

1203764 [2012] RRTA 312 (18 May 2012)

DECISION RECORD

RRT CASE NUMBER:	1203764
DIAC REFERENCE(S):	CLF2012/1259
COUNTRY OF REFERENCE:	Sri Lanka
TRIBUNAL MEMBER:	Giles Short
DATE:	18 May 2012
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is a review of a decision made by a delegate of the Minister for Immigration and Citizenship on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] March 2012 refusing an application by the applicant for a Protection (Class XA) visa. The applicant, who is in immigration detention, was notified of the decision under cover of a letter dated [in] March 2012 and the application for review was lodged with the Tribunal on [a further date in] March 2012. I am satisfied that the Tribunal has jurisdiction to review the decision.
2. The applicant is a citizen of Sri Lanka. She arrived in Australia in December 2011 and she applied for a Protection (Class XA) visa [in] January 2012.

RELEVANT LAW

3. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

‘(2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) to 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 non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa; or
- (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa.’

Refugee criterion

4. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the

'Refugees Protocol' as 'the Protocol relating to the Status of Refugees done at New York on 31 January 1967' Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

5. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as a 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.'

6. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.
7. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) states that 'serious harm' includes a reference to any of the following:
- (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

8. In requiring that 'persecution' must involve 'systematic and discriminatory conduct' subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of 'persecution' that an individual be the victim of a series of acts:

'A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention.'

9. 'Systematic conduct' is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J

(dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:

‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)

10. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’ Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’ It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
11. Fourthly, the applicant must have a ‘well-founded’ fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

‘There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.’
12. A fear will be ‘well-founded’ if there is a ‘real chance’ that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be ‘well-founded’ in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

‘no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.’ (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

Complementary protection criterion

13. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. ‘Significant harm’ for the purposes of that definition is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer ‘significant harm’ if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to ‘torture’ or to ‘cruel or inhuman treatment or punishment’ or to ‘degrading treatment or punishment’. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are further defined in subsection 5(1) of the Act.

CLAIMS AND EVIDENCE

14. The Tribunal has before it the Department's file CLF2012/1259 relating to the applicant. The applicant appeared before the Tribunal [in] April 2012 to give evidence and present arguments. The Tribunal was assisted by an interpreter in the Tamil and English languages. The applicant was represented by [name and firm deleted: s.431(2)], a solicitor and registered migration agent. [The representative] attended the hearing.

The applicant's original application

15. The applicant is aged in her mid-forties. In her original application and in an accompanying statement she said that she was a Tamil and a Hindu. She said that she had been born in [Town 1] in [District 2] in Sri Lanka where her father had been a school teacher. She said that in 1986 she had married her husband who had also been a school teacher. She said that they had two sons and one daughter. She said that one of her sons, [Mr A], was an Australian permanent resident and that her husband was missing since his boat had sunk on the way to Christmas Island.
16. The applicant said that her problems had started in 2006. She said that members of the Liberation Tigers of Tamil Eelam (LTTE) had often come to their home to ask for money and that the LTTE had threatened that, if they did not give the LTTE money, the LTTE would kidnap them and take them to a place where they could harm them and deprive them of food. She said that from 2007 the Sri Lankan Army had come closer to their house, making it dangerous for them. She said that as they had started bombing she and her family had had to move.
17. The applicant said that she and her family had come to Oddusuddan in 2008 but she also said that they had moved many times in 2008 and 2009 to avoid danger. She said that in one place her husband had been hurt by a bomb in his leg and taken to hospital by the LTTE and in another place that her daughter and her husband had been shot in the hand by the LTTE. She said that she and her son [Mr A] had been captured by the LTTE but they had both escaped and the whole family had been reunited at a relative's house.
18. The applicant said that in 2009 they had all surrendered to the Sri Lankan Army and she had been taken to a [camp] where she had been from 2009 to 2011 and where she said her family had been reunited. She said that the army had been asking them if they were supporters of the LTTE. She said that they had taken [Mr A] away and had hit him and after this he had escaped. She said that they had tortured her husband asking him where [Mr A] had gone so he had had to leave to save his life as well. She said that she had not heard from him since.
19. The applicant said that after this they had started to torture her because her husband and her son had escaped. She said that she had been hiding in a neighbour's house and they had come and had taken her and had beaten her with wooden sticks. She said that when she had regained consciousness she had been in hospital. She said that this had been in about April 2011. She said that she had stayed in the hospital for about a month. She said that one of her brothers had helped her to escape from the hospital and she had moved between different relatives' houses to hide from the army.
20. The applicant said that she had given an agent some money to help her to come to Australia. She said that [Mr A] had sent some money to help her and she had also sold her property and had given this money to the agent as well. She said that a friend of her husband had made the

arrangements for her to leave the country. She said that she had left Sri Lanka travelling on a passport in her own name [in] December 2011. She said that in Singapore a smuggler had given her a different passport to use for the trip to Australia. She said that since she had arrived in Australia her daughter had been caught and questioned by the army and was now in hiding. She said that her younger son was living in a hostel and that her brothers had told her that the army was looking for her.

21. The applicant said that she feared that if she returned to Sri Lanka she would be detained, tortured, imprisoned and killed by the Sri Lankan Army. She said that she had escaped from the army and they believed that she was a supporter of the LTTE. She said that there was nowhere safe for her in Sri Lanka and that the army would be able to find her easily. She said that the army had been looking for her in the area where she used to live.

