contained evidence of the grant of a [visa] granted on the basis of an intended [holiday] in Australia. The applicant held a return airline ticket Singapore to [City 1, in Australia]. Departmental officials at the [City 1] Airport noticed incongruities in the passport including entry and departure stamps for dates earlier than the date the passport was allegedly issued.
32. Departmental officials interviewed the applicant at the airport with a Tamil interpreter on the day of his arrival. The record of that interview (D1, folio 70) notes the applicant as providing a clear and concise response to all questions and stating that he was not suffering from any medical condition at the time of the interview. The applicant stated that he intended to travel to Australia [for a short stay; further details deleted: s.431(2)]. He was unable to explain why his passport contained stamps dated earlier than the date on which the passport was issued. He stated that he had travelled to India six months ago for a religious festival. The Departmental officials put to the applicant their intention to cancel the [visa] because of their assessment of the passport is being fraudulent. In response the applicant said again that he only wanted to stay for [a brief period] and return to Singapore.
33. The Department cancelled the [visa] on [that same day in] November 2010 under section 116(1)(d) of the Act. After being advised of the decision, the applicant was interviewed by the Australian Federal Police (the AFP) to whom he stated that his true identity was [Name C], born [Date 2], and that he was from Sri Lanka.
34. Departmental officials then arranged for the applicant's removal on a flight to Singapore scheduled to leave [later that same day]. According to Departmental records, the applicant was not removed on that flight due to "a self – harm incident" (D1, folio 68). It would appear the applicant was then detained at [Immigration Detention Centre 1].
35. [In] November 2010, the Department actioned an Interpol request in Singapore and Malaysia. According to a response to that request from Interpol Kuala Lumpur (D1, folios 74 – 75) a search of fingerprints provided by the applicant to the AFP matched a set of fingerprints held by Singaporean authorities for a [Name D], who was the holder of an Indian passport number [Document A] and who had a criminal record in Singapore.
36. [In] January 2011, the Department's Post advised the delegate that the Indian authorities could not retrieve any record with the passport number [Document A], that "the passport was issued before 1995 and that the Indian authorities may not hold the electronic record of the person. Their system retrieved around 21 records with the name [Name D]; however in the

absence of any further bio-details or photograph, it was not possible to establish any viable links."

37. [In] January 2011, the Department requested a fingerprint comparison between the fingerprint records provided by Interpol Kuala Lumpur for [Name D], ones provided by the applicant [in] November 2010 and a fingerprint purporting to be the thumbprint of "[Name A]" taken from a Singapore work permit.
38. The delegate interviewed the applicant with the assistance of a Tamil interpreter [in] February 2011. The representative attended the interview. The Tribunal has listened to an audio recording of the interview.
39. [In] February 2011, the Department's Identity Resolution Centre (IRC) provided a report (D1, folios 97 – 99) stating that the finger impressions on each of the three documents were made by the same person. Annexed to that report were the three sets of fingerprint records that were compared by the IRC. The fingerprint records provided by Interpol Kuala Lumpur include hand written records of the identity information of the person whose fingerprints were taken. At the place on the records where place and date of birth are to be recorded a hand written date "[Date 3]" has been crossed out and another date, "[Date 4]", hand written next to it. The writing of the latter shows the "[first two numerals]" to be a correction of another number which is no longer clear on the copy of the record provided. At the place on the records where height is to be recorded the number "[three digit number]" has been written. The fingerprint records include a handwritten date, presumably when the fingerprints were taken, of [a given date in the 1990s].
40. [Later in] February 2011 Interpol Singapore advised the delegate that a [man whose name was Name B] departed Singapore [in] November 2010 and had not returned to Singapore since that time.
41. The applicant provided a statutory declaration in support of his application dated [in] March 2011, completed with the assistance of a Tamil interpreter.
42. In his statutory declaration, the applicant claimed the following.
43. He denied that he is an Indian citizen with a criminal record in Singapore and states he cannot explain why his fingerprints match other than to suggest it must be a mistake or that his fingerprints had "somehow been fraudulently placed on this passport".
44. His wife and children fled to India in about 2007 from [Location 1] because of the escalation of violence between the Liberation Tigers of Tamil Elam (the LTTE) and the SLA.
45. His marriage certificate has been misplaced.
46. He started working in the [retail] trade in about 1991 and would travel to Colombo from [Location 1] to buy [goods] to bring them back to sell.
47. Before the ceasefire in 2003, the SLA would come and search his house and would sometimes beat him. He was also regularly stopped at checkpoints by the SLA. His mother's spinal cord was damaged with the butt of a gun during one search and she still has restricted movement. The SLA suspected them of supporting the LTTE and was searching their house to see if they had weapons. On another occasion the SLA [injured] his eldest [child]. Sometimes the LTTE would also search the house.

48. In about 2005, success in his business meant the applicant was able to rent a property in [Location 3] in Colombo. He and his family moved there.
49. In 2007 there were further problems between the SLA and the LTTE. The applicant had contacts in Colombo who helped get his wife and children passports and he arranged to obtain his own passport at that time. He did not travel to India with his wife and children as he felt he had to stay behind to look after his mother and to keep running the business to support his family.
50. With two other Tamils named [Mr E] and [Mr F] who also worked in the [same line of] business in Colombo, from [location deleted: s.431(2)], the applicant began supplying [goods] to the SLA. [Claims relating to how these goods were procured and supplied to the SLA deleted: s.431(2).]
51. The transaction worked for the first two or three times but then he was not paid. The applicant went to the army people in [locality deleted: s.431(2)] and demanded payment. The SLA claimed they had paid. An argument began. An officer pushed the applicant on the floor and he was [detained for a period] during which he was beaten. His two Tamil associates paid [an amount] to the SLA and he was released. He was taken to [a hospital] for medical treatment.
52. Two weeks later army people came to his house and stole [an amount of money] and took the remaining [goods]. They forced him to kneel and put a gun to his head. They beat him. Again he had to be taken to [hospital].
53. Supporters of General Fonseca began to harass him because he was supplying [goods] to the SLA. They would take the applicant from his house to their place and beat him.
54. As a Tamil speaking Muslim he could not get protection from the Sri Lankan police. Tamil speaking Muslims are persecuted by the SLA and pro-government militias. The LTTE suspect Tamil Muslims support the army and so also persecute them.
55. He decided he had to flee Sri Lanka. His Tamil colleagues assisted him by finding an agent and providing him with financial support. The agent arranged for him to travel to Malaysia where he was met by another agent. He stayed somewhere with [a number of] other people – [some] were Sri Lankan. The agent gave him a false Malaysian passport, false Malaysian identity documents and false Singaporean identity documents.
56. He was in Singapore for about two weeks. The agent then arranged for him to fly to Australia. He was told what to do and say on arrival in Australia. This was what he said when he was interviewed by officials on his arrival. He was told he should only speak about his true situation to a lawyer. He paid [an amount] for this assistance.
57. [Information relating to self-harm deleted: s.431(2)].
58. He fears he will be harmed by the Sri Lankan government, the SLA and pro-government militias because he has been detained and harmed by the SLA in the past, who have also stolen from him, threatened and beat him. He also fears he will be targeted by the SLA because he is a Tamil speaking Muslim businessman. Because of his problems with the SLA he will also be seen to oppose the SLA and government. He also fears harm at the hands of supporters of General Fonseca. He will get no protection because he is a Tamil Muslim.

59. He could not start his business again in Sri Lanka now. He fears he will be targeted for extortion, harmed or killed by the army if he were to try to start his work again and without his work he would have no source of income.
60. He fears it is unsafe for Tamil Muslims in the Eastern Province. He fears harm there at the hands of the SLA, paramilitary groups and other militias including those loyal to General Fonseca. He notes the Eastern Province has also experienced bad flooding.
61. He fears he would be interrogated at the airport if he was forced to return to Sri Lanka and that as a Tamil speaking Muslim without a Sri Lankan passport he would be investigated and interrogated. He fears he would be suspected as being involved with the LTTE because he has fled Sri Lanka, sought asylum and would be being forcibly returned. He also fears he will be at greater risk of harm because he no longer has a Sri Lankan identity card and has significant scarring. He fears detention and torture at the hands of the SLA because of this.
62. He is unable to obtain any other identity documents from his family because their documents have been lost during their travels.
63. Provided with the statutory declaration was an original of what the applicant claims to be his Sri Lankan birth certificate.
64. The Department referred the Sri Lankan birth certificate provided by the applicant to the IRC [in] March 2011.
65. [In] March 2011, the applicant was transferred from [Immigration Detention Centre 1] to [Immigration Detention Centre 2].
66. [In] April 2011, the IRC stated it was unable to make a conclusive finding about the genuineness of the Sri Lankan birth certificate provided by the applicant.

