

061032202 [2007] RRTA 43 (8 March 2007)

DECISION RECORD

RRT CASE NUMBER: 061032202

DIMA REFERENCE(S): CLF2006/120588

COUNTRY OF REFERENCE: Sri Lanka

TRIBUNAL MEMBER: Antoinette Younes

DATE DECISION SIGNED: 8 March 2007

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Sri Lanka, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter dated and posted.

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

The applicant applied to the Tribunal for review of the delegate's decision.

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

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Convention). Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1,

MIMA v Khawar (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

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

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

In support of the application for a protection visa, the applicant provided a statement in which claimed that:

- He has a big family. Since his childhood he and his family underwent a lot of hardship. Since the time he began to understand the world, there were Sinhalese colonies near his village. In order to protect those villages, there were army camps nearby and army soldiers came from the camp and killed many people on many occasions. They also launched shell and artillery attacks towards the village. He could not forget such incidents in which he and his family members underwent a lot of hardship.
- After all of those incidents when the army captured Jaffna, many people evacuated and came to their village. Those people took refuge in schools and temples. Some of them built small huts and lived in those huts. As a result, for periods of time schools did not function and his education was disrupted. While they were undergoing those problems, they received tragic news for their family. One of his siblings was forcibly recruited to the LTTE movement and was given training and taken to battle from where they died. LTTE members showed the body and then buried it. It took a long time before he and his family members recovered from this tragedy.
- After that incident when the LTTE movement attacked the army base in city A which was several kilometres from the village, LTTE members forcibly took him and others from their village. They made them treat and feed the wounded, bury the dead. He was mentally affected as he had witnessed many people who had been wounded. For many months he did not have proper sleep and suffered without treatment. While he was made to work, a plane dropped a bomb which exploded nearby and as a result of this a friend of his was seriously wounded. Thereafter he could not understand what would happen to human life.
- As all this was happening Sri Lankan security forces undertook a major security operation called Jayasikuru in which the security forces began to advance. People in villages, including his village, began to evacuate. His house and belongings were all destroyed. He and his family moved out of the village and lived in a different village. There they lived in great hardships without food or water or proper medical facilities.
- Amid great hardship he got permission from the LTTE to go to town A. There he stayed in his relative's house and continued his education. During this time his family again faced tragedy when his father died. As he did not get transport he could not attend the funeral and this became an unforgettable incident in his life.
- After the death of his father he had to shoulder all of his family responsibility and he got a job in retail. With his income, he looked after his remaining family. Around this time, he participated in community project and PLOTE group members came to see him and insisted that he should pay them money. As he did not have any money he could not give them any and as a result this project was destroyed.

- Subsequently with the assistance of his relatives he purchased a vehicle to assist his employment. He was working in great difficulties to look after his family. But again PLOTE members arrested him and alleged that he was giving money to the LTTE movement. They detained him in a camp and asked him to give them money again. A family member paid a small amount of money and explained the difficulties in relation to his family and subsequently he was released.
- After those problems, tax collectors from the LTTE began to increase. Without paying money to the LTTE it was difficult to live in town A. He paid a small amount of money but they expected much more than he could afford and asked him to go to town B. The LTTE also sent a letter for him saying that he was a traitor. He became very scared and went to town B. When he was there he was ordered to help the LTTE movement who asked him to give a large sum of money. He said he did not have any amounts of big money to give to them and he told them that he was only a man looking after his family. He was released but was told that he should do whatever he was ordered by the LTTE to do.
- During that time there was a cease fire agreement signed in Sri Lanka between the LTTE and the Sri Lankan authorities and as a result, the presence of the LTTE movement in town B increased. He did not want to leave but did not have any other option. He went to Colombo and opened his own business. Although there were some difficulties at the beginning they progressed and prospered. As business did develop he began to travel abroad.
- While in Colombo he secretly contacted his family members in town B. He was scared of the LTTE and thought that they would spot him to ask for his help and money. However, he secretly travelled to town B and got married and returned to Colombo.
- One day while he was parking his vehicle, several people kidnapped him at gunpoint. They blindfolded him and drove for approximately 30 minutes. They stopped and asked him for money for the LTTE. He said that he did not give any money to the LTTE. They tortured him and said that he should pay. They threatened that he should give them money. He did not have any option but to sell his jewellery in order to pay them some of the money they demanded for. He was able to do that with the help of his relative. They later released him and told him that he should pay the rest of the money soon.
- After that incident he was scared and he contacted an agent who had made arrangements with people to travel to foreign countries. Soon after he left Sri Lanka with the assistance of the agent, abroad the agent said that he would send him to a country where he would be safe. When they got to country A the agent said that he had to wait there for some time before he was able to travel any further. The agent told him that he should travel to country B as he had a visa to country B. He went to country B with the agent who said he would make all the arrangements for him to travel to country C. He waited for a couple of months but the agent did not send him to country C. As his visa was ceasing for country B he went to country D. As he feared returning to Sri Lanka, he contacted his family in Australia and asked whether he could come to Australia to do business in Australia. His sibling helped him to get a visa to come to Australia with the assistance of her husband.