The applicant's evidence at the Departmental interview

22. The applicant was interviewed by the primary decision-maker in relation to her application [in] February 2012. The applicant said that she had lived all her life in [Town 1] in [District 2] until 2006 and that from 2007 she and her family had lived in various places because of the problems. She said that finally she had ended up in a camp in Vavuniya, then she had been in hospital and after that she had been in hiding until she had come to Australia. She said that almost from the time she had been born [District 2] had been under the control of the LTTE. She confirmed that her father had been a teacher and that she had completed her education in [Town 1]. She confirmed that she had [taught] privately.
23. The applicant said that she did not know the month in 2009 when she and her family had surrendered to the Sri Lankan Army. The primary decision-maker put to the applicant that her son had said that he had boarded a boat for Australia in October 2009. The applicant confirmed that it had been after this that her husband had escaped as well and she repeated the account she had given in her statement of the torture to which she had been subjected. Asked about the injuries for which she had been treated in hospital she said that finally they had raped her four times and she had fallen unconscious. The applicant's representative said that this was a claim which the applicant had been reluctant to bring up in the past.
24. The applicant said that she thought that she might have been in [hospital] in May 2011. Asked what sort of medical treatment she had been given she said that she was not aware of what treatment she had been given but she had been injected with glucose.
25. The applicant said that she did not have any relatives in Colombo but she had been in hiding in Colombo with some friends just before coming here. The primary decision-maker noted that the applicant's passport had been issued [in] July 2009 and that it had been examined and had been found to be a genuine document. The applicant said that all her documents had been with her brother and he had been the one who had organised the passport. She said that this had been a renewal of a previous passport but she had not travelled on her previous passport.
26. The primary decision-maker put to the applicant that the fact that she had been able to leave Sri Lanka travelling on a passport in her own name indicated that she had been of no interest to the authorities. The applicant said that she had left Sri Lanka by bribing high-up officials. She said that she had been accompanied by someone when she had left. She said that by paying bribes she had been able to pass through the airport. The primary decision-maker referred to the fact that pages from the passport had been torn out. The applicant said that the

person who had accompanied her to Singapore had handed her the passport when she had left Singapore and she had not been aware of whether the passport had been intact or torn.

27. The primary decision-maker put to the applicant that the passport had been forensically examined and there was evidence that she had left Sri Lanka in August 2009, returning at a later date. The applicant repeated that she had not travelled outside Sri Lanka before her current trip to Australia. She repeated that the passport had been given to her by this person in Singapore. She then confirmed that she had left Sri Lanka using this passport and she said that in Singapore the person who had accompanied her had asked her for this passport and had then given it back to her.
28. After a break to consult her representative the applicant repeated that she had been tortured and humiliated and that she had been in hiding in Sri Lanka. She said that she would face the same problems if she went back. She said that they were searching for her and they came and questioned her brother all the time. She repeated that she had never travelled outside Sri Lanka before and she said that the person who had taken her to Singapore might have misused the passport. She said that he might have been the person who had torn the pages out of the passport. She said that now she came to think of it this person had been in and out with her brother so he might have misused the passport. She said that she had had no suspicions so she had not examined the passport. She said that he appeared to have betrayed her. The applicant's representative submitted that the applicant should be given the benefit of the doubt.

Further submission to the Department

29. In a submission dated [in] February 2012 the applicant's representatives referred to the applicant's evidence that she had not been aware that her passport had missing pages. They said that the applicant had 'presented evidence that her passport was obtained while she was in the camp and suggested that her passport may have been used by the smuggler to take other persons through the airport while she was still in the camp' They quoted from a paper prepared by the Immigration and Refugee Board of Canada, *Sri Lanka: Alien Smuggling* (1 May 1996), which, however, deals with the smuggling of Sri Lankans to Canada using, for example, the passport of a Canadian national of Sri Lankan origin or a Sri Lankan passport with a Canadian Landed Immigration Form (proof of permanent residence at the time).
30. The applicant's representatives also referred to information in the same paper on false documents, quoting a comment that perhaps the most common method was to use genuine passports and to match up a client with someone whose passport photograph looked similar. They submitted on the basis of this information that it was certainly possible that the applicant's passport had been used to smuggle others out of the country.
31. With regard to the applicant's ability to leave Sri Lanka travelling on a passport in her own name the applicant's representatives referred to evidence that Immigration Officers had no power to prevent people from leaving Sri Lanka unless a court decided to impound a person's passport or an arrest warrant was issued and the person's details were placed on an alert or wanted list or the State Intelligence Service placed the name of an individual suspected of terrorist activity on the Department of Immigration & Emigration database. They also referred to information in relation to the prevalence of corruption in relation to the issuing of ID cards and passports in any identity. They submitted that it was plausible that the applicant had been able to leave Sri Lanka although she had 'an adverse profile'.

Further material submitted to the Tribunal

32. [In] April 2012 the applicant's representative submitted to the Tribunal a copy of a 'Relief Assistance Card' issued to the applicant and her family (together with a translation) indicating that they were in a [camp] and that they were issued with rations and other items on various dates between [April] 2009 and [March] 2011.
33. The applicant's representative also produced two letters dated [in] February 2012 and [in] March 2012 from a forensic psychologist, [Ms B], who said that she had seen the applicant for four sessions prior to [February] and again [on two occasions in] March 2012 after the applicant had received the decision under review. [Ms B] referred to the applicant's claims. She said that the boat on which the applicant's husband and son had been travelling to Australia had capsized and that only the applicant's son had survived but she said that the applicant was in denial about her husband's death. [Ms B] stated that in her opinion the applicant was suffering from chronic post-traumatic stress disorder with major depression. The second letter is mainly concerned with safety planning because the applicant had been expressing suicidal thoughts.

