

**1212872 [2013] RRTA 173 (9 January 2013)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1212872
<b>DIAC REFERENCE(S):</b>	CLF2012/132146
<b>COUNTRY OF REFERENCE:</b>	Sri Lanka
<b>TRIBUNAL MEMBER:</b>	Hilary Lovibond
<b>DATE:</b>	9 January 2013
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

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

### RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

#### Refugee criterion

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

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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

### **Complementary protection criterion**

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

### **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file CLF2012/132146 relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant was represented in relation to the review by his registered migration agent.

#### *Protection visa application*

21. The applicant gave his name as [name and date of birth deleted: s.431(2)]. He stated that he fears returning to Sri Lanka because of his political opinion and his previous political activities. He stated that his ethnicity is Sinhalese and his religion Catholic.
22. He stated that he has traditionally supported the United National Party but in the lead-up to the 2010 presidential election he supported General Sarath Fonseka and the National Democratic Alliance. To assist the election campaign of the National Democratic Alliance he attended the campaign rallies for General Sarath Fonseka, put up posters and spoke to UNP supporters to garner support. At a number of rallies he spoke to General Sarath Fonseka.
23. He became concerned for his safety after the 2010 presidential election. He attended several of the rallies protesting General Fonseka's imprisonment. A number of people who attended these rallies disappeared and he suspected their disappearance was linked to their

participation in the protests. He received threats in relation to his participation in political activities, communicated verbally by people he did not know. At the beginning of 2012 he attended a protest organised by the [Agency 1] about the [Issue A], where the government killed one person and injured two.

24. He fears that he will be subjected to serious harm by the government and its authorities if he returns to Sri Lanka. He also fears harm from the people who organised his travel to Australia.

*Protection visa submission*

25. In a submission dated [in] August the applicant's representative submitted that as a fisherman from [Town 2] Puttalam District who has historically supported the UNP and more recently participated in pro-General Fonseka and pro-UNP activities, there is a real chance the applicant will be subjected to serious harm if he returns to Sri Lanka. The representative submitted that this risk is underscored by the killing and wounding of others who attended the [Town 3] protest attended by the applicant and exacerbated by the potential perception of the applicant as anti-government because of his illegal departure from Sri Lanka. It was submitted that the applicant fears harm on the basis of his real and imputed political opinion against the government and in favour of General Fonseka and the UNP. It was submitted that country information about Sri Lanka provides substantial grounds for believing the applicant will be subjected to significant harm as a consequence of his unauthorised departure.
26. It was submitted that in addition to his political activities in support of General Fonseka and the UNP and against the government, he may also be imputed with anti-government political opinion because of his unauthorised departure from Sri Lanka. It was noted that in 2010 the Director of the Edmund Rice Centre stated that Sri Lanka is not safe for deported asylum seekers and that the Sri Lankan authorities are of the view that any Sinhalese person who fled the country "must be a traitor".
27. With reference to country information including reports from the UK Home Office, Minority Rights Group International and the US Department of State, the representative submitted that a climate of fear exists in much of Sri Lanka and human rights violations continue in a climate of impunity for the perpetrators. The Representative cited the Director of the Edmund Rice Centre who stated in 2011 that "[a]nyone who publicly dissents from the Government's position is at risk" She noted further that civilians have been detained on the basis of their opposition to the government and its leaders and arrested for putting up posters.
28. Referring to documented instances of violence associated with the presidential and parliamentary elections in 2010 and the local elections in 2011, the representative submitted that election violence has become endemic in Sri Lanka such that there is a real chance the applicant will be subjected to serious harm for reason of his support for the UNP. The representative cited Höglund and Piyarathne as stating that as members of an opposition party, UNP members are particularly vulnerable and that generally, the authorities side with the party in power<sup>1</sup>.
29. It was submitted that the applicant risks detention, interrogation and serious harm on arrival at Bandaranayake Airport and that as cited in a 2011 IRB Canada report, an academic researcher had found there were reports of the abuse and torture of airport detainees.

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<sup>1</sup> Höglund K and A Piyarathne 2008, *Paying the Price for Patronage: Electoral violence in Sri Lanka*

30. In relation to the applicant's claims to protection under the complementary protection regime, it was submitted that the applicant faces a real risk of significant harm if returned forcibly to Sri Lanka. The representative submitted that because of his illegal departure and because his return would be without the normal forms of identification, a real risk exists that he would be detained by the authorities on his arrival and subjected to torture, cruel and inhuman treatment and/or degrading treatment. With reference to a submission to the UK Home Office by the Law and Society Trust and other bodies, it was submitted that returnees are viewed with suspicion, seen as traitors and as having brought the country into disrepute and lied about the country abroad.
31. It was submitted further that the country information about the arrest, detention and severe mistreatment by the authorities of those with the applicant's profile gives substantial grounds for believing the applicant will be subjected to this punishment. The representative noted that the Foreign and Commonwealth Office and Human Rights Watch have both identified illegal departure and return without an identification card and other documentation as a factor in increasing the risk that an individual will experience difficulties with the authorities on arrival, including possible detention. The representative noted that the Law and Society Trust also indicated that returnees are identifiable by the temporary travel documents on which they return and are subjected to "special questioning" by the police and the Terrorist Investigation Department and that "[t]hey are almost always detained, sometimes for hours and sometimes for months, until security clearance is obtained" and remain at risk of being detained at check points or abducted by paramilitary groups and subjected to intimidation and extortion.
32. The representative submitted that the United Nations Committee against Torture concluded in 2011 that the use of torture and ill-treatment in Sri Lanka is "widespread and persistent" and that on this basis substantial grounds exist for believing that if returned, the applicant will be detained and subjected to treatment that constitutes torture, cruel or inhuman treatment or punishment and/or degrading treatment or punishment. Accordingly, it was submitted that the applicant is a person to whom Australia owes protection obligations under s.36(2)(aa) of the Act.
33. It was submitted that as the harm feared by the applicant is at the hands of state actors, relocation is not a relevant consideration and further, is not reasonable in the applicant's circumstances in view of the lack of basic infrastructure, inadequacy of essential services, presence of landmines and unexploded ordnances and continued economic and security restrictions in the north and east of the country.