- He fears that if he were to return to Sri Lanka he would be killed. He fears that the LTTE movement would catch him and ask him to work for them if he happened to be in the area under their control. If he were to return to Colombo, the Karuna group members would extort money from him. As he does not have any money they would kill him. They would also suspect that he had helped the LTTE movement. For those reasons he is asking for Australia's protection.

In support of the application for a protection visa the applicant provided the following documents:

1. Student records;
2. Application for registration of a motor vehicle on transfer;
3. Sri Lankan identity card;
4. Register of birth;
5. Register of marriage;
6. Copies of three photographs (folio 58).

The applicant was interviewed by the delegate. Subsequent to the interview with the delegate the applicant provided the Department with post-hearing submissions. In those submissions the applicant claimed that he wanted to mention that the Karuna group released him without killing as they needed the rest of the money. Although they suspected that he could have supported the LTTE, they needed the rest of the money from him. He believes that was the reason for his release. Currently the situation in Sri Lanka has worsened and traders like himself are being abducted and killed in Colombo, other cities and even in Jaffna.

In support of his claims the applicant provided a number of newspaper articles relating to Sri Lanka and stated that he is claiming refugee status because he is a young Tamil from the North of Sri Lanka and persons like himself are suspected of being involved in the LTTE movement. He will be persecuted by the LTTE as its members will try to recruit him into their group. He belongs to a particular social group being "*Tamil Traders being persecuted by Karuna Group*". His history is consistent with country information relating to Sri Lanka. Some country information explicitly state that Karuna group is involved in killing Tamil traders in Polonnaruwa.

The applicant provided a number of documents, namely:

1. A translated article entitled "*Tamil doctor kidnapped in Colombo*", dated 19 September 2006.
2. An articles entitled "*Great fear owing to increasing abduction and killing Tamil ~~traders~~ flee to India*" dated 15 September 2006.
3. An article entitled "*Intrusive attack in Medunkerni area – five people including a doctor killed*" dated 10 August 2006.

4. An article entitled “*Bodies of Tamil couple abducted in Welikanda and killed found*” dated 1 July 2006.
5. An article entitled “*Senthilmathan President of Tamil Congress Vavuniya district shot dead*” dated 27 April 2006.
6. An article entitled “*Early morning search in Colombo – 21 youths from north arrested*” dated 22 September 2006.
7. An article entitled “*Tamil trader shot dead in Colombo yesterday*” dated 3 September 2006.

The applicant provided copies of photographs relating to the killing of various persons.

Material provided to the Tribunal

The applicant provided a Statutory Declaration in which he essentially reiterated his claims. In summary the applicant claimed that:

- Members of the Karuna group did not kill him because they said he should pay the rest of the money, in Lakhs Rupees. It is possible that they would kill him after getting the rest of the money. Members of the Karuna group would kill him because they knew that he had helped the LTTE and also because they knew that one of his siblings was in the LTTE and died subsequently. The reason for this being that the Karuna group was once the Tigers. There is no evidence that Karuna group would kill him only for money.
- He fears that he would be persecuted by members of the Karuna group and the Sri Lankan security forces because one of his siblings was in the LTTE and had died. One day the LTTE told his sibling that they were having meetings and asked that they go to the meeting. The sibling went to the meeting and did not return. The LTTE said that one member of each family should join the LTTE.
- They went looking for this family member and were told by the LTTE that they could not tell them of their whereabouts. The sibling died when they were shot by the army. The body was brought to the house by the LTTE and only at that time did they know what had happened. The place where the body was buried was in town B, under the control of the army. The intelligence unit people have all the relevant particulars of people who died as martyrs. His sibling died at a time when what later became the Karuna group was with the LTTE and they knew all about their death. There is a list called the martyrs’ list and his family members have been included in that list so the logical sequence is that if one member died as an LTTE martyr, the entire family members would be branded as belonging to the LTTE and it is impossible for them to live peacefully in an area under the control of the army.
- The army intelligence unit used to go to the applicant in Colombo. They used to go to his shop and say that they wanted to make inquiries about him. They claimed that he was an LTTE supporter and that he had helped them and sent money to them. This occurred on a number of occasions and on each occasion he gave them money to get out of the problem. They troubled him a lot. The Karuna group was once with the LTTE and they know that he had assisted the LTTE. The Karuna group and the army are one and the same.

