

**060409776 [2006] RRTA 176 (31 October 2006)**

**DECISION RECORD**

**RRT CASE NUMBER:** 060409776

**DIMA REFERENCE(S):** CLF2005/92999

**COUNTRY OF REFERENCE:** Sri Lanka

**TRIBUNAL MEMBER:** Richard Derewlany

**DATE DECISION SIGNED:** 31 October 2006

**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 letter and posted on the same day.

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

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

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

### **RELEVANT LAW**

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged, in this case 21 October 2005, 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 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.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages.

The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

### *Protection visa application*

In his protection visa application the applicant stated that he was born in Jaffna. His passport confirms his place of birth. The applicant stated that he was married with several children, and that his wife and children resided in Sri Lanka. He also stated that his mother and siblings resided in Sri Lanka, one sibling resided in Australia and another sibling resided overseas.

In a statement submitted with the visa application the applicant stated that he went to school in City A, where his relative worked. In early 1980s the Sri Lankan army amassed because of ethnic riots. The army took him to a camp, where he was detained, interrogated and beaten. The army was seeking to establish whether he had contacts or involvement with militant groups. He was released later, but continued to be subject to detention and arrest when the army undertook 'cordon off and search' operations.

In late 1980s the applicant was travelling with members of his family to Jaffna, their vehicle was hit by army. One of his family members was hit and died. In the late 1980s was also the year that Indian army troops came to Sri Lanka for peace keeping duties, and Tamil militant groups became involved in political activities. That time the young Tamil males were conscripted into an army. The applicant was taken to an Eelam People's Revolutionary Liberation Front (EPRLF) camp, where he was kept for several weeks. He was released following the intervention of an EPRLF official. Sometimes later he was detained and questioned by the LTTE in another area, and was released after several months. Fighting had occurred between the LTTE and the Sri Lankan Government. After his release the applicant was told by the LTTE a few times to assist them with labouring work.

In the early 1990s LTTE members came to his home and said that he should join the movement. After some questions raised by the applicant's relative the LTTE members said they would return in a few days. His relative helped him to travel to Colombo to avoid further pressure from the LTTE. The applicant was given work in a shop of a relative.

Few years after as a result of police checks the applicant was detained at a police station where he was beaten. He was released with the help of the relative who owned the shop.

A year after, he was subject to an army check and because his identity card showed he was from City A, he was detained. The army wanted to know whether he had any connection with

the LTTE, and they suspected that he had come to Colombo to assist the LTTE. The shop owner helped him again to get released but told him that he feared, the shop owner would have problems given the applicant's ongoing problems, and suggested that the applicant seek his own 'protection'. In the mid 1990s with the help of his relative the applicant registered a shop in his sibling's name.

In the mid 1990s the applicant was married in city A. After returning to Colombo with his wife he was questioned by the police. The police suspected that when the applicant was in city A he had met with LTTE representatives.

Few years after, he was detained and questioned again by the police. He was released following intervention by someone, whom he discovered was a high ranking official in the Western People's Front (WPF). This official suggested that the applicant would encounter fewer problems if he joined the WPF. The applicant did so. [Information about the applicant's activities deleted in accordance with s.431 as it may identify the applicant]. He continued to operate his business, and this included undertaking travel overseas.

Some people from the LTTE approached the applicant and asked for assistance in various forms. The applicant explained that he had had problems in the past with the army and police and would probably be under surveillance. The LTTE representatives told him that if he did not assist he would be considered a traitor so he did provide some money and his personal belongings. [Information about the applicant deleted: s.431] LTTE members contacted him again and asked him to meet an official in the city A office of the LTTE. The applicant did so and told again that he should provide further assistance to the LTTE. The applicant stated that he would think about the matter but he did not contact the LTTE again.

After a period of time the applicant was contacted by the LTTE and told to travel to city A to meet with LTTE representatives again, and he was asked why he did not respond to their previous requests. He stated that he had a family and was worried about the affect on his family if he became involved. The LTTE demanded more strongly that he consider assisting them. After these meetings the applicant was approached by representatives of the Eelam People's Democratic Party (EPDP) in Colombo who told him they knew he had travelled to city A, and they suspected he was involved in the LTTE. He was warned not to travel to City A again. The applicant was however called to city A again by the LTTE but he stated that he was planning to travel overseas on business so he could not go. He did not tell them of the warning given by the EPDP.

The applicant had obtained a visa for Australia for the purpose of visiting his sibling, but he did not travel after obtaining it because his sibling travelled to Sri Lanka because their other relative had died.