The applicant's evidence at the hearing before me

34. At the hearing before me the applicant said that the interpreter who had assisted her in preparing her original application had been from India and that there were some mistakes in her application. She said that she had amended it and had submitted it. I noted that I did not have any amendments to the application.
35. The applicant confirmed that she had been born in [Town 1] in [District 2] in Sri Lanka and that her father had been a school teacher. She confirmed that she had got married in 1986 and that she and her husband had continued living in [Town 1]. I asked her what problems they had had while they had been living in [Town 1]. The applicant said that in 2007 they had had to leave that place as a result of army shelling. I asked her if she had had any problems in [Town 1] before that. The applicant said that in 2006 the LTTE people had tortured them a lot.
36. I asked the applicant if they had had any problems with the LTTE before 2006. The applicant said that before 2006 they had also had problems with the LTTE. She said that the LTTE had had some rules and they had had to follow these rules. She said that the LTTE people would come to their house and would ask for money. She said that if you did not give them money they would put you in a prison where you would not be given any food and you would be given a lot of torture. She said that after some time you would be released but then the same thing would happen again. She said that this had happened to her and her husband and they had also tried to recruit her children. She said that to avoid this they had hidden their children in a hole in the ground or in the trees.
37. I asked the applicant if her area had been affected by the tsunami (in December 2004). The applicant said that at the time of the tsunami she had been [in] [District 2], six kilometres from [Town 1]. She said that they had all run for their lives to escape from the tsunami. She said that she had not mentioned this before because she had not been asked. She confirmed that she and her family had continued living in [Town 1] until November or December 2007 when she said that they had moved to Oddusuddan because of the army shelling. She said that her mother and her mother-in-law had come with them.

38. The applicant confirmed that she and her family had only surrendered to the army in 2009 and that she and her husband and their three children had all been reunited in one [camp]. She confirmed that she claimed that she had been there from 2009 until 2011, that her son [Mr A] had escaped and that after this her husband had left as well. She confirmed that she claimed that she had then been tortured because her son and her husband had escaped and that she had ended up in the [hospital].
39. The applicant confirmed that she had been in the [hospital] for about one month and that one of her brothers had helped her to escape from the hospital. She said that she had gone to the house of a relative in Ukkulankulam, near Vavuniya. She said that she had been kept in different relatives' houses for two days after which her brother had taken her to Colombo. She said that she had only been in Colombo for two days. She said that she did not know any people in Colombo so they had taken her back to Vavuniya where she had once again stayed in different relatives' houses. She said that she had stayed there for a long time and after that she had come here.
40. I referred to the fact that the applicant's daughter and her younger son had been in the camp with her. The applicant said that when she had been admitted to the hospital people from the camp had also taken her children to the hospital. She said that, at the same time as her brother had helped her to escape from the hospital, her children had also escaped but she had not known this at the time. She said that she thought that her brother had also helped her children to escape but she said that she did not know how this had happened.
41. I referred to the fact that the applicant had left Sri Lanka travelling on a passport in her own name and I asked her how she had obtained this passport. The applicant said that she had already had a passport and she had renewed it when she had left Sri Lanka. I put to the applicant that the passport which she had used had been issued [in] July 2009. The applicant said that she did not know about the dates and that her brother had done this. She said that she knew that it had been renewed in 2009.
42. I asked the applicant how she had made the arrangements to leave Sri Lanka. The applicant said that she had given a lot of money to a person named [Mr C] who had helped her to escape from Sri Lanka to Australia. She said that her brother had given her this money. I referred to the fact that in her statement the applicant had said that she had sold some property. The applicant confirmed that she claimed that she had sold her property in order to come to Australia and that her son had also given her some money to come here. She said that she had had agricultural land around six kilometres from [Town 1] which her brother had sold and he had given her this money
43. I put to the applicant that my understanding was that people had still not been allowed back into the [Town 1] area. The applicant said that her relatives were there and their land was next to her land. She said that her relatives had also sold their land which was next to her land. She said that she had sold this land in 2011, maybe in August. I put to the applicant that [District 2] had been where the LTTE had made its last stand against the Sri Lankan Army and that my understanding was that the whole area including the [area] where she had lived had still to be demined. I put to her that the Sri Lankan Government was saying that it was not safe for people to return to the area ([Source deleted: s.431(2)], accessed 17 April 2012). The applicant said that she had been in a camp and she did not know about [Town 1].
44. I indicated to the applicant that I was going to give her some information which I considered would be the reason, or a part of the reason, for affirming the decision under review.

I indicated that I would explain the information to her so that she understood why it was relevant to the review and that I would also explain the consequences of the information being relied upon in affirming the decision under review. I indicated that I would ask her to comment on or to respond to the information. I indicated that if she wanted additional time to comment on or to respond to the information she could tell me and I would then consider whether to adjourn the review to give her additional time.