*Delegate's decision*

34. The delegate found that the applicant was confused about dates, could provide little detail and was vague about the threats he had received. She noted much of the information the applicant provided regarding political events and protests in Sri Lanka was publicly available but accepted nonetheless that his political profile was as claimed.
35. The delegate found that the applicant's fear of persecution was not well-founded as:
  - the likelihood of the applicant being harmed because of his presence at the same rally as others who were abducted and killed was far-fetched;
  - the harassment and detention of Fonseka supporters indicated by country information were not serious harm within the meaning of s.91R;

- the chance of his being harmed as a result of attending the [Issue A] protest was remote; and
  - his political profile was not such that he would attract adverse attention in the future.
36. The delegate found that there were not substantial grounds to believe there was a real risk the applicant would suffer significant harm if returned, as despite media reports indicating that returned refugees are regularly stopped and interrogated on arrival and some held for months without trial, Sri Lankan government reports indicated that a group of failed asylum-seekers had returned without any “substantiated allegations of mistreatment” and the UNHCR advised that travel documents are issued to returning asylum-seekers in a “fairly straightforward process”.

*Proceedings before the Tribunal*

37. Under cover of a response to hearing invitation dated [in] October 2012 the applicant’s representative submitted that he had instructed that subsequent to his POD interview [in] June, people had visited his home and enquired about his whereabouts.
38. The applicant appeared before the Tribunal [in] October 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Sinhala and English languages.
39. At hearing, the applicant stated that he knew the information that was contained in his Protection visa application. The finished application was interpreted back to him and he thought that everything in it was correct. There were no mistakes that he wanted to point out or correct.
40. The applicant stated his name as [name and date of birth deleted: s.431(2)]. He is a citizen of Sri Lanka, has never lived in another country and does not have permission to live in any other country. He is Catholic and before coming to Australia lived in the village of [Town 2] in Puttalam District. He speaks only Sinhalese.
41. The applicant’s mother, wife, [children] and mother-in-law live in [Town 2]. His only contact with them now is by phone. Because of lack of money he has not spoken to them for four days. His father is dead.
42. He attended school to [level deleted: s.431(2)]. After that he worked as a fisherman and helped his mother drying fish. He was self-employed as a fisherman but worked under the supervision of [name deleted: s.431(2)], from [Town 4]; he became crippled and handed the work over to him. He worked fishing and drying fish until just before he left Sri Lanka.
43. Asked about the UNP, the applicant said the UNP looks after the welfare of the people and helps the people. Asked how long the party has existed, he said during the time of President Premadasa and after that the president was Wickremasinghe. Since he became a voter he has been a UNP supporter. Asked why he supported them, he said he likes to say that the country grew and never went down during their regime. Asked how he thought they were dealing with the situation currently, he said it’s better if they come back to power instead of the current government. Asked if other members of his family also support the UNP he said they do, but they don’t participate in politics; only he does that.

44. Asked what General Fonseka's main election platforms were, the applicant said his main topic was development of the country. Asked about his support for the NDA, the applicant said that the UNP had been losing for years and they supported General Fonseka, expecting him to win. He worked for him arranging pocket meetings and visited his main political meetings. He distributed posters and displayed banners.
45. Asked whether he had any formal position or role and in what capacity he organised the meetings, the applicant said there was a representative of General Fonseka in the district; he organised the engagements under his supervision. His name was [Official 5].
46. Asked where the pocket meetings were held, the applicant said on land next to his mother's house. Asked why he had not mentioned these meetings previously, the applicant said that he had. The Tribunal asked if that was what he meant in his statement when he talked about talking to UNP supporters and he said his wife gave him that information after he arrived here. The Tribunal clarified that it was talking about the statement with information about why he feared going back to Sri Lanka. The applicant said again that his wife spoke to the lawyer; they also know his problems so his wife submitted all this information to them and they prepared the application. He spoke to the general public about the qualities of General Fonseka and how they must support him. The Tribunal clarified again that it was asking whether he was talking about the pocket meetings when he mentioned talking to members of the public who were UNP supporters and he said he was.
47. Asked which campaign rallies he attended, the applicant said that when he spoke in public General Fonseka said he would eliminate corruption and develop the country. He also attended other meetings, not necessarily presided over by General Fonseka, but by parliamentarians. Asked where the meetings were held, he said he can't remember specific meetings as there were several. He remembers one at [Town 6]; that was a big meeting and General Fonseka attended. Asked how many people were there, he said maybe thousands. Asked how many of these meetings he went to he said apart from the big one he has gone to about four meetings. They were all within the district. The Tribunal noted that it was a little surprising that he could not remember where they were held, and the applicant said General Fonseka only came to the meetings he attended in [Town 6]. The other meetings in [Town 3] were only attended by the UNP district representatives. Asked where those meetings were held, the applicant said they were in playgrounds. Asked if they were public playgrounds, the applicant said he didn't know, but they were opposite the hospital in [Town 3].
48. Asked where he put up posters, the applicant said the posters were provided to the local politicians and they distributed them among their people and they pasted them in their villages and adjacent villages. Asked how he travelled to do this, the applicant said he was walking. Asked if they received any specific instructions about putting the posters up, the applicant said no, wherever they thought, they pasted them. Asked what time of day he did this he said it was at dusk; he couldn't do it in the daytime because the government supporters were watching these activities. Because they did it at night, they attracted attention. They were interested in what they were doing, so they were watching. The people in the neighbourhood gave information about who had done this. They would name the person. Someone told him they had seen him pasting posters and that is why he had these problems. Asked who that person was, the applicant said he lives about four kilometres away but he doesn't know his name. Asked how he came to talk to the applicant, he said he sent a message through another person because he saw them pasting posters and said "we will give you the works" Asked if he was talking about the threats he had received, the applicant said they said "since you are doing this very soon you will be in trouble".



