

**060647336 [2007] RRTA 6 (5 January 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 060647336

**DIMA REFERENCE(S):** CLF2006/45002

**COUNTRY OF REFERENCE:** Sri Lanka

**TRIBUNAL MEMBER:** Andrew Jacovides

**DATE DECISION SIGNED:** 5 January 2007

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

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

The applicant, who claims to be a citizen of Sri Lanka arrived in Australia and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by post. The delegate refused the visa application as the applicant was not a person to whom Australia has protection obligations under the Refugees Convention.

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

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

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

Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

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

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

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

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

CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 205 ALR 487 and *Applicant S v MIMA* (2004) 217 CLR 387.

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

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

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

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

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

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

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

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

## **CLAIMS AND EVIDENCE**

The Tribunal has before it the Department's file relating to the protection visa application. The applicant appeared before the Tribunal to give evidence and present arguments. The applicant was represented in relation to the review by a registered migration agent.

*Department file CLF2006/45002*

The applicant stated in his protection visa application that he was a citizen of Sri Lanka. He submitted a copy of his birth certificate. He stated that he entered Australia with a false passport issued in a different name. He described himself as a Hindu Tamil. The applicant stated that he left Sri Lanka and travelled to an Asian country. He stated he remained in that country until he came to Australia. He stated he travelled abroad on a Sri Lankan passport under another alias.

The applicant stated that he lived in his birth town until he left Sri Lanka. He stated that he had several years of education and he worked in a particular profession. He stated that he has one sibling who lived in Sri Lanka at the time of application. He claimed his parents were deceased.

The applicant claimed that he was at risk of harm by the authorities in Sri Lanka because he was a Tamil from the north east suspected of supporting the Liberation Tigers of Tamil Eelam (LTTE). He claimed he also feared harm by the LTTE because the group had attributed an adverse political opinion to him.

The applicant stated that his parents died in the 1980s. He stated he and his sibling were raised by close relatives. The applicant claimed that his sibling ran away and joined the LTTE. He stated he heard that his sibling was in "charge of some section" of the LTTE (f. 45). The applicant stated that he and his sibling never discussed LTTE activities.

The applicant claimed that he was often asked to join the LTTE but he refused. He stated he was taken to an LTTE camp and was told to join the group. He stated he told them that his sibling was a member of the LTTE and they released him unharmed the following day.

The applicant claimed that he was arrested after he was implicated in an attack against the authorities. He stated he was held for a few weeks, beaten, tortured, asked questions, and accused of being with the LTTE. The applicant stated that after the police verified his identity, they released him. He stated the police subsequently harassed him and took his belongings.

The applicant stated that he was detained again a few years later at a checkpoint after an attack was made against the authorities. He claimed he was beaten by the police and asked questions regarding his involvement with the LTTE. The applicant claimed that a police officer later recognised him and he was released.

The applicant stated that several years later his sibling asked him to take a member of LTTE to a particular destination. He stated that getting there involved going through a checkpoint and he was asked because he was known at that checkpoint. The applicant claimed that a few

days later he escorted the LTTE member to the destination. He claimed that a week later his sibling told him that the person he escorted had been arrested and the LTTE suspected him of being a police informer. The applicant stated that when he returned home he was told that the police were looking for him because he had been identified as the person who escorted the LTTE member.

The applicant stated that he had no money to flee. He stated the relatives who raised him were poor. He claimed that he sought assistance from another relative. He stated that this relative enabled him to contact another relative who lived abroad, it was this relative who paid for the applicant's journey to Australia. The applicant stated that he travelled with an agent and he was given a false passport. He stated that soon after the incident he left the country with the agent. He stated the agent took him to a house in an Asian country where he remained until the agent was able to arrange his journey to Australia. He claimed that he entered Australia with another passport issued in a different name. He stated the agent did not escort him to Australia but someone met him upon his arrival in Australia and took the passport.

The applicant provided information from external sources dealing with ongoing human rights violation by the authorities and the LTTE in Sri Lanka.

#### *The delegate's decision*

The delegate essentially decided that the applicant's claims were implausible and found that he fabricated the claims to get a protection visa.

