

0803883 [2009] RRTA 719 (17 August 2009)

DECISION RECORD

RRT CASE NUMBER: 0803883

DIAC REFERENCE(S): CLF2008/61373

COUNTRY OF REFERENCE: Sri Lanka

TRIBUNAL MEMBER: Paul Fisher

DATE DECISION SIGNED: 17 August 2009

PLACE OF DECISION: Melbourne

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Sri Lanka, arrived in Australia [in] March 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] March 2008. The delegate decided to refuse to grant the visa [in] June 2008 and notified the applicant of the decision and his review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] June 2008 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

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

Definition of 'refugee'

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

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. 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.

Application for Protection

20. The applicant is a 29 year old male who was born in Kurunegala, Sri Lanka [in] 1979 and is a citizen of Sri Lanka. He was granted a subclass 988 Maritime Crew visa [in] March 2008, first arrived in Australia at Brisbane [in] March 2008, and departed his vessel in Sydney [in] March 2008, whereupon he immediately lodged an application for a protection visa.
21. In his application, the applicant stated that he left Sri Lanka because of political harassment but provided no other details of his claims. The form states that he is of Sinhalese ethnicity and Buddhist religion, and that he speaks, reads and writes only Sinhala. The applicant lists his occupation immediately before arriving in Australia as a seaman, but the application form contains no detail about his employment and residential history in Sri Lanka.
22. The applicant then moved to Melbourne and secured legal representation. In a statutory declaration dated [in] April 2008, the applicant stated that he had been persecuted in Sri Lanka for his political activities and if he returned to Sri Lanka he feared that he would be killed. He claimed that his father was a school principal who had died on 1994. His mother was a retired school teacher and he had a 25 year old brother and a 27 year old sister. He claimed that he completed secondary school in Sri Lanka.
23. The applicant claimed that his mother worked as [position deleted in accordance with s431(2) of the Migration Act as this information could identify the applicant] of the Women's Front section of the United National Party (UNP) in the [location deleted: s431(2)] seat from 1977 to 1986 but resigned her position due to personal and family matters. In January 1999, [name deleted: s431(2)], a local UNP politician, asked his mother to organise the election campaign for the women's vote, but due to her age and poor health she asked that the applicant become involved instead. The applicant supported the UNP's policies relating to the war with the Liberation Tigers of Tamil Elam (LTTE) and the economy, so he joined the UNP and began to do a lot of support work for the party over the next 8 years until he left Sri Lanka.
24. The applicant claimed that after he joined the UNP in 1999 he did a lot of campaigning for youth votes by addressing small meetings of young UNP supporters held at his house, addressing large rallies of young people, distributing pro-UNP leaflets, door knocking and telling people about the UNP. He claimed that through these activities he built a strong base of youth votes for the party. He claimed that as a result of his work, he was elected [position deleted: s431(2)] of the Youth Front of the UNP [in] June 2000.

As [position deleted: s431(2)], he launched a massive campaign to gather youth support for the UNP and would represent the Youth Front at various meetings with religious leaders and senior figures in the community. He claimed that as a result of his work, the People's Alliance (PA) was losing support in the seat of [location deleted: s431(2)] and a lot of people started leaving the PA for the UNP.

25. The applicant claimed that a lot of PA members in [location deleted: s431(2)] got very angry with him and he became a target for verbal and physical harassment. He stated that his family and his life were threatened at that time.
26. The applicant claimed that [in] September 2000 he was in the [area deleted: s431(2)] hanging up banners and posters with other UNP supporters in the lead up to the general election, when he was beaten up by PA supporters around 10.00 pm. He recognised one of his attackers as [attacker deleted: s431(2)], a leading character in the [area deleted: s431(2)]. He was told by the attackers to stop motivating youth to support the UNP or he would be killed and burnt. As he argued with his attackers, his friends managed to flee and then he was hit with a baton on the head. He fell unconscious and was found at 7am the next morning by a child going to school. He claims that he went to the police in [Police Station 1] straight away and reported the incident. He stated that the police did not do anything in response to his report because they were afraid to take action against powerful people like [attacker deleted: s431(2)].
27. The applicant stated that after this incident he kept slightly away from public election stages and rallies due to threats on his life. [Politician's name deleted: s431(2)] lost his seat at the general election [in] October 2000, and for the next year the applicant continued to campaign. He had several arguments with PA supporters but did not experience any major threatening incidents until late 2001.
28. He stated that around 5pm [in] November 2001 he was returning from an election rally in [village deleted: s431(2)] when he noticed a large group of around 400 PA supporters who had gathered at [place deleted: s431(2)] and who were hitting bicycles and cars. He immediately left his vehicle by the side of the road and ran into the bushes alongside the road to save his life. He climbed up a tree and watched as PA supporters burnt his vehicle and then shot in the general direction where he had run away. He spent the whole night in the tree then hitched a lift with a lorry driver. The lorry driver told him that the PA supporters had been attacking UNP supporters [in] November 2001 because the son of a prominent PA member had been shot dead by police at an election rally held in support of [politician's name deleted: s431(2)]. He reported the incident to the police but they did not do anything following his report, perhaps because he could not clearly identify the individuals responsible, apart from knowing they were PA supporters.
29. The applicant claimed that after the 2001 elections, Ranil Wickramasinghe from the UNP became Prime Minister of Sri Lanka and would visit his house when he was in the local area and that party discussions with other senior figures would take place at his house because he was still the [position deleted: s431(2)] of the Youth Front of the United National Party. He claimed that while the UNP were in power he did not have any serious life threatening arguments but had many verbal arguments. [In] March 2002 he became involved in a heated argument with [official deleted: s431(2)], a senior PA official, and this man motioned to hit the applicant with a baton during the argument. He left with his supporters to avoid any problems and experienced similar incidents around that time because he had been invited by UNP student leaders to address their campaign

rallies to get the youth vote. He stated that [in] March 2002 the UNP had great success in local council elections as a result of his activities and the work of other UNP supporters.

30. The applicant claimed that during the time the UNP was in power he did a lot of social service work such as co-ordinating a World Bank project to supply water in his community, reconstruction of roads and drains and the distribution of shelter sheets to poor families in his community. The UNP lost power at an election on 2 April 2004 and at 9.45pm the following day his house was attacked by PA supporters. They threw rocks at the house damaging windows, doors and light bulbs. They were angry because his family had allowed UNP supporters to stay at the house. He was not at the house at the time of the attack because he feared for his safety and had gone to [politician deleted: s431(2)] house. His mother reported the attack to the police and told him that the next day monitors from the Peoples Action for Free and Fair Elections (PAFFREL) came to take photographs of the damage. After this incident he experienced continuing verbal and physical threats to his life and he continued to stay at [politician deleted: s431(2)] house.
31. [In] April 2004 the applicant claims that he went to his family home for a visit and at 4pm four unknown men entered the house, including one with a pistol. One man forced his mother to inhale from a handkerchief and she fell unconscious. His brother's hands were tied with a cloth and he was hit firmly on the chin. They were told they would be finished that day and they were dragged out of the house into a jeep. They were made unconscious like his mother and they then became conscious again around 8pm. The jeep was stopped in a hilly area and there was nobody else in the car. He and his brother managed to untie themselves and ran away to hide in the bushes. Around 15 minutes later they heard the jeep leave and they remained hidden in the bushes all night. The next day they went to [Police Station 2] to report the incident.
32. The applicant claimed that after this incident his family asked him to leave the house and since that time he had lived in over 50 different places. He claimed that during this time lots of telephone calls were made to his family to find out where he was hiding and the callers told his family that if they did not tell them where he was, they would kill them all and throw their bodies in the river. The applicant claimed that he decided to leave the country for his safety, and his mother and brother also wanted him to leave the country because of the threats he was experiencing. He tried to go to various countries but could not get any visas and then found out about a shipping course, so he started the course in Colombo in September 2004.
33. The applicant claimed that while he was doing his shipping course he worked in a restaurant in the [suburb deleted: s431(2)] area of Colombo from 7pm until late. One night at around 6.30pm when he was going to work with his friends, two people tried to hit him but he and his friends hit them back and they ran away. He claimed this incident happened around December 2004. He did not know who the attackers were but he believed they were from the PA because they told him to stop his political campaigning. He did not report the incident to police because he was sick of making reports with nothing happening.
34. In September 2005, when he was living in Colombo, [politician deleted: s431(2)] asked him to campaign for him in a new seat he was contesting. Having agreed to do so, he would travel from Colombo to [location deleted: s431(2)] to campaign.