Persons from the LTTE came to his shop and stated that several persons would need to stay at his shop for a while. The applicant told them that he had been warned by the EPDP and thus could not assist them but he was threatened that he kept making excuses and that they would not entertain a refusal. The following day several persons arrived and they stayed at the applicant's shop. They left several days later, and then the police visited his shop asking about the persons who had stayed there, mentioning them by name. The applicant stated that he was involved in the WPF and met many people but the named persons had never come to see him. The police mentioned that they might need to question him further, and also stated that it appeared his party was in support of the LTTE as its leader had met with the LTTE. The police visited the applicant's home in a particular month, searched it and also asked his

wife if she knew about the persons who had stayed at the applicant's shop. Towards the end of the month someone came to his shop and said he should go to city A but he did not as he was afraid. He was contacted by phone and asked why he did not travel to city A. He met a person and was warned not to divulge any information about the people who stayed at his shop.

Following these incidents the CID visited his shop a few times for further questioning. He was visited by several persons at home; they stated they were from the EPDP and took him for questioning. He was beaten and was asked where the persons were; he decided to say that he would tell them where the persons were. He was allowed to bath and was given something to eat. He was told that someone would accompany him to where he said the persons were. When he left the place where he was detained he noticed that it was a premises operated by the EPDP in Colombo. On their way the applicant escaped. He waited for a few hours and then went to a friend's house, where he stayed, while a high ranking official of the WPF was informed. He was advised that he should leave Sri Lanka because it was considered that his life was in danger. Arrangements were made to obtain his passport from his home. He also came to know that CID and EPDP members had visited his home looking for him. A friend organised a ticket for Australia and it was also organised that the applicant stay at another house until he could leave. The friend organised a ticket to depart Colombo. The applicant went to the airport. It was arranged that money would be paid to someone at the airport to facilitate the applicant's immigrations/customs checks. He departed Colombo in the early hours. After he left Sri Lanka he contacted his wife who informed him that CID and EPDP members had continued to visit his home looking for him.

The applicant stated that as a result of what had occurred prior to leaving Sri Lanka, he felt that his life was in danger. For this reason he was seeking protection in Australia.

The applicant submitted with his application a letter from an official confirming that the applicant had been a member of the WPF. The letter stated that forces opposed to the party had threatened him and for this reason the applicant had left Sri Lanka.

### *Review Application*

Prior to the hearing the applicant's representative made submissions to the Tribunal setting out the applicant's history and providing further details of his claims. The representative also submitted to the Tribunal copies of reports about the current situation in Sri Lanka, and about the increase in abductions of Tamils in Colombo.

### *Tribunal hearing*

At the Tribunal hearing the applicant gave further evidence in particular about the events when he was approached in Colombo by members of the LTTE and was asked to provide the LTTE with various forms of assistance. When the applicant met with an official in city A he was told that as a businessman in Colombo he could help the LTTE. He had told the LTTE that he would think about the matter but he did not contact the LTTE again. Later on several persons asked him to come to city A, where he was asked to explain why he did not respond to the requests made by an official previously. The applicant felt that the LTTE representatives were not happy with the applicant's excuses. A short while after the applicant returned to Colombo he was visited by members of the EPDP who wanted to know why he went to city A; he was threatened that he could be shot if he went to city A again. This was the reason why he did not travel to city A even though he was asked to go to city A again.

The applicant felt threatened by the LTTE but stated that he had to travel overseas on business and this was why he had not been able to go to city A.

The applicant stated that he had planned to travel to Australia to visit his sibling, but his plans were disrupted. His sibling visited from Sri Lanka because their other relative had died, and the applicant was not at that time thinking of travelling to Australia.

The LTTE representatives who told him he should provide accommodation for several people came to visit him. At that time the applicant told the LTTE representatives of his problems with the EPDP but was advised that an order had been made from 'higher up' and he was not to refuse the demand. He discovered that the people had left; a short while later he was visited by the CID who asked about the people who had stayed at the shop.

The applicant gave further evidence regarding how he was taken for questioning by the EPDP. He described how his wife was threatened not to tell anyone what had happened and how his children were frightened because the persons who came for him were armed. The applicant explained that he did not give his interrogators any information about the people who stayed at his shop because he was afraid of the threats made by the LTTE if he divulged any information. He was beaten and he thought that he would have to at least indicate he would give information; he thought that he had to try to get away. Once he told them that he would show them where the persons were he was treated in a friendlier manner. On their way the applicant escaped. He hid in a building for a couple of hours and then went to a friend's house. He discussed what had happened with a high ranking official of the WPF, who told him that his wife had informed him that he had been taken away. After further discussing his situation with the EPDP official it was decided that he faced too much danger and should leave Sri Lanka.