*Departmental decision*

67. The delegate refused the application [in] April 2011, finding that the applicant did not meet the definition of a refugee. The delegate gave greater weight to the Interpol fingerprint match than to the Sri Lankan birth certificate provided by the applicant and concluded that the applicant was an Indian citizen named [Name D], born [Date 4].
68. The delegate accepted that the applicant had demonstrated knowledge of the Sri Lanka at the Departmental interview and that it was possible the applicant had resided there for some time. The delegate found his account of being persecuted for supplying [goods to the army] to be implausible and noted the absence of any documentary evidence of his business dealings with the army. The delegate did not accept that the army had stolen money from the applicant given that he had been able to pay [an amount] for his flight from Sri Lanka. He did not accept the applicant could not relocate with his family to Tamil Nadu and found that the applicant was in fact an Indian citizen.

**Application for review**

69. The applicant lodged an application for review of the delegate's decision [in] April 2011. The applicant appointed the representative as his representative and authorised recipient in relation to the application for review. The application for review was constituted to the presiding member on [the following day].



70. In response to a request for clarification from the Tribunal, the Department advised the Tribunal [in] May 2011 that the Singaporean work permit from which the thumbprint at annexure "C" to the IRC report referred to at [39] was taken was a Singapore Work Permit Card provided by the applicant [in] November 2010 to the AFP and that the applicant had told the AFP that the Singapore Work Permit Card and a Malaysian Identity Card he also had were "bogus".

71. In relation to Singapore Work Permits, the Department advised the Tribunal that:

“Foreigners who wish to take up employment or do business in Singapore must have valid Work Passes. Under the Singapore’s Work Pass Framework, there are three main types of Work Passes:

- (i) Employment Passes
- (ii) S Pass
- (iii) Work Permit.

A Work Permit (WP) is a Work Pass issued to a \*skilled or an unskilled foreigner with a monthly basic salary of not more than SGD\$1,800 to work in Singapore.

*\*A skilled foreign worker is one who possesses at least a SPM qualification or its equivalent, or a NTC-3 (Practical) Trade Certificate [also known as ITE’s Skills Evaluation Certificate (Level1) from July 2002] that is relevant to his/her occupation.”*

72. [The day after receiving this advice from the Department], the Tribunal wrote to the applicant inviting him to comment on or respond to information which the Tribunal considered would, subject to the applicant’s comments or response, be the reason, or a part of the reason, for affirming the decision under review. The information in the letter was a summary of paragraphs [21], [31] – [33], [35] – [37], [39], [63] – [64] and [66] set out above. Copies of the documents referred to in those paragraphs were attached to the letter. The Tribunal gave the applicant until [a certain date in] May 2011 to provide his comments or responses to the information.

73. [Prior to that date], the applicant, through his representative, requested an extension of time to provide the comments or response to the information because the applicant had misplaced some of his documents when he was transferred [Immigration Detention Centre 1] to [Immigration Detention Centre 2] and because he was attempting to obtain additional documents from Sri Lanka. Under r.4.35B(2) of the Tribunal granted the prescribed extension of time to the applicant and so required the applicant to provide his comments or responses by [a certain date in] June 2011.

74. On [that date in] June 2011, the Tribunal received a letter from the representative. In the letter, the representative submitted that it is possible errors were made in the assessment of the validity of the fingerprint records provided by Interpol Kuala Lumpur, particularly given that the prints provided were taken at "a time of older technology". The representative quoted a number of extracts from Wikipedia about the validity of fingerprinting for identification. The representative also noted that there was no evidence that the Sri Lankan birth certificate provided by the applicant was not genuine and that the applicant lost a number of documents during his transfer from [Immigration Detention Centre 1] to [Immigration Detention Centre 2].

75. Enclosed with the letter from the representative was a statement from the applicant dated [in] June 2011 as follows:

I confirm that I have never been to school. I can read and write a little Tamil but am virtually illiterate. I have learnt a little English since I have been in Australia.

I confirm that I have continuing fears of persecution if I am returned to Sri Lanka for the reasons I have previously provided.

In relation to point 1 of the particulars provided for my comment I have already explained that I travelled to Australia on a false passport in the name of [Name B] which was organised by an agent in Malaysia. This agent also arranged false identity documents for me.

I have also explained that I fled Sri Lanka on a genuine Sri Lankan passport which I obtained in 2007. I obtained this passport at the same time as I arranged passports for my wife and children. Due to the increased conflict in Sri Lanka and risks to my family, I decided to send my wife and children out of Sri Lanka to Tamil Nadu in India. I obtained the passport from Colombo.

The agent from Malaysia had a person in Sri Lanka ([Mr G]) who assisted in arranging my own exit from Sri Lanka. This person arranged my ticket. My friends [Mr E] and [Mr F] accompanied me to an office in [street] to collect my plane ticket to Malaysia. This was my first ever trip out of Sri Lanka.

My friends [Mr E] and [Mr F] travelled to Colombo airport with me and the agent met me at the airport. I had no trouble passing through the airport. I understand that the agent had paid bribes so that I would have no difficulties. I have explained that I paid altogether [an amount] to get from Sri Lanka to Australia.

Before I left Sri Lanka, the agent [Mr G] sent my photograph to the other agent in Malaysia. When I arrived at Kuala Lumpur airport there was another agent waiting for me called [Mr H]. [Mr H] spoke to me in Tamil.

I had no problem getting through Kuala Lumpur airport. [Mr H] took me in a car to an apartment. As I have explained there were about [number] of us there – [a number of] men and [a number of] women. About [number] others were from Sri Lanka. I believe the others were seeking asylum like myself. There was a person to cook for us. I went out only on Fridays to attend the mosque for prayer. The mosque was only five minutes walk from the apartment.

As I have also explained the Agent then arranged for me to travel to Singapore. [Mr H] arranged for me to get a bus to Singapore. I note that my statutory declaration states that I flew to Singapore - this is not correct - I went by bus. [Mr H] and another guy travelled with me to Singapore. Before I left Malaysia I was given a false Malaysian passport, a false Malaysian identity card and a false Singapore work permit. [Mr H] took my fingerprints about five days after arriving in Malaysia. [Mr H] took my Sri Lankan passport from me in Malaysia, He made several attempts at making a false passport for me which I will explain later.

I had no problem passing across the border into Singapore. There were many people waiting at the border. We had to wait for a long time - about one hour.

When we got to Singapore [Mr H] arranged a ticket for me to fly to Australia, He also arranged a lodge for me to stay at in Singapore. The people working for [Mr H] went out and brought food for breakfast, lunch and dinner. There were about another five people at this place.

[Mr H] came and told me that I would be flying to Australia the next day. He gave me a hotel voucher at the airport together with US\$ 1000 and \$85 Australian. [Mr H] told me what to say to the Australian authorities when I reached Australia which was the information that I gave at the [City 1] airport and which you have written in the letter to me.

I was able to exit from Singapore airport without any problems. [Mr H] took me to the Singapore airport in a taxi. A friend of [Mr H] was also in the taxi. I'm not sure why he came. These two men came into the Terminal with me. They assisted with the formalities and then left me to go through customs.

[Mr H] told me that I would be able to get through [City 1] Airport with the documents. I had memorised the story he had told me to say.

I was very distressed at [City 1] Airport when I arrived and was told by the authorities that they were not letting me through. I repeatedly said what [Mr H] had told me to say. I recall the officers said you must tell us the truth.

I did not know that there was a stamp in the passport with a date prior to the date of issue of the passport until I arrived in [City 1] and was told this by the officers. [Mr H] made up two other passports also and there were mistakes on both of those as well. He decided those passports could not be used.

The first document they made was in the name [Name I], the second document was [Name J], the third was [Name B]. They told me the last document was ok and this is the one I was given. I used this document to leave Malaysia. As I have said, I was very scared when questioned by officers and police when I arrived in Australia. I eventually gave the name [Name I] because this is what came into my mind. I had memorised all three names. I recall that the Federal police interrogated me and then I went and rested and I fell asleep. I was told that I would be sent back to my country. I got very panicked and hurt myself by cutting into my body. I had to be taken to hospital.