49. The Tribunal asked when this happened. The applicant replied that he met the person on the road to [Town 3] and he said they have been given information about him. Asked again when this occurred he said he can't remember the date but it was close to the elections. There is a person who saw these activities and he told another man. Asked if he knew who either of these people were, he said one is a local representative of the village, a member of the divisional committee in the area. The local representative passed the information on to him.
50. Asked how many people were involved in putting up posters in the district, the applicant said at the time, about ten or fifteen people. Asked if they also received threats, the applicant said that three of those who also pasted posters are no longer alive. Three others followed him in pasting posters; those three are also missing. Asked how he knew about this, he said he heard villagers talking and saying that because these people did this they have disappeared.
51. The Tribunal noted that his statement refers to a number of threats and he had mentioned one instance. Asked if there were others, the applicant said they came to his home twice and he asked them "why are you after me like this?" The applicant then said that someone came to his home on three occasions. Asked if he knew who they were, he said he didn't recognise them or know their names. Asked if it was the same person or people, the applicant said different people came at different times.
52. Asked when this happened, the applicant said it was in 2011. Asked if he could be a little more specific, he said because he was living in fear he can't remember the dates. Asked what the people said, he replied that his wife accosted them and asked why they were after him; they said he had better be careful. Asked if they said why he should be careful, the applicant said because of his involvement in politics. Asked to explain in as much detail as he could what they actually said to him, the applicant said "...otherwise you will have the same fate as the other three" Asked if they had a conversation or whether they just came and delivered a message, the applicant said they came and delivered the message that he should be careful otherwise what happened to the other three will happen to him. Asked what time of day it happened, he said he couldn't remember exactly but it was in the afternoon. Asked if his children were home, he said no; they had gone to play.
53. Asked if he knew the people at the pocket meetings, the applicant said they were his neighbours and outsiders also came. Whoever was known to him attended the meetings: he asked people to come. Asked how many people were there, the applicant said they were mostly fishermen; between fifteen and twenty. Those who are involved with the party came. Asked what he said to them, the applicant said "we have been working for the UNP all this while and they have been losing, but with this man we will win the election". Asked how they reacted, he said they said "Yes, it's good; we will all work together."
54. Asked what his views are about General Fonseka and his background, he said people are dedicated to him because they are confident he will develop the country and do well for the country. Asked what his personal views are, in light of the fact that it is alleged General Fonseka did some things that were not so good, the applicant said he won the war and he had hopes that he will develop the country.
55. Asked about speaking to General Fonseka as he claimed in his statement, the applicant said it was at the meeting held at [Town 6]; he shook hands and spoke to him at that meeting. The Tribunal noted that in his Protection visa statement he had claimed at the he spoke to General

Fonseka at a number of campaign rallies; the applicant said that it was only one. The Tribunal noted that this meant that the information in his statement was not entirely correct.

56. Asked if he knew who the people were who disappeared after attending the rallies, he said he didn't know; they were from [Town 6]; they were in a different village. Three were from adjacent villages and two were from other villages.
57. The Tribunal noted that he had mentioned at the start of the hearing that his family had been threatened again and asked when that occurred. He said it was after he came to Australia. Asked if he could be more specific, he said it was in August this year. Asked when he learned about it, the applicant said it was [in] September. Asked who came to his house, the applicant said he doesn't know; four or five men. His wife told him about it. Asked exactly what she had told him, the applicant said he asked for more information fearing the family would be in trouble. They asked "where is your husband?" She said he had gone for his work. Then his wife asked who they were; they said it doesn't matter who they are and they left. Asked if they came only once, the applicant said they came four times in the month of August. He didn't ask for dates. The Tribunal noted it would have expected he would have asked his wife for all the details. The applicant said she was scared and he didn't want to frighten her further; he can do nothing from here. He has [big] girls so he told her not to interact too much with them, thinking they will harm the children. Asked if the children are aware of what has happened he said they know about it.
58. Asked about the protest about [Issue A] the applicant said the fishing community has an association and they gave him a letter. Asked how many people attended he said about fifty. Asked if it was organised by the association in his village or somewhere larger he said when the local association contacts other village groups; they all congregate in one place and they make these demonstrations. About fifty people from his association took part; other people joined too, not only members. It was held near [Town 3 landmark]. There were too many people to count.
59. Asked what happened during the protest, he said the police were there and the army and the navy. One of them shot one of the people and he died; two other people were wounded. Others had hands and feet amputated. This occurred during the protest. Asked if he saw that happen he said when the shooting happened everyone had run away. When they heard someone was shot they came closer. Asked what the people were doing during the protest, he said they were shouting slogans about [Issue A]. He has photos. The Tribunal asked if these were the photos he had already provided and he said they were. Asked if he witnessed any violence or damage to property he said they hadn't done anything like that, only shouting slogans. There is no place for a poor man. Asked what he meant by that, he said the poor become still worse; these actions show what happens to a poor man; they are unable to go higher up. This is what will happen to anyone as things are in the country.
60. Asked which protests against General Fonseka's imprisonment he attended, he said four rallies; one big one at [Town 3] and one at [Town 4]. Two big rallies in two days; the others were smaller ones at [location deleted: s.431(2)]. Asked what happened at the rallies he said he was walking with banners asking for the release of General Fonseka. They were holding banners and standing in the town disturbing the traffic. Asked where they were standing, he said in [Town 3] near the [landmark deleted: s.431(2)] and in [Town 4] also near the [landmark deleted: s.431(2)]. Asked how many people attended the big rallies he said two to three hundred in [Town 4]; in [Town 3] maybe the same number. Asked when these were he said one rally was in 2011, [date deleted: s.431(2)]. The other dates he can't remember.