The applicant gave the Tribunal further details of his departure from Sri Lanka, and that his checks through immigration were facilitated after money had been paid to an officer at the airport. He confirmed that the police and EPDP representatives had visited his home after his departure. He stated that he had tried to get visas for his children for another country because he did not think it was safe for them.

The applicant gave further evidence on events which had occurred in the 1980s when he had been involved in training at the EPRLF camp, and when the LTTE had required him, along with many other young people, to help them labouring work.

The applicant told the Tribunal that his work with the WPF consisted of [information about the applicant's details deleted: s.431] he joined the party mainly as a means of protecting himself after the problems he experienced with the LTTE. He told the Tribunal that the WPF was one of a number of parties who had met with LTTE leaders, but was seen as being more pro-LTTE by groups such as the EPDP.

The applicant explained to the Tribunal that when he was initially approached by the LTTE he thought that if he gave some money he would not be bothered again. The LTTE pressured him to provide more assistance, however, as they saw him as someone with connections and property in city A, and as a businessman well placed in Colombo to assist.

The applicant explained that even though he had experienced problems in the past, he thought he could continue to live and do business in Colombo and he thought he should just manage the pressure from the LTTE and the checks made by police. At the time he obtained his

Australian visa he was not thinking of leaving Sri Lanka to seek protection; he was planning only to visit his sibling. His problems did not seem insurmountable to him until the events that the LTTE demands him provide accommodation to several persons. As a result of what happened when he was taken for questioning by the EPDP, and his escape from the EPDP, the applicant feared that the EPDP would be convinced that he did know the whereabouts of the peoples they were searching for, and that he was in fact actively involved with the LTTE. He felt that his life would be in danger from the EPDP and/or the police. He was convinced that the EPDP worked with the assistance of the police. He gave an example from a newspaper article regarding an abduction in May 2006, where it appeared the abduction occurred shortly after the person was stopped at a police checkpoint.

The applicant also considered that he would not be able to avoid ongoing or increasing demands from the LTTE to provide assistance, and that this would place him in further danger. He did not think that he could relocate to another part of Sri Lanka; he paid a bribe to get through immigration checks at the airport. He felt in any case that he would always be in danger from the EPDP and/or the police, and continued pressure from the LTTE.

#### *Post hearing submissions*

The Tribunal received submissions from the applicant's representative and further documentary evidence after the hearing. The representative submitted that although there was evidence that the LTTE had committed human rights abuses there was also evidence from external sources to indicate that other para military organisations working alongside or with the tacit support of Government forces had also committed human rights abuses. The representative referred to reports which indicate that Government forces and persons linked to the State were targeting persons even mildly suspected of links to the LTTE ('The South Asian: Impact on Human Rights in Sri Lanka', 18 September 2006, [www.thesouthasian.org](http://www.thesouthasian.org)). The representative also referred to other material which indicated that the EPDP was responsible for killings of Tamil civilians who were sympathetic to the cause of the LTTE ('Rampant Extra Judicial Killings Sri Lanka', 8 September 2006, Home for Human Rights website, [www.hhr-srilanka.org](http://www.hhr-srilanka.org)).

The representative submitted that although the applicant had been a member of a political party (WPF) which had given general support to the LTTE, he was a Tamil from Jaffna and (later) city A; this was one of the main reasons why the LTTE approached the applicant in Colombo for assistance and expected that he would provide assistance.

#### *Information from external sources*

The Tribunal also has had regard to information from external sources relevant to the applicant's claim that he will suffer serious harm if he returns to Sri Lanka. The sources include:

- US Department of State, March 2006, *Country Reports on Human Rights Practices 2005: Sri Lanka*.
- UK Home Office, April 2006, *Country of Origin Information Bulletin: Sri Lanka; Update on Key Issues*.
- US Department of State, October 2006, *Background Note: Sri Lanka*.