[Mr H] had told me that people from the hotel would meet me at the airport. He said that he was 100% sure I would get through at the airport. He told me that other people would meet me at the hotel. He said that Australia is a good country of humanity.

[Mr H] told me that if I got caught at the airport I must say that I am seeking asylum. I think I told someone at the airport that I wanted to seek asylum but I was so stressed that it is difficult for me to recall exactly what I said and when.

I was in a great state of confusion at [place name] airport, particularly when I was told that I would be sent back. I was confused about who I was speaking to and what their role was.

I recall that the first time I gave my correct details was after I came back from the hospital to the detention centre. I understand that the interview notes from my first interview at [the detention centre] indicates that some details in relation to my identity including my family name were corrected and also that it is recorded that I wanted to seek protection. My agent has explained that this interview happened [in] November 2010 after I was returned from hospital.

The reason I mentioned my [siblings] being in trouble if I went back at that interview, is because my [children] had been in hiding in the home of my [siblings]. There was forced conscription by the Tigers in Sri Lanka. They were looking for people to join them - especially young boys. My [children] were also suspected of being with the LTTE by the army. When the army would come in search operations they would want to see if we were assisting the LTTE. They suspected my [children] were involved with LTTE. They once held

them for one day but let them go after they found they were students. They remained very suspicious of them however. Until 2007 when I could send them to Tamil Nadu in India, my [children] were hiding in the homes of my [siblings]. I was scared that my [siblings] would be in danger because they kept my [children] and gave them refuge. My [children] lived with my [siblings] between [dates]. They first went to stay with my [sibling, name] and after this [that sibling] moved them to the homes of different relatives including my other [sibling]. Even I was not aware of where the children were at a given time. My [siblings] also lived in [Location 1]. Our family home was in a very open place but where my [siblings] lived had more protection and it was easier to get away. In the end I decided it was too unsafe for the family to stay in Sri Lanka and I have explained that I arranged to send them to Tamil Nadu.

I have feared for a long time that my [siblings] would be in danger for doing this. I was genuinely afraid for them and thought if I spoke about this even after I arrived in Australia, it would get back to the Sri Lankan authorities and that my [siblings] could be harmed. I realise that I should have disclosed this earlier but I was afraid and did not want any harm to come to my [siblings]. The army is still creating trouble for people suspected to have supported the LTTE.

In my interview at [the detention centre] [in] November 2010 I also provided details of my family. [Mr H] told me to trust only my lawyer with my story about my fears in Sri Lanka.

I have previously explained that I am not [Name D] and that the information in my protection claim is correct. I have never used a passport in the name of [Name D]. I note that [Name D] was born 10 years before me. This is a significant difference. I am happy to undergo medical tests if it will help determine my true age.

I cannot explain why my fingerprints match with a passport in the name of this man going back to [the 1990s]. I can only say that I am not this person and I have never used a passport in this name. This journey to Australia is my first trip out of Sri Lanka. I cannot understand why these fingerprints match mine. I understand that the Department of Immigration has no further bio-details or photograph of [Name D]. It is impossible for me to try to provide an explanation with such limited information. I can only say that this is not me.

In relation to my birth certificate, my relatives in Sri Lanka posted to me at [the detention centre] my original Tamil birth certificate, a certified copy of this and a certified copy of an English Translation of the birth certificate. I understand my relatives obtained the certified copies from [Location 1]. These documents were forwarded by fax to my agent/lawyer who then provided them to my Department of Immigration case officer.

My Migration Agent has informed me that she understood the original birth certificate had been provided by me to the Department of Immigration but in fact I kept this with my other papers in my room. I handed the certified copies to the Department of Immigration when I was at [Immigration Detention Centre 1] and I don't know what has happened to those.

When I was transferred to [Immigration Detention Centre 2] some of my documents went missing. Amongst the missing documents was the original Tamil birth certificate as well as my refugee application documents, my toiletries and an MP3 player. Serco has given me a new MP3 player and I understood they are still searching for the other documents. I believe that other detainees who were transferred also lost documents. My Agent sent me a new set of my legal documents after I arrived at [Immigration Detention Centre 2].

It is not possible for my relatives to get another original of my Tamil birth certificate but I am hoping that the original will be located.

I am unable to provide other documents from Sri Lanka to prove my identity. In relation to employment documents, I did not hold any civil service position in Sri Lanka. I have always worked for myself I have never had a bank account in Sri Lanka and always dealt in cash. I cannot get education records because I have never attended school. As I am virtually illiterate I have organised my life in a way that my limited ability to read and write was not a problem. I have asked my relatives in Sri Lanka to post some documents directly to my agent, but unfortunately they have not arrived yet. My relatives have told me that they have posted some documents about [a family member's] recent hospitalisation. I am also unable to provide documents from my family in Tamil Nadu as they are living there as refugees and have no documentation. My wife took our family identity documents with them to Tamil Nadu but lost a bag containing these documents on their journey.

I believe that my relatives in Sri Lanka will be prepared to speak to the Tribunal to confirm my identity.

[Sic]

76. [In] June 2011, the Tribunal wrote to the applicant stating that it had considered the material before it but was unable to make a favourable decision on that information alone and inviting the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in his case on [on a certain date in] July 2011.
77. [In] July 2011, the Tribunal wrote to the applicant advising him that due to circumstances beyond the applicant's and the Tribunal's control the Tribunal was no longer able to conduct a hearing on [the scheduled date in] July 2011 and inviting the applicant to appear before the Tribunal on [another date in] July 2011.
78. [Three days before the hearing], the Tribunal received a letter from the representative referring to the evidence previously provided in support of the application by the applicant. In the letter, the representative made the following submissions in relation to the applicant's identity:

The applicant arrived at [City 1] Airport on [date] November 2010 on a false Malaysian passport in the name of [Name B] (Interpol Singapore confirm he departed Singapore on this passport) and in possession of a false Malaysian identity card and false Singapore work permit. In his statement of [date] June 2011 the applicant has provided more detailed information about the arrangements made by an Agent to assist his travel to Australia, about the circumstances of his arrival and detention at [City name] airport, and about information he gave about himself at the time he was intercepted and subsequently.

The applicant has stated that he departed Sri Lanka on a genuine passport in 2010 which was retained by the Agent along with his identity card.

It is clear the applicant was under considerable stress during his period of detention at [City 1] airport which has no doubt impacted upon his precise recall of events. The applicant asserts that he informed authorities at the airport that he wished to seek asylum.

The applicant was so distressed when advised at [City 1] airport that he would be removed from Australia that he self harmed and required hospitalisation. He was first taken to [Immigration Detention Centre 1] and then on to Hospital. Notes of his initial client interview at [Immigration Detention Centre 1] on [date] November 2011, required to be conducted within 24 hours of arrival, indicate that he stated he was seeking protection. Again the applicant had been through considerable stress and trauma having been intercepted and having self harmed requiring hospitalization. In our assessment he was still traumatized when we attended at [Immigration Detention centre 1] approximately 2 weeks later to assist with the protection visa application.

The applicant maintains that he is not [Name D] as determined by the DIAC delegate.

In relation to information received from Interpol, we note that the applicant's fingerprints were found to match that of an Indian national [Name D] whose date of birth is detailed as [Date 4]. The fingerprints of [Name D] are provided on a document dated [on a given date in the 1990s] provided by Interpol Kuala Lumpur. We also note that [Name D] is said to be the holder of an Indian Passport number [Document A]. [Name D] also has a criminal record in Singapore dating back to [the 1990s].

From the DIAC National Identity Verification and Advice Section Investigation Plan and Running Sheet obtained under Freedom of Information, we note that the Indian authorities could not retrieve any record with the passport number [Document A] in the name of [Name D], and it is noted that if the passport was issued before 1995 'they may not hold the electronic record of the person.' It is also noted that while 21 records with the name [Name D] were retrieved, in the absence of further bio-details or photographic evidence it was not possible to establish links. As a consequence, aside from the fingerprints provided by Interpol Kuala Lumpur purportedly belonging to a [Name D], there is no photographic or other evidence to link the applicant [Name A] with the holder of Indian passport [Document A].