61. After a break, the Tribunal asked the applicant if there was anything he wanted to say having spoken with his representative. The applicant said he wanted to elaborate: he was threatened at his family home three times and on the road three times and on the seventh time he was threatened on his way from church. The Tribunal noted that this appeared different from what he had said before. The applicant said there were three times at home and three times on the road; seven instances altogether. Asked if the people said the same things every time, he said it was the same message every time. Asked if the messages were given by the same person he said it was a different person the first three times; the final time it was a man called [Mr A]. Asked how he knew [Mr A], he said he is from a different village; it was the first time he had met him. The applicant asked for his name. The other three times the messages were sent through people in the village. He knew those people. The Tribunal noted that this appeared to be different from the information he had provided previously which was that the threats were given to him by people who were not known to him personally. The applicant said he didn't know them personally but they were from the village. Asked how many people live in the village he said about two thousand.
62. Asked how he obtained the letter from General Fonseka's secretary, he said his wife approached [Official 5] and he obtained the letters. His wife went with the local politician to General Fonseka's office. Asked if he meant she went with [Official 5], the applicant said no, it was a local government representative. Asked the local representative's name he said it is [name deleted: s.431(2)]. He appealed to General Fonseka's secretary and told him he had left the country.
63. Asked when he received them, he said he got them when he was at [location deleted: s.431(2)]. His wife sent them by email to his case manager. Asked whether he communicates with his wife by email, he said no; he can't use the internet; he has enough trouble with a phone. His wife went to a place where you pay someone to send it.
64. Asked whether he knows [Official 5] personally, the applicant said he has spoken to him. He knows the applicant is involved in political work. Asked if he knows where the originals of the letters are, he said his wife has them. Asked if he had told his wife to get this information, he said that he told her he needed it.
65. Asked when he decided to come to Australia he said he had no idea of leaving the country but he decided to come when they had threats. He got the threat [in] February and came [in] February. Asked which threat he was referring to, he said the seventh threat was [in] February. He doesn't remember the other dates. Asked how come he remembers the seventh time, he said it was because he was coming home from church. Asked why he remembered it specifically, he said he was in fear for his life. Asked if there was something different about that instance so that he remembered it and not other times such as the fourth or the sixth, he said he didn't take the threats at home seriously. He had some concerns about the first three, after that he didn't take much notice. The last time was the deciding one. Asked why, he said he was in fear for his life. Asked why that was the case, he said the man was really threatening hard and he thought something would happen to him. [Mr A] advised him to leave the country because he had a problem like this. Asked whether he had mentioned this before, the applicant said it was only when the man threatened him on the way from church and told him to go.
66. Asked when he started organising his travel, he said that after meeting this man he decided to go. Asked how much he paid for his passage he said it was LKR250,000; he still has to pay some more. He took a loan.

67. Asked how he left the country he said when he returned from church a vehicle came and he was asked to get in and taken to [location deleted: s.431(2)]. Because he didn't have money he got into the vehicle with LKR500 in his pocket. They got into a small boat and were transferred into a bigger boat. Asked if this happened on the same day that he met [Mr A], he said he went home after meeting [Mr A] and it was [in] February he came on this journey. The vehicle didn't pick him up on the way from church. Asked if he made the arrangements with someone, he said he had paid the money and a vehicle came to his house. Asked to whom he paid the money he said he doesn't know the name. Asked how he knew who to pay, he said [Mr A] told him to give the money to a person who would come to the [landmark deleted: s.431(2)].
68. Asked what he fears may happen if he returns to Sri Lanka the applicant said he fears there may be a danger to his life. Asked who he thinks would harm him, he said from the government side; there is a white van system taking place. He fears that could happen to him. Asked why they would harm him he said because they have come and threatened the people at his house and him; he believes these things can happen. Asked why they would want to harm him he said because of his participation in political activities and demonstrations.
69. Asked how they would know he had returned, he said it is easy to find out. When you go back there are lists and they will be able to locate him. Asked who has the lists and what they comprise, he said the village office has statistics of people living in the area, people who have gone abroad and people who are dead. There is a separate list and this is why they are after him. Asked what the separate list is he said there is a voters' register in every village and in that they indicate whether people are in the country or whether they are migrated or dead.
70. Asked if there were any other reasons he feared returning to Sri Lanka he said he will be able to get out of the airport but after a week or two he will be abducted. Asked who would abduct him, he said the airport officers will know he has returned and after about two weeks they will go after him. The CID will go after him. Asked why, he said they want to get them and that is why they are following him. Asked who is following him, he said officers of the CID. Asked if this was happening before he left Sri Lanka, he said many times. Asked why he had not mentioned it before, he said it had not happened to him.
71. Asked whether he feared harm from anyone else or for any other reason if he returned to Sri Lanka he said the people who lent him the money had come to his house and asked for the money and said that if it is not paid they will take over the properties. The Tribunal noted that actions of this nature against him would not occur for a reason connected with the Refugees Convention. He said he understood this, but he also feared something may happen to his children.
72. Asked whether he thinks the authorities in Sri Lanka will protect him from the harm he fears if he returns, he said he doesn't think they will protect him because he has gone against the wishes of the current government so they are angry with him. Asked if he would be able to move to another area of Sri Lanka and live there without risk of harm, he said the only place he can go is to his wife's area, but as a stranger he would be easily located there. His wife comes from [location deleted: s.431(2)]; it is in the same district but pretty far.
73. Asked if he has suffered harm for any other reason while in Sri Lanka he said he has never experienced anything before like this. It was because of the things he has taken part in. In relation to the fear that the people who lent him money may take his property or harm his

children, he said the property is his mother's; he has greater fear about the safety of his children.

74. The Tribunal noted that it was having some difficulties understanding how the details of his story fitted together and that it appeared to be lacking in detail and the information about the threats he received, in particular, seemed to have changed as they went along, and asked if there was anything he would like to say in response to that. He replied that he is almost sure that he will be in serious danger if he goes back.
75. The Tribunal noted also that it was not sure that it could place a great deal of weight on the letters he had provided as it was not sure that they were genuine as people may sometimes provide information in a bid to help people and may sometimes not be entirely genuine in situations such as his and asked if there was anything he would like to say about that. The applicant said there is only the letters and the photographs he has provided; he doesn't have anything other than that.
76. The Tribunal noted that it was still a little concerned that some of the information the applicant had provided seemed a bit mixed up and that while it understood these things had happened a little while ago now and that he had had a difficult time since then, it was wondering why some of the information he had provided seemed quite vague and would like him to comment on that if he could. The applicant said on the seventh occasion he realised they were real threats and he decided that day to find the money and to come. That's when he was taken to the boat in [location deleted: s.431(2)].
77. Asked if there was anything else he would like to say about why he feared returning to Sri Lanka the applicant said he has a feeling he will be in trouble if he goes back.
78. The applicant's representative submitted that:
  - the events leading up to the applicant's departure, especially his conversation with [Mr A] and his departure, were mentioned in his entry interview or his POD;
  - it may be more accurate to describe the conversation with [Mr A] as a warning than a threat;
  - the recent visits to his home in his absence were mentioned in her letter [in] October;
  - the applicant has said throughout that he has difficulty counting and he is not highly educated; he has difficulty with numbers and his claims were broadly consistent with his POD interview;
  - his claims in summary are that he will be at risk because of his previous political activity;
  - he has a public profile as someone with an anti-government political opinion as he supported Sarath Fonseka and participated in protests;
  - his fears regarding his inability to repay the loan should be considered under complementary protection;
  - country information supports the claim that UNP supporters have previously been arrested or jailed for putting up banners and posters and further, indicates that violence during elections time seems to be endemic in Sri Lanka.