- He was arrested by Tamils in civilian clothes from the Karuna group. He was detained in a room in a camp and kept for a few days. There were people from the army and the Karuna group there. They hit him and tortured him. They demanded money from him. He still has the marks. He was arrested in Colombo and he does not know where they took him. He telephoned his relative and made arrangements to jewellery in his home. A part payment was arranged through his relative who handed it to the Karuna group.
- He is a young Tamil from the North of Sri Lanka. He would be killed because he would be branded by the Sri Lankan security forces as a member/supporter of the LTTE. He fears persecution at the hands of the LTTE and as such he would not be able to go to areas controlled by the Tigers. The LTTE now recruits people into their movement. If he were to return he would be recruited as well. He does not want to be in the LTTE and die like his sibling.
- In relation to issues raised by the delegate, it is true that he had travelled on many occasions abroad. On all those occasions except for the last journey he travelled out of Sri Lanka for business purposes. The last time he left Sri Lanka was to protect his life and he travelled out of Sri Lanka with an agent. He did all that the agent wanted him to do. He stayed in country A only for two days and went to country B on the advice given by the agent. Even in country B and as it was expensive for him to stay in the city, he travelled to a smaller region and stayed there. He came to Australia in the pretext of doing business but his real reason was to seek protection in Australia. He told the authorities in country D that he was going to Australia for business.
- His former business partner contacted him and told him that since he has left Sri Lanka and because of the troubles that the Army Investigating Unit and the Karuna group gave him, he too has fled Sri Lanka. He also told him that a Tamil boy who was working with them had been arrested by the intelligence group and had been taken.

In written submissions to the Tribunal, the migration agent, acting for the applicant provided a summary of the applicant's claims and submitted that the applicant continues to fear persecution from the Sri Lankan security forces and the Karuna group. If the applicant were in an LTTE controlled area, he would be at risk of persecution by the LTTE. The applicant fits a profile of a person at risk of human rights abuses in Sri Lanka. The applicant is Tamil. He comes from the northern part of Sri Lanka. He has been forced to do work for the LTTE and his sibling was forcibly recruited by the LTTE and died. He has been targeted by the Sri Lankan security forces and the Karuna group. The human rights situation in Sri Lanka which has been poor for decades, has deteriorated further in recent times. The advisor referred to a number of articles relating to human rights issues in Sri Lanka. The Tribunal was provided with photographs of the applicant's sibling's funeral.

HEARING

The applicant appeared before the Tribunal to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent, who attended the hearing.

Material received in the course of the hearing

The Tribunal received:

- The applicant's Sri Lankan ID card (photocopied and placed on file).
- A copy of a letter from the applicant's wife to the applicant.
- An article entitled "*Tamil teacher shot dead in Vavuniya*" dated 10 February 2007.
- Copies of a Tamil newspaper dated 10 February 2007.

The applicant's evidence

The Tribunal showed the applicant the statement provided to the Department in support of his application for a protection visa. The applicant recognised the statement. The Tribunal asked the applicant who assisted him in the preparation of the application for a protection visa and the statement provided in support. The applicant stated that he wrote out a document in Tamil and a friend of his assisted him by finding the translator. The Tribunal asked the applicant if there was anything in either the application or the statement that he wanted to amend and the applicant confirmed that he has nothing to amend.

The applicant gave evidence that he is of Tamil ethnicity, and that he has several siblings. He gave evidence that he came to Australia on and that he had been on various business trips in country A, B and E. The Tribunal asked the applicant for how long he was in country A and when. He stated that he was not in country A for a long time. He said it was for a few days. The Tribunal asked the applicant when and for how long he was in country B. He stated that he was there for several weeks and that he had been there on three different occasions. He said on each trip he would have been there for about several weeks. The Tribunal asked the applicant for how long and when he was in country E. He said he was there for a couple of months. The Tribunal asked the applicant if the trips to those countries were for business purposes and the applicant stated that on the first few occasions to country B they were business trips, however on the last occasion he went there in order to explore the possibility of seeking asylum in another country.

The Tribunal asked the applicant if he sought asylum in country B and the applicant stated he did not as it is not possible to seek asylum in country B. The Tribunal asked him how he knew that he could not seek asylum in country B and the applicant stated that as the visa country B was only used once and he cannot seek asylum. He stated that if a person is caught without a visa they would be imprisoned. He confirmed that he however had a visa. The Tribunal indicated to the applicant that the Tribunal needed to further consider his explanations about the reasons for not seeking asylum in country B. The Tribunal asked him if he had sought asylum in country E and he stated that he did not as he did not have problems when he was in country E. He said when he was in country E the situation was not really bad. He stated "*the problems were not intolerable*". The Tribunal indicated that it would consider carefully his explanations in relation to not seeking asylum in country E. The Tribunal asked him if he had sought asylum in country A. He stated that he was taken to country A by an agent who said that he would organise everything for him. He said the agent took him to country A with a plan to leave. The Tribunal indicated that it would consider his explanations in relation to not applying for asylum in country A. The applicant stated that to the best of his knowledge asylum status, is not granted in those

countries. The Tribunal indicated that it would further consider the matter. The Tribunal put to the applicant that the Tribunal needed to consider whether the fact that he did not seek asylum in any of these countries could raise doubts about the genuineness of his fear of persecution. The applicant stated that in those countries if a person would seek asylum, they would be thrown in jail. The Tribunal asked how he knew that. He said he knew it from other Sri Lankans who had been imprisoned when they sought asylum. The Tribunal asked and the applicant confirmed that he did not make attempts to seek asylum in any of the countries that he had visited. He stated that the agent had promised to send him to other countries. The Tribunal indicated to the applicant that the fact that he had returned to Sri Lanka might suggest that he did not indeed fear persecution. The applicant stated that he had returned to Sri Lanka but he faced a lot of problems from the Karuna group that had arrested him and took him to a camp. He said he had to hand over Rupees in order to enable his release. They had asked for more but he was released on the condition that he would pay the remainder later. He said that subsequently he put pressure on his agent to make arrangements for him. The Tribunal indicated that it would further consider his explanations.