- Amnesty International Report 2005: Sri Lanka, May, CX122508.
- Tamils in Colombo, DFAT Country Information Report No. 83/03, 11 June 2003, CX80216.
- Treatment of Tamils and Muslims, DFAT Country Information Report No. 100/03, 7 July 2003, CX 82735.
- DFAT Country Information Report No. 101/03, 9 July 2003, CX 82736.
- ‘Western province Tamil leader meets Thamilchelvan’, *TamilNet*, 6 April 2004.
- ‘Sri Lanka’s Tamil Tigers demand end to emergency rule’, *PTI*, 28 August 2005, CX 133021.
- ‘What now for Sri Lanka?’, *BBC News*, 18 November 2005, CX 140949.
- ‘Tamil Tigers warn new President’, *BBC News*, 18 November 2005.
- ‘Sri Lanka continues to violate State obligations towards Tamils, say Tamil parties’, *TamilNet*, 21 January 2006, CX145063.
- ‘Abductions in Lanka cause of concern’, *Hindustan Times*, 2 September 2006, CX160870.
- ‘Fears grow over Tamil abductions’, *BBC News*, 26 September 2006, CX162525.

Independent information indicates that the Sri Lankan government and the LTTE signed a formal cease fire accord in 2002 but that the LTTE suspended negotiations associated with the accord and facilitated by Norway, in April 2003.

The information indicates that while the cease-fire technically remains in force its future is increasingly fragile. It has been reported that in 2005 both the Government and the LTTE frequently violated the peace accord (US Department of State, 2006).

A state of emergency had been declared in Sri Lanka in August 2005 after the assassination of the country’s Foreign Minister, widely blamed on the LTTE. The LTTE in turn demanded that the state of emergency be lifted and has stated that it is a threat to the cease fire agreement. Presidential elections in November 2005 resulted in increased tensions between the LTTE and the government. The elected President Mahinda Rajapakse, who had received support from Nationalist parties in the election, had undertaken to renegotiate the ceasefire agreement and to review Norway’s role in the peace process. The LTTE warned the new president about taking a hard line against the LTTE in the peace process and stated that it would intensify its struggle for self-determination and political independence if the government adopted a hard line position (CX133021, CX140949).

As a result of increased tensions between the LTTE and the Government a number of 'cordon and search operations were launched by the Government, including one of the largest in Colombo on 31 December 2005 in which about 1000 people had been arrested; most had been detained briefly but were released after fingerprinting or photographs had been taken (UK Home Office, 2006)

In February 2006 talks between the Government and the LTTE recommenced. After an apparent lull, violent attacks by both the LTTE and the Government forces occurred again from April 2006. In June 2006 the Government and LTTE traveled to Oslo to discuss the future of the Scandinavian-led Sri Lanka Monitoring Mission (SLMM). The LTTE refused to sit for talks with the Government. Heavy fighting between the LTTE and Government forces occurred in August 2006. Fighting and armed attacks from both sides have continued even though both the Government and the LTTE claim to adhere to the ceasefire (US Department of State, 2006).

The country information indicates that the LTTE have carried out a number of attacks against anti-LTTE groups, including members of the breakaway military leader's Karuna group and members of the anti-LTTE party, EPDP. There are also reports that armed paramilitary groups suspected of being linked to the government or security forces, had also carried out attacks. These groups include the Karuna group, the EPDP and the People's Liberation Organization of Tamil Eelam (PLOTE) (UK Home Office, 2006)

The country information also indicates that the LTTE has been involved for a number of years in forced recruitment, hostage taking and extortion. Recruitment has involved not only recruitment for military training and activity, but also a wide range of other activities such as information gathering, propaganda, monitoring and informing, digging bunkers and providing general assistance to the LTTE. The information also suggests that the LTTE's methods of ensuring they obtain assistance from the local population has continued after the cease fire agreement, and that their activities have increased in the current environment of heightened tensions between the LTTE and the government.

The information from external sources indicates that the LTTE has a demonstrated history of using force, intimidation, harassment and extortion to exact assistance from the local population. The information indicates that the LTTE also uses intimidation, harassment and violence against those who have resisted or opposed providing assistance, and that ultimately it has been willing to resort to killing those it considers to be opponents (US Department of State, 2006).

Reports highlight the increasing number of abductions of Tamils, including businessmen and professionals such as journalists, which have occurred in 2006 particularly in the capital Colombo. It appears that some abductions are carried out for the purposes of obtaining significant ransom payments. In other cases however those abducted have disappeared, or have been found dead. Tamil community leaders, including Mr Mano Ganesan MP, have stated they have provided information to the Government about the abductions, but have claimed that little or no action had been taken by the police about the problem. The police in turn have reported that Tamil activists have deliberately engaged in false propaganda to malign the police. The reports indicate that the abductions have contributed to the increased climate of fear amongst Tamils in Colombo (CX160870, CX162525).