45. I put to the applicant that, as we had discussed, her passport had been issued [in] July 2009. It had been examined after she had arrived in Australia and assessed as being a genuine document. However pages had been torn out of the passport (see folio 68 of the Department's file CLF2012/1259). The applicant said that she did not know. I put to her that the stamps on the pages which had been torn out had left impressions on the remaining pages (see the copy at folio 88 of the Department's file CLF2012/1259). I put to the applicant that the information available to me indicated that a person using this passport had travelled to India on two occasions, [in] August 2009, returning [in] October 2009, and [in] December 2010, returning [in] January 2011 (see folio 102 of the Department's file CLF2012/1259). The applicant asked who this person had been. I put to her that all I knew was that they had been using the passport issued to her [in] July 2009. The applicant repeated that she did not know.
46. I referred to the fact that the applicant and her representatives had suggested that someone else could have used her passport without her knowledge. The applicant said that she had only come to know about this at the Departmental interview and that she thought that some people who knew her had been using this passport but she did not know how this had happened. I noted that the applicant's representatives had referred to information regarding the smuggling of Sri Lankans to Canada using, for example, the passport of a Canadian national of Sri Lankan origin or a Sri Lankan passport with a Canadian Landed Immigration Form (proof of permanent residence at the time). I put to the applicant, however, that there would not have been any reason to have used these sorts of methods to travel to India. The applicant said that she did not know anything about the passport issue. She repeated that she had only come to know about the pages torn out of her passport at the Departmental interview.
47. I noted that the applicant's representatives had referred to the fact that the prevalence of corruption in Sri Lanka meant that passports could be issued in any identity. I put to the applicant that this meant that there would have been no need for someone to have pretended to be her and to have used her passport to travel to India. The applicant said that she did not know about the passport because it had been with her brother. She said that she thought that the man named [Mr C] who had helped her had been using her passport for illegal purposes. She said that she really did not know anything about the passport.
48. I referred to the fact that the applicant's representatives had produced to the Tribunal a 'Relief Assistance Card' indicating that she and her younger son and daughter had been in a [camp] at least during the first of the two trips to India. I noted, however, that, as I had mentioned, her representatives had referred to the high level of corruption in Sri Lanka and the fact that many official documents could be issued in an unlawful way. I put to the applicant that I might give greater weight to the information about the travel using her passport than I did to the 'Relief Assistance Card'.
49. I put to the applicant that all of this information was relevant to the review because the information about the travel using her passport cast doubt on her claims that she had been in

the [camp] at that time. It suggested that she had been free to travel between Sri Lanka and India during this time and that she was not of any interest to the Sri Lankan authorities. The applicant said that she had escaped from that place.

50. I put to the applicant that if I found that it had been she who had made these trips to India this would mean that she had been out of Sri Lanka and that she had returned to Sri Lanka on two occasions before coming here. I put to the applicant that this cast doubt on her claims that she had been escaping from Sri Lanka or that she had feared persecution in Sri Lanka. I put to the applicant that it cast doubt on her claims that the army was looking for her in Sri Lanka and that she feared that she would be detained or tortured or killed by the army if she returned to Sri Lanka now.
51. I put to the applicant that if I relied on this information I might not accept that there was a real chance that she would be persecuted for one of the five Convention reasons if she returned to Sri Lanka. I put to her that I might likewise not accept that there were substantial grounds for believing that, as a necessary and foreseeable consequence of her being removed from Australia to Sri Lanka, there was a real risk that she would suffer significant harm. I put to her that if I relied on this information it might form part of the reason for my concluding that she was not a person to whom Australia had protection obligations and that she was therefore not entitled to be granted a protection visa.
52. The applicant asked why I did not believe that she was entitled to a protection visa. I put to the applicant again that if I thought that she had travelled on her passport to India this would suggest, first, that she had not been in the [camp] at the time and, secondly, that she had been free to travel in and out of Sri Lanka at the time. The applicant said that she had not done this and that she had been in the camp at that time. She said that the army people had not allowed her to go from that camp.
53. I noted that this was what I had been trying to explain. I had to consider which of these two pieces of information I believed. I had the information that someone using her passport had travelled to India on two occasions and had returned to Sri Lanka on both of those occasions. The applicant said that she had not gone anywhere and she asked again if I could tell her who had been using her passport. I put to the applicant that if I thought that it had been someone else then I would not have been putting the information to her. The applicant repeated that she had not gone anywhere, that she had been in the camp and that the army people had been torturing her. She repeated that she did not know anything about the passport and that she had only come to know about the passport issue at the Departmental interview.
54. I noted that, as I had mentioned earlier, the applicant was entitled to seek additional time to comment on, or to respond to, the information I had given her in the course of the hearing. I gave the applicant's representative until [a date in] May 2012 (subsequently extended until [a further date in] May) in which make any further comments or a response in writing. I asked the applicant if there was anything further which she wished to say before I closed the hearing. The applicant said that she did not want to go back and she repeated that she did not know about this passport issue.

Post-hearing submission

55. In a submission dated [in] May 2012 the applicant's representatives submitted that the applicant had presented compelling evidence that she had not been aware that her passport had had pages missing or that it had been used to exit the country. They referred to the fact

that she had said that the passport had been obtained while she had been in the camp and that her passport might have been used to smuggle other people while she had been in the camp. They referred to the 'Relief Assistance Card' and they submitted that this card was genuine and legitimately issued. They said that they could provide the original of the card to allow the Tribunal to make any inquiries which it considered appropriate.