35. [In] November 2005 at around 4.30pm he was travelling with [politician deleted: s431(2)] to participate in a rally in [town deleted: s431(2)] when his path was blocked by a van carrying PA supporters including a PA Minister called [name deleted: s431(2)]. Grenades were thrown at the applicant's vehicle, and he suffered an injury to his right shoulder from the blast. He was admitted to the [hospital deleted: s431(2)] and the police took a statement from him when he was in hospital. He claimed the incident was also widely reported in the media in Sri Lanka.
36. The PA won the 2005 election and the applicant claimed that things got worse for him after the election with people from the PA searching for him wherever they suspected he would be hiding. They would also threaten his friends so a lot of people were reluctant to keep him in their house. He kept moving from house to house and stopped his political activities, not participating in the March 2006 local government elections. Despite no longer participating, the threats to his life did not stop. There were no other major incidents before he left Sri Lanka because the PA did not know where he was hiding but they were regularly threatening his family and friends, and they would threaten to kill them if they did not reveal where he was hiding.
37. The applicant claimed that he was now focused on leaving the country. He had completed his shipping course in January 2005 but it was hard to get a job on a ship. He spent over two years looking for work, from January 2005 to May 2007, and supported himself by continuing to work at the restaurant and receiving money from home. He signed a 10 month contract [in] May 2007 but had no guarantee of further work after that time and would have to have spent 3 or 4 months back in Sri Lanka before he could get his next contract, but he felt very afraid to return to Sri Lanka because of all the threats.
38. The applicant claimed that [in] February 2008 at around 8pm PA people went to his house and asked his mother to tell him to come back to Sri Lanka. As they were leaving, they fired shots in the air. In regular telephone calls his mother told him about this incident and about anonymous threatening phone calls she was receiving. His ship was working between Singapore and China and he decided to seek protection in another country before his contract expired. He felt he would not be safe in Singapore as anyone can get easy access to that country and he was thinking of going to China but his ship got a special charter to come to Australia and he had friends here so he decided to apply for protection here before his contract ended.
39. The applicant subsequently provided the Department with the following documents:
- A police book extract issued by the [Police Station 1] in relation to an incident said to have taken place [in] September 2000 and been reported [the following day], describing the attack that the applicant claimed in his declaration took place on [the previous day]. The date of issue is blank;
 - A police book extract issued by the [Police Station 1] in relation to an incident said to have taken place [in] November 2001 and reported [in] December 2007 (as per the translation, although it may be [in] December 2001 – the original is unclear) in which the applicant reports the attack on his vehicle that he claimed in his declaration took place [in] November 2001. The date of issue is blank;
 - A police book extract issued [in] March 2007 by the [Police Station 1] in relation to an incident said to have taken place [in] April 2004 and recorded as having been reported by the applicant's mother on [the following day]. The report describes an

attack on their family home which the applicant claimed in his declaration took place [in] April 2004. The report states that “we suspect [names]. They had once mentioned that they would attack us. Therefore, we suspect they may have attacked our house. Also, these people once attacked the lights that were around our house”. The report does not mention the PA or any political motive. The report also states that the deponent lives in the house with her daughter and her son named [son deleted: s431(2)] The original Sinhalese language version is and was sealed with a duty stamp;

- A police book extract issued by the [Police Station 2] in relation to an incident said to have taken place [in] April 2004 and reported [in] April 2007 (as per the translation, although it may be [in] April 2004 – the original is unclear) in which the applicant reports about the kidnapping of himself and his brother which he claimed in his declaration took place [in] April 2004. The date of issue is blank;
 - A police book extract issued by the [Police Station 3] in relation to an incident said to have taken place [in] November 2005 and reported [in] January 2008 in which the applicant reports about the attack that he claimed in his declaration took place [in] November 2005. The date of issue is blank;
 - Three membership receipts for the UNP from 1996, 2005 and 2007. The names on these receipts are written in Sinhalese and no translation has been provided;
 - A photocopy of a photograph of two people, which it is claimed are the applicant and the former Prime Minister of Sri Lanka, Ranil Wickramasinghe;
 - A copy of a letter, together with English translation, dated 2006.09.[date deleted: s431(2)] from Ranil Wickeramasinghe, leader of the UNP, addressed to the applicant stating that threats to the applicant’s life had been brought to his attention by [politician deleted: s431(2)] but that the UNP did not have the resources to provide him with personal security; and
 - A copy of a letter, together with English translation, dated [in] October 2005 from the [senior official deleted: s431(2)] of the UNP National Youth Front addressed to the applicant in his capacity as [senior position deleted: s431(2)] of the UNP Youth Front in [location deleted: s431(2)] asking him to call an urgent meeting of the youth council in his electorate in relation to the presidential election due on 17 November 2005.
40. In a submission dated [in] June 2008, the applicant’s representative stated that the applicant feared harm from supporters of the PA for reasons of his political opinion due to his heavy involvement over time in the UNP. The representative also provided arguments in support of the applicant’s claims. The Tribunal has read and considered this submission prior to making its decision in this matter.
41. The protection visa application was refused [in] June 2008, without the applicant having been interviewed in respect of his protection claims. The delegate concluded that the applicant was not a person to whom Australia has protection obligations, rejecting his claims for various reasons, including:
- a. He claimed to have lived at over 50 houses during the period he was in hiding, and yet he only listed a small number of addresses covering this period on his Form 80, and recorded there that he lived at some of those addresses for months at a time;

- b. He claimed to have avoided incidents from 2005 – 2007 because he was in hiding, and that he worked in a restaurant until May 2007, and yet he also claimed that he was attacked by political opponents near the restaurant when on his way to work in December 2004, suggesting that if there was an ongoing threat the applicant's opponents could have located him at his workplace and carried out that threat;
- c. Country information suggests that political violence in Sri Lanka generally subsides after each election, the November 2005 election was *generally conducted in a free and fair manner and free of major violent incidences*, electoral violence has generally diminished since that time, and the UNP has organised demonstrations and rallies which have been mainly peaceful and have not resulted in reports of violence between any parties or their supporters. Furthermore, the applicant did not appear to have had a significant enough profile to have warranted ongoing attention from his political opponents;
- d. Four of the police reports showed no date of issue, on three of them the dates appeared to have been altered, and a number of them appear to have been reported long after the alleged incidents took place, raising doubts about their authenticity;
- e. The applicant had produced no documentary evidence such as medical reports or newspaper clippings to corroborate his claim to have been injured in a grenade attack [in] November 2005, which was said to have been widely reported in the Sri Lankan press at the time;
- f. Despite saying that he wanted to depart from Sri Lanka in 2004, the applicant failed to do so until 2007;
- g. The fact that the applicant was able to renew his passport in May 2007 and depart Sri Lanka without problems suggests that state protection would be available to him if he sought it.

Review Application

- 42. The applicant was represented in relation to the review by his registered migration agent.
- 43. In a statutory declaration dated [in] August 2008, the applicant addressed several issues raised in the delegate's decision.
- 44. The applicant claimed that he had stayed at many different places whilst in hiding and had only provided the main addresses to the Department. He would also stay at homes of UNP friends and supporters when he was campaigning. Sometimes he only stayed a few hours or a night, so he was not able to remember the exact address of each place he had stayed at.
- 45. He claimed that when he was attacked on his way to work at the restaurant in December 2004, the attack took place 5 or 6 kilometres away from the restaurant so he did not believe the PA supporters were aware of his exact place of work or the purpose for which he was walking in that area at the time. He went on leave after the attack for two weeks and looked for another job but could not find anything, so when he returned to work at the restaurant he would use an alternative route and only worked there a few days a week.
- 46. The applicant stated how important his role was as the local [senior position deleted: s431(2)] of the UNP Youth Front, which was why senior party people including the

leader would have meetings at his house to try and recruit members. His role always exposed him to attacks by opposing parties.

47. The applicant stated that the style of writing and issuing of police reports varies between police stations and between officers. He also stated that it was obvious that acceptance of claims by police after several years is not possible. He claimed that on three of the reports he submitted the date of issue was written where the date should be and it is not the date that the reports were made to the police. He claimed that he had cash paid receipts for these extracts and it can be confirmed by viewing them. He stated that the extract from the incident [in] September 2000 had been issued [in] February 2008 but reading the report it can be understood that the incident was reported the following day rather than 8 years later. He stated it can also be confirmed by viewing the relevant cash receipt. He claimed that on some police extracts they had mistakenly placed the date the extract was issued where the date of the complaint should be. He claimed he had therefore obtained new police extracts with the correct dates of when the incidents were reported and when the police extracts were issued.
48. The applicant also made new claims about his political involvement and claimed that he had been involved in exposing the corruption of the PA party in many ways which placed him at further risk of harm. He claimed that he organised a protest rally [in] July 2005 relating to a corrupt mining transaction as well as exposing corruption by PA members at a provincial council level relating to various water projects. He stated that he had brought these incidents to the notice of the Bribery and Corruption Commission in Sri Lanka but they had done nothing because they did not want to be involved in politics. He also claimed that he disclosed abuses and organised protest rallies against a number of other allegedly corrupt PA politicians and had led a strike shutting down shops and buses [in] June 2004 because PA thugs were collecting ransom money from shopkeepers and bus owners. He claimed that because he had exposed these corrupt practices he believed he was at continuing risk from PA supporters and they were still interested in him because they believed he had documents and knowledge that would expose their corruption.
49. The applicant claimed that around July or August 2006 he was waiting for a bus when two men assaulted him. One of the men was the son of a PA organiser. The applicant claimed that he ran to a nearby hospital for security and hid in the toilet but he had not mentioned this incident because he had no police report to prove it happened so he did not think he could mention it. He claimed that he did not go to the police because he knew they would not do anything. He also claimed he could not remember every incident that had happened to him.
50. The applicant claimed that one month before he left Sri Lanka he was on his way to [station deleted: s431(2)] when a local council [senior official deleted: s431(2)] from the PA came and asked him about documents and details relating to corruption of two senior PA figures. This man threatened the applicant that if he did not give him the documents then he would not be allowed to live. He could not report this to the police because he was the local [senior position deleted: s431(2)] and again he did not mention this matter previously because he had no police report and he thought he needed to have evidence for everything that he claimed had happened. He also claimed that he was under a lot of stress and pressure.

51. The applicant claimed that he could not relocate anywhere in Sri Lanka and he had already tried to relocate but his problems continued. He believed he would not be safe anywhere in Sri Lanka.

Tribunal Hearing

52. The applicant appeared before the Tribunal [in] April 2008 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Sinhalese and English languages. The applicant’s representative attended the hearing.