*Post-hearing submission*

79. In a submission dated [in] October 2012 the applicant's representative submitted that that applicant had instructed that after his hearing, unknown people visited his home and asked

where he was. when his wife refused to tell them, they broke the windows of his house. The applicant suspects this incident is related to his involvement in politics.

## **FINDINGS AND REASONS**

### *Country of Nationality*

80. The applicant has claimed to be a citizen of Sri Lanka. He has provided photocopies of a number of documents appearing to originate in Sri Lanka including a passport, driver's licence, his children's birth certificates, his marriage certificate and the national identity cards of his mother, wife and eldest daughter. Having regard to this evidence the Tribunal accepts that the applicant is a national of Sri Lanka.

### *Credibility*

81. The applicant's evidence regarding his origins and background has been consistent throughout; so too have his claims of political involvement and he was able to respond to questions at hearing and provide additional information to clarify his claims in this respect. However, the Tribunal found some aspects of his evidence confused and vague; he appeared at times to have difficulty explaining the sequence of events and on other occasions was unable to provide fairly basic details about events in which he claimed to have participated. The Tribunal also has reservations about some evidence introduced for the first time at the Tribunal hearing. The Tribunal finds the applicant to be a credible witness with respect to his political activity, but considers that some elements of his claims are embellishments lacking a basis in fact.
82. The Tribunal is mindful of the need to adopt a reasonable approach to the assessment of credibility and notes that as cautioned by Foster J at 482 in *Minister for Immigration and Ethnic Affairs and McIlhatton v Guo Wei Rong and Pan Run Juan* (1996) 40 ALD 445, ...care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted.
83. The Tribunal is also alert to the difficulties which may be faced by an applicant with limited education attempting to present his or her case in an unfamiliar environment. Accordingly, the Tribunal has assessed the claims of the applicant as set out below. Specific difficulties are dealt with as they arise.

### *Consideration of past claims and future harm*

84. The applicant's claims regarding his origins and life in Puttalam District have been consistent throughout and the Tribunal accepts that he was born and has lived all his life in [Town 2] where he worked as a fisherman and assisted his mother in drying fish.
85. As noted above, the applicant has also given consistent evidence about his political affiliations and his involvement with the United National Party (UNP) and more recently the National Democratic Alliance and as a supporter of General Sarath Fonseka in the Presidential Elections of 2010. At hearing he was able to give simple but contextually appropriate responses to questions about the organisations he supported, and why. Based on this evidence the Tribunal accepts that he has supported the UNP and that during the presidential election campaign he supported General Fonseka.

86. The applicant has stated that he worked for General Fonseka's campaign before the election, putting up posters, organising "pocket" meetings at which he spoke and attending rallies. The Tribunal found his evidence in relation to this somewhat vague but notes that it has been broadly internally consistent. The applicant was unable to give detailed, specific or convincing evidence about how, when or where he had put up posters and the Tribunal accepts that he may have done so largely because it is an activity which might reasonably be expected of a village-level supporter.
87. The applicant conceded at hearing that the information in his Protection visa application overstated the extent of his association with General Fonseka during the election campaign and the Tribunal finds that his description at hearing of having organised and spoken at meetings similarly inflated his actual activity, which he initially described as speaking to UNP supporters to garner support. However, the Tribunal accepts that the applicant encouraged friends and neighbours who were UNP supporters to support General Fonseka.
88. The applicant conceded at hearing his initial statement that he had spoken to General Fonseka at a number of rallies was incorrect. Given further his inability to recall where the other rallies took place, the Tribunal has some reservations about whether he attended a number of rallies as he initially claimed. However, the Tribunal accepts that the applicant attended at least one election rally for General Fonseka.
89. The Tribunal discussed with the applicant at hearing his claim to have attended a number of post-election protests against General Fonseka's imprisonment and he provided relatively concrete information about these events. While the Tribunal has been unable to find evidence of the rallies mentioned, it accepts that there was a significant popular outcry against General Fonseka's imprisonment and that local protest events may have taken place without any record of those being accessible now. In the absence of evidence to the contrary the Tribunal accepts that that applicant attended rallies protesting the imprisonment of General Fonseka.
90. Asked at hearing whether he knew his local UNP MP [Official 5] personally, the applicant replied that he has spoken to him. The applicant has submitted a letter purportedly from [Official 5] attesting to the applicant's support for the UNP, the "consequences" he faced as a result of that and urging support for his application. Asked how he obtained the letter, the applicant said his wife approached [Official 5]. As discussed with the applicant at hearing, politicians are frequently willing to write letters on behalf of their constituents and such letters may be of little evidentiary value. The Tribunal gives little weight to this letter. The Tribunal finds that the applicant's evidence regarding his association with [Official 5] indicates that he was not well-known to his local member and further, that his political profile related to the UNP, if any, was slight.
91. As above, the Tribunal accepts that the applicant supported General Sarath Fonseka in the 2010 Presidential elections. The applicant has also submitted a letter purportedly authored by General Fonseka's secretary and obtained by his wife with the assistance of a local government representative. For reasons similar to those outlined in respect of the letter from [Official 5], the Tribunal considers this letter of little evidentiary value and has given it little weight. The applicant conceded at hearing that the information in his Protection visa application overstated the extent of his association with General Fonseka during the election campaign and the Tribunal finds that his description at hearing of having organised and spoken at meetings similarly inflated his actual activity, which he initially described as speaking to UNP supporters to garner support. The applicant does not claim to have had any

organising role in the protests he attended against General Fonseka's imprisonment. The Tribunal finds that the applicant's activity in support of General Fonseka was low-level.