56. The applicant's representatives submitted that since her arrival in Australia the applicant had been receiving physiotherapy to treat the injuries she had sustained to her neck and back as a result of having her head pulled in and out of a tank filled with water. They produced a report from a psychologist dated [in] March 2012 which they submitted relevantly stated that the applicant had reported '[s]ymptoms of anxiety and stress resulting from a history of torture and trauma and uncertainty of reuniting with her children' They also produced progress notes made by a general practitioner which record that [in] January 2012 the applicant sought treatment for pain in her right wrist 'c/o was beaten by army in srilanka?' and that [in] February 2012 she sought treatment for painful wrists 'c/o was beaten by army - while in SRILANKA - LAST YR - april/may', 'WAS PULLED BY HAIR', 'PAIN - NECK' and 'ARMY MADE HER TO DRINK URINE ?' They noted that the general practitioner had requested an X-ray of the applicant's cervical spine and a pathology test.
57. The applicant's representatives also produced a further letter from the forensic psychologist, [Ms B], dated [in] May 2012, in which she referred to the applicant being uncomfortable about being treated by a male physiotherapist '[g]iven the previous rape and torture experienced in Sri Lanka before arriving onto Australian shores' and said that she 'has shown to have similar pain to that of those who seek asylum or are refugees who are from war town [sic] countries where torture is widespread'. The applicant's representatives noted that [Ms B] had said that the applicant 'also bangs her head regularly due to pain' and that she was 'showing increasing signs of traumatic cognitive dysfunction'.
58. The applicant's representatives also produced a report from [Dr D], a psychiatrist, who said that he had seen the applicant [in] April 2012 and that his diagnosis was post-traumatic stress disorder and major depressive disorder. The applicant's representatives submitted that it would be open to the Tribunal to accept on the basis of this material that the applicant had been receiving treatment in Australia for injuries that were consistent with her claims of having been mistreated and tortured in Sri Lanka, that she had been diagnosed with having symptoms of anxiety and stress resulting, in part, from a history of torture and trauma and that she had shown the symptoms of, and possessed injuries that were consistent with, a person who had been a victim of torture and trauma.
59. The applicant's representatives also produced a compilation of country information prepared by Amnesty International Australia for the applicant. They drew attention to the reference in that document to the fact that the UN Secretary-General's Panel of Experts on Accountability had reported that the screening process to identify suspected LTTE members among civilians surrendering to the Sri Lankan Army had resulted in cases of executions, disappearances, rape and sexual violence, that civilians in need of medical attention had been transferred to hospitals in Vavuniya or a clinic in Pulmoddai where they had been subject to interrogation by police investigators and that some patients had disappeared from hospitals.
60. The applicant's representatives also drew attention to a passage in the Amnesty International Australia document quoting from a Human Rights Watch report published in March 2008 which said that some victims of abductions and disappearances, especially in Jaffna, had clearly been targeted because of their alleged affiliation with or support for the LTTE and

that the affiliation could include anything from receiving training in LTTE camps to running a small shop which LTTE cadres might have entered as customers. The Amnesty International Australia document also referred to a briefing note issued by the International Commission of Jurists in September 2010 which observed that most civilians in areas under the control of the LTTE would have had some link with the LTTE.

61. The applicant's representatives also drew attention to a passage in the Amnesty International Australia document dealing with the targeting of family members of actual or suspected LTTE members. The document referred to the fact that in a [report] Amnesty International had referred to evidence given by several witnesses to the Lessons Learnt and Reconciliation Commission in Sri Lanka that surrendering family members who had been affiliated with the LTTE had been loaded onto army buses in [District 2] in the final days of the war, after which they had disappeared. The document also quoted a passage from the same report to the effect that:

‘Sri Lankans, particularly in the north and east of the country, remain subject to serious threats including enforced disappearances and extrajudicial killings, which continue to be reported. People with former links to the LTTE, including family members of detained cadres face particular dangers, as do individuals who have been released from detention and attempt to return home.’
62. The Amnesty International Australia document also referred to comments made by the Co-ordinator of the Law and Society Trust to the Danish Immigration Service's fact-finding mission to Sri Lanka in June and July 2010 to the effect that the Sri Lankan Army was looking for everyone who had somehow been affiliated with the LTTE, including family members, and was giving them warnings, threatening them and making sexual advances on women whose husbands had been known LTTE leaders.
63. The applicant's representatives also drew attention to the reference in the Amnesty International Australia document to a report in relation to Sri Lanka's security detainees published by Amnesty International in March 2012 in which it said that the Sri Lankan authorities engaged in systematic torture or other ill-treatment of individuals suspected of LTTE affiliations, that unlawful detention, torture and other ill-treatment were standard tools for intelligence gathering and that they had also been meted out as punishment for individuals who resisted the Sri Lankan Government's offer of 'rehabilitation'.
64. The Amnesty International Australia document also quoted from an article published by the Centre for Human Rights and Development noting the use of drugs like sedatives and general anaesthetics in torture in Sri Lanka. The Amnesty International Australia document also noted that the March 2011 UK Home Office *Operational Guidance Note* in relation to Sri Lanka said that '[t]hose perceived to be connected to the LTTE, both men and women, and held in rehabilitation camps, prisons or detention centres may be at heightened risk of illtreatment and torture'.
65. The applicant's representatives submitted that this information supported the applicant's claims that acts of humiliation, torture, rape and sexual violence had been widespread in army camps following the war, that those in need of medical care had been taken to hospitals, that the Sri Lankan authorities had been prepared to detain any Tamil who they believed might have been affiliated with the LTTE, that most Sri Lankans living in areas previously controlled by the LTTE would have had some form of contact with the LTTE and could face detention on these grounds and that the applicant's home district of [District 2] had been the last area controlled by the LTTE before the end of the war.