The applicant has provided a certified copy of his Sri Lankan birth certificate with an English translation which states that he was born in [Location 1] Sri Lanka on [Date 1]. The details on the birth certificate in relation to the applicant and his parents are consistent with details provided by the applicant in his protection visa application.

We note that the certified copy of the Sri Lankan birth certificate was examined by the Document Examination Unit and a report provided dated [date] April 2011. The report states,

*The entire document has been laser copied and contains an authorizing wet stamp and signature from the Divisional secretariat indicating that this document is a true copy from the Registry of entry of birth. The actual layout and format of the document conforms with previously examined documents from this region that were not copies.*

*There are no obvious alterations or deletions to the data within the document however as document is a copy I cannot comment on this with 100% confidence.*

Certified copies of the applicant's birth certificate were faxed from [the detention centre] to [the representative] and then forwarded on to the Department of Immigration case officer on [date] March 2011. We have not sighted the documents as they were received by the applicant at [the detention centre], but understood from the applicant that the actual documents received by him were with the Department of Immigration.

It is submitted that there is nothing to indicate that the certified copy of the birth certificate from Sri Lanka is not genuine and that in the absence of evidence to the contrary (noting that the Indian passport in the name of [Name D] or other identity documents for this man are not available), it should be accepted that the applicant is [Name A] born in [Location 1] Sri Lanka.

We note that the applicant states that his original birth certificate was also sent to him at [Immigration Detention Centre 1] but that this document went missing during his transfer from [Immigration Detention Centre 1] to [Immigration Detention Centre 2] in March 2011. This document was not faxed to [the representative] with the certified copies, and the applicant did not inform us that this document had been in his possession until some time later. On [date] March 2011 the applicant filled out a form at [Immigration Detention Centre 2] detailing his personal items that went missing upon his transfer to [Immigration Detention

Centre 2] and a copy of this form is attached. Upon request we provided a new copy of his legal documents. The applicant later also made a formal complaint to SERCO about items having gone missing including the birth certificate. SERCO responded stating that they did not have record of some items including the birth certificate being in the applicant's possession. A copy of this response is also attached. We note that SERCO replaced an IPOD admitting that it had gone missing. It appears that some of the applicant's property did in fact go missing in the transfer.

The applicant has never been to school. He explains that he ran his business and his life in Sri Lanka very simply for this reason.

79. In the letter, the representative also made submissions in relation to the delegate's findings regarding the applicant's credibility and referred to the relevant policy and legal guidance on this issue. The representative also referred in some detail to recent country information in relation to the human rights situation in Sri Lanka; the targeting of Muslim or Tamil business owners and of Muslims and Tamils generally in Sri Lanka; the targeting of individuals identified as opposed to the current Sri Lankan government; the denial of effective protection in Sri Lanka and the risk of harm to returnees identified as having sought asylum outside Sri Lanka.
80. Enclosed with the letter were the letters from the detention centre operator, SERCO, referred to in the representative's submissions at paragraph [78] above and three original Sri Lankan medical documents for a "[name deleted: s.431(2)]", none of which refer to the applicant.

#### *Tribunal hearing*

81. The applicant appeared before the Tribunal [details deleted: s.431(2)] [in] July 2011 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's son, [Mr K], by telephone. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages. The representative attended the Tribunal hearing in person. Due to circumstances beyond the applicant's and the Tribunal's control, the start of the hearing was delayed by approximately one hour.
82. The applicant advised the Tribunal that he wanted the Tribunal to take evidence from his "uncle", a [Mr L], by telephone. The applicant stated he was not certain of his exact relationship to [Mr L] but that he thought [Mr L] was a cousin of his father. He stated that [Mr L] was currently living in [Location 1], Sri Lanka.
83. The applicant stated that he had been born on [Date 1] in [Location 1], Sri Lanka. He named both of his parents and his [siblings]. He stated that [information regarding siblings deleted: s.431(2)]. His father had been a farmer and also ran a [small business]. He described the location of his father's [place of work] in [Location 1]. He stated that his father had died of natural causes in about 2003. He stated that his mother and [siblings] continue to reside in and around [Location 1].
84. The Tribunal asked the applicant if he knew the ages or dates of birth of his mother or [siblings]. The applicant stated he thought his mother was [age deleted: s.431(2)] years old but that he was not sure. He stated that he only knew the order of his [siblings] but was not sure of their dates of birth. He stated that as far as he knew his mother did not have a birth certificate but that his [siblings] had birth certificates. He stated that [a number of] months ago there was serious flooding in and around [Location 1] and all his family had to leave their homes and stay in the local school for a week. He stated that his family lost all their identity

documents in the flood. The applicant stated he was not in direct contact with his [siblings] or mother and only spoke to [Mr L] who told him about them.

85. The applicant stated he had never attended school and worked with his father on the farm when he was growing up. He stated that he married his wife in 1989. He stated his wife came from the [Location 1] area and was related to him through his father. The applicant was asked when his wife was born. The applicant stated he was not sure.
86. The applicant was asked whether his wife had a birth certificate or other identity documents. The applicant stated that his wife and children had fled Sri Lanka in 2007 and were now living in Tamil Naidu in India. He stated that while they were travelling in India his wife and children were moved from one bus to another and they lost all their identity documents. He stated they lost their birth certificates, passports and education certificates. He stated that his wife and children were currently renting a small house in [location deleted: s.431(2)] for Rs.3000. He stated that [one of his children], [name deleted: s.431(2)], had work [details deleted: s.431(2)] and [this] income was paying the rent and supporting the family. He stated [the names and dates of birth of his children]. He stated that his younger to children went to school in [Location 1]. He stated that his wife's family also came from [Location 1] but [information regarding his wife's family deleted: s.431(2)].
87. The Tribunal asked the applicant if he was currently in contact with his wife. The applicant stated that he was, that he spoke to her by telephone and that he had spoken to her most recently a week before the hearing. The Tribunal asked the applicant if he agreed to the Tribunal contacting his wife by telephone during the hearing. The applicant agreed to this and gave the Tribunal the mobile telephone number for his wife.
88. The Tribunal called the mobile telephone number provided by the applicant. [Mr K] answered the telephone. Initially, the Tribunal only told [Mr K] that it was calling him in relation to an application it was assessing and did not specify the name of the applicant. In response to questions from the Tribunal [Mr K] confirmed his name, date and place of birth and that he had been living in Tamil Naidu for approximately 4 years with his mother [and his siblings]. He confirmed the names of his mother and father and siblings. He also confirmed that he was living in a house the rent for which was Rs.3000 which was paid for by [one of his siblings] who was working in a shop. He stated that [this sibling] was at work, [another] was at school and that his mother had gone to the funeral of a neighbour.
89. [Mr K] stated that his father did not travel with him to India and that his father was in Australia to keep safe. He stated that he had no memory of his father living in any country other than Sri Lanka. The Tribunal asked him if he had a birth certificate, passport or any other identity document. He described in detail an incident in 2007 when he and his family were travelling on a bus full of Sri Lankan Tamil refugees when the bus broke down and they were transferred to another bus. He stated that during the transfer the family lost the bag containing all of their identity documents. He was asked whether he tried to replace any of those documents. He stated that he had no intention of returning to Sri Lanka and had very little contact with his father's family there so was not able to seek to replace any of those documents. He stated that he did not think he needed those documents to live in India.
90. The Tribunal asked [Mr K] whether he and his family were able to register as refugees in India. [Mr K] stated that there was a procedure for registering as a refugee but that his family had decided against it because refugees receive so little help in India that there did not seem



much point in doing so. He stated that neighbours look down on people who have registered as refugees.