53. At the commencement of the hearing the applicant handed up the following documents:

- The five original police report extracts listed above, with authorised translations;

A further five original extracts copied from police books, with authorised translations indicating essentially the same content apart from the dates, as follows:

Police Station	Date of Incident	Date Incident Reported	Date Extract Issued
[Police Station 1]	[date] Sept 2000	[date] Sept 2000	[date] Aug 2008
[Police Station 1]	[date] April 2000	[date] April 2000	[date] Aug 2008
[Police Station 1]	[date] Nov 2001	[date] Dec 2001	[date] Aug 2008
[Police Station 2]	[date] April 2004	[date] April 2004	[date] Aug 2008
[Police Station 3]	[date] Nov 2005	[date] Nov 2005	[date] Aug 2008

- Untranslated receipts partly in English corresponding to the five reports listed above, being for 75 rupees dated [in] August 2008, and for 25 rupees respectively dated [in] August 2008;
- A certified copy of the applicant’s UNP membership card for 2007-2008;
- Original medical and diagnosis certificates dated [in] November 2005 indicating that the applicant was hospitalised [in] November 2005 and treated for *lacerated wounds to his l/s shoulder*.

Evidence of the Applicant

54. The applicant was asked why he had only now produced the medical certificate issued in 2005. He explained that at the time he had sent it to the UNP head office, because that had a system for compensating people who had been injured in the course of party work. He had retained a copy and asked that it be sent to him but it was lost in the post. Subsequently, through his contacts in the party, he has been able to have the original returned to him.

55. The Tribunal noted that the applicant had submitted two different sets of police reports apparently relating to the same incidents. He was asked to account for this fact, and in particular for the dates appearing on the various original police reports, as the two sets of reports appeared to have been issued at different times and to have conflicting dates.
56. The applicant explained that most of the complaints described in the reports were made either on the day of the incident described in them or, more commonly, on the following day. However, the reports themselves were only obtained subsequently, when his mother went around to the various police stations concerned and requested them. The initial set contained mistakes, with only the report dated [in] April 2004 being accurate, and it was for this reason he asked his mother to obtain another set with the correct information.
57. The Tribunal noted that the first set had been submitted by the applicant as being correct, and he explained that he had only subsequently realised that they contained mistakes. At the time he was not in a good mental state. Also, in one case, the report fails to mention any political angle because the police refused to incorporate it into the report.
58. The Tribunal queried why it should accept any of this evidence given that the reports appeared to be capable of being solicited to order. The applicant replied that it was common for these reports not to be completed correctly, and that people did not understand what was happening in the police stations. During this time there was a change of government and this would affect the police. The officer in charge of the police station would be trying to protect his position, and so these things were not happening properly.
59. The applicant was asked about his background. He explained that he comes from Kurunegala, about 110 km or 2½ hours from Colombo. He joined the UNP in 1999 when the local organiser had asked his mother to become involved again, but as she was by then too old and feeble she asked him to instead. The UNP often held large rallies in the area, and he was attracted to it for a number of reasons, including its conciliatory approach to the LTTE, and its more liberal economic policies, which he felt had the potential to create greater job opportunities.
60. Asked why he had submitted a 1996 UNP membership card in support of his claims if he had not become a member until 1999, he explained that that was his mother's card, as could be seen from her name on the back. He had told the Department that his mother was a member of the UNP. The Tribunal noted that the applicant had said that his mother resigned in 1986. He replied that she had resigned from her position, but she remained a member of the Party.
61. The applicant was asked what work he did after leaving school, he replied that from 1999 until 2004 he was basically working for the UNP. Asked whether he was paid to perform work for the UNP he said he was not. The Tribunal put it to the applicant that he had been unemployed between 1999 and 2004 and he agreed that was the case. Asked how he survived financially during that time, the applicant replied that his mother provided some money, and they got income from their land.
62. The applicant was asked when he started working in the restaurant, and he replied that it was in September 2004. He worked cleaning dishes and chopping vegetables. He worked there until May 2007, although he had about two to three weeks off after he was assaulted in December 2004.

63. Asked about the circumstances of the assault, the applicant explained that he was living at [suburb deleted: s431(2)] in Colombo at the time, and had to catch two or sometimes three buses in order to get to work. The assault took place at [road deleted: s431(2)], which is about five or six km from the restaurant where he was working. He had to change buses there and was waiting for the bus when he was assaulted. He was with three friends at the time.
64. The Tribunal then put it to the applicant, erroneously, that he had said in his initial statement that he was assaulted while he was *walking* to work. He replied that what he had meant to say is that he was on his way to work [which is what he did in fact say in his original declaration, at folio 47, paragraph 28 of the DIAC file].
65. The Tribunal then noted that the applicant had raised new claims at the review stage, namely that he had exposed corruption by PA officials, and that he had suffered further attacks from PA supporters. The applicant was asked why he had not mentioned these matters earlier, and he replied that at that stage he did not have documents to support those claims. He couldn't get the documents, and also there are deficiencies in the reports.
66. The Tribunal noted it had received no documents about corruption, and the applicant indicated that he was still hoping to obtain some, but he had given them at the time to party officials.
67. The Tribunal pointed out that the absence of a police report about the December 2004 assault had not prevented him from raising that claim. He replied that his three friends were also involved in that event, and could corroborate it. Also, prior to coming to Australia he was on a ship for 10 months, and it was like being in a prison.
68. The applicant added that he personally collected only one or two of the police reports, one which he obtained a few weeks after the event in November 2005, for the purpose of claiming insurance on the damaged vehicle, and another, although he can't recall which one, and it may not even have been submitted.
69. The applicant was asked whether he wished to add anything else.
70. The applicant asked whether he needed to submit any more documents to support his claims or whether the Tribunal accepted those already submitted.
71. The Tribunal replied that it would weigh up the evidence before it, but it was for the applicant to make out his case. It also indicated that it accepted that the applicant's shoulder had been injured, but not necessarily that it was for the reasons claimed.
72. The Tribunal also noted that there were variations in some of the dates appearing in the two sets of reports, and that only one of the reports appeared to have had stamp duty paid on it.
73. The applicant's representative submitted that the second set of reports was accompanied by receipt evidencing the fees paid, but the Tribunal pointed out that the receipts had not been translated, and indicated that they should be if the applicant proposed to rely on them.

74. The applicant's representative also explained that the applicant had obtained the second set of reports in order to rectify the omissions in the original set, and when the Tribunal pointed out that this was only after the Department had pointed those omissions out, the representative agreed that the applicant was responding to a potentially adverse issue which had been raised against him, and queried how else he was supposed to have done so.
75. When the Tribunal observed that there was no evidence before it from the police officer, the representative pointed out that police from the country of origin could hardly be expected to give evidence in these types of proceedings. How they completed the reports depends on the calibre of the officers concerned, and it cannot be assumed that the extract reports are copied out consistently from the information books.

Post Hearing

76. [In] August 2008 the Tribunal was advised that the applicant's brother had recently been killed. The covering letter to that effect foreshadows the provision of further documentary evidence of that event, which is said to underscore the seriousness of the risk to the applicant himself. The letter encloses a statutory declaration by the applicant dated [in] August 2008, and also copy of the contract referred to in that declaration, which is said to support the applicant's claims that he has evidence of government corruption. The contents of the applicant's statutory declaration are as follows:

1. I have just found out that my brother was killed last weekend. I called my mother on Tuesday. She told me that my brother had been killed on Sunday at midnight. Four men came to the house and demanded to know where I was. They were all wearing coverings over their head so they could not be identified. They abused my mother. Then one of the men hit my brother over the head with a stick. Then they ran away. Police then came to the house. I will provide the Tribunal with the police report and the death certificate as they are being sent over.
2. This incident has deeply upset me and my family. This is further evidence that my life is at risk.
3. I am also providing the Tribunal with a document which is evidence of the corruption by the government regarding the Kahatagaha Graphite mine. As I mentioned in my statement to the Tribunal, the government was getting the supply from hired generators (1000KVA , skip type) instead of the regular power grid at a cost of Rs 9500 a day unnecessarily. Then the hirer company was paying a commission money to chairman of the mine. I have provided a copy of this agreement between Sakurai trading company and the Kahatagaha Graphite Lanka Pty Ltd.

77. [In] October 2008, the Tribunal received written submissions on behalf of he applicant. The following documents were enclosed with the submissions:
- Certified copies of death certificate, with authorized translation, pertaining to the death of the applicant's brother [brother deleted: s431(2)], [in] August 2008, from bleeding in the brain caused by assault;
 - A certified copy of a police book extract issued [in] September 2008 by the [Police Station 1] in relation to an incident said to have taken place [in] August 2008 and recorded as having been reported by the applicant's mother on [the following day]. The report describes an attack on their family home by four masked assailants at approximately 11.00pm demanding to know the whereabouts of the applicant. In the course of heated argument, the applicant's now-deceased brother was struck on

the head with a club and fell to the floor unconscious.

- Copy of letter to Bribe and Corruption Review Commission from [the applicant] and certified translation, dated [in] May 2004;
- Copy of letter to Bribe and Corruption Review Commission from [the applicant] and certified translation dated, [in] July 2005;

78. The written submissions of fact and law include the following [please note that the somewhat confusing paragraph numbering is reproduced as it appeared in the submission]:

SUMMARY OF CLAIMS

1. The applicant has a well founded fear of serious harm in Sri Lanka based upon his political opinion. The applicant is a supporter and campaigner for the UNP. The applicant has suffered serious harm in the past as a result of his political beliefs and activities. The persecutors have made it clear they are political opponents from the Peoples Alliance Party. He has received regular death threats and suffered other abuse. He has suffered psychological harm from this. Politics in Sri Lanka is marked by violence which continues.

2. Recently the applicant's brother was killed by political opponents. The applicant has provided a police report and death certificate testifying to this and the fact that his brother was killed by political opponents who were looking for the applicant. This happened just after the recent Tribunal hearing.