92. The applicant has claimed that his participation in the election campaign and the protest rallies has placed him at risk because he was threatened about it and several people who attended the big election rally at [Town 6] have since disappeared. The Tribunal accepts that in the overall context of election violence in Sri Lanka referred to in country information presented by the representative it is possible some individuals who attended this rally may have disappeared. However the applicant's claims in relation to this were vague and entirely absent any detail as to who the people were, how he knew they had disappeared or to substantiate his claimed belief that this related to their attendance at the rallies. Even if the Tribunal were to accept that other people who attended the same rallies as the applicant disappeared because of their participation in these activities, the applicant stated that thousands of people attended the election rally in [Town 6] and the independent sources consulted indicate that many protests were held around the country following General Fonseka's imprisonment<sup>2</sup>. The Tribunal finds that given the low level of his political involvement and the large number of people present at the rallies, the applicant's attendance at these events would not amount to a real chance of serious harm, now or in the reasonably foreseeable future, should he return to Sri Lanka.
93. The applicant claimed at hearing that three of the ten or fifteen people who pasted election posters in his district are missing or dead. The Tribunal found the applicant's evidence in relation to this claim unconvincing as it was adduced only late in proceedings and despite stating it as a matter of fact, when asked how he knew about it the applicant replied that he had heard other villagers talking about it. He claimed also that he was threatened directly in relation to putting up posters. The applicant's representative has referred to reports from the US Department of State<sup>3</sup> and the Asian Human Rights Commission<sup>4</sup> indicating that people have been detained for putting up or just possessing posters critical of the government or supporting the opposition. However, the applicant does not claim to have been threatened with detention by the police but rather to have received vague threats of harm from people from another village, and claims to have remained in Sri Lanka for some five months after he was involved in pasting posters. Further, the applicant has made claims only in respect of events relating to the 2010 presidential elections, and despite his claimed strong and ongoing support for the UNP he gave no evidence of any significant political activity or issues arising from that prior to this time. The Tribunal finds that in light of all the evidence relating to the applicant's claimed political activity, any likelihood that he would be detained or suffer serious harm, now or in the reasonably foreseeable future, as a result of his involvement in putting up posters is remote at most.
94. The applicant's evidence regarding the threats made to him has been vague, confused and inconsistent. He has claimed to have received verbal threats because of his political activity from persons not known to him, to have been threatened verbally in relation to putting up posters by a man whose name he did not know who lived four kilometres away and to have

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<sup>2</sup> Perera, Yohan and Susitha R Fernando, *South Asians for Human Rights*, 2010, "Countrywide "Free Fonseka" Protests Gather Momentum", 5 October, <<http://www.southasianrights.org/?p=1636>> Accessed 7 December 2012; AsiaNews.it 2010, *Protests widen against the detention of Sarath Fonseka*, 19 October, <<http://www.asianews.it/news-en/Protests-widen-against-the-detention-of-Sarath-Fonseka-19761.html> > Accessed 7 December 2012

<sup>3</sup> US Department of State, 2011, *2010 Human Rights Reports: Sri Lanka*, 8 April, <<http://www.state.gov/j/drl/rls/hrrpt/2010/sca/154486.htm>> Accessed 7 December 2012

<sup>4</sup> Cited in Refugee Review Tribunal 2010, *RRT Research Response: Sri Lanka LKA37498*, 21 October



been threatened twice, three times, six times and seven times. He claimed at hearing to have had some concerns about the first three instances, not to have taken seriously the threats at home and to recall the date on which he was threatened the seventh time by a man called [Mr A] who told him he should leave. The Tribunal discussed its concerns regarding this evidence with the applicant and in response he reiterated that the seventh time he took it seriously, got the money and came on the boat. The Tribunal does not accept that the vagueness and internal inconsistency of the applicant's evidence in respect of this crucial aspect of his claims can be explained by lack of education and difficulties with the interview process. The Tribunal considers the claimed threats to be embellishments designed to strengthen the applicant's case and finds that the applicant was not threatened because of his political activity.

95. [In] October 2012 the applicant's representative advised that the applicant had requested the Tribunal be informed that subsequent to his POD interview [in] June, people had visited his home and enquired as to his whereabouts. Asked about this at hearing, he said four or five men went to his home and asked his wife where he was. This occurred four times but he did not ask his wife for the dates as he didn't want to worry her. [In] October 2012 the applicant provided further information via his representative stating that after the hearing, unknown people visited his home, asked where he was and broke the windows. He believes this incident is related to his political activity. The Tribunal finds the timing of the introduction of this evidence detracts significantly from the applicant's credibility in this regard. As the Tribunal has not accepted that the applicant was the subject of threats relating to his political activity while in Sri Lanka and has significant concerns about the reliability of this evidence, the Tribunal does not accept that unknown persons have visited his home looking for him since his departure.
96. The applicant has also claimed that he attended a protest against [Issue A] organised by [Agency 1] and has provided photographs in which he claims that he is visible in the background. He has also provided a letter from [Agency 1] in the [division deleted: s.431(2)] stating that he attended the protest [in] February 2012. The Tribunal discussed his claims about this rally with the applicant at hearing and he appeared unaware of much of what took place, according to independent and contemporaneous accounts. However, having regard to the documentary evidence he has provided, and despite his. However, the Tribunal recognises that it was a large protest and that the applicant may not have been in the same location where [protest details deleted: s.431(2)].<sup>5</sup> The Tribunal accepts that he was present in the general locale of the protest.
97. The applicant has not claimed directly that he fears harm as a result of his attendance at this protest. However, the Tribunal has considered nonetheless the implied fear of harm arising from the applicant's emphasis on his participation in the protest and the fact that according to his evidence, one person was killed and two wounded during the fisheries protest. The accounts consulted by the Tribunal indicate variously that three, four or eight people were seriously wounded in addition to the fatality. They also indicate that as many as five thousand people took part in the protest. The applicant has claimed no specific connection to those wounded or killed during the protest and given the very large number of protestors, the Tribunal does not accept that his participation in the protest would cause him to face a real chance of harm now or in the reasonably foreseeable future, should he return to Sri Lanka.