The Tribunal asked the applicant about his claim that his sibling was forcibly recruited by the LTTE. The applicant stated that at that time they were working and during a staff meeting they were taken. The applicant was very tearful and very upset when discussing his sibling's death. He said he was very sad talking about his sibling. He said that his sibling was with the LTTE for a number of years and was shot by the Sri Lankan army.

The Tribunal asked the applicant if he has ever been taken by the LTTE and the applicant stated that in the mid 1990s when the army moved into Jaffna, he was forced to work in a camp. The applicant stated that he was in the camp for about a couple of weeks. The Tribunal asked him if he had been taken by the LTTE on any other occasion. The applicant stated that a few years later when his family was relocating, the LTTE ordered him to help with bunkers and supply food. He stated that he was constantly harassed by the LTTE. The Tribunal asked the applicant if he had ever been taken by the Sri Lankan security forces and the applicant stated that he was not taken into custody as such but they were enquiring about him. He said in they enquired about him on a number of different occasions. The Tribunal asked the applicant when those occasions occurred. The applicant stated that he could not recall the dates but gave an estimated time of occurrence. He said he was doing business at that time. He said he used to send money to the army. He said he was interviewed by the army intelligence several times. Upon further questioning by the Tribunal the applicant stated that the first occasion occurred on [date]. He said that he was accused of helping the LTTE. He said he had to pay a substantial amount of Rupees in order for them to leave him alone. The Tribunal asked the applicant about the other occasions when the Sri Lankan security forces enquired about him. He said the Sri Lankan security forces enquired about him at regular intervals. He said he knew that this happened but he could not recall the exact months or the dates. The applicant stated that he was under constant harassment by the Sri Lankan security forces because his family, as a result of his sibling's death, had been declared to be martyrs.

The Tribunal asked the applicant when were the other occasions that he had been approached by the army intelligence. He said that occurred several weeks after the initial visit. He said the follow up visit would have occurred approximately on [date]. The Tribunal asked the applicant about the subsequent occasions when he was visited by the army intelligence. The applicant stated that this occurred several weeks after the other visit. He said that on the last occasion when he was visited by the army intelligence, through a friend who spoke Sinhalese, he told them that he was not associated with the LTTE. The Tribunal asked him again when was the last

occasion when he was visited by the army. He stated that this occurred towards the beginning of [year]. The Tribunal asked the applicant if he knew what the army intelligence wanted from him. He said they were following intelligence about him but he was able to bribe them..

The Tribunal asked the applicant if prior to [year] he had been approached by the Sri Lankan security forces. He stated that nothing happened prior to [year] as there was peace at the time. The Tribunal asked him if he knew why they would have come to see him in early [year]. He stated that his sibling's tomb is within the control of the army intelligence. He said they have a full profile of his siblings and other members of his family. He said he was shown a document by the army intelligence about his sibling and his family. He said the document had details about his sibling and how they were a martyr. He said they had a full profile of the family, and his siblings. He said they had dates and they questioned him further. The Tribunal indicated that it would further consider the matter.

The Tribunal asked the applicant when members of the Karuna group arrested him. The applicant stated that members of the Karuna group arrested him on [date] whilst he was having a meal. He said he was put in a vehicle and he was blindfolded. He said they travelled in the vehicle for about 30 minutes. He said subsequently he was locked up in a room with no windows. He said he was questioned about payment to the LTTE and he told them that he had no links to the LTTE. He said they did not accept his explanation and accused him of helping the LTTE. He said he was assaulted and ill treated. He said they wanted a substantial amount of Lakhs Rupees. He said they pushed him. He said subsequently he contacted a relative who assisted in giving the group a smaller amount on condition that the balance would subsequently be paid. He said he was released from the camp. He said subsequently he contacted an agent. The Tribunal asked the applicant if he knew where the army camp was to which he was taken. The applicant stated that although he knew that he was taken to an army camp, he did not know to which army camp he was taken.

The Tribunal asked the applicant if he has ever been involved in any activities of the LTTE and the applicant confirmed that he has not.

The Tribunal asked the applicant about his claim that members of the PLOTE group members had come to see him. He said at the time he was working and that the PLOTE group asked him for money and he told them that he was helping his family. He said that the building where he worked was set on fire because he did not give money to members of the PLOTE group. He said he was arrested by members of the group and taken to a camp. He said they wanted a large amount of Rupees for his release. He said his relative spoke with them in relation to family difficulties which lead to the subsequent reduction of the demanded amount which his relative paid.

The Tribunal asked the applicant if he has any business operating in Sri Lanka currently and the applicant stated he does not. He said his business partner had been threatened and had to escape as a consequence.