## **FINDINGS AND REASONS**

The Tribunal is satisfied that the applicant is a citizen of Sri Lanka. The Tribunal finds that the applicant has given credible evidence in regard to his claims and that the evidence given at the Tribunal hearing is consistent with the statement of claims he submitted with his protection visa application.

The Tribunal is satisfied that the applicant grew up in the city A region of northern Sri Lanka. The Tribunal finds that the applicant has given a credible account of his detention and interrogation by the Sri Lankan army in early 1980s, and his temporary conscription in late 1980s by the EPRLF.

The Tribunal finds that the applicant has given a credible account of being questioned by the LTTE in 1990s, and of approaches made to him by the LTTE in early 1990s to join the movement. The Tribunal accepts that as a result of the applicant's intermittent but ongoing experience with the army, the EPLRF and the LTTE in the 1980s and early 1990s, he decided to travel to Colombo and try to establish himself there.

The Tribunal accepts that given that the applicant's identity documents identified him as a Tamil from the city A region, the applicant was questioned by the army again in the early 1990s after settling in Colombo, and that it is likely he would have come under suspicion of involvement with the LTTE. The Tribunal further accepts that the applicant's travel to city A to marry may have aroused the suspicions of police in Colombo and that he was questioned as a result.

The Tribunal accepts that as a result of the problems he was experiencing with the police around mid 1990s the applicant became involved in the WPF.

The Tribunal finds that the applicant's account of being approached by the LTTE in Colombo to provide assistance to the LTTE, is consistent with the country information about methods used by the LTTE to extract assistance from Tamils. The Tribunal accepts the further submissions after the hearing that the LTTE would have approached the applicant in particular because he was a Tamil originally from Jaffna and later from City A, and that the LTTE would have expected the applicant to provide help. The Tribunal is satisfied that the applicant may have at times been able to postpone or delay assistance on occasions, and that he may have been able to avoid a significant level of involvement for a period of time by donating money and personal belongings. The Tribunal is satisfied however that when the LTTE made demands that the applicant provide accommodation to several persons, and indicated he was not in a position to refuse the demands, the applicant genuinely felt he would have to comply with the LTTE's wishes, and that he would be at risk of harm if he did not comply.

The Tribunal accepts the applicant's account that as a result of the applicant's visits to city A to speak with LTTE representatives in early 2000s, the applicant came to the attention of members of the EPDP and was questioned by them in Colombo about his visits. The Tribunal accepts that as a result of threats made by the EPDP the applicant decided not to travel to city A again even though the LTTE requested him to do so.

The Tribunal accepts that the persons referred to the applicant by the LTTE stayed at the applicant's shop for a number of days and had left on a particular day. The Tribunal accepts that the applicant knew little about them and had little contact with them. The Tribunal

accepts that the applicant was questioned on a number of occasions by the police after those persons left. The Tribunal is satisfied that although the applicant may not have had information that he could have given the police, it is likely that the police had increased suspicions that the applicant was in some way involved with the LTTE as a result. The Tribunal is also satisfied that the EPDP would also have had stronger suspicions that the applicant was actively involved with the LTTE.

The Tribunal accepts the applicant's evidence that he was taken for questioning by the EPDP, and that he felt he had to indicate to the EPDP that he knew the whereabouts of the persons who had stayed at his shop if he were to have any chance of escaping harm. The Tribunal accepts that the applicant realized he had been kept at premises in Colombo operated by the EPDP. The Tribunal finds that it is difficult to establish with certainty the circumstances that led to the applicant being able to escape from the EPDP. While the Tribunal has some concerns about the applicant's account of the ease with which he was able to flee from the company of an EPDP member, the Tribunal does accept that the applicant was able somehow to escape from the EPDP and was able to stay with friends until arrangements were made for him to leave Sri Lanka. The Tribunal accepts that the circumstances that led to his detention and questioning by the EPDP, his earlier questioning by the police, and his escape from the EPDP, made the applicant realize that he was no longer able to continue residing and operating his business in Colombo in safety.