3. Given that Sri Lanka is a small country, relocation within Sri Lanka would not provide the applicant with protection. Given he would continue to support the UNP he would be easily located and targeted again by political opponents supporting the government.

4. The applicant claims that State protection is not available to him in Sri Lanka. The applicant has made police complaints and has provided documentation to verify that. The police however are politicised and do not follow through with investigations against Peoples Alliance party (government) supporters. This failure to properly investigate incidents of political violence results in perpetrators going unpunished and essentially gives the green light for ongoing harassment and violence. The Sri Lankan police are withholding protection from the applicant due to his political beliefs and activities.

5. Recent Independent Country information included in this submission indicates that policing in Sri Lanka is highly politicised. It also supports the applicant's claim that he is being selectively denied law enforcement practices of a 'reasonable' standard - *MIMA v Respondent S152/2003*. The country information indicates that the policing standards are generally dysfunctional and politicised and that those standards are not restricted to police response to LTTE/Tamil issues. There are numerous examples of police failing to properly investigate complaints from a broad range of victims in Sri Lanka and of them abusing a broad range of Sri Lankan citizens....

Well founded fear of Persecution

7. It is submitted that the applicant has suffered serious harm in the past which has included regular threats to his life and other threats of serious harm.

8. It is submitted that this satisfies S91R(1)(b) of the Migration Act being a threat to his life and liberty and significant physical harassment of the person.

9. These threats and harassment against the applicant continued over a period of years and clearly were made against the applicant because of his political opinion

and activities. The applicant has provided evidence of revealing corruption by political opponents and therefore it is submitted that the applicant has a profile which would lead to his persecution on return.

10. It is submitted that the applicant remains at risk of serious harm in Sri Lanka in the foreseeable future.

State Protection

11. It is submitted that in considering whether reasonable protection will be provided to the applicant, the experience of the applicant in making complaints and the apparent failure of the police to put a reasonable standard of law enforcement in place through the investigation process is the relevant factor.

12. It is submitted that the Sri Lankan police will provide the applicant with less than adequate protection if he is forced to return to Sri Lanka.

13. Recent independent country information overwhelmingly supports the applicant's claims in this regard.

14. The country information about the Sri Lankan police suggest that the police force is dysfunctional and that its failures and dysfunction is not limited to its dealings with the LTTE or other Tamil groups.15. As explained at the recent Tribunal hearing, the applicant has been to the police numerous times to report incidents of violence against him by political opponents. The applicant initially provided five police reports regarding incidents of violence against him. Four of these police reports cited the date of issue of the police report as the date that the incident was reported. This was clearly an error on the part of the police station when they extracted the police report. The date of the incident is correctly cited in the body of the police report. The applicant then subsequently submitted further reports with the correct dates of issue and date of report which he instructed his family to procure from the police station. The Tribunal has now cast doubt upon the authenticity of the police reports. It is submitted that these reports cannot be impugned simply due to the dates being incorrectly noted by the police station. Extracts of police reports in Sri Lanka are provided at any time that they are requested. These police reports clearly detail the incidents which were reported by the applicant.

INDEPENDENT COUNTRY INFORMATION - STATE PROTECTION

16. The following are extracts from the US State Department Human Rights Country Report Sri Lanka 2007:

There were numerous reports that the army, police, and pro government paramilitary groups participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity.'

'On October 27, an Asian Human Rights Commission (AHRC) study of 48 police torture cases in the south revealed that the reasons for torture included obtaining bribes, favoring a second party, preventing a complaint that may lead to a criminal inquiry, failing to comply with traffic rules, and asking a police officer a question'

'Role of the Police and Security Apparatus

Following the 2005 presidential election, the government eliminated the Ministry of Internal Security and placed control of the 65,000-member police force, including the 5,850-strong paramilitary Special Task Force, under the Ministry of Defense. Senior officials in the police force handled complaints against the police. Few police officers serving in Tamil majority areas were Tamil and generally did not speak Tamil or English. Impunity, particularly for cases of police torture and disappearances of civilians within HSZs, was a severe problem. Several NGOs

claimed that corruption was also a problem in the police, force. An October assessment by the AHRC revealed the government's tolerance of the pervasive corruption and incompetence of the police force as a major reason for the institution's incapacity to investigate and prosecute cases effectively. (emphasis added)

17. An Asian Human Rights Commission report - Sri Lanka : Police Reform Initiatives within a dysfunctional System posted on the AHRC website on 24 October 2007¹ states in its conclusion on p9....

The type of crisis that the Sri Lankan policing system faces is a part of a larger political and societal crisis. The salient question is as to what type of policing the state as well as civil society wants to have. So long as the state fears the development of an efficient policing system as a threat to the way the state exists in the country at the moment the implicit answer to that question is that the state has allowed the system to become dysfunctional. An efficient policing system will threaten the existing pattern of misrule abuse of power and corruption.

As long as the state and society cannot arrive at an agreement to eliminate these factors the talk of police reform will remain of little practical value. The real problems are the issues of the nature of the state and the role that the policing system has to play within such a system.

18. The Special Rapporteur on Torture made a statement following his visit to Sri Lanka in 2007. It is reproduced in the 2007 Asian Human Rights Commission report for Sri Lanka and the following are extracts relevant to police standards and conduct :

'SPECIAL RAPPORTEUR ON TORTURE CONCLUDES VISIT TO SRILANKA'
29 October 2007

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, issued the following statement today:

Over the course of my visits to police stations and prisons, I received numerous consistent and credible allegations from detainees who reported that they were ill-treated by the police during inquiries in order to extract confessions, or to obtain information in relation to other criminal offences. Similar allegations were received with respect to the army. Methods reported included beating with various weapons, beating on the soles of the feet (falaqa), blows to the ears ("telephono"), positional abuse when handcuffed or bound, suspension in various positions, including strappado, "butchery", "reversed butchery", and "parrot's perch" (or dharma chakara), burning with metal objects and cigarettes, asphyxiation with plastic bags with chilli pepper or gasoline, and various forms of genital torture. This array of torture finds its fullest manifestation at the TID detention facility in Boossa.

Intimidation of victims by police officers to refrain from making complaints against them was commonly reported, as were allegations of threats of further violence, or threatening to fabricate criminal cases of possession of narcotics or dangerous weapons. Detainees regularly reported that habeas corpus hearings before a magistrate either involved no real opportunity to complain about police torture given that they were often escorted to courts by the very same perpetrators, or that the magistrate did not inquire into whether the suspect was mistreated in custody. Medical examinations were frequently alleged to take place in the presence of the perpetrators, or directed to junior doctors with little experience in documentation of injuries.

19. In a statement 'SRI LANKA: Disappearances day, October 27 - denial of local or international investigations' issued on October 20 2007² the Asian Human Rights Commission states

¹ www.ahrchk.net/pub/inainfile.php/sldysfunctional/254/

² www.ahrck.net/statements/mainfile.php/2007_statements/1238/

State responsibility - large scale disappearances, as they have been happening in Sri Lanka continuously since 1971, can only occur when there is political approval for such activities by the regime in power. Law enforcement agencies engage in such acts. Thus, it can be said that those involved in serious breaches of the law do so only when they have the assurance that those who hold power will ensure that no investigations or prosecutions will take place. This assurance has become the cornerstone of the relationship between the political regime and the police and military during this long period.

There is today an entrenched political and legal culture in which firm undertakings not to investigate or to prosecute disappearances and other gross abuses of human rights remain a foundation stone. It is an unwritten code that politicians will do all that is within their power to stop investigations into allegations of disappearances and other related matters. The operation of the criminal justice system takes place only outside the boundary of this agreement between those in power and the police and military.

It is this agreement to ensure that investigations into these matters will be prevented that has created the obstacles to the local criminal investigation system to the extent that it has become dysfunctional. The officers of the Criminal Investigation Division (CID), who, being propelled by their professional obligations try to undertake investigations into this forbidden territory, put themselves at serious risk. The numbers of persons whose careers within the investigation field have suffered serious setbacks, either due to their lack of understanding of the rules of this forbidden area, or due to their defiance of these rules in the pursuit of the best traditions of their profession, are many. An entire psychology within the criminal investigation machinery in the country has become completely twisted due to these experiences. Today investigations into cases where state agencies are involved would be considered an act of great disloyalty to the police and the military.

Local people when affected by gross human rights abuses try to make complaints to local police authorities. The Criminal Procedure Code of Sri Lanka has laid down the detailed procedure for the recording of complaints, their investigation and the prosecution of criminal cases. When local people resort to the provisions in the local law regarding forced disappearances and similar types of human rights abuses, mostly done by the police or the military, they discover the hidden agenda that has developed over the last decade not to investigate or to prosecute these matters as explained above. After having exhausted all attempts to find legal redress, when they realise that locally, nothing will happen, they begin to seek help from human rights organisations and others to take these matters to the United Nations human rights agencies. When this happens, the same state that denies them the investigations locally, declares that international agencies need not interfere as there are local legal mechanisms to deal with these matters. Thus the citizen facing these problems has nowhere to turn to. They are deprived of access to local as well as international systems to find a solution to the tremendous wrongs they have faced.

55. The 2007 Asian Human Rights Commission Report - The state of human rights in eleven Asian nations in 2007 - "Sri Lanka Human Rights violations rise further in 2007" makes recommendations at its conclusion. The following recommendation is made in relation to investigation of human rights abuses:

State sponsored violence has created two types of problems. One is that the police officers themselves including high ranking officers have taken part in such violence on a large scale. The other reason is that when the state itself is involved in such violence there is severe constraint to investigate such acts. This problem of the investigating unit is the key issue that guarantees immunity to perpetrators. This issue needs to be addressed if there is to be any improvement at all.