The Tribunal discussed with the applicant material provided (folios 65-73) in the course of the hearing. The applicant gave evidence that the newspaper article refers to the death of his relative. He stated that the relative who had been killed had a sibling in the LTTE who is now deceased. He said he had given money to the Karuna group. The applicant stated that he does not know why his relative had been shot. He said he however thought that his relative had been

accused of being a supporter of the LTTE. He said the incident in relation to the killing of his relative suggests that if he is suspected of being involved in the LTTE, he could be killed.

The Tribunal referred to the letter in Tamil from the applicant's wife. The applicant stated that his wife is telling him about harassment by the army and that bullets had been fired. He said the letter also referred to the Karuna group and the army abducting young females and sexually assaulting them. He said his mother, his wife and sibling planned to escape.

Post hearing submissions

The Tribunal received written submissions of the advisor summarising the applicant's claims, the development of security problems in Sri Lanka, the applicant's fear of harm by the PLOTE and Karuna groups and the applicant's reasons for not seeking protection in countries A, B, D and E. The advisor provided a number of reports relating to the security situation in Sri Lanka.

COUNTRY INFORMATION

There are serious human rights issues in Sri Lanka. The US Department of State, *Sri Lanka, Country Reports on Human Rights Practices-2005* (Released by the Bureau of Democracy, Human Rights and Labor- March 2006) notes that:

Sri Lanka is a constitutional, multiparty republic with a population of approximately 20 million. President Mahinda Rajapaksa, elected on November 17 to a 6-year term, and the 225-member parliament, elected in April 2004 also for a 6-year term, share constitutional power. According to the preliminary report of the European Union Election Observation Mission (EUEOM), the November 17 presidential election was generally conducted in a professional and impartial manner, with the exception of the boycott enforced by the Liberation Tigers of Tamil Eelam (LTTE) in the north and east, and was deemed an improvement over the 2004 election. From 1983 until 2001, the government fought the Liberation Tigers of Tamil Eelam (LTTE), a terrorist organization that advocated a separate ethnic Tamil state in the north and east of the country. In 2001, the government and the LTTE announced unilateral cease-fires and signed a formal cease-fire accord in 2002. In 2003 after participating in six rounds of talks facilitated by the Norwegian government, the LTTE suspended the negotiations. The civilian authorities generally maintained effective control of the security forces, although some members of the security forces committed serious human right abuses.

The government generally respected the human rights of its citizens, although serious problems remained. During the year both the government and the LTTE frequently violated the 2002 peace accord. According to Sri Lanka Monitoring Mission (SLMM) statistics, the LTTE committed 14 cease-fire violations for every 1 committed by the government. Civilian deaths due to land mines were drastically reduced through a nationally coordinated humanitarian demining effort. The government enacted emergency regulations three times during the year: twice following the December 2004 tsunami, and once following the August 12 killing of Foreign Minister Lakshman Kadirgamar. The emergency regulations, which

remained in effect at year's end, permit arrests without warrant and nonaccountable detentions for up to 12 months. The following human rights problems were reported:

- *unlawful killings by government agents*
- *high-profile killings by unknown actors*
- *politically motivated killings by paramilitary forces and the LTTE*
- *disappearances*
- *arbitrary arrest and detention*
- *torture*
- *poor prison conditions*
- *denial of fair public trial*
- *government corruption and lack of transparency*
- *infringement of religious freedom*
- *infringement of freedom of movement*
- *discrimination against minorities*

There were numerous reports that armed paramilitary groups, suspected of being linked to the government or security forces, participated in armed attacks during the year. These groups included the Karuna faction of the LTTE, the Eelam People's Democratic Party (EPDP), and the People's Liberation Organization of Tamil Eelam (PLOTE). The LTTE continued to control large sections of the north and east and engaged in politically motivated killings, disappearances, torture, arbitrary arrest and detention, denial of fair public trial, arbitrary interference with privacy, denial of freedom of speech, press, of assembly and association, and the recruitment of child soldiers.