66. The applicant's representatives submitted that if the Tribunal accepted that the applicant was a Tamil from [District 2] it could be satisfied that it was likely that her family would have been detained and placed in an army camp following the war. They submitted that the applicant's evidence had been consistent and that her claims of mistreatment, humiliation, abuse and torture were entirely consistent with country information and the medical reports they had produced. With regard to the issue of the applicant's passport having been used to travel in and out of Sri Lanka during the period of claimed detention they referred to the fact that the applicant had emphatically denied using her passport during this period and they submitted that the possible explanation which she had provided was plausible.
67. The applicant's representatives referred to the passage in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* in which it is suggested that, if an applicant's account appears credible, he or she should be given the benefit of the doubt unless there are good reasons to the contrary. They submitted that the applicant's account of her experiences in Sri Lanka was credible and they repeated that her evidence had been consistent and was supported by the country information and medical reports. They submitted that, if the applicant returned to Sri Lanka, there was a real chance that she would continue to be questioned regarding the whereabouts of her husband and son who the authorities had imputed or would impute with an association with the LTTE and that she would continue to be subject to acts that would amount to serious harm.

Background

68. The Australian Department of Foreign Affairs and Trade (DFAT) has advised that:
- ‘The security situation in the north and east is greatly improved since the end of the military conflict, although incidents of violence can occur. A high security forces presence remains in the Northern and Eastern Provinces, although is less visible than during the fighting. The role of the security forces in the north and east, including intelligence operatives, is understood to include the monitoring of anti-government sentiment and any form of civil resistance.
- Mines and unexploded ordnance remain widespread in the north, particularly the Vanni region, although de-mining is continuing. A few isolated areas which have not yet been certified clear of mine or UXO hazards remain in the east. The security forces continue to uncover caches of weapons, ammunition, explosives and other remnants of war in both the Eastern and Northern Provinces.
- Incidents of abduction continue to be reported from both the north and east, although have significantly reduced since the time of the military conflict. Reports of interrogations of Tamil civilians in the north and east are ongoing. Individuals with suspected LTTE links are the most likely targets for abduction and interrogation.’
(DFAT Country Information Report No. 10/58, 21 September 2010, CX249694)
69. The Danish Immigration Service fact-finding mission which visited Sri Lanka in June and July 2010 reported in relation to the living conditions in the return areas in the North of Sri Lanka that the military presence continued to be high. It said that:
- ‘UNHCR informed the delegation that women – and especially single women in female headed households – report to UNHCR that they feel vulnerable as they are returning to an area with a military atmosphere. UNHCR explained that in general, the return areas are characterised by a fairly high number of female headed households, because husbands are either dead or missing or being detained in the rehabilitation camps.

...

An official attached to a local human rights organisation mentioned that there have been cases of sexual assault against women committed by the military, but most of the victims do not dare to come forward. In this connection the official mentioned that people in the newly cleared areas have been under the LTTE system for a long time, and they do not have knowledge about the legal system. The official had information on some cases related to sexual abuses made by the army against local women, but only two of these cases have gone to court. The official further mentioned that women will be the victims in the sense that they will have to move, and some parents place their daughters in convents because they are afraid they might be harassed.

The Norwegian Embassy informed the delegation that there is a huge military presence in the areas where people have recently returned. The embassy mentioned that the government's perception seems to be that the IDP's who have now returned have been LTTE-sympathisers as they have been under LTTE control for a long period.

An anonymous source found that Tamils in general and especially Tamils from the Vanni are regarded as LTTE members. The anonymous source further stated that the NGO's which are operating in the North are under the control of the Ministry of Defence.

According to the Co-ordinator of Law and Society Trust, the army in general considers the people in the Vanni to be former LTTE members and sympathizers, as they have been under LTTE rule since the 1990's. For that reason the population is closely monitored and checked. The Co-ordinator explained that the policy of the LTTE was to take one cadre per family and in the last years even more from each family, which mean [sic] that all people in the Vanni have had some kind of affiliation with the organisation. The Co-ordinator was of the opinion that very few people joined the LTTE voluntarily and in the last years especially it would have been 99% of the recruited people who had been forced to join. The army, however, would not make a distinction between voluntary or forcefully recruited people. According to the Co-ordinator, no mass search has taken place in the Vanni, but the army is still questioning people.

The Co-ordinator of Law and Society Trust said that the army is looking for everyone who was somehow affiliated with the LTTE, including family members and giving them warnings, threatening them, and making sexual advances on women whose husband has been known LTTE leaders.' (Danish Immigration Service, *Human Rights and Security Issues concerning Tamils in Sri Lanka - Report from Danish Immigration Service's fact-finding mission to Colombo, Sri Lanka, 19 June to 3 July 2010*, Copenhagen, October 2010, pages 25-26)

70. The US State Department said in its *Country Reports on Human Rights Practices for 2010* in relation to Sri Lanka that:

'The overall number of extrajudicial killings dropped significantly from the previous year. Nevertheless, during the year unknown actors suspected of association with progovernment paramilitary groups committed killings and assaults of civilians. These included the Tamil Makkal Viduthalai Pulikal (TMVP), led by breakaway LTTE eastern commanders Vinayagamurthi Muralitharan, alias "Karuna," and Sivanesathurai Chandrakanthan, alias "Pillaiyan," in the east, as well as the Eelam People's Democratic Party (EPDP), led by Minister of Social Services and Social

Welfare Douglas Devananda, in Jaffna. These and other progovernment paramilitaries also were active in Mannar and Vavuniya. All of these groups endeavored to operate political organizations, some with more success than others, and there were persistent reports of close, ground-level ties between paramilitaries and government security forces. Whereas these groups served more of a military function during the war, often working in coordination with security forces, the paramilitaries now took on increasingly criminal characteristics as they sought to solidify their territory and revenue sources in the postwar environment.