5.2.2 To achieve the above objective the following problems in the Sri Lankan policing system need to be addressed.

5.2.3. The collapse of the exercise of command responsibility by officers of higher ranks as required by the Department Code of the police as well as the normal

practices of any policing system that has a credible record of investigations into crime. There is a serious problem at the very top of the policing system in terms of the quality as well as the willingness of the top ranking officers to exercise their responsibilities. The neglect of the duties of the top ranks has also contributed to the allegations of serious corruption in some of the top ranking officers of the police. There are further allegations of direct criminal involvement of some such (?)Ticers. Without resolving the problems that lie at the very top of the policing system it is not possible to get this system to function in a manner that the law requires. All these problems of top layer of the police seep down to the lower ranks. **As a result the entire system today suffers from dysfunctionism.** (emphasis added) The AHRC has through constant communication tried to highlight this issue. On this too the AHRC is disappointed that neither the government nor the local human rights lobby, nor the international human rights lobby on Sri Lanka has taken this issue as a significant one in dealing with human rights violations.

5.2.4. As a result of the above mentioned problems and others serious criminal investigators within, the policing system does not get the internal support as well as the security it needs to conduct investigations into serious crimes including serious human rights abuses. Such investigators are in danger of their lives from outside forces such as organised crimes, including alleged terrorism and also they suffer from internal problems of betrayal in their organisation itself. This has resulted in the waste of much talent and training that has gone into the creation of crime investigating capacity within the premier law enforcement agency in the country. Once again the AHRC notes that neither the government nor the local human rights lobby or the international lobby on human rights in Sri Lanka have paid sufficient attention to this problem.

The Attorney General

5.3.1. The Attorney General - The failure to prosecute serious crimes including serious abuses of human rights is a failure on the part of the country's prosecuting office which is vested with the Attorney General. This failure and the way to remedy it have not yet become a key concern of the government or the local and international human rights lobby. The excuse of the Attorney General's Department is that it only prosecutes when evidence is made available by the police investigators. Its claim is that it also has no duty to ensure investigations. Therefore, when investigations do not taken place for the reasons stated above the Attorney General's Department claims that the prosecutors are not responsible for this situation.

20. An Asian Human Rights Commission statement of 4 October 2007 Sri Lanka: Policing and Pimping details the experience of a Dutch journalist making a police complaint for theft in Sri Lanka and instead being asked by a police officer whether he needed a woman to have sex with. The statement at pl states...*As the International Group of Eminent Persons has pointed out, this abandoned commission's time is running out. The state of Sri Lanka has virtually abandoned its duty to investigate and prosecute serious crimes and human rights abuses. As a result, the type of law enforcement officer like the one who made the offer to the Dutch journalist has been created.*

21. The UK Home Office Country information Service June 2008 report for Sri Lanka contains highly relevant and up to date country information about law enforcement issues in Sri Lanka. The following are relevant extracts from this report which support the applicant's contention that he will not receive reasonable protection from the Sri Lankan authorities.

20 May The Deputy Minister for Vocational Training and Industrial Education, P. Rathakrishnan, claimed to have received information that Sri Lanka Police personnel and Sri Lanka Army soldiers had been involved in several 'white van' abductions. The Deputy Minister decried the rising number of abductions, disappearances and arbitrary arrests. Between 16 January and 15 May 2008 he received complaints of 93 abductions, of which 12 cases were identified to be in police detention; 22 were released after being "tortured"; and the whereabouts

of the remaining 59 were unknown. In addition to these abductees the Deputy Minister said that a total of 290 Tamils were still being detained by the authorities. - *Pro-LTTE website TamilNet, SLA, Police complicit in white van abductions- SL Minister, 20 May 2008* <http://www.tamilnet.com/art.html?catid=13&artid=25696#>
Date accessed 20 May 2008

Events in 2008

3.41 As noted in the Economist Intelligence Unit (EIU), Country Report Sri Lanka, Main report, January 2008:

"On January 1st [2008] a UNP parliamentarian, T Maheswaran, was assassinated en route to a Hindu temple. Mr Maheswaran was killed just a few days after he had threatened to reveal information about alleged government involvement in recent abductions during a television interview; the government subsequently reduced his security.

7.05 Ms Arbour continued

"Sri Lanka has many of the elements needed for a strong national protection system ... However, in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming. There is a large number of reported killings, abductions and disappearances which remain unresolved... While the Government pointed to several initiatives it has taken to address these issues, there has yet to be an adequate and credible public accounting for the vast majority of these incidents. In the absence of more vigorous investigations, prosecutions and convictions, it is hard to see how this will come to an end. While Sri Lanka has much of the necessary human rights institutional infrastructure, critical elements of protection have been undermined or compromised. The application of treaties in domestic law has been questioned by the Supreme Court in the Singarasa case. The Government's proposed legislation to address this problem, tabled this week in Parliament only partially addresses the issues and risks confusing further the status of different rights in national law ... In my view the current human rights protection gap in Sri Lanka is not solely a question of capacity. While training and international expertise are needed in specific areas, and I understand would be welcomed by the Government, I am convinced that one of the major human rights shortcomings in Sri Lanka is rooted in the absence of reliable and authoritative information on the credible allegations of human rights abuses." (A Press Statement from Ms. Louise Arbour, UN High Commissioner for Human Rights forwarded by the Asian Human Rights Commission) [47e]

8. SECURITY FORCES

8.01 The security forces comprise the 65,000-member police force (which included the 5,850-strong paramilitary Special Task Force) (U.S. State Department, Country Reports on Human Rights Practices 2007, Sri Lanka, issued on 11 March 2008: USSD 2007) [2f (Section Id)]; the 150,900-strong armed forces (including recalled reservists and comprising: army 117,900, navy 15,000, air force 18,000), and paramilitary forces of around 88,600 (including 13,000 Home Guard, an estimated 15,000 National Guard and a 3,000-strong anti-guerrilla unit). (Europa World Online, Defence) [[a]

8.02 The Human Rights Watch (HRW), World Report 2008, Sri Lanka, January 2008, covering events in 2007, noted that:

"Government security forces are implicated in extrajudicial killings, enforced disappearances, forcibly returning internally displaced persons (IDPs) to unsafe areas, restricting media, freedoms, apparent complicity with the abusive Karuna group, and widespread impunity for serious human rights violations. Hundreds of people have been detained under newly strengthened Emergency Regulations that give the government broad powers of arrest and detention without charge. The regulations have been used to conduct mass arbitrary arrests of ethnic Tamils in the capital Colombo,

as well as to detain political opponents, journalists, and civil society activists."
[21b/ (pl) emphasis added.

As noted in the USSD report 2007:

"Following the 2005 presidential election, the government eliminated the Ministry of Internal Security and placed control of the 65,000 member police force, including the 5,850 strong paramilitary Special Task Force, under the Ministry of Defense. Senior officials in the police force handled complaints against the police. Few police officers serving in Tamil majority areas were Tamil and generally did not speak Tamil or English. Impunity, particularly for cases of police torture and disappearances of civilians within HSZs [High Security Zones], was a severe problem. Several NGOs claimed that corruption was also a problem in the police force. **An October assessment by the AHRC revealed the government's tolerance of the pervasive corruption and incompetence of the police force as a major reason for the institution's incapacity to investigate and prosecute cases effectively.**" [2f (Section id)]

8.04 As noted in the report of the UN Special Rapporteur on his Mission to Sri Lanka (28 November to 6 December 2005), published on 27 March 2006:

"Significant levels of police brutality and impunity were reported to me by a wide range of sources. The underlying causes are not difficult to discern. In the course of more than three decades of civil strife and violence, the police force has been transformed into a counter insurgency force. More than two thirds of today's police officers belong to the 'reserve' rather than the regular force and most of these have never received significant training in criminal detection and investigation...

8.09 As recorded in Jane's Sentinel Country Risk Assessments, Country Report Sri Lanka (last accessed 4 January 2008):

"Policemen are poorly paid and susceptible to corruption at lower levels. Senior police officials are recruited more on a basis of class than ability. (Sri Lanka is a highly class-conscious society.) Human rights organisations have been highly critical of the Sri Lankan police, whose rapid expansion and poor training have contributed to lack of professionalism...