The last few years have witnessed increased uncertainty both politically and in relation to security in Sri Lanka. In Colombo the major parties continued to dispute the terms and agreed outcomes of the peace process with outgoing President Chandrika Kumaratunga vacillating between hardliners in the Sri Lanka Freedom Party (SFLP) and People's Liberation Front (*Janatha Vimukthi Peramuna* – JVP) and the more conciliatory United National Party (UNP). Of greater concern within the Tamil political environment, a violent schism occurred early in 2004 when Colonel Karuna broke from the LTTE. Based in its eastern strong-hold of Batticaloa, the Karuna faction – which is widely believed to receive support from the government in Colombo – has engaged in an ongoing struggle in the north-east of the country with regular LTTE forces with significant casualties on both sides and making the north and the east the most dangerous and volatile parts of Sri Lanka. These tensions were further exacerbated by the effects of Asian Tsunami which devastated the eastern coast of Sri Lanka. The results of these events have meant that the peace process has stalled. The Government rejected proposed peace talks in Norway and the LTTE, in turn, rejected a compromise proposal by the Norwegian Government that peace talks be held at the international airport in Colombo. A state of emergency was declared in Sri Lanka following the assassination of the Foreign Minister, Lakshman Kadirgamar, on 12 August 2005, widely blamed on the LTTE despite strong denials by the LTTE leadership. The LTTE in turn has demanded a lifting of the state of emergency, saying that it has put the ceasefire agreement at grave risk (Iqbal Athas, 'State of emergency declared in Sri Lanka', *CNN*, 13 August 2005, [CX134530](#); 'Sri Lanka: The target was peace', *The Economist*, 18 August 2005, [CX133021](#); 'Sri Lanka's Tamil Tigers demand end to emergency rule', *PTI*, 28 August 2005, [CX133860](#); 'Sri Lanka PM agrees to scrap plans to share power with Tigers', *Agence France Presse*, 8 September 2005, [CX134343](#); 'Sri Lanka: Tamil Tigers reject Norwegian talks proposal', *NRK*, 9 September 2005, [CX134450](#); Perry, A. 2005, 'Battle for Sri Lanka', *Time*, 13 November

<http://www.time.com/time/asia/news/printout/0,9788,1129536,00.html> – Accessed 19 December 2005 – [Link](#); Balachandran, PK 2005, ‘Rajapaksa unlikely to upset Lankan applection’, *Hindustan Times Online*, 21 November http://www.hindustantimes.com/2005/Nov/21/7752_1552461,004100180006.htm – Accessed 19 December 2005 – [Link](#); ‘Incidents of violence between the LTTE and Tamil National Front (rebel faction led by Vinayagamorthy Muralitharan alias ‘Colonel’ Karuna)’ 2005, South Asia Terrorism Portal, August <http://www.satp.org/satporgtp/countries/shrilanka/database/violenceincidents.htm> – Accessed 24 November 2005 – [Link](#); Human Rights Watch 2005, ‘Sri Lanka: Political Killings Escalate’, 16 August, [CX131566](#); Human Rights Watch 2005, ‘Sri Lanka: Killings Highlight Weaknesses in Ceasefire’, 11 February, [CX113788](#)).

Political violence is prevalent regardless of which side happens to be in power. As noted in the *Home Office Report* for October 2004 where paragraph 4.40 present statistics of violent incidents during the 2001 elections in which the UNP was successful. Another independent source of information respecting the same election – Cable CX83973 CIS “*Pravada Journal*” December 2001-remarked:

“Concern has been expressed over the violence in the run up to, during and after the elections, despite the deployment of 40,000 police officers. Observers say the two major parties, the UNP and the PA, were guilty of perpetrating violence. The Colombo based Centre for Monitoring Election Violence (CMEV) has recorded 2,734 incidents of violence and election offences up to the polls and 422 after the elections. These included murder, attempted murder, hurt, grievous hurt, assault, robbery and arson. There were also incidents of threat and intimidation and damage to property. Fifty five people, including 17 on election day, were killed and three were 88 attempted murders and 262 incidents of arson. Twenty incidents of misuse of state property and 43 election offences were recorded. In several places, election monitors were attacked. A curfew immediately after the election could not prevent the violence continuing. The PA, which was the ruling party before the elections, was responsible for 1346 incidents and the UNP for 1021.”

BBC NEWS provides a good summary of events in Sri Lanka – as follows

Peace moves

2002 February - Government and Tamil Tiger rebels sign a permanent ceasefire agreement, paving the way for talks to end the long-running conflict. The peace initiative is sponsored by Norway.

2002 March-May - De-commissioning of weapons begins; the road linking the Jaffna peninsula with the rest of Sri Lanka reopens after 12 years; passenger flights to Jaffna resume.

2002 September - Government lifts ban on Tamil Tigers - a rebel demand. First round of talks begins in Thailand. Both sides exchange prisoners of war for first time. Rebels drop demand for separate state.

2002 December - At peace talks in Norway the government and rebels agree to share power. Under the deal, minority Tamils would have autonomy in the mainly Tamil-speaking north and east.

2003 February - Peace process talks get under way in Berlin.

2003 April - Tamil Tigers suspend their participation in peace talks, saying they are being marginalised.

2003 May - Country's worst-ever floods leave more than 200 people dead and drive some 4,000 people from their homes.

Political crisis

2003 November - President Kumaratunga dismisses three ministers, suspends parliament. She had been at odds with government over peace process. Parliament reopens after two weeks but negotiations with Tamil Tigers are put on hold.

2004 March - Renegade Tamil Tiger commander, known as Karuna, leads split in rebel movement and goes underground with his supporters.

2004 April - Early general elections held amid political power struggle. Party of President Kumaratunga wins 105 of 225 parliamentary seats, falling short of overall majority. Mahinda Rajapakse sworn in as prime minister.

2004 July - Suicide bomb blast in Colombo - the first such incident since 2001 - raises fears for the fragile peace process.