#### *Refugee Review Tribunal file 060647336*

The applicant did not provide any claims with the review application.

#### *The hearing*

The applicant attended the hearing accompanied by his migration agent. He essentially repeated the written claims he provided to the Department.

The Tribunal noted that the birth certificate submitted to the Department was issued after the applicant left Sri Lanka. The applicant stated it was sent to him by his relative in Sri Lanka. The Tribunal asked the applicant if he had any other identification papers, such as a Sri Lankan identification card. He stated he had no other documents.

The Tribunal indicated to the applicant that it required more evidence to verify his identity and background. The Tribunal asked him if his relatives in Sri Lanka, or his overseas relative who helped him, could be contacted and asked to act as witnesses. The applicant stated that he was unable to contact his family in Sri Lanka and he did not know how to contact the overseas relative. The adviser stated that he could provide a linguistic analysis indicating that the applicant was a Tamil from north-east Sri Lanka. The Tribunal commented that it would accept the linguistic analysis but it preferred evidence from witnesses who could verify the applicant's identity as well as his circumstances. The Tribunal told the applicant that it would wait one week for submissions.

#### *Correspondence after the hearing*

The Tribunal received several requests from the applicant's adviser for further time to prepare submissions. The Tribunal received a report by a linguist who stated that he had listened to the Tribunal hearing tapes and concluded that the applicant "speaks the dialect of the Tamil language that is characteristic to the north and east of Sri Lanka" (RRT file 060647336, f. 76).

#### *Information from external sources*

The Tribunal also considered information from external sources relevant to the applicant's claims. The US Department of State, provides the following overview regarding human rights Sri Lanka:

The government generally respected the human rights of its citizens, although serious problems remained. During the year both the government and the LTTE frequently violated the 2002 peace accord. According to Sri Lanka Monitoring Mission (SLMM) statistics, the LTTE committed 14 cease-fire violations for every 1 committed by the government. Civilian deaths due to land mines were drastically reduced through a nationally coordinated humanitarian demining effort. The government enacted emergency regulations three times during the year: twice following the December 2004 tsunami, and once following the August 12 killing of Foreign Minister Lakshman Kadirgamar. The emergency regulations, which remained in effect at year's end, permit arrests without warrant and nonaccountable detentions for up to 12 months. The following human rights problems were reported:

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

There were numerous reports that armed paramilitary groups, suspected of being linked to the government or security forces, participated in armed attacks during the year. These groups included the Karuna faction of the LTTE, the Eelam People's Democratic Party (EPDP), and the People's Liberation Organization of Tamil Eelam

(PLOTE). The LTTE continued to control large sections of the north and east and engaged in politically motivated killings, disappearances, torture, arbitrary arrest and detention, denial of fair public trial, arbitrary interference with privacy, denial of freedom of speech, press, of assembly and association, and the recruitment of child soldiers. (US Department of State, 2006, *Country Reports on Human Rights Practices – 2005*, Sri Lanka, Introduction, 18 March at [www.state.gov](http://www.state.gov)).

The report indicates that past human rights violations by the army, most of which were directed at the Tamil community, have not been investigated. The Tribunal noted that fighting in Sri Lanka resumed in 2006 and the ceasefire which began in 2002 is effectively over (see for example, *BBC News*, 2006, Sri Lanka: Timeline, 5 September, at [http://news.bbc.co.uk/2/hi/south\\_asia/country\\_profiles/1166237.stm](http://news.bbc.co.uk/2/hi/south_asia/country_profiles/1166237.stm)).

The Telegraph reported that 100,000 refugees fled the recent fighting between the government and the LTTE (*Telegraph.co.uk*, 2006, 'Strife-torn Sri Lanka faces disaster', 12 August, at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/08/12/wsri12.xml>).

The Tribunal noted that under the conditions of the cease-fire the LTTE is no longer a proscribed organisation in Sri Lanka. As such this has led to an improvement in the human rights situation for known LTTE member/supporters in Colombo (see UK Home Office, Country Information and Policy Unit, 2004, *Sri Lanka Country Report April 2004*, April - <http://www.ind.homeoffice.gov.uk/filestore/Sri%20Lanka%20April%202004.pdf> ).