91. The Tribunal asked the applicant's younger son what he knew about his father's family. He confirmed that his father's father was deceased and that his father's mother was still alive and that his father has [a number of siblings]. He named his father's mother and began to list the names of his father's [siblings].
92. The Tribunal asked [Mr K] whether, before he left to Sri Lanka, his father had lived with him. He stated that his father would stay a few days with the family and then go away for business. He stated his father would travel to Colombo for business trading in [certain goods]. The Tribunal asked the applicant whether his father worked alone or with other people. He stated that his father worked with other people but he did not know their names.
93. The Tribunal asked [Mr K] whether he knew anything about his father's circumstances. He stated that he knew his father was in detention in Australia and that his father had had some problems while doing business in Sri Lanka. He stated they were business problems and were a big concern but that he did not know what the problems were. He stated that he thought these problems had started before he, [Mr K], had left Sri Lanka.
94. The Tribunal asked [Mr K] whether, to his knowledge, his father had ever travelled overseas. He stated that as far as he knew his father had never travelled outside Sri Lanka. The Tribunal asked him if his father had ever been to Singapore. He repeated that as far as he knew his father had never travelled outside Sri Lanka.
95. After the Tribunal finished questioning [Mr K], the applicant and [his son] engaged in conversation. Towards the end of that conversation the applicant became extremely distressed and the call was ended.
96. After a brief adjournment, the Tribunal continued to question the applicant. The Tribunal asked the applicant if he had travelled outside Sri Lanka before May or June 2010. The applicant replied he had not travelled anywhere. He was asked if he had ever travelled to India. He stated that he had not. He was asked whether he had travelled to Singapore at any time before June 2010. He stated that he had not.
97. The Tribunal asked the applicant if he had ever held a genuine or fake Indian passport. The applicant stated he had never had an Indian passport of any sort.
98. The applicant was asked whether he could explain the matching of his fingerprints with the fingerprints held by Interpol Kuala Lumpur. The applicant stated he was not an expert but that all he could say as he did not know about the matches and that the date of birth recorded with those fingerprints was 10 years older than he was.
99. The Tribunal asked the applicant why he obtained a Sri Lankan passport in 2007. The applicant stated he had obtained passports for all the members of his family in case they needed to travel to India. He stated that he had been considering sending his family to India in 2007 because [they feared that one of their children] would be forcibly recruited by the LTTE or the other Tamil paramilitary units operating in the east. He stated that he was also having trouble with the SLA at that time.

100. The Tribunal asked the applicant why he did not flee to India with his family. He stated that he originally intended to do so but then decided to stay back because of his business. He stated that he was supplying [goods] to the SLA and had difficulties with some of the transactions. He explained that [when he had first provided goods] to the SLA it had been okay but that after that the officers would not pay him. He stated that he had been supplying the SLA with [goods] between [years deleted: s.431(2)] but that because he was Tamil and supplying them with [goods] they began to suspect that he was also providing [goods] to the LTTE.
101. The Tribunal asked the applicant when he started working as a trader. The applicant explained that in 1991 he began selling [certain products] from a bag as a door-to-door salesman. He stated that he did this after stopping work on his father's farm. He stated that the work on his father's farm did not bring in enough income to support his family and that he wanted to be independent which was why he started working as a trader. He stated that he initially worked as a salesman from home and that in 1992 he began travelling to Colombo. He would purchase [the products] in Colombo and then bring them to [Location 1] to sell. In response to questions from the Tribunal, the applicant gave further detailed evidence in relation to the conduct of his [business], including his leasing of premises in Colombo for storage of the goods he would sell. The applicant stated that he never held a bank account or given the money he earned from his sales to anyone else. He stated that he kept the money in a safe place in his warehouse. He stated that he kept records of his sales and purchases in a simple form in a notebook. He stated that the SLA had confiscated all of his business notebooks. He stated that when "the trouble peaked" the SLA took all his notebooks and all the cash – [a specified amount] – from his shop.
102. The Tribunal asked the applicant what he could remember about the Sri Lankan passport that was issued to him in 2007. The applicant stated he could not read or write but that he believed the passport was in his name and that it did have his photograph on it. The Tribunal asked the applicant if he could not read or write how he was able to record his business dealings in a notebook. The applicant stated that he was able to write figures and write the initials of the people who owed him money or to whom he owed money but nothing more than that. The Tribunal advised the applicant it found it difficult to believe that he could conduct his business in Sri Lanka for 18 or 19 years but have no documentary evidence that he has done so.
103. The Tribunal attempted to call [Mr L] twice during the hearing on the telephone number provided by the applicant. Both times the telephone number was engaged. The Tribunal asked the applicant if it would be possible for the Tribunal to speak with his mother by telephone at a resumed hearing. The applicant said he would try to arrange this.
104. The Tribunal advised the applicant that it would be necessary to conduct a further hearing with the applicant because of the limited time available for the hearing on that day.
105. [In] August 2011, the Tribunal wrote to the applicant inviting him to attend the resumption of the hearing [in] September 2011.
106. [Four days before the scheduled resumption of the hearing in] September 2011, the Tribunal received a letter from the representative submitting that, in relation to the IRC report on the fingerprint records, that, given the age of the fingerprints and the fact they were provided from an overseas jurisdiction, the Tribunal should require that the notes taken at the time the report was prepared be produced to the Tribunal or that the IRC fingerprint examiner be

summoned to give evidence. The representative submitted that, in the absence of evidence corroborating the fingerprint record match or establishing that the person who gave those fingerprints was, in fact, an Indian citizen, mistake, fraud or incompetence could not be discounted in the recording of the details provided with the fingerprint record or in the use of those fingerprints before they were provided to the Australian authorities. The representative also noted that the fingerprint records provided by Interpol Kuala Lumpur lists the height of the person who provided those fingerprints as [measurement deleted: s.431(2)]. Enclosed with the letter from the representative was a copy of the applicant's "Detention Dossier" which records the applicant's height as [eight centimetres greater than that listed on the fingerprint records].

107. In that letter the representative referred to a Department e-mail dated [in] May 2011 which she had obtained under Freedom of Information procedures. At the Tribunal's request, the representative provided the Tribunal with a copy of that e-mail, which requests that further checks be undertaken with the Indian authorities about the names allegedly used by the applicant, "[Name D]", "[Name C]" and "[Name B]".
108. The representative attended the hearing before the Tribunal [in] September 2011. The applicant was unable to attend the hearing on that day because [details deleted: s.431(2)].
109. [Later in] September 2011, the Tribunal conducted an interview with [Ms M] from the IRC. During that interview, [Ms M] stated that the examiner who had conducted the comparison of the fingerprints for the IRC report no longer worked at the IRC. Based on her readings of the IRC files relating to the IRC report and the conversation she had with the Acting Manager of the Department's National Identity Verification Assessment section, she stated that the IRC were provided with an electronic copy of the Interpol Kuala Lumpur fingerprint records from which the comparison examination would have been completed using an electronic comparator or a fingerprint magnifying glass. She stated there were no notes on the file about the basis for the assessment of the comparison of the fingerprint records the subject of the IRC report. She stated that there was another set of fingerprints on the file which matched the sets of fingerprints in the IRC report. She stated those fingerprints were for a Singaporean work permit in the name of "[Name A]".
110. [In] October 2011, the representative wrote to the Tribunal to advise that she would be unable to attend a resumed hearing or respond to a request for further information on the half of the applicant [for two weeks in] October 2011 [due to other work obligations].
111. [In] November 2011, the Department advised the Tribunal in relation to the request made by the Department [in] May 2011 referred to at paragraph [107] above that the New Delhi post of the Department of Foreign Affairs and Trade (DFAT) had made some enquiries with the Indian passport issuing office, that no records had been found and that no further enquiries had been made either by the Indian authorities or by or on the half of the Australian government.

### **Relevant country information**

#### *Tamils in Sri Lanka*

112. In its most recent report on post-war progress the International Crisis Group's (ICG) key messages include:

### *Militarisation and insecurity*

The actual security situation for the minority Tamil and Muslim communities in the north and east, and for some segments of the majority Sinhalese, is much more precarious. There is deep distrust of the police and army. The “Grease Devil” controversy, which the president blithely dismisses, has in fact resulted in vigilante attacks on some and some killings of alleged “grease devils” believed responsible for a spate of attacks on women, particularly in the heavily militarised north and east but also in the central highlands and the south. Civilians have launched violent protests against the security forces, suspecting them of harbouring attackers, which the forces have often responded with arbitrary arrests and excessive use of force, killing and badly injuring protestors. Instead of restoring law and order by investigating the reported incidents and arresting those responsible, the police and military have reacted defensively, displaying the same “with us or against us” mentality that define the final years of the war. Indeed, Defence Secretary Gotabaya Rajapaksa has made it clear that anyone who challenges the military will be dealt with as “terrorists”, even now.

This most recent violence is occurring against a backdrop of an increasingly permanent military presence in the north and east. The predominantly male, Sinhalese soldiers control nearly all aspects of daily life for the Tamil-speaking residents, a disproportionate number of whom are female and vulnerable.