2004 December - More than 30,000 people are killed when massive waves, generated by a powerful undersea earthquake off the coast of Indonesia, devastate coastal communities. Hundreds of thousands are forced from their homes. The government declares a national disaster.

2005 June - Deal reached with Tamil Tiger rebels to share nearly \$3bn in tsunami aid among Sinhals, Tamils and Muslims. Sinhala nationalist JVP party pulls out of coalition in protest.

2005 August - State of emergency declared after Foreign Minister Lakshman Kadirgamar is assassinated.

2005 November - Mahinda Rajapakse, prime minister at the time, wins presidential elections. Most Tamils in areas controlled by the Tamil Tigers do not vote.

Mounting violence

2006 February - Government and Tamil Tiger rebels declare their respect for the 2002 ceasefire at talks in Geneva.

2006 April - Explosions and rioting in Trincomalee, in the north-east, leave 16 people dead. Police blame Tamil Tiger rebels for the blasts, which come amid a marked escalation in deadly violence.

A suicide bomber attacks the main military compound in Colombo, killing at least eight people. The military launch air strikes on Tamil Tiger targets.

2006 May - Tamil Tiger rebels attack a naval convoy near Jaffna. International monitors describe the deadly attack as a "gross violation" of the 2002 ceasefire.

2006 June - 64 people are killed in a mine attack on a bus in Anuradhapura district. Days later, more than 30 people are killed in a land and sea battle between government forces and Tamil Tiger rebels.

Tamil Tigers insist that most of the 65-person Sri Lanka Monitoring Mission be replaced in light of an EU terror ban against the rebels.

2006 August - Tamil Tiger rebels and government forces clash in the north-east. It is the worst fighting since the 2002 ceasefire. Hundreds of people are killed and the UN says tens of thousands have fled their homes.

2006 September - The government says it has pushed Tamil Tiger rebels from the mouth of strategic Trincomalee harbour. This is seen as the first major capture of enemy territory by either side since a 2002 ceasefire.

2006 October - A suicide bomber attacks a military convoy, killing more than 90 sailors.

Tamil Tigers attack a naval base in Galle, the southern city frequented by tourists.

Peace talks resume in Geneva but fail over the rebels' demand that the government reopen a key highway to Tamil-dominated Jaffna peninsula that was closed owing to fighting in August.

2007 January - After weeks of heavy fighting the military says it has captured the Tamil Tiger stronghold of Vakarai, in the east. Tens of thousands of civilians flee the area.

President Mahinda Rajapakse's government secures a long-elusive parliamentary majority after 25 opposition MPs defect to its ranks.

2007 February - Unidentified gunmen shoot dead a Hindu priest days after he welcomed President Rajapakse to the former Tamil Tiger stronghold of Vakarai. The government blames the killing of Selliah Parameswar, an ethnic Tamil, on Tamil Tiger rebels, who deny responsibility. (http://news.bbc.co.uk/1/hi/world/south_asia/country_profiles/1166237.stm).

FINDINGS AND REASONS

On the basis of the available information, the Tribunal is satisfied that the applicant is a Tamil national of Sri Lanka and that he is outside that country.

On the basis of the available information and in consideration of the evidence as a whole, the Tribunal is satisfied that the applicant has a well-founded fear of persecution for Convention reasons.

The Tribunal conducted a relatively lengthy hearing, exploring in details the applicant's claims. Whilst the Tribunal notes that there were various evidentiary problems in the applicant's oral testimony, the Tribunal is satisfied that they were minor and as such the Tribunal has decided not to place much emphasis on those matters. Overall, the applicant's evidence was consistent and plausible. The applicant was very tearful and sad when he talked about the circumstances surrounding his sibling's death who had been taken by the LTTE and later shot by the army. The Tribunal got an impression that the emotions displayed by the applicant were genuine. Further, the applicant's claims are consistent with independent country information about Sri Lanka.

For those reasons and in consideration of the evidence as a whole, the Tribunal is satisfied that the applicant's sibling was shot by the Sri Lankan army, after they had been forcibly recruited by the LTTE. The Tribunal is satisfied that the applicant was forced by the LTTE to work in a camp, for several weeks. The Tribunal is satisfied that when the applicant's family was relocating, the LTTE ordered the applicant to help with bunkers and supply of food. The Tribunal is satisfied that at various times, the applicant was harassed by the LTTE who demanded large sums of money which the applicant could not pay. The Tribunal is satisfied that the Sri Lankan security forces enquired about the applicant on a number of different occasions and that he sent money to the army. The Tribunal accepts as being plausible that the applicant was accused of helping the LTTE and that he had to pay a bribe in order for the security forces to leave him alone. The Tribunal accepts as being plausible that the applicant was harassed by the Sri Lankan security forces because his family, as a result of his sibling's death, had been declared to be martyrs. The Tribunal accepts as being plausible that the security forces have a profile of

his family. The Tribunal accepts as being plausible that the applicant was shown a document by the army intelligence about his family.