8.57 Instead of making a diligent effort to investigate and prosecute enforced disappearances, the government of President Mahinda Rajapaksa continues to downplay the scope of the problem ... Despite the hundreds of alleged 'disappearances' reported over the last two years to the Human Rights Commission, it has issued no public reports on the matter, has refused to provide statistics on the complaints it has received, and has tried to downplay the scale of the problem. The monitoring and investigative authority of the Human Rights Commission has also been effectively negated by the obstructive attitude of the security forces and lack of support from the government." (HRW, 'Recurring Nightmare - State Responsibility for 'Disappearances' and Abductions in Sri Lanka', March 2008)

8.91 As noted in a statement issued by the Asian Human Rights Commission on 2 January 2008:

"The year 2008 began, for Sri Lanka with the assassination of the Tamil opposition UNP Member of Parliament, T Maheshwaran... Political assassinations... by politicians and their family members are now a normal way of life in Sri Lanka... The Member of Parliament, T. Maheshwaran was assassinated after he made a public statement in a television interview that he would reveal the names of those who are engaged in kidnappings, abductions and murders in the north and east of the country... making such revelations is considered to be an offence in Sri Lanka now, justifying summary capital punishment. Threats are made to anyone who makes or plans to make any revelation about the criminal acts done by political leaders through the police and military as well as paramilitary groups. The paramilitary groups are the executioners who carry out the crimes but those who want the crimes to be committed and sanction

such actions remain behind the scenes. After every such crime the president of the country makes a declaration that there will be an impartial inquiry. Sometimes the declaration even goes further to the effect that if the local inquiry fails foreign experts will be called in to conduct further inquiries. Such promises are forgotten within a few days. The same political authorities that directly or indirectly sanction such murders and other crimes also ensure that no inquiries are conducted into these matters. "

8.98 The Special Rapporteur further commented:

"The issue of killings, in many respects, provides an important window into many, facets of the overall situation in Sri Lanka. They are symptomatic of the widespread use of police torture, of the failure to rein in abuses committed or tolerated by the military, and of the systematic efforts by various armed groups, and particularly the LTTE, to kill Tamils who refuse to support the LITE and to provoke military retaliation. "

8.99 "The police are now engaged in summary executions, which is an immensely troubling development. Reports, unchallenged by the Government, show that from November 2004 to October 2005 the police shot at least 22 criminal suspects after taking them into custody. It is alleged that the use of force became necessary when, after having been arrested, presumably searched, and (in most cases) handcuffed by the police, the suspects attempted either to escape or to attack the officers. In all cases the shooting was fatal, and in none was a police officer injured. The Government confirmed that in none of these cases had an internal police inquiry been opened. The reason proffered was that no complaints had been received. The pattern of summary executions that emerges demands a systematic official response that brings those responsible to justice and discourages, future violations. " (UN Special Rapporteur, report dated 27 March 2006)

AVENUES OF COMPLAINT

8.106 The Human Rights Watch (HRW), World Report 2008 [2007 events], Sri Lanka, January 2008 noted that:

"The Sri Lankan government fails to hold members of the security forces and nonstate armed groups accountable for abuses. Key parts of the criminal justice system, such as the police and the Attorney General's Office, have not effectively investigated human rights violations or brought perpetrators to justice. Victims of abuses by security forces and non-state armed groups are apprehensive about complaining to the authorities for fear of retaliation, especially in the absence of functioning victim and witness protection mechanisms. A draft witness protection bill is still pending.... Independence of the Human Rights Commission and other constitutional bodies has been undermined since 2006, when Sri Lankan President Mahinda Rajapaksa directly appointed commission members, contrary to the constitution. " [21b] (p3-4)

8.108 The Human Rights Watch (HRW) report 'Return to War, Human Rights under Siege', published on 6 August 2007 recorded that:

`Impunity for human rights violations by government security forces, long a problem in Sri Lanka, remains a disturbing norm. As the conflict intensifies and government forces are implicated in a longer list of abuses, from arbitrary arrests and `disappearances' to war crimes, the government has displayed a clear unwillingness to hold accountable those responsible for serious violations of international human rights and humanitarian law. Government institutions have proved inadequate to deal with the scale and intensity of abuse. One barrier to accountability lies in the failure to implement the 17th amendment to the constitution, which provides for the establishment of a Constitutional Council to nominate independent members to various government commissions, including the Human Rights Commission. Ignoring the amendment, the president has directly appointed commissioners to the bodies that deal with the police, public service, and human rights, thereby placing their independence in doubt. The 17th amendment (see text) has been

similarly bypassed in the unilateral appointment of the attorney general, which undermines the independence of that office. " [21f] (Summary)

8.111 The International Crisis Group document 'Sri Lanka's Human Rights Crisis, Asia Report N°135', 14 June 2007 noted that:

"When the terms of office of the members of the Human Rights Commission expired in April 2006, the president appointed new members directly, arguing that this was required due to the nonfunctioning of the Constitutional Council .. Since its appointment in May 2006, the present Human Rights Commission has issued no reports on high-profile human rights violations, disappearances, the Emergency Regulations or any other matter. It has occasionally published some figures on complaints but these are incomplete or contradictory. The commissioners downplay the many reports of disappearances and abductions received, arguing that in the majority of cases the person has returned and that media reports are 'highly exaggerated, unfounded, and malicious' and are 'being made to tarnish the image of the country'. Commissioner Jayawickrama claims that since May 2006, there have been 'no cases of torture' by the police. This contradicts the Commission's own statistics, which show 528 complaints of torture in 2006 and another 159 through April 2007. " [76a] (p20)

The AHRC report further noted that:

"Quite regularly reports appear in the press of persons in police custody, having tried to attack the police with grenades or other weapons, being shot dead ... In all these cases the magistrates accepted the versions given by the police and entered verdicts of justifiable homicide. The magistrates decided the correctness of the versions given by the police before the cases had been brought to trial at a High Court and before all the evidence was examined. Such deaths which have become quite a common occurrence indicate that the police higher authorities approve of such practices. The fact that the government or the parliament has not taken any visible or effective action to question this practice also suggests that there is direct or indirect political approval of such killings. The former Inspector General of Police (IGP) quite publicly approved this practice and the present IGP has spoken of stopping crime by 'hook or by crook'. Neither was taken to task by the government or parliament.

8.117 As reported by Human Rights Watch (HRW), Sri Lanka: Human Rights Commission Downgraded, on 18 December 2007:

"Recently the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights - the international body that regulates national human rights institutions - reduced Sri Lanka's NHRC [National Human Rights Commission] to the status of an 'observer' because of government encroachment on its independence ... The international coordinating committee downgraded the Sri Lankan NHRC on two grounds: first, because of concerns that the appointment of its commissioners was not in compliance with Sri Lankan law, which meets international standards; and second, because of doubts that the commission's practice was not 'balanced, objective and non-political, particularly with regard to the discontinuation of follow-up to 2,000 cases of disappearances in July 2006. 'The NHRC has failed to adequately address the hundreds of reported cases of new 'disappearances' in Sri Lanka over the past two years. In a note dated June 29, 2006, the secretary of the commission said that it had decided to stop inquiring into these complaints for the time being, unless special directions are received from the government.' An internal NHRC circular dated June 20, 2007 imposed a maximum time period of three months in which complaints must be filed with the commission, even though there is no such limitation in existing laws or regulations. More than three months after an incident, the commission will only investigate complaints at its discretion. " [21g]

8.127 The International Crisis Group document 'Sri Lanka's Human Rights Crisis, Asia Report N°135', 14 June 2007 noted that:

"In the face of this explosion of political crimes and rights violations, law enforcement agencies and the judicial system have failed almost completely. There have been

almost no credible police investigations and very few arrests or indictments in any of the hundreds of killings, abductions, and disappearances over the past year and a half of sustained violence. Of the sixteen high profile cases to be investigated by the Presidential Commission of Inquiry into Serious Human Rights Violations, for instance, the police have filed indictments in only one - the assassination of Lakshman Kadirgamar. The public position of the police and the attorney general's department is that there are no suspects or insufficient evidence in the other cases. The government claims to have arrested some soldiers and police under the Emergency Regulations in connection with recent abductions and disappearances but it has given no information about the arrests, and no charges have been filed."

8.148 The International Crisis Group document 'Sri Lanka's Human Rights Crisis, Asia Report N°135', 14 June 2007 noted that:

"The failure of the police and judiciary_ is not simply the result of inadequate training or lack of resources. It is the direct result of a lack of political will and a refusal by the government to acknowledge the extent of the problem. Throughout 2006-2007, the official response to allegations of abuses has been denial, obfuscation, ad hominem attacks on its critics and threats against activists and journalists. In an attempt to counter international pressure, the government has established a number of institutions to investigate human rights abuses but these have been singularly ineffective. " [76a] (p18)

15.02 As noted in the ICG (International Crisis Group) document 'Sri Lanka's Return to War: Limiting the Damage', Asia Report N°146, 20 February 2008:

"Political power is concentrated in the hands of the president, his three brothers, a few close supporters and the military leadership. An uncompromising attitude has taken hold of many senior officials and officers. In the name of patriotism, and out of a mix of Sinhala nationalism and determination to retain power, dissent is increasingly equated with treason. Publicly questioning government policies has become dangerous. Under the 1978 constitution, the president has extraordinary powers and is difficult to remove from office. Rajapaksa has taken the defence, finance and nation-building portfolios. His brother, Gotabhaya, is defence secretary and runs that ministry's day-to-day operations; brother Basil, a parliamentarian and presidential adviser, manages the nation-building ministry; brother Chamal is minister for irrigation and water management and ports and aviation. Two thirds of the national budget comes under ministries controlled by the four brothers. " [76d] (p15)

15.03 The ICG report of February 2008 further noted:

"The opposition is also targeted. In late 2007, the TMVP kidnapped relatives to prevent TNA parliamentarians from voting against the government budget. They abstained and the budget passed. "The pressure and threats ... were well beyond what can be tolerated in a democratic setup", a Western diplomat said. "The government is making liberal use of death threats to keep people in line". A Tamil parliamentarian who led the campaign against disappearances and abductions went into self-imposed exile after his police security detail was cut."

15.09 In June 2007 Mangala Samaraweera and Sripathi Sooriarachchi announced that they were leaving the Sri Lanka Freedom Party (SLFP) to form a breakaway party, the Sri Lanka Freedom Party - Mahajana Wing (SLFP - M), (The Keesing's Record of World Events, June 2007, Sri Lanka) [23b] The SUP - M later signed a memorandum of understanding with the UNP and their first public rally took place on 26 July 2007 in Colombo, when thousands of protesters marched against the Government. (BBC Sinhala, 26 July 2007)

15.10 On 10 February 2008, the government-controlled Sunday Observer reported that "Former Minister Sripathi Sooriarachchi MP and his two bodyguards were killed yesterday when the jeep in which they were travelling veered off the road and crashed on to a tree in Thambuttegama, Anuradhapura Sooriarachchi was on his way to participate in a conference organised by the University students of the Sri Lanka Freedom Party's Mahajana Wing, Chief Organiser Ruwan Ferdinands told the

Sunday Observer. Former Minister Man gala Samaraweera also attended the conference, he said.”

