

AT AUCKLAND

Appellant: CH (Sri Lanka)

Before: S A Aitchison (Member)

Counsel for the Appellant: C Curtis

Counsel for the Respondent: No Appearance

Date of Hearing: 9 April 2015

Date of Decision: 1 May 2015

DECISION

[1] This is an appeal against a decision of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellant, a citizen of Sri Lanka.

INTRODUCTION

[2] The appellant is a young Tamil man. The core of his claim arises from his participation in two demonstrations in the United Kingdom in 2009 and 2012 against the Government of Sri Lanka, and participation in a referendum for Tamil independence. He claims that, upon return to Sri Lanka in November 2012, the Criminal Investigation Department (CID) detained and mistreated him. The CID have photographs of him protesting in London and will cause him serious harm upon return to Sri Lanka.

[3] The appeal turns on both whether the appellant's claim is credible, and whether, on the facts as found, he holds a well-founded fear of being mistreated on return to Sri Lanka. Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

This is an abridged version of the decision. Some particulars have been removed from or summarised in the decision pursuant to section 151 of the Immigration Act 2009. Where this has occurred, it is indicated by square brackets.

THE APPELLANT'S CASE

[4] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[5] The appellant, a Hindu of Tamil ethnicity, was born in the northern central district of Sri Lanka. His family were displaced to the [east] in 1991 by war, and his brother and parents still live there.

[6] From his teenage years to early adulthood, the appellant came to the attention of the authorities on several occasions. In 2006, he participated in an [event commemorating] students killed by the Sri Lankan Army (SLA). [Withheld]. Some months later, while talking to friends on the road outside his home, the Police Special Task Force (STF) questioned [him about his] participation in the funeral parade.

[7] In [...] 2007, when an official was visiting [the east], the appellant was [questioned and assaulted at a checkpoint]. He was then released after his father intervened.

[8] The appellant went to Colombo in September 2007 and enrolled in a business programme. He came to the attention of the authorities again in [...] 2008, following [an incident in a public area]. He was arrested while out walking on the street, along with some 15 other men and was released after four hours. He was not ill-treated during his detention and questioning.

Activities in the United Kingdom

[9] In September 2008, the appellant left Sri Lanka and travelled to the United Kingdom, where he completed a Bachelor of Arts degree in business at a university in [Z]. He participated in two protests while living there.

[10] In 2009, the appellant participated in a Tamil protest organised by the Tamil Youth Organisation (TYO) and the British Tamil Co-ordination Committee (BTC) against the Sri Lankan government. Some 100 to 150 persons took part in the protest which included a march. The protest began in the morning and finished at approximately 5pm. The appellant was present for the full day and held various placards. He later learned that he had been photographed during the protest and found four photographs of himself at the event on a United Kingdom website.

[11] In early 2010, a friend engaged the appellant in a TYO event to assist voters in a Tamil referendum. The voting took place at a local Hindu temple and the appellant participated for one day showing people how to vote.

[12] After graduating in [...] 2010, the appellant worked part-time in a store and then returned to Sri Lanka for a month in [...] 2011. He encountered no difficulties at the airport when arriving, or when departing in 2011, to return to the United Kingdom.

[13] The appellant participated in a second protest in early [...] 2012 in London. The protest was organised by Tamil groups to coincide with President Mahinda Rajapaksa's visit to London to participate in the Queen's Diamond Jubilee celebrations. The protest included a march from Mansion House to Marlborough House, which the appellant joined. At times, the appellant was at the front of the crowd of some 6,000 persons. He marched and held various banners and placards throughout the day. The media were present taking photographs and videos of the protests, as were other persons. The appellant believes that he may also have been photographed during this protest.

[14] Because of the unrest caused by the London protest, the United Kingdom Government advised President Rajapaksa's security team to cancel future events in London that the president was planning to attend. The appellant considered the president suffered great embarrassment from the protest.

[15] Other than his participation in the two protests and the referendum, the appellant had no direct involvement with Tamil groups in the United Kingdom or Sri Lanka.

Return to Sri Lanka, detention and ill-treatment

[16] In 2012, the appellant returned to Sri Lanka landing at Bandaranaike International Airport in Colombo around 1pm. After passing through immigration checks and retrieving his luggage, the appellant was approached by three CID officers. One of the officers showed him his identity card and told the appellant that they needed to make some enquiries. The appellant walked beside them through a separate passage to a white van that was waiting. Inside the van, he was blindfolded and his hands were tied. He was placed between two officers in the van and taken to a room in a building where his blindfold was removed.