The applicant fears harm by the PLOTE group, a Tamil paramilitary organisation that has supported the Sri Lankan security forces and is considered to be hostile to the LTTE and its supporters. The Tribunal gives the applicant the benefit of the doubt and accepts as being plausible that members of the PLOTE group went to see him asking for money and that his building where he worked was set on fire for non-payment to the PLOTE group, that he was arrested by members of the group and taken to a camp, that they wanted large amount of Rupees for his release but following negotiations, the demanded amount was reduced which his relative paid.

The Tribunal gives the applicant the benefit of the doubt and accepts as being plausible that members of the Karuna group arrested him whilst he was having a meal. The Tribunal accepts as being plausible that the applicant was subsequently locked up in a room with no windows, that he was questioned about payment to the LTTE, that he was accused of helping the LTTE, that he was assaulted and ill treated, that they wanted a substantial amount of Lakhs Rupees, that he contacted his relative who assisted in giving the group a part payment on condition that the balance would subsequently be paid.

The Tribunal gives the applicant the benefit of the doubt and accepts as being plausible that the relative who has recently been killed had a sibling in the LTTE who is now deceased and that it is plausible that his relative had been accused of being a supporter of the LTTE. The Tribunal gives the applicant the benefit of the doubt and accepts as being plausible that that his wife is harassed by the army in Sri Lanka.

The Tribunal finds that the applicant has suffered harm amounting to persecution as contemplated by the Convention. The Tribunal is satisfied that the harm happened for reasons of the applicant's race (Tamil) and his imputed political opinion arising from his sibling's involvement, albeit forced, in the LTTE. The US Department of State Report (2006, *supra*) noted that although "*There were no confirmed reports of politically motivated killings by the government; however, it was often alleged that paramilitary groups, sometimes with the aid of the government, engaged in targeted killings of political opponents. The government and the army denied the allegations. Human rights organizations and other sources reported an increase in encounter killings by police. At year's end the Human Rights Commission (HRC) reported that police killed 25 individuals in police custody. The HRC determined that 20 of those individuals died as a result of torture in police custody during the year (see section 1.c.)*". The evidence before the Tribunal suggests that there is a real chance that the Sri Lankan authorities, PLOTE and the Karuna group would regard the applicant and his family as sympathetic to the LTTE and would therefore target them. Furthermore, the Tribunal is satisfied that if the applicant were to return to Sri Lanka, as a Tamil, there is a real chance, particularly as a trader, that he would be targeted by the LTTE for financial support and/or recruitment. There is evidence that the LTTE continue to target and intimidate other Tamils. In an article entitled *Embark on a concerted campaign against LTTE terrorism* (<http://lankaweb.com/news/items06/2003-1.html>), the author noted that "*Although LTTE claims they are fighting for the rights of the Tamil people.....Their [Tamil people] children are abducted and forcibly trained as LTTE combaters and are forced to pay heavy illegal taxes to the LTTE on all essential commodities and punishment by kangaroo courts...*" In an article on 15 March 2006, *Funding the "Final war" – LTTE Intimidation and Extortion in the Tamil Diaspora* (<http://www.colombopage/archive/March1515854.html>), it is reported that "*the LTTE's use of intimidation, harassment, extortion, and even physical violence*

against members of the Tamil diaspora is effectively stifling Tamil dissent regarding on-going LTTE human rights abuses in Sri Lanka. The LTTE is forcing Tamils, including those who do not support the LTTE, to provide financial support for LTTE operations, including its continuing pattern of child recruitment and political killings". That article refers to a Human Rights Watch Report concluding that the LTTE even target Tamils living outside of Sri Lanka (*Funding the "Final war" – LTTE Intimidation and Extortion in the Tamil Diaspora*, Human Rights Watch, March 2006).

The Tribunal considers that the persecution which the applicant fears involves 'serious harm' as required by paragraph 91r(1)(b) of the Migration Act in that it involves a threat to his life or liberty or significant physical harassment or ill-treatment. The Tribunal considers that the applicant's race and his imputed political opinions are the essential and significant reasons for the persecution which he fears, as required by paragraph 91r(1)(a), and that the persecution which he fears involves systematic and discriminatory conduct, as required by paragraph 91r(1)(c), in that it is deliberate or intentional and involves his selective harassment for one or more of the five Convention reasons, namely his race and imputed political opinion. Since the applicant fears harm from Sri Lankan military groups, the Tribunal considers that there is no part of Sri Lanka to which he could reasonably be expected to relocate where he would be safe from the persecution which he fears.

The Tribunal finds that the applicant is outside his country of nationality, and for the reasons given above, the Tribunal finds that he has a well-founded fear of being persecuted for reasons of his race and his imputed political opinion if he were to return to Sri Lanka now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the Sri Lankan government.

Prior to travelling to Australia, the applicant went to countries A, B, D and E. There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality, Sri Lanka. The Tribunal therefore finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C V Minister For Immigration And Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister For Immigration And Multicultural Affairs V Applicant C* (2001) 116 FCR 154). It follows that the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicant satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act for the grant of a protection visa.

CONCLUSIONS

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

DECISION

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant.

Sealing Officer's I.D. PRRT38