The finding above is relevant to the Tribunal's consideration of the evidence that the applicant had travelled overseas on business on a number of occasions over a number of years, and had returned to Sri Lanka during periods when he was being questioned and indeed threatened by the police, the EPDP and the LTTE. The evidence also includes that the applicant obtained an Australian visa but did not travel to Australia until many months later. This evidence might in other circumstances indicate that the applicant did not have a well founded fear of persecution. The Tribunal accepts however that the applicant felt, during the years he lived in Colombo, that he could somehow continue to live and do business in Colombo notwithstanding the pressures he faced from the LTTE, and the questioning from the police and the EPDP. The Tribunal accepts that for a significant period he felt that these were aspects of his life as a Tamil businessman in Colombo that he had to endure. The Tribunal accepts that the series of events which were set off by the LTTE's demands changed the level of risk of serious harm that the applicant faced, and the level of his apprehension about the chances of being harmed. In these circumstances the Tribunal is satisfied that the applicant's previous travel overseas does not adversely affect the credibility of his claims.

The Tribunal is satisfied that as a result of the applicant's escape from the EPDP, and in the context of previous questioning of the applicant by the EPDP and the police, there is a real chance that the police and the EPDP would have concluded that he had been actively involved in supporting the LTTE and had deliberately withheld information from the police and the EPDP about his involvement. The Tribunal is satisfied that if the applicant returned to Sri Lanka he would be targeted by the police and the EPDP on account of his race, being a Tamil, and his imputed political opinion of supporting the LTTE. The country information supports a view that Government forces have committed human rights abuses against Tamils they have perceived to be supported of the LTTE. The independent information before the Tribunal supports a view that anti-LTTE groups such as the EPDP may operate with assistance of the Government. The Tribunal is satisfied that if the applicant returned to Sri Lanka there would be a real chance that he would be subject to detention and questioning by the EPDP and/or the police which would be likely to involve physical abuse. The Tribunal is

satisfied on the basis of the independent information before it that the State has not been willing or able to adequately protect Tamils against such abuses.

The Tribunal also finds that there is a real chance that the applicant would be subject to continuing and increased pressure from the LTTE to provide assistance to that organization. The Tribunal accepts the applicant's claims that the LTTE's pressure to provide assistance became more significant when they demanded that he provide accommodation to several persons referred by them. The Tribunal is satisfied that if the applicant returns to Sri Lanka there is a real chance that the LTTE would continue to demand that he provide assistance. The country information confirms that if the organization chooses to, it can enforce cooperation and assistance from the local population in a ruthless and brutal manner. The Tribunal is satisfied that if the applicant refused to comply with the LTTE's demands he would be regarded as being anti-LTTE and would suffer serious harm as a result of his imputed political opinion. The Tribunal is satisfied that in these circumstances the applicant would not be able to obtain effective protection from the Sri Lankan authorities.

The information regarding the recent spate of abductions of Tamils in Colombo refers to the possible links that abductors have to political groups. While the Tribunal is unable to establish which political groups, if any, might be responsible for or be participating in the abductions, the Tribunal finds that these abductions have increased in the period since the applicant's arrival in Australia. The Tribunal is satisfied that the applicant does have a well founded fear, given his previous experiences with the police, the EPDP and the LTTE, that he might be abducted and be subjected to physical violence or indeed be killed if he returns to Sri Lanka.

The Tribunal is satisfied that the applicant's own past involvement with the LTTE, even in a non-military capacity, puts him at risk of serious harm from anti-LTTE groups such as the EPDP and from Government forces. The Tribunal is satisfied that the reason there is a real chance he would suffer serious harm is his race (Tamil) and imputed political opinion (support for the LTTE).

The Tribunal is satisfied that the essential and significant reason for the persecution to which the applicant would be exposed at the hands of the EPDP and Government forces such as the police is his race (Tamil) and imputed political opinion (support for the LTTE), as required by paragraph 91R(1)(a) of the Act.

The Tribunal also finds that an essential and significant reason for the persecution to which the applicant might be exposed at the hands of the LTTE is his imputed political opinion (being anti-LTTE) and his race (Tamil). In the applicant's circumstances, given the risk of harm from anti-LTTE groups and Government forces as well as from the LTTE, the Tribunal finds that there is no part of Sri Lanka to which the applicant could reasonably be expected to relocate where he would be safe from serious harm.

The Tribunal finds that the applicant is outside his country of nationality, Sri Lanka. For reasons given above, the Tribunal finds that he has a well-founded fear of being persecuted for reasons of his race and his imputed political opinion if he returns to Sri Lanka. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the Government of Sri Lanka. There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country apart from his country of nationality, Sri Lanka. The Tribunal therefore

finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act.

## **CONCLUSIONS**

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.

<p>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 <i>Migration Act 1958</i>. Sealing Officer's I.D. PMRTAK</p>
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