15.12 The letter from the BHC Colombo further reported that:

“There is no evidence to suggest that non-state actors, such as the LTTE, have targeted political groups during 2007. All Tamils and LITE supporters are vulnerable to be targeted by the police and military. High profile politicians remain top targets, and any assassination attempts are normally immediately attributed to the LITE, although perpetrators are rarely caught and in the aftermath, rumours abound and the press point accusations at other groups. In the case of D.M.Dassanayake [killed by a bomb blast on 8 January 2008], later press reports stated that the Sinhala Tigers have been linked to his murder. Tamil MP Thiyagarajah Maheshwaran was probably shot dead by pro-government paramilitaries, and another high profile Tamil MP, Mano Ganeshan, was forced to leave the country following threats. In both cases their government security had been reduced a few days prior to attacks/threats.” [15r]

15.13 “According to the police, they do respond to complaints from individuals of mistreatment on account of their political opinion or activity, although no statistics are readily available. Similarly, we were unable to obtain statistics for those arrested/prosecuted for mistreating members of political groups. Regarding accusations of discrimination by the police against members of particular political groups, it does not appear openly, but generally SLFP and allied groups receive extensive physical protection. Other MPs may receive protection, but this is subject to the whim of the government. Security is often withdrawn from MPs who are perceived to be disloyal or too vocal, particularly from the minority communities. There is nothing to suggest that members of political groups cannot live in Colombo/Gampaha region. All political parties are registered in Colombo.” (BHC letter, 16 May 2008)

22. A 2006 report by Transparency International - In pursuit of ‘absolute integrity’ identifying causes for police corruption’ and referred to on the Australian Development Getaway website states the following about police corruption at p115...

9.2.4 Political Interference

Political interference has become a major problem in dealing with police corruption. This is a problem faced by both India and Pakistan as well. This is largely due to the nature of the colonial Police Acts which are operative in those countries. Pakistan has recently addressed this problem through a revision of its Police Act. The National Police Commission in Sri Lanka is expected to ensure that appointments and transfers of police officers are conducted on an independent basis and that politicians don't have any say in the matter. Discussion with many police officers however revealed that they did not have faith in the National Police Commission and that this resulted in their succumbing to political pressure out of fear of being transferred to difficult areas, and making biased decisions.

23. It is submitted that given all of the above country information which clearly establishes the Sri Lankan police and law enforcement system as dysfunctional and politicised, the applicant's profile and history of harm for convention based reasons, will not receive reasonable state protection should he be forced to return to Sri Lanka.

24. The applicant has suffered serious harm in the past as a result of his political activities and beliefs. Independent country information indicates that the human rights situation and law enforcement standards in Sri Lanka have continued to deteriorate since the applicant fled. 25. It is submitted that the police have previously failed to properly investigate complaints by the applicants against Peoples Alliance Party supporters. Recent and in depth independent country information indicates that the applicant is highly unlikely to receive police protection to a reasonable standard should he return to Sri Lanka.

25. In short there is a real chance which is not remote or speculative that the applicant will suffer serious convention based harm if returned to Sri Lanka. Independent country information does NOT indicate that he will receive protection from

the Sri Lankan authorities.

Reconstitution

79. On 7 July 2009, the matter was reconstituted pursuant to s.422(1) of the Act because the member who previously constituted the Tribunal for the purposes of this review was no longer a member of the Tribunal

Country Information

80. In addition to the information referred to in the delegate's decision and that cited by the applicant and/or reproduced above, the Tribunal has had regard to additional country information it considered relevant
81. On November 2004 the Sri Lanka *Daily News* reported that former UNP Minister Rohitha Bogollagama had changed sides and joined the People's Alliance government: see <http://www.dailynews.lk/2004/11/19/pol02.html>. (The Sri Lankan government website indicates that he is currently Minister for Foreign Affairs: http://www.priu.gov.lk/Govt_Ministers/Indexministers.html.) On 6 February 2005 the *Sunday Leader* reported an investigation into corruption in the sale of graphite from the Kahatagaha mine under Bogollagama's tenure, as referred to in the applicant's claims: <http://www.thesundayleader.lk/20050206/spotlight.htm>.
82. The following extracts are from a paper entitled *Paying the Price for Patronage: Electoral Violence in Sri Lanka*, presented at the September 2008 conference of the Swedish Political Science Association (SWEPSA), and accessed on 14 August 2009 from http://www2.statsvet.uu.se/Portals/7/Pdf/8_Kristine_H%C3%B6glund.pdf:

Electoral violence is a type of violence which is distinguished from other forms of political violence by its timing and targets. It can take place before, during and after elections and is in different ways linked to the electoral process. In previous studies on electoral violence, four types of targets can be discerned: electoral stakeholders (voters, candidates, election workers, media, and monitors), electoral information (registration data, vote results, ballots, campaign material), electoral facilities (polling and counting stations), and electoral events (campaign rallies, travelling to polling station) (Fischer, 2002, 9). In this study we are mainly concerned with direct physical violence against people and property, including threats and intimidation.⁶ Electoral violence can be carried out by a diverse set of actors, such as state actors (military and police), political parties, guerrilla/rebel groups, and militia and paramilitary groups.

Theories on elections, electoral malpractice, and political violence have largely been silent on why some people become targets of electoral violence and how politics is affected at the village level. This article has its theoretical point of departure in the functioning of societies in which politics is patronage-based and operates through the political parties. Contradictory theoretical arguments can be made. On the one hand, it can be argued that the supporters of the party in opposition are more likely to become victims of violence, than supporters of the party in power. This is because there is a power asymmetry between incumbent political parties and opposition parties, which works in favour of the party which holds political power.

Several advantages for the ruling party can be discerned (see e.g. Jackson and Rosberg, 1984; Kitschelt and Wilkinson, 2001; Migdal, 1988; Panebianco, 1988). Firstly, the incumbent party has more resources at its disposal. The state resources can be used for political patronage, such as distribution of welfare services, business contracts and jobs, which can be used to secure loyalty for the political party. Such resources can also be used

as incentives or rewards for the use of violence by party supporters. Secondly, generally speaking it is more likely that the police, judiciary and election commissioner or commission will side with the party in power. In societies based on politics of patronage, these institutions are more vulnerable to political pressures from the incumbent political party or leaders. This makes the ruling party more likely to get away with violence.

Violence has become a recurring phenomenon at election times in Sri Lanka. Such violence preceded the armed conflict between the LTTE and the government over an independent Tamil state in the north and east of Sri Lanka. Electoral violence was a feature of the JVP uprisings. For instance, in the 1988 presidential election and the 1989 parliamentary one, the JVP issued death threats against both voters and election workers, and carried through on those threats, in deliberate attempts to sabotage the elections. Due to the fear created, the election had an extremely low voter turnout. However, what is striking about electoral violence in Sri Lanka, is that much of the political violence has been carried out in areas which have not been contested by the LTTE and not only in times of political uprisings in the southern parts of the island. Instead, the main perpetrators of electoral violence have been the established parties, the SLFP and the UNP.

Who Was Targeted?

Several observations can be made about who it was – or whose property it was – that was subjected to electoral violence. A first observation regarding targets of violence is that many of those who became victims of violence were politically active around election times. In fact, several of the victims were responsible for the village level organisation of the election campaigning. They were doing door-to-door canvassing, preparing poster campaigns, and participating in or organising pocket meetings. Further five of the six houses/buildings that were burnt down or attacked had been used for political organisation and had been housing party workers and the party candidates when they came to the village.

83. The following article entitled *UNP supporters attacked in Puttalam* was published by Neth News on 21 January 2009, and accessed from http://www.nethfm.com/news_1918-unp-supporters-attacked-in-puttalam.html on 14 August 2009:

A group of supporters of the main opposition UNP came under attack at Puttalam town last night (Jan. 19), police said.

They had been returning after attending a poll-related discussion, when the assailants had struck.

According to Puttalam Police, an area politician is responsible for the attack.

The same attackers have assaulted a UNP candidate when he had visited Puttalam Hospital where the injured in the previous attack are warded

84. The following article entitled *State Terror in Jaffna: UNP*, was published in Sri Lanka's online *Daily Mirror* on 14 July 2009 and was accessed on 14 August 2009 from http://www.dailymirror.lk/DM_BLOG/Sections/frmNewsDetailView.aspx?ARTID=54668:

The main opposition UNP charged yesterday that armed men freely roaming in the North were threatening its candidates to stop their election work while police were distributing leaflets on behalf of UPFA candidates.

The UNP election's coordinator and North Central Provincial Councillor Rohana Gamage told a news conference his party's candidates were forced to stop campaigning after dusk.

Mr. Gamage said the poster campaign and the house to house canvassing being carried out by the UNP were being repeatedly disrupted by EPDP supporters.

He alleged that the EPDP which is contesting under the UPFA betel symbol was carrying out election work accompanied by police who were distributing propaganda leaflets of its candidates.

Mr. Gamage said unlike at other Local Council polls where state resources and state functions were used and abused, what was happening in the North was the unleashing of terror on a wide scale.

“There had been no foundation stone laying ceremonies or erecting of posts for power supply that was very evident at the other recently held elections,” he said.

Mr. Gamage said the people in the North were not interested in the poll because they are more focused on more essential work such as locating their relatives who had been separated or had lost touch with during the war.

He said the government had not given permission to bring in local and foreign election monitors and rejected the statements made by Ministers Anura Priyadarshana Yapa and Lakshman Yapa Abeywardene that election monitors were not needed for the northern polls.