### *Political settlement on devolution and minority rights*

...Finally, widespread scepticism within Sri Lanka about the government’s willingness to devolve power is also based on the highly authoritarian, centralised and militarised way in which the Rajapaksa regime governs the whole country. Since the end of the war in May 2009, power has been further centralised in the hands of the president, his brothers and the military, both through the eighteenth amendment to the constitution in September 2010 and other administrative changes.<sup>1</sup>

### *Situation in the north and east*

113. On the situation in the north and east, the ICG observe in a July 2011 report that:

...the government has in many ways replaced the LTTE’s repressive and violent rule of the north and east with its own systems of control based on militarization, deprivation and fear.

...Whilst enforced disappearances are down from the levels experienced during the last years of the civil war, they are still occurring, mostly in the north and east.

114. In March 2011, ICG senior analyst and Sri Lanka project director, Alan Keenan, stated that since the end of the civil war in 2009, the government’s deliberate undermining of the rule of law has increased.<sup>2</sup> The ICG also reports that although they have decreased since the end of the war, “reports of abductions, disappearances and politically motivated killings do continue to be received, and the terror machine established to destroy the LTTE remains in place”.<sup>3</sup>

### *Ongoing paramilitary activity*

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<sup>1</sup>International Crisis Group, ‘Sri Lanka: Post-War Progress Report, 12 September 2011’ [www.crisisgroup.org](http://www.crisisgroup.org)

<sup>2</sup> Keenan, A. 2011, ‘The Politics of Domestic and International Accountability Options in Sri Lanka’, International Crisis Group website, 24 March <http://www.crisisgroup.org/en/publication-type/speeches/2011/the-politics-of-domestic-and-international-accountability-options-in-sri-lanka.aspx>

<sup>3</sup> Keenan, A. 2010, ‘Human Rights in Sri Lanka in the Post-Conflict Period’, International Crisis Group website, 6 December <http://www.crisisgroup.org/en/publication-type/speeches/2010/human-rights-in-sri-lanka-in-the-post-conflict-period.aspx>

115. In its 2011 annual report on Sri Lanka, Amnesty International observed that:

Armed Tamil groups aligned with the government continued to operate in Sri Lanka and commit abuses and violations, including attacks on critics, abduction for ransom, enforced disappearances and killings.<sup>4</sup>

116. Minority Rights Group International reported in January 2011 that former members of the Eelam People's Democratic Party (EPDP) "have been responsible for a spate of recent extrajudicial killings, disappearances and abductions. Some are still armed, even if they do not carry weapons publicly. They also work closely with the military as informants".<sup>5</sup>

117. An assessment by Jane's Sentinel on Sri Lanka referred to in the latest UK Border Agency Sri Lanka Country of Information Report<sup>6</sup> observes that:

The security forces preferred to outsource much of the work of controlling major Tamil towns such as Jaffna, Vavuniya, Batticaloa and Trincomalee to non-LTTE paramilitary groups such as the People's Liberation Organisation of Tamil Eelam (PLOTE), Eelam People's Democratic Party (EPDP), Tamil Eelam Liberation Organisation (TELO) and latterly the People's National Liberation Tigers (TMVP).<sup>7</sup>

118. In the US State Department (USDOS) 2010 Human Rights report on Sri Lanka it states that:

Reports of abductions for extortion and ransom increased during the year, particularly in the north and east. Local residents blamed such abductions in the Jaffna Peninsula on armed members of the EPDP, led by government ally and Member of Parliament Douglas Devananda. In other areas of the north and east however, it was difficult to identify perpetrators. Whereas in the past local citizens often reported they were reasonably certain which paramilitary groups were behind abductions and killings, during the year they more often stated that they were unsure of which group was involved in a particular incident.<sup>8</sup>

#### *Targeting of Muslim businessmen*

119. In March 2008 Human Rights Watch (HRW) released a report on disappearances and abductions in Sri Lanka. The report states that many of the victims of abductions in Colombo (and other districts) were Tamil business owners. Twelve were murdered, five released after the payment of large ransoms, and 51 were still missing at the time of the report. The report states that: "Initially business owners victimized in the abductions were predominantly Tamil, but in 2007 Muslim businessmen were also targeted. According to media reports, in May 2007 more than a dozen Muslim businessmen were abducted. Some were released after paying ransoms ranging from 30 to 100 million SLR (US\$ 300,000 - 1,000,000). These

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<sup>4</sup> Amnesty International Annual Report 2011 – Sri Lanka, released on 13 May 2011; <http://amnesty.org/en/region/sri-lanka/report-2011>

<sup>5</sup> Minority Rights Group International (UK), *No war, no peace: the denial of minority rights and Justice in Sri Lanka*, 19 January 2011, [www.minorityrights.org](http://www.minorityrights.org)

<sup>6</sup> Home Office, UK Border Agency, Sri Lanka, Country of Origin (COI) Report, 4 July 2011

<sup>7</sup> Jane's Sentinel Country Risk Assessments, Country Report, Sri Lanka, [http://sentinel.janes.com/docs/sentinel/SASS\\_Country.jsp?Prod\\_Name=SAS&Sent\\_Country=Sri%20Lanka&](http://sentinel.janes.com/docs/sentinel/SASS_Country.jsp?Prod_Name=SAS&Sent_Country=Sri%20Lanka&[subscription%20only]) [subscription only] accessed on 24 May 2011, Security and foreign forces, 31 January 2011

<sup>8</sup> US Department of State 2010, *Country Reports on Human Rights Practices for 2010 – Sri Lanka*, 8 April 2011, section 1b, <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154486.htm>

abductions have created an atmosphere of fear and panic among the Tamil and Muslim business communities”.<sup>9</sup>

120. The 2007 USDOS Human Rights report likewise states that “In addition to politically motivated abductions, there were dozens of kidnappings for ransom, with payment demands ranging from \$20,000 (2.25 million rupees) to \$750,000 (60.6 million rupees). Although initially the problem appeared limited to the Tamil business community, in June and July dozens of Muslim businessmen were kidnapped for ransom, the vast majority of whom were released after ransom was paid. However, less than half of Tamil businessmen kidnapped for ransom were released after the ransom was paid.”<sup>10</sup>
121. On 14 October 2009 the Colombo post of DFAT provided advice with regard to, among other things, the security situation in Colombo. According to DFAT, “Anecdotal evidence and newspaper reporting suggest that the majority of abductions in Colombo are criminal based, sometimes on the instructions of politicians”.<sup>11</sup>
122. An August 2009 UK Home Office fact-finding mission report<sup>12</sup> also looks at the incidence of ‘politically motivated’ disappearances compared with abduction for ransom. The sources consulted generally concurred that there was often a combination of political and financial reasons. The representative of the Swiss Embassy in Colombo also said that “sometimes denouncement and personal revenge could also play a role” The UNHCR Protection Officer mentioned reports of cases of extortion faced by Muslims. The relevant extract is as follows:

**What is the incidence of ‘politically motivated’ disappearances compared with abduction for ransom/money?**

3.15 The senior intelligence official said that some abductions were for ransom and the police was taking action to curtail this. He could not comment on political motivation.

3.16 The Human Rights Activist said that it was either for political reasons or for ransom. He could not say exactly in what proportion, but had the impression that recent cases seem more related to ‘commercial reasons’, i.e. for ransom.

3.17 The representative of the Swiss Embassy in Colombo said there were cases where there seemed to be a strong political motive; where media, human rights or political activities were involved. But there often seemed to be a mixture of both elements. Sometimes denouncement and personal revenge could also play a role. As for Colombo, the Embassy knew only about a few cases that were reported. The Swiss Asylum Section had the impression that detentions resulting from regular checks and cordon operations were not always due to investigations against terrorism, but also driven by the security forces’ desire to get money. Some inmates had told the Asylum Section that, for whatever reason, the number of suspects in the cells remained the same.

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<sup>9</sup> Human Rights Watch 2008, *Recurring Nightmare-State responsibility for Disappearances and Abductions in Sri Lanka*, March

<sup>10</sup> US Department of State 2008, *Country Report on Human Rights Practices for 2007 – Sri Lanka*, March, Introduction, Section 1.b

<sup>11</sup> DIAC Country Information Service 2009, *Country Information report No 09/75 –Treatment of Tamils-Colombo airport, search operations, disappearances, checkpoints and residency* – sourced from DFAT advice 12 October 2009.