...

Disappearances continued to be a problem, but at a lower rate than during the war. While disappearances in previous years often appeared related to the conflict, during the year they most often appeared connected with extortion and other criminal activity, sometimes involving government actors. Reliable statistics on the number of disappearances were difficult to obtain, with one estimate of 77 persons missing during the year. Most observers concurred that the majority of disappearances occurred in the north and east, while some took place in Colombo. Government reports on disappearances often claimed that most cases actually involved persons who had left the country for foreign employment and had not informed family members; however, civil society and human rights organizations strongly disputed this interpretation.

...

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

...

In the east and the north, military intelligence and other security personnel, sometimes working with armed paramilitaries, carried out documented and undocumented detentions of civilians suspected of LTTE connections. The detentions reportedly were followed by interrogations that frequently included torture. There were reported cases of detainees being released with a warning not to reveal information about their arrests under the threat of rearrest or death if they divulged information about their detention. There were also previous reports of secret government facilities where suspected LTTE sympathizers were taken, tortured, and often killed.' (US State Department, *Country Reports on Human Rights Practices for 2010* in relation to Sri Lanka, Sections 1.a, Arbitrary or Unlawful Deprivation of Life, 1.b, Disappearance, and 1.c, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)

71. The US State Department said that, in an effort to prevent any resurgence of the LTTE, the Sri Lankan Government continued to search for and detain persons it suspected of being LTTE sympathisers or operatives (US State Department, *Country Reports on Human Rights Practices for 2010* in relation to Sri Lanka, Introduction).

FINDINGS AND REASONS

The applicant's ability to participate effectively in the hearing before the Tribunal

72. As referred to above, the applicant's representatives submitted to the Tribunal a letter dated [in] February 2012 from a forensic psychologist, [Ms B], stating that in her opinion the applicant was suffering from chronic post-traumatic stress disorder with major depression and a report from a psychiatrist, [Dr D], who said that he had seen the applicant [in] April 2012 and that his diagnosis was post-traumatic stress disorder and major depressive disorder. I accept the opinions of [Ms B] and [Dr D] that the applicant is suffering from post-traumatic stress disorder and major depressive disorder.
73. The letter from [Ms B] and the report from [Dr D] are relevant in assessing whether the applicant had the capacity to participate in the Tribunal hearing (see *SZNMJ v Minister for Immigration and Citizenship* [2009] FCA 1345 at [45] per Cowdroy J) although neither of them expressed any opinion about the applicant's capacity to participate effectively in a hearing before the Tribunal. The applicant had no apparent difficulty in recalling events and she was able to address the issues I raised with her. Having taken into account the letter from [Ms B] and the report from [Dr D], I consider that the applicant was able to participate effectively in the hearing before the Tribunal.

The applicant's claims

74. As referred to above, the applicant claims that from 2009 to 2011 she was in a [camp] and that while she was there she was tortured because her husband and her son had escaped. As I put to the applicant, the problem I have with this claim is that the information available to me indicates that her Sri Lankan passport, issued [in] July 2009, was used to travel to India on two occasions, [in] August 2009, returning [in] October 2009, and [in] December 2010, returning [in] January 2011 (see folio 102 of the Department's file CLF2012/1259).
75. The applicant has maintained that someone else must have used her passport and her representatives referred in their submission to the Department dated [in] February 2012 to information regarding the smuggling of Sri Lankans to Canada using, for example, the passport of a Canadian national of Sri Lankan origin or a Sri Lankan passport with a Canadian Landed Immigration Form (proof of permanent residence at the time). However, as I put to the applicant, there would have been no reason for a person to have used these sorts of methods to travel to India. The applicant's representatives themselves referred to the fact that the prevalence of corruption in Sri Lanka meant that passports could be issued in any identity so there would have been no need for someone to have pretended to be the applicant and to have used her passport to travel to India.
76. The applicant's representatives produced to the Tribunal a 'Relief Assistance Card' indicating that the applicant and her younger son and daughter had been in a [camp] at least during the first of these two trips to India. However, as I noted, the applicant's representatives themselves referred to the high level of corruption in Sri Lanka and the fact that many official documents can be issued in an unlawful way. In their submission dated [in] May 2012 the applicant's representatives submitted that the 'Relief Assistance Card' was genuine and legitimately issued and they said that they could provide the original of the card to allow the Tribunal to make any inquiries which it considered appropriate. However I consider that the only way to determine beyond doubt whether the 'Relief Assistance Card' is genuine would be to contact the authorities in Sri Lanka and given that the applicant claims to

fear being persecuted by the Sri Lankan Government I do not consider that it would be appropriate to make such inquiries. As I put to the applicant, I may give greater weight to the information about the travel using her passport than I do to the 'Relief Assistance Card'.