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<sup>5</sup>[References deleted: s.431(2)]

98. The applicant's representative has submitted that his support for the UNP and for General Fonseka and his participation in the [Agency 1] protest, together with his unauthorised departure from Sri Lanka may found the imputation to him of anti-government sentiment and that this in turn would place him at risk of detention, interrogation and serious harm on arrival at Bandaranayke Airport. The Tribunal notes the representative's reference to a Canadian IRB report citing the research of a Temple University adjunct professor which stated there had been reports of the abuse and torture of airport detainees<sup>6</sup> but notes that this aspect of the report appears to relate specifically to Tamils and those suspected of supporting the LTTE. The Tribunal notes also the views of the Director of the Edmund Rice Centre referred to by the representative that Sri Lanka "is not safe for returned asylum-seekers" and that any Sinhalese person who departed the country unlawfully is viewed by the government as a "traitor"<sup>7</sup> Against this, the Tribunal has had regard to and prefers the information published in 2011 by the Canadian, British and Australian governments which states that all Sri Lankan nationals are treated in the same manner with regard to entry procedures into Sri Lanka. The Tribunal also notes the advice from the Department of Foreign Affairs and Trade, that as at 16 October 2012, no failed asylum seekers who had returned from Australia had been charged in relation to illegal departure.<sup>8</sup> In 2011 the Department of Immigration and Citizenship advised in relation to both voluntary and involuntary removals from Australia to Sri Lanka that it was aware of just one alleged instance of mistreatment of a returned asylum-seeker and that after investigation, the allegations that this person had been beaten were not substantiated.<sup>9</sup>
99. The Tribunal has found that that any political profile attaching to the applicant as a result of his support for the UNP and General Fonseka is a minor one. The applicant has advanced no evidence to indicate that he is of interest to the authorities at such a level as to cause his political activities or affiliations to become known the authorities on his return. Even if, as the independent evidence suggests is likely, the applicant were to be questioned on his return through the airport at Colombo, the Tribunal does not accept that his profile is sufficient to connect him to village-level political activity which occurred more than two years ago.
100. The applicant has claimed that he fears harm from the government because there is a white van system and separately that if he returns, he will be able to get out of the airport but a week or two later the CID will come after him and abduct him. Asked why, he said because they want to get him. He has claimed that unknown persons have visited his home twice since his departure and the voter's register in his village shows him to be absent. As the Tribunal has found that the Applicant has a minor political profile, if any and has not been threatened in relation to his political activity, the Tribunal does not accept that he would face a real chance of harm on this basis either now or in the reasonably foreseeable future.
101. The applicant has also claimed that he fears he will be harmed by the people who organised his travel to Australia as he still owes them money and they have come to his house asking

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<sup>6</sup> Cited in UK Home Office 2012, Sri Lanka Country of Origin Information Report , 7 March, <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/srilanka12/report-070312.pdf?view=Binary>>, Accessed 7 December 2012

<sup>7</sup> Cited in UK Home Office 2012, Sri Lanka Country of Origin Information Report , 7 March, <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/srilanka12/report-070312.pdf?view=Binary>>, Accessed 7 December 2012

<sup>8</sup> RRT 2012, *Country Advice Sri Lanka LKA40999*, 22 October

<sup>9</sup> Department of Immigration and Citizenship, Returns and Removals Section – Compliance and Case Resolution Division 2011, "Advice on the voluntary and involuntary return of failed asylum seekers to Sri Lanka and Iran", 15 December

for it since he left. If it is not paid they will take over the properties belonging to his mother and he fears they may harm him or his children. The Tribunal accepts that the applicant owes money to unnamed persons for his passage to Australia but finds that as discussed with the applicant at hearing, were his creditors to harm the applicant this would not occur for a convention reason but rather for monetary and/or criminal reasons. As there is no convention nexus, the Tribunal has not considered the likelihood of this occurring. The applicant has claimed that he doesn't think the authorities will protect him from these harms because they are angry with him owing to his opposition to the current government. The Tribunal has found that the applicant's involvement in political activity has been at a low level and has not accepted his claims regarding politically-motivated visits to his home after his departure. It finds further that he does not otherwise have a profile which indicates he would be of interest to the government of Sri Lanka. In light of these findings the Tribunal does not accept that the authorities would discriminatorily withhold protection from him for reason of his actual or imputed political opinion, now or in the reasonably foreseeable future.

102. The applicant's representative has submitted that the applicant will be at risk of harm if returned forcibly to Sri Lanka, largely because he will be without a passport, national identity card and standard travel documentation. The Tribunal notes the independent evidence relied on by the representative in relation to this claim, namely the 2012 reports of the Foreign and Commonwealth Office and Human Rights Watch which indicated that the absence of an identity card and other documents increased the likelihood that an individual would experience difficulties with the authorities. The Tribunal notes also that the UNHCR *Guidelines* for Sri Lanka for 2012 state that in 2011, 75% of returnees were contacted after arrival in their villages of destination by either the military or police for further "registration" and 26% visited again, but that while some sources have reported detention and ill-treatment of returnees, particularly Tamils, no systematic monitoring after arrival takes place of the treatment of returnees.<sup>10</sup>
103. The Tribunal has also considered the specific and detailed information contained in the DFAT advice of October 2012<sup>11</sup> which states that the government of Sri Lanka now has standardised processes in place for identity and security checking identity of all returnees and has a new Readmission Case Management System to streamline the issuing of temporary travel documents to returning Sri Lankans without valid travel documents. The DFAT advice states further that the Sri Lankan agencies involved "endeavour to complete identity and security checks as soon as possible". The Tribunal notes also advice from the Canadian IRB which states that "[t]he screening process is the same for all persons returning to Sri Lanka – whether voluntarily or by escort. The process is not impacted by ethnicity"<sup>12</sup> Analysis of the DFAT advice indicates that while the processing of voluntary and involuntary returnees may vary insofar as whether DIAC or IOM sits in on interviews conducted after the individual's arrival, all returnees who are known to have departed Sri Lanka unlawfully will be questioned by the Department of Emigration and Immigration, the State Intelligence Service and the Police Airport CID under the standardised processes referred to above. The Tribunal considers that on balance, the independent evidence

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<sup>10</sup> UN High Commissioner for Refugees 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December, <http://www.unhcr.org.refworld/docid/50dla08e2.html>, accessed 3 January 2013

<sup>11</sup> Department of Foreign Affairs and Trade 2012, *DFAT Report 1446 – RRT Information Request: LKA40999*, 22 October

<sup>12</sup> Immigration and Refugee Board of Canada 2011, *Sri Lanka: Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport*, LKA103815.E, 22 August <[http://www.irb-cisr.gc.ca:8080/RIR\\_RDI/RIR\\_RDI.aspx?id=453562&l=e](http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=453562&l=e)>

indicates that the processing of returnees does not differ according to whether their return was voluntary or involuntary. The Tribunal finds that being questioned would not in itself entail serious harm amounting to persecution as envisaged by s.91R(1), now or in the reasonably foreseeable future. The Tribunal finds that as a Sinhalese person with no discernible profile the applicant would not face a real chance of serious harm as a consequence of being forcibly returned to Sri Lanka, either now or in the reasonably foreseeable future.