The Department of Foreign Affairs and Trade (DFAT) advised that following the ceasefire in 2002 human rights conditions improved dramatically for Tamils in Colombo. (Department of Foreign Affairs and Trade, 2003, *Tamils in Colombo*, Cir No. 83/03, 11 June). They advised that "many of the checkpoints in Colombo" were removed after the agreement was signed in 2002 and there were "only a few reports of arrests of suspected LTTE" sympathisers in the city (see also Department of Foreign Affairs and Trade, 2003, *Human Rights: Treatment of Tamils and Muslims*, Cir No. 100/03, 7 July).

DFAT advised previously that at the height of hostilities between the LTTE and the government, the persons most at risk of government harassment were young Tamils from the north east provinces (DFAT Country Information Report No. 193/99, dated 4 June 1999, CX36118). Approximately half of those detained for security reasons complained they were tortured by the authorities. DFAT suggested that Tamils were the primary targets and that there was a connection between the incidence of torture and mistreatment and the detainee's race and imputed political opinion (DFAT Country Information Report No. 67/99, dated 5 March 1999, CX35499).

None of the officers responsible for such acts were brought to justice (US State Department *Country Reports on Human Rights Practices for 2000* in relation to Sri Lanka, Section 1.a, Political and Other Extrajudicial Killing). The climate of impunity in relation to torture by the security forces continued even after the ceasefire was signed (US State Department, *Country Reports on Human Rights Practices for 2003*, Section 1.c, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

## **FINDINGS AND REASONS**

The applicant claims he is citizen of Sri Lanka and a Tamil. He claims he and his sibling were raised by relatives after their parents died. The applicant claims his sibling left the

family and joined the LTTE. He claims he remained with his relatives and he worked in a particular profession. The applicant claims that he was targeted by the LTTE and the authorities because each side suspected him of supporting the other side. He claims that LTTE detained him in a camp and told him to join the LTTE. The applicant claims that he was detained and tortured by the authorities after he was suspected of involvement in an attack against the authorities. He claims he suffered similar treatment by the authorities a few years later when he was suspected of involvement in another attack against the authorities. The applicant claims that he escorted an LTTE member at the request of his sibling and he was subsequently targeted by the authorities and the LTTE when that person was detained. The Tribunal accepts these claims.

The applicant claims the authorities and the LTTE will seek to harm or kill him if he returns to Sri Lanka because an adverse political opinion has been attributed to him.

The Tribunal is satisfied that the applicant provided a truthful account of his circumstances in Sri Lanka. Information from external sources summarised above, which the Tribunal accepts, indicates that the LTTE and the authorities have been implicated in widespread human rights violations against the citizens of Sri Lanka. The Tribunal has noted that human rights conditions improved after the ceasefire in 2002 but recent developments indicate that hostilities have resumed and both sides are targeting each other and civilians. Information from external sources indicates that the LTTE and the authorities are targeting their opponents or perceived opponents, with “politically motivated killings, disappearances, torture, arbitrary arrest and detention” (US Department of State, 2006, *Country Reports on Human Rights Practices – 2005*, Sri Lanka, Introduction, 18 March at [www.state.gov](http://www.state.gov)). The Tribunal is satisfied that the applicant is at risk of life-threatening harm in Sri Lanka because he has attracted the adverse interest of the authorities and the LTTE for the reasons stated.

The Tribunal has considered whether the applicant can avoid the harm he anticipates in north-east Sri Lanka by relocating within the country. It finds that the applicant will be at risk of serious harm from the LTTE and the authorities wherever he lives in Sri Lanka.

The Tribunal is satisfied that the applicant has attracted the adverse interest of the LTTE and the authorities in Sri Lanka, and an adverse political opinion has been attributed to him by both sides in Sri Lanka’s civil war. The Tribunal finds that the applicant will not be able to live safely in Sri Lanka in the reasonably foreseeable future. The Tribunal finds that the applicant is at risk of persecution by the LTTE and the authorities in Sri Lanka for reasons of political opinion.

## **CONCLUSIONS**

Having considered the evidence as a whole, the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.

## **DECISION**

The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.



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

Sealing Officer's I.D. PRRRNP