Mr. Gamage said the UNP would conduct its campaign despite the threats and intimidation and confirmed that General Secretary Tissa Attanayake would unveil the party’s election manifesto on July 23 at Vavuniya shortly.

85. The following article entitled *UNP candidate's vehicle attacked*, was published in Colombo Today 4 August 2009 and was accessed on 14 August 2009 from <http://www.colombotoday.com/english/articles/Lite/UNP-candidate-vehicle-attacked/4626.htm>:

The UNP says a vehicle of one of its candidates at the upcoming Uva Provincial Council election came under attack last night (Aug. 03). Party candidate Nihal Chandrasiri, in a complaint lodged with Bibile Police, said his cab came under fire at Wegama area. Four people in the vehicle were injured in the incident and admitted to hospital, he said. The candidate had been travelling in another vehicle at the time.

FINDINGS AND REASONS

86. Having had regard, for the purposes of s.422(2) of the Act, to the record of the proceedings of the review made by the Tribunal as previously constituted, including the record of the hearing conducted [in] August 2008, the Tribunal has decided to determine the review in favour of the applicant on the basis of the material before it.

Country of Nationality

87. The applicant claims to be a Sri Lankan citizen. He has produced evidence of his background in Sri Lanka, and entered Australia on a valid Sri Lankan passport issued in Sri Lanka. The Tribunal finds on this basis that he is a national of Sri Lanka and has assessed his claims against that country.

Well-founded Fear of Persecution for a Convention Reason

Assessment of Protection Claims

88. The applicant provided detailed claims with his protection visa application describing much of the history of his involvement with the UNP in Sri Lanka. The written claims were supported by documentary evidence including:

- police reports evidencing incidents of political violence said to have been witnessed by and/or inflicted on the applicant or his family, including a report of the fatal assault on his brother;
- a death certificate consistent with the claimed manner of the brother's death;
- medical certificates supporting the applicant's claim to have been hospitalised in November 2005;
- UNP membership cards evidencing the involvement of the applicant and his mother in that party;
- letters of support from the UNP attesting to the applicant's involvement in the party and also the threats and risks which had ensued from this involvement; and
- a photograph apparently showing the applicant together with what is, quite clearly in the view of the Tribunal, UNP leader and former prime minister Sunil Wickramesinghe.

89. At the review stage the applicant elaborated considerably on his claims, explaining that some of the UNP protest demonstrations he had organised concerned corruption by government figures. The applicant explained the nature of these corrupt dealings in detail, and indicated that he had raised these concerns with the *Bribery and Corruption Commission*. Aspects of these claims, too, were evidenced by supporting documents, being copies of letters on UNP letterhead which had been sent to the Commission, and also, in one case, by a copy of a contract for the supply of generators to provide power for the Kahatagaha graphite mine when, according to the applicant, power was available much more cheaply from the grid. Country information as extracted above also lends support to the applicant's claims with respect to corruption at Kahatagaha involving former UNP politician Bogollagama who switched sides to join the PA in 2004.
90. Many aspects of the applicant's claims appear to be uncontroversial, in the sense that they are supported in general - and, to some extent specific - terms, by the documentary evidence and country information set out above.
91. Similarly, many of the concerns raised by the delegate have, in the view of the Tribunal, been addressed in the submissions and/or the further statutory declarations made by the applicant. For example, the applicant has explained, in a way which makes sense geographically, how he could have been assaulted en route to work in the manner claimed, without the assailants necessarily learning where he worked. With respect to the alleged failure by the applicant to record on his Form 80 all the relevant addresses where he temporarily sought refuge prior to departing Sri Lanka, the Tribunal observes that that applicant has provided a considerable number of addresses but that in any event, that form only requests addresses where an applicant has resided for 12 months or more, and clearly he claims to have stayed temporarily at many places only on a very short-term basis requiring no identification by the Form 80.
92. Of particular concern to the delegate, and to the Tribunal also, were the various police reports submitted. As the delegate has pointed out, these reports clearly contain mistakes, omissions and alterations. However, it does not necessarily follow from this that the reports are not genuine, or that the alterations were made with any intent to mislead, particularly as they are so obvious as to appear quite artless

93. The reports appear to reflect a process whereby a complaint is made and recorded in a police incident log book, and subsequently, upon payment of a fee, a report of the original complaint can be transcribed from the book. This is clearly a cumbersome process, and one in respect of which it stands to reason both that complainants may be told to come back at a quieter time if they want a copy of the report and also that mistakes will occur, particularly given what the country information extracted above says about the standard of policing generally. For example, the 2008 *Jane's Sentinel* Country Risk Assessment quoted in the UK Home Office report extracted above, refers to the Sri Lankan police in the following terms:

Policemen are poorly paid and susceptible to corruption at lower levels. Senior police officials are recruited more on a basis of class than ability. (Sri Lanka is a highly class-conscious society.) Human rights organisations have been highly critical of the Sri Lankan police, whose rapid expansion and poor training have contributed to lack of professionalism...

94. Given the concerns raised by the delegate, the applicant has solicited a further set of reports, obtained in August 2008 by his mother, with the errors rectified. The content of the second set of reports is otherwise essentially the same as that in the first set, although the different translations have, obviously, resulted in slight variations in expression. They are also evidenced by receipts for payment.

95. The two sets of documentation have all the appearance of having been obtained in the manner claimed, that is by having been copied from the original police information books.

96. Some of the reports are corroborated by other documents submitted by the applicant, such as the medical reports which lend support to the claimed assault said to have occurred [in] November 2005.

97. The most recent report obtained was not previously submitted, as it relates to an event which only occurred after the Tribunal hearing, namely the death of the applicant's brother. That report too is corroborated by another document, the brother's death certificate.

98. Having carefully considered all the evidence before it, the Tribunal accepts the applicant's claims as to both the incidents of threatened or actual harm he says he has been subjected to in the past by PA supporters, and also as to the motivations attributed to those incidents. The Tribunal also accepts that the applicant's brother was killed in August 2008 as claimed, an incident which, in the view of the Tribunal, underscores the seriousness of the risk faced by the applicant himself.

99. The Tribunal therefore finds that there is more than a remote chance that the applicant will encounter serious harm from PA supporters capable of amounting to persecution for the purposes of s.91R of the Act in the reasonably foreseeable future, should he return to Sri Lanka.

Convention Nexus

100. The evidence before the Tribunal indicates that the harm which the applicant fears is motivated by his actual and imputed political opinion, namely that he is in fact, and is perceived to be, an opponent of the Sri Lankan ruling party. The Tribunal is therefore

satisfied that the motivations of the putative persecutors bring the applicant's claims within the scope of the Convention.

Availability of State Protection

101. In *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, Gleeson CJ made the following observation (at p.13):

Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.

102. To the extent that the threats to the applicant are not state-sanctioned, the issue arises as to whether state protection is available to the applicant in all the circumstances.

103. The applicant has provided documentary evidence tending to support the proposition that he has repeatedly complained to the Sri Lankan authorities to no avail. He has indicated that he does not believe that the state will protect him for the reason that the attacks on him are politically motivated, and the Sri Lankan police are not prepared to record and/or respond to such complaints where the complainant is from the opposition.

104. The relevant question for the Tribunal, then, is whether this unwillingness to seek the protection of his country of nationality is justifiable. The country information referred to above indicates to the Tribunal that it is.

105. It follows from this that the Tribunal finds that the applicant's unwillingness to avail himself of state protection is justified in the circumstances, as there is, in the view of the Tribunal, a real chance that the Sri Lankan authorities would be unwilling to provide protection to the applicant for reason of his political affiliation with the UNP, the issuance of a Sri Lankan passport to the applicant notwithstanding.

Conclusion on Persecution

106. In the present case, the Tribunal finds that the applicant faces a real chance of persecution if he returns to Sri Lanka in Iraq in the reasonably foreseeable future, for the Convention reasons of his political opinion, as a result of the combination of the existence of a Convention-motivated risk of serious harm and a failure of state protection.

107. The Tribunal finds for the purposes of s.91R(1)(a) that it is the Convention reason listed in the preceding paragraph is the essential and significant reason for the harm feared.

Relocation

108. The Tribunal accepts that the applicant has already moved around extensively while he remained in Sri Lanka, in an attempt to minimise the risk of harm, albeit only in a relatively small area of Sri Lanka.

109. It is possible, in the view of the Tribunal, that the applicant could avoid the harm feared if he were to relocate within Sri Lanka, desist from any political activity, and keep a low profile. However, in *Appellant S395 of 2002 v Minister for Immigration and*

Multicultural Affairs (2003) 216 CLR 473, McHugh and Kirby JJ made the following observation at [40]:

...persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.

110. Bearing this in mind, and given what the Tribunal considers to be a genuine commitment by the applicant to acting on his political beliefs, the Tribunal considers that to require the applicant modify his behaviour by concealing or suppressing any political activity would amount to a persecutory curtailment of his right to political expression. Just as the Court in *Appellant S395* found that it was erroneous for the Tribunal to assume that the homosexual applicant could simply return to Bangladesh and avoid persecution by behaving discreetly, it seems to the Tribunal that it would be similarly erroneous to expect the applicant in the present case to suppress his legitimate and genuinely held political beliefs in order to avoid further problems in Sri Lanka.

Safe Third Country

111. Finally, there is no evidence before the Tribunal which might suggest that the applicant has a presently existing, legally enforceable right to enter and reside in any safe third country. Accordingly, the Tribunal finds that the Australia's protection obligations are not excluded under s 36(3) of the *Migration Act 1958*.

CONCLUSIONS

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

DECISION

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. prrt44