<sup>12</sup> UK Home Office 2009, report of *Information Gathering Visit to Colombo*, Sri Lanka 23-29 August 2009

3.18 The UNHCR Protection Officer said there were some politically motivated cases such as the well-known cases of some journalists. Reports of cases of extortion faced by Muslims were also mentioned.

3.19 CPA said that there had been one or two cases of businessmen. Those in a particular form of work, media personnel are targeted, probably more than those abducted for ransom. In June 2009 there was a case of a media-related person who was abducted and later dumped somewhere in Colombo.

3.20 The former Chief Justice, Sarath Silva, stated that there had been both money related and politically motivated cases, sometimes the two elements were related.

3.21 Professor Wijesinha said that abductions for ransom still happened. Officials were sometimes found to be involved in such abductions and so were members of some paramilitary groups, but not necessarily acting officially or on instructions from such groups. More frequently they were acting in connection to criminal elements.

3.22 Mano Ganesan MP was of the view that most disappearances were politically motivated, adding that they did not occur in Colombo. Ransom abductions occurred but it was more likely to be just intimidation, demanding protection money.

123. The 2008 Human Rights Watch report<sup>13</sup> states that there is evidence of involvement by non-state armed groups and local security forces in the abductions for ransom of Tamil and Muslim businessmen. The report states:

*“Particularly in Colombo, and in the eastern districts...the lines between politically motivated ‘disappearances’ and abductions for ransom have blurred since late 2006, with different groups taking advantage of the climate of impunity to engage in abductions as a way of extorting funds. While criminal gangs are likely behind some of the abductions, there is considerable evidence that the Karuna group and EPDP have taken up the practice to fund their forces, while the police look the other way”.*

[Emphasis added]

124. A 2007 ICG report on the human rights crisis in Sri Lanka discusses the surge in abductions of Tamil and Muslim businessmen for ransom. The ICG report states that “there is widespread concern in minority communities that the abductions are part of a broader plan by Sinhalese extremists to drive Tamils and Muslims out of key economic sectors”. The report also states that “the police have not followed up any leads provided to them”. The relevant extract follows:

The reliance on paramilitaries to fight the government’s war, while refusing to pay them for it, has blurred the lines between political and criminal violence. *What may have started out as an attempt to establish an extra layer of militant taxation or undermine LTTE taxation networks has descended into increasing lawlessness and insecurity for all minority businessmen* Any rich entrepreneur from the Tamil or Muslim communities is now a potential target. In May 2007 there were reports of more than a dozen Muslim businessmen abducted for ransom. Some were reportedly released after paying 50 million SLR (\$500,000).

Although this may indicate a general descent into criminality from earlier, more politically motivated abductions, *there is widespread concern in minority communities that the abductions are part of a broader plan by Sinhalese extremists to drive Tamils and Muslims out of key economic sectors* A Tamil lawyer claims that “there is a more subtle targeting of

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<sup>13</sup> See fn 9

Tamil business now than in 1983. Now they are snuffing out the economic lifeline. What they failed to do in the 1983 riots, the JHU and the JVP together, with the help of security forces, are succeeding in today.”

Certainly many Tamil businessmen have left the country, deciding it is too risky to remain in Colombo. *There is no protection in these cases: the police have not followed up any leads provided to them*<sup>14</sup>

[Emphasis added]

## **FINDINGS AND REASONS**

### **Country of nationality**

125. The applicant claims to be a citizen of Sri Lanka. He arrived in Australia on a fraudulent Malaysian passport and initially on arrival claimed to be a Malaysian citizen. He subsequently claimed to be a citizen of Sri Lanka and, during the processing of his visa application, provided the Department with a copy of a Sri Lankan birth certificate. Identity checks conducted by the Department revealed that a set of fingerprints provided by the applicant to the AFP matched a set of fingerprints taken in [the 1990s] provided by Interpol Kuala Lumpur which identified the person who made those fingerprints to be the holder of an Indian passport numbered “[Document A]” and who had been convicted of crimes in Singapore.
126. Based on a report of the ICU stating that the sets of fingerprints matched, the Department found that the applicant was a citizen of India. The applicant claims he is not a citizen of India, that he had not travelled outside Sri Lanka before 2010 and that the age of the fingerprints, the lack of corroborating identity information and the potential for error or fraud in the taking, recording and storing of the fingerprints in Singapore or Malaysia means that the purported match of the sets of fingerprints cannot be relied upon.
127. The Indian authorities state there is no record of an Indian passport with the number “[Document A]” and have not provided any further information that identifies the applicant has an Indian citizen.
128. Relevant questions for the Tribunal are whether it accepts that the fingerprints provided by the applicant to the AFP matches the set of fingerprints taken in [the 1990s] provided by Interpol Kuala Lumpur and, if so, whether the Tribunal can rely on the identity information recorded with the set of fingerprints provided by Interpol Kuala Lumpur to find that the applicant is an Indian citizen.
129. The Tribunal accepts that the age of the fingerprints and the fact that it appears only an electronic copy of the set of fingerprints provided by Interpol Kuala Lumpur were used by the ICU to compare with the set of fingerprints provided to the AFP may raise some doubts about the accuracy of the comparison undertaken by the ICU. However, the Tribunal finds that the ICU will have taken these factors into account in conducting its comparison assessment and so, in the absence of any other expert assessment of the sets of fingerprints the subject of the ICU report, accepts the finding in the ICU report that the person who gave the set of fingerprints provided by Interpol Kuala Lumpur is the same person who gave the

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<sup>14</sup> International Crisis Group 2007, *Sri Lanka's Human Rights Crisis*, Asia report No 135, 14 June pp. 11 -12



set of fingerprints for the AFP. The Tribunal finds that the person who gave both sets of fingerprints is the applicant.

130. However, the Tribunal has significant doubts about the accuracy of the identity information recorded with the set of fingerprints provided by Interpol Kuala Lumpur. The Tribunal notes that the identity information appears to have been recorded hastily by hand and a number of errors made, then corrected. The Tribunal notes that the height recorded for the applicant is inaccurate. Given the significance to the applicant, a claimant for refugee status, of a finding that the recorded identifying information that the person who provided the fingerprints was the holder of a genuine Indian passport and an Indian citizen, the Tribunal is unwilling to give the benefit of the doubt to whoever recorded the identifying information that, while it is certain they have recorded some information inaccurately, they may have recorded other information accurately.
131. Accordingly, the Tribunal finds that the set of fingerprints provided by Interpol Kuala Lumpur cannot be relied upon as evidence that the applicant is an Indian citizen or the holder of an Indian passport.
132. The Tribunal also gives significant weight to the fact that there is no record with the Indian authorities of an Indian passport with passport number “[Document A]”. The Tribunal accepts that it may be possible that the applicant was in the possession of a false Indian passport, the details of which were accurately recorded when he made the set of fingerprints provided by Interpol Kuala Lumpur. However, whether the applicant was in possession of a false Indian passport or not in possession of an Indian passport at all is irrelevant to an assessment of whether the applicant is an Indian citizen and so the Tribunal makes no finding about this.
133. In light of the above, the Tribunal does not accept that there is adequate evidence that the applicant is a citizen of India and so finds he is not a citizen of India.
134. In assessing whether the applicant was born in Sri Lanka and is a Sri Lankan citizen, the Tribunal gives some weight to the copy of the Sri Lankan birth certificate provided by the applicant and significant weight to the detailed evidence provided by the applicant at the hearing about his early life in Sri Lanka. The Tribunal also accepts that the individual who provided evidence by telephone at the hearing was the applicant’s younger son based on the detailed evidence provided by him and the emotional response of the applicant to that evidence during the hearing. The Tribunal also gives significant weight to the detailed and spontaneous evidence provided by the applicant’s son at the hearing as to his and his family’s circumstances in India, and to the applicant’s place of birth, Sri Lankan citizenship and occupation.
135. Accordingly, the Tribunal accepts that the applicant is a citizen of Sri Lanka, and not the citizen of any other country, and has assessed his claims against that country.

### **Well-founded fear of persecution for a Convention reason**

#### *Assessment of Protection claims*

136. The applicant has made claims against based on the Convention grounds of his Tamil ethnicity, his Muslim religion, his imputed political opinion as an opponent of the SLA and the supporters of General Fonseca and his membership of particular social groups comprising

"Tamil/Muslim business owners"; "business owners"; "returnees" and "failed asylum seekers".