77. In their submission dated [in] May 2012 the applicant's representatives submitted that it would be open to the Tribunal to accept on the basis of the medical reports they had produced that the applicant had been receiving treatment in Australia for injuries that were consistent with her claims of having been mistreated and tortured in Sri Lanka, that she had been diagnosed with having symptoms of anxiety and stress resulting, in part, from a history of torture and trauma and that she had shown the symptoms of, and possessed injuries that were consistent with, a person who had been a victim of torture and trauma. However I consider that it is apparent that, with the exception of the letter from [Ms B] dated [in] May 2012, the reports they produced simply recorded the history given by the applicant. While [Ms B] indicated in her letter that she accepted the applicant's claims to have suffered rape and torture in Sri Lanka, she was not in possession of the information before me which I consider casts doubt on the claims made by the applicant.
78. As I have indicated above, I accept the opinions of [Ms B] and [Dr D] that the applicant is suffering from post-traumatic stress disorder and major depressive disorder. I also accept that some of the injuries which the applicant reported to the general practitioner are consistent with her account of her experiences in Sri Lanka. However I do not accept that the progress notes, letters and reports which the applicant's representatives have produced from a general practitioner, a psychologist, [Ms B] and [Dr D] do more than establish that the applicant has reported symptoms which could be consistent with the account she has given.
79. Contrary to the applicant's representatives' submission, I do not consider that the explanation which the applicant has given for the use made of her passport is plausible. I do not accept that there would be any reason for someone else to have been using the applicant's passport to travel to India. I conclude on the evidence before me that the applicant used her passport issued [in] July 2009 to travel to India on two occasions, [in] August 2009, returning [in] October 2009, and [in] December 2010, returning [in] January 2011. I do not accept that she was in a [camp] at the time she made these trips. I conclude that she was free to travel between Sri Lanka and India during this time. As I put to her, I consider that the fact that she travelled to India on these two occasions, returning to Sri Lanka on both occasions, suggests that she was not of interest to the Sri Lankan authorities.
80. I accept, nevertheless, that the applicant comes from [Town 1] in [District 2]. Her passport, which I accept is a genuine document, gives her place of birth as [District 2]. Having regard to the applicant's evidence at the hearing before me I accept that she was still living in [Town 1] at the time of the tsunami in December 2004. Given her evidence that she has relatives who live in or near Vavuniya it seems reasonable to infer that she and her family made their way there at some time before 2009 when, as I have found, she obtained her passport and made these two trips to India.
81. While for the reasons given above I consider that the applicant was not of specific interest to the Sri Lankan authorities at the time she left Sri Lanka, it is nevertheless necessary for me to consider what her circumstances would be should she return to Sri Lanka now or in the reasonably foreseeable future. As I noted, my understanding is that it will not be possible for her to return to her home in [Town 1] ('[Source deleted: s.431(2)], accessed 17 April 2012). I consider, however, that she will return to the north of Sri Lanka where she has relatives. I accept her evidence that she does not have relatives in Colombo.

82. As I have indicated above, I accept that the applicant comes from [District 2] and I accept that she will be able to be identified from her passport and her National Identity Card as coming from that district. I accept that, as submitted by the applicant's representatives, the applicant is likely to be perceived as an LTTE member or sympathiser because she is a Tamil who has lived in an area which was under the control of the LTTE from the 1990's until the end of the war in 2009. I accept that, as indicated by the evidence referred to in paragraphs 68 to 71 above, the Sri Lankan Army continues to search for and detain people with perceived links to the LTTE and that detentions of civilians suspected of LTTE connections are followed by interrogations that frequently include torture. I also accept that the applicant's husband is missing, presumed dead, and that, as indicated by the evidence referred to in paragraph 69 above, women whose husbands are missing or dead are particularly vulnerable to being harassed, threatened and sexually assaulted in the current context in the north of Sri Lanka.
83. I have considered whether it would be reasonable, in the sense of practicable, for the applicant to relocate to another part of Sri Lanka where, objectively, there would be no appreciable risk of the occurrence of the feared persecution (see *Randhawa v Minister for Immigration Local Government and Ethnic Affairs* (1994) 52 FCR 437 per Black CJ at 440-441). However the applicant is a widowed woman who has only ever worked [teaching] privately in her home. While she has relatives in the north I accept that she does not have relatives in Colombo. Under the circumstances I do not consider that it would be reasonable, in the sense of practicable, for the applicant to relocate to some other part of Sri Lanka such as Colombo where she has no relatives and where it would be difficult for her to find accommodation, to support herself or to survive on her own without the support of relatives.
84. For the reasons given above I consider that there is a real chance that, if the applicant returns to the north of Sri Lanka now or in the reasonably foreseeable future, she will be detained, interrogated and tortured or sexually assaulted for reasons of the combination of her race (Tamil), the political opinion imputed to her (membership of or sympathy for the LTTE) and her membership of the particular social group of Tamil women whose husbands are missing or dead. I consider that such treatment clearly amounts to persecution involving 'serious harm' as required by paragraph 91R(1)(b) of the Migration Act in that it involves a threat to her liberty or significant physical harassment or ill-treatment. I consider that the essential and significant reason for the persecution which the applicant fears is the combination of her race (Tamil), the political opinion imputed to her (membership of or sympathy for the LTTE) and her membership of the particular social group of Tamil women whose husbands are missing or dead, as required by paragraph 91R(1)(a) of the Act. I further consider that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves her selective harassment for a Convention reason.

CONCLUSIONS

85. I find that the applicant is outside her country of nationality, Sri Lanka. For the reasons given above, I find that she has a well-founded fear of being persecuted for reasons of the combination of her race, her imputed political opinion and her membership of the particular social group of Tamil women whose husbands are missing or dead if she returns to Sri Lanka. I find that the applicant is unwilling, owing to her fear of persecution, to avail herself of the protection of the Government of Sri Lanka. There is nothing in the evidence before me to suggest that the applicant has a legally enforceable right to enter and reside in any country apart from her country of nationality, Sri Lanka. I therefore find 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 I am 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.

DECISION

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