104. The applicant's representative has submitted that he is likely to face harm as a fisherman who has supported the UNP and Sarath Fonseka and because of his unauthorised departure from Sri Lanka, leading to him being perceived as anti-government. The applicant was asked several times at hearing whether there were any reasons he feared returning to Sri Lanka other than those he had already mentioned, which are discussed in detail above. He did not mention his status as a fisherman or his unauthorised departure, his lack of documentation or any specific fear related to being a returned asylum-seeker. The Tribunal finds that the applicant does not have a subjective fear of persecution for reason of his illegal departure from Sri Lanka or for reasons relating specifically to his former occupation as a fisherman and that there is not a real chance that he would be subjected to serious harm for these reasons, now or in the reasonably foreseeable future.
105. The applicant has claimed to have been a UNP supporter "all his life" before supporting General Fonseka in the 2010 presidential election and the Tribunal has accepted that he attended campaign rallies and put up posters as well as attending the [Agency 1] protest again [Issue A], suggesting that he maintained a level of political engagement over a number of years. However, the applicant has advanced no claims regarding his intention to remain involved in politics should he return to Sri Lanka. The Tribunal finds that he may remain engaged at a similar level should he return but that there is no evidence to suggest that he will be involved in activities which would significantly raise his profile. For the same reasons it has found there is not a real chance that he would be subjected to serious harm for reason of his past political activity, the Tribunal finds that there is not a real chance that he would be subjected to serious harm in the reasonably foreseeable future for reason of any political activity he might undertake in the reasonably foreseeable future.
106. For the reasons outlined above, and having considered the applicant's claims individually and cumulatively, the Tribunal finds that the applicant does not face a real chance of persecution on the basis of his real or imputed political opinion or for any other Convention reason now or in the reasonably foreseeable future. The Tribunal finds that his fear is not well-founded.

#### *Complementary Protection*

107. The applicant's representative has submitted that his fears concerning the people who lent him money should be considered in light of the complementary protection criterion. The applicant stated that the people to whom he owed money for his passage to Australia had come to his house and threatened to take over the property if he did not pay. He stated further that the property belonged to his mother and he was more concerned that they might do something to harm his children. The Tribunal has accepted that the applicant owes money to unspecified persons and it accepts also that it is possible his creditors may take action to recover the monies owing. However, the Tribunal notes that the applicant first made specific claims that he feared his home would be taken or his children harmed only at the Tribunal hearing. The Tribunal has found previously that the applicant has embellished some aspects of his claims as his case has progressed, and having considered this claim in light of the

totality of his evidence, the Tribunal considers that the late introduction of this specific evidence detracts significantly from its credibility.

108. The Tribunal accepts that were the applicant's children to be harmed by his creditors as punishment for not repaying his debts or to intimidate him into paying, this would constitute cruel or inhuman treatment amounting to significant harm to the applicant as envisaged by s.36(2)(aa). The Tribunal has searched for but has been unable to locate independent evidence relating to retribution by money lenders in Sri Lanka for non-payment of debts and/or specific information regarding the targeting of children in relation to such matters. The Tribunal recognises that the absence of evidence does not indicate that a claim is not true. However, it does consider that in conjunction with its concerns regarding the credibility of the applicant's claims, the lack of supporting evidence of such activity as a known practice in Sri Lanka detracts from the strength of the applicant's claims.
109. The Tribunal notes that for the criterion at s.36(2)(aa) to be satisfied, both the evidentiary standard and the level of risk implied by the wording must be satisfied. In the absence of judicial consideration of this provision, the Tribunal has had regard to the Explanatory Memorandum as a guide to interpretation. The Explanatory Memorandum states that "[a] real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory and suspicion but does not have to meet the test of being highly probable."<sup>13</sup> Having been unable to locate country information about the targeting of children in response to non-payment of debts, and noting that the late introduction of this evidence gives rise to concerns regarding its credibility, the Tribunal is not satisfied that there are substantial grounds for believing such harm will occur or that the risk of such harm is more than theoretical or speculative.
110. In addition, the Tribunal considers that any risk of the applicant's children being harmed as a result of his outstanding debts would exist regardless of his location and could not therefore be said to arise as a necessary and foreseeable consequence of his removal from Australia.
111. The applicant's representative has also submitted that the country information indicates the applicant would be at risk of torture, cruel or inhuman treatment or degrading treatment on return to Sri Lanka, particularly as he would be returning without a national identity card or current passport. As discussed above, there are contested accounts of the treatment accorded returned asylum-seekers. A number of sources, including some cited by the representative<sup>14</sup>, indicate that returnees, particularly Tamils, are at risk of prolonged detention, interrogation and even torture on return. However, the Tribunal prefers the advice of government agencies from Australia, the UK and Canada referred to above which indicates that voluntary and involuntary returnees are processed in the same way. Further to this advice, an official of the Canadian High Commission stated in 2011 that the High Commission was aware of "only four cases" of persons being detained upon arrival and that those cases involved outstanding criminal charges<sup>15</sup>. In June 2011 the South Asia Regional Director of the UK Border Agency

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<sup>13</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [67].

<sup>14</sup> See for example the Law and Society Trust Joint Submission in United Kingdom: Home Office, *Country of origin Information Report – Sri Lanka*, 7 March 2012; Law and Society Trust, 2012 *Still Human Still Here*, "A commentary on the April 2-012 Sri Lanka Operational Guidance Note" 3 May

<sup>15</sup> Immigration and Refugee Board of Canada, 2011, *Sri Lanka: Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport*, 22 August, LKA103815.E, <<http://www.unhcr.org/refworld/docid/4e784eab2.html> Accessed 7 December 2012

stated in an interview that there were no issues of safety issues on return to Sri Lanka for deportees.<sup>16</sup> The Tribunal finds that being questioned on arrival would not on its own give rise to a real risk of significant harm as envisaged by s.36(2)(aa).

112. For the reasons outlined above, and having considered the applicant's claims individually and cumulatively, the Tribunal is not satisfied that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he will suffer significant harm.

## **CONCLUSIONS**

113. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
114. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
115. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

## **DECISION**

116. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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<sup>16</sup> *Sunday Leader* 2011, "UK satisfied with Lankan deportations", 26 June, <<http://www.thesundayleader.lk/2011/06/26/uk-satisfied-with-lankan-deportation/>> Accessed 7 December 2012