137. The applicant fears harm at the hands of the SLA, the Sri Lankan government, Sri Lankan opposition party members and other non-state actors.
138. The Tribunal accepts the difficulties of proof faced by applicants for refugee status. In particular there may be statements that are not susceptible of proof. It is rarely appropriate to speak in terms of onus of proof in relation to administrative decision making: see *Nagalingam v MILGEA & Anor* (1992) 38 FCR 191 and *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 357; 6 ALD 6 at 10. The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, at paragraph 196-197 and 203-204 recognises the particular problems of proof faced by an applicant for refugee status and states that applicants who are otherwise credible and plausible should, unless there are good reasons otherwise, be given the benefit of the doubt. Given the particular problems of proof faced by applicants a liberal attitude on the part of the decision maker is called for in assessing refugee status.
139. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Moreover, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. In addition, the Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.
140. As noted above, the Tribunal has given significant weight to the evidence provided by the applicant's son at the hearing. The Tribunal notes that the applicant was given no warning prior to the hearing of the Tribunal's intention to make contact with the applicant's family in India and so considers the consistency of the applicant's son's evidence with the evidence provided by the applicant to strongly support the credibility of the applicant's evidence where it is consistent with the evidence provided by his son.
141. Accordingly, the Tribunal accepts that the applicant is a Tamil Muslim man who was born and raised in [Location 1], [District 5], in eastern Sri Lanka and has worked as a [businessman] in eastern Sri Lanka and in Colombo for many years. The Tribunal also accepts that, as a Tamil Muslim businessman from [District 5], the applicant would have faced ongoing harassment and discrimination at the hands of the SLA, the LTTE and other Tamil paramilitary groups at least until the conclusion of the civil war in 2009. The Tribunal also accepts that if the applicant were to return to Sri Lanka he would continue to work as a trader in the [same line of] business in eastern Sri Lanka and Colombo.
142. However, the Tribunal notes that, given his youth, the applicant's son was unable to provide any evidence about the applicant's activities and whereabouts before the mid- to late 1990s and was unable to provide any evidence about the applicant's business dealings after the applicant's family fled to Tamil Nadu in 2007. Accordingly, the Tribunal cannot rely on any evidence provided by the applicant's son as corroborating evidence of claims made by the applicant as to his activities or whereabouts before the mid- to late 1990s or his business dealings after his family fled in 2007.

143. The Tribunal also notes that the applicant has denied ever having had his fingerprints taken by the Malaysian or Singaporean authorities and ever having travelled outside Sri Lanka before 2010. The Tribunal has found that the applicant did provide a set of fingerprints to the Singaporean and Malaysian authorities at some point in his past. While the Tribunal does not accept the accuracy of the identifying information provided with that set of fingerprints, it does accept that those fingerprints are likely to have been taken at some time [in the 1990s], particularly as this is consistent with other dates recorded on that set of fingerprints such as the one on the archival date stamp in the top right-hand corner of the document which appears to record a date in 2001. Accordingly, the Tribunal finds that the applicant did provide a set of fingerprints to the Singaporean and/or Malaysian authorities in [the 1990s] and was in Singapore and/or Malaysia during that time.
144. The Tribunal finds the applicant's denial that he provided fingerprints to the Singaporean and/or Malaysian authorities in Singapore and/or Malaysia [in the 1990s] or some other time before 2010 raises serious doubts about the applicant's credibility in relation to his possible travel outside Sri Lanka before the mid to late 1990s and his claims as to the nature of his business dealings after 2007. These doubts are compounded by the applicant's admissions that he has repeatedly travelled under false names, given false information or relied on false documents in dealings with the immigration authorities in a number of countries, including Australia. While the Tribunal accepts that a genuine fear of persecution may lead to an individual engaging in fraudulent activity in order to reach a place of safety, the Tribunal finds that such a genuine fear may also lead to an applicant embellishing or fabricating claims in order to obtain protection.
145. The Tribunal finds its concerns regarding the applicant's credibility sufficiently significant to conclude that, in the absence of any corroborating evidence, it does not accept the applicant's claims to have ever conducted business either officially or unofficially with the SLA or any representatives of the SLA at any time during or after 2007, as claimed. Further, the Tribunal does not accept that the applicant was ever beaten, harassed or detained by the SLA because of his business dealings with them. The Tribunal also does not accept that the applicant was harassed by supporters of General Fonseca because he had been supplying [goods] to the SLA.

*Risk of Serious Harm Capable of Amounting to Persecution*

146. Based on the country information available to it, the Tribunal accepts that there continues to be a risk of extortion, kidnap for ransom or murder for Tamil Muslim business owners in Sri Lanka at the hands of paramilitary or criminal groups with links to the SLA or Tamil paramilitaries operating with impunity, particularly in eastern Sri Lanka. The Tribunal also accepts from the country information that the motives for extortion and abductions can be a combination of political and financial factors. The ICG's concern set out in the country information above is mirrored in reports pointing to a heightened level of antagonism towards Muslims by segments of the Sinhalese community and some government linked political parties. The UNHCR has also advised that Muslims have experienced targeted violence and other human rights violations by government actors as well as pro-government Tamil groups. The Tribunal finds that the harm that Tamil Muslim business owners face in Sri Lanka involves 'serious harm' as required by paragraph 91R(1)(b) of the Act.
147. Accordingly, while the Tribunal finds that the applicant would not have a particularly high profile as a Tamil Muslim business owner in Sri Lanka (there being no evidence as to the applicant's wealth before the Tribunal), the Tribunal accepts that, in light of the available

country information, the chance the applicant, as Tamil Muslim businessman, may suffer serious harm at the hands of paramilitary or criminal groups with links to the SLA or Tamil paramilitaries operating with impunity, particularly in eastern Sri Lanka, if he were to Sri Lanka return to now or in the reasonably foreseeable future is more than merely remote or farfetched.

#### *Convention nexus*

148. The Tribunal accepts that Muslim Tamil business owners in Sri Lanka are a clearly cognisable social group, arising from a combination of their religion, ethnicity and business dealings in the wider community, membership of which is not defined by the persecution they may face. Accordingly, the Tribunal finds that the essential and significant reason, as required by paragraph 91R(1)(a) of the Act, that the applicant risks being persecuted in Sri Lanka is his membership of the particular social group Tamil Muslim business owners.
149. Given that it does not accept that the applicant had direct business dealings with the SLA, the Tribunal does not accept the applicant faces a risk of harm arising from an imputed anti-government political opinion arising from any such dealings. Further, in light of its finding that the applicant faces a risk of harm because of his membership of a particular social group it is unnecessary for the Tribunal to make findings in relation to the applicant's claims to face a risk of harm arising solely from his Tamil ethnicity or Muslim religion, or his membership of particular social groups comprising "returnees" or "failed asylum seekers".

#### *Availability of state protection*

150. The Tribunal accepts from the independent country information set out in this decision that there is a real chance that authorities in Sri Lanka are likely to be either unable, or unwilling, to prevent the targeting for harm of a Tamil Muslim business person and in some cases, may be involved in it. Where opposition party supporters, or non-ruling minority groups such as Muslims, are extorted or abducted, the Tribunal finds the available country information establishes there is not adequate State protection available in Sri Lanka.

#### *Conclusion on Persecution*

151. The Tribunal considers that, taking all the information together, there is a real chance that the applicant will encounter serious harm capable of amounting to persecution for reasons of his membership of a particular social group comprising Tamil Muslim business owners in the reasonably foreseeable future should he return to Sri Lanka.

#### **Internal relocation**

152. The Tribunal is satisfied that in the present case the risk of Convention persecution exists in the country as a whole, including but not limited to Colombo and the applicant's home area, and that safe relocation within Sri Lanka is therefore not reasonably open to the applicant.

#### **Safe third country**

153. The Tribunal has found that the applicant does not have Indian citizenship. The Tribunal also finds, in light of the significant weight it gives the evidence of the applicant's son, that the applicant's family do not have any lawful immigration status in India. Accordingly, in the absence of any other evidence of the applicant having a right to enter India, the Tribunal finds that the applicant has no legally enforceable right to enter and reside India or any other

country other than Sri Lanka either temporarily or permanently and so finds that the applicant has no right to enter and reside in any safe third country for the purposes of s.36(3) of the Act or of Article IE of the Convention.

### **CONCLUSIONS**

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

### **DECISION**

155. 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.