[17] The appellant was left in the room for sometime before two men entered and commenced slapping, beating and kicking him. A kick to the stomach brought the appellant to the ground where he fell unconscious. When he woke he was naked and his hands had been untied. Another man entered the room, gave the appellant his clothes and he was taken into another room.

[18] The appellant believed that he was in an abandoned house, which he observed when taken from the first room to the next. In the second room, a man sat at the table and another man entered and commenced questioning the appellant. The man spoke to him in broken Tamil, and it was not possible to understand every word he said. The appellant was asked where he was from; what he was doing in London; where he was working; whether he was sending money to help the Liberation Tigers of Tamil Eelam (LTTE); and so forth. A written record was kept of his responses.

[19] The appellant gauged from the conversation that the men were interested in payment of a bribe. Accordingly, he offered for his family to pay a bribe for his release. The men telephoned the appellant's home. After the appellant spoke briefly with his mother the man told his mother that they wanted payment otherwise she would never see her son again. It was arranged that a man would collect five *laks* from the mother in [the east]. The appellant was given a release paper to sign. Later that afternoon, a blindfold was placed on the appellant and he was released at an unknown location in Colombo.

[20] The appellant's brother collected him and took him back to [the east], where he stayed in the family home for some two to three days before going to stay with an aunt several kilometres away. The appellant was bruised from his ill-treatment, but he did not seek medical treatment.

[21] When the appellant had not arrived as expected at the airport, the appellant's mother reported him missing the same evening to the police. The following day, she reported him missing to the Human Rights Commission in [the east].

[22] The appellant stayed in hiding with his aunt until coming to New Zealand in [...] 2013. Some three weeks after he had gone into hiding, three armed men visited his parents' home, identifying themselves as CID. They produced a photograph showing the appellant standing in front of an LTTE flag and stated that the appellant had participated in protests in support of the LTTE. They wanted to arrest him. The mother told them that the appellant had left the country. They

checked the house and warned the mother that if the appellant appeared again she should tell them. The family received no further visits from the CID or other authorities seeking the appellant.

[23] The appellant decided to flee Sri Lanka and seek refuge in New Zealand. At the airport, he was stopped at the passport checkpoint and told that he was wanted by the CID and needed to wait. He told the immigration officer that he had done nothing wrong and offered him a bribe of NZ\$1,350 cash, which was accepted. The appellant then departed without difficulty to New Zealand.

[24] The appellant stated that the Sri Lankan Government assumed that Tamils who lived in London or abroad were all anti-government. Even though there had been recent elections and a new president elected, the attitude of CID officers to Tamils had not changed.

Material and Submissions Received

[25] On 1 April 2015, counsel filed submissions, a statement from the appellant (19 March 2015), and other evidence and country information in support of the appeal.

[26] At the hearing, the Tribunal provided counsel with a copy of an article: "Two Tamils Arrested on Return to Sri Lanka" *Tamil Guardian* (6 February 2015); and an excerpt from a United Kingdom Upper Tribunal (Immigration and Asylum Chamber) decision: *GJ and ors (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC) paragraph 351.

[27] On 15 April 2015, counsel filed further submissions and material with the Tribunal.

[28] The Tribunal has before it a copy of the Refugee Status Branch (RSB) file, a copy of which has also been provided to the appellant.

ASSESSMENT

[29] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[30] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant’s account.

Credibility

[31] The Tribunal accepts the appellant’s background and history of contact with the authorities in Sri Lanka prior to his travelling to the United Kingdom in 2008.

[32] The Tribunal also accepts that the appellant travelled in September 2008 to the United Kingdom and attended two anti-Sri Lankan government protests. There are photographs of the first protest on an internet website. In some of the photographs, the LTTE flag is present in the background.

[33] However, the Tribunal does not accept the appellant’s evidence of his treatment by CID officers upon return to Sri Lanka on 1 November 2012 and the events he claims stemmed from this. The appellant’s evidence in this regard was inconsistent and mobile.

Abduction by CID at airport

[34] The appellant’s evidence about being abducted by the CID in 2012 was inconsistent and mobile.

[35] In his confirmation of claim form, the appellant stated that he was escorted from the airport by CID officers after they had asked him questions at the airport. However, he told the Tribunal that the CID officers simply told him that they needed to make enquiries of him. When the Tribunal asked him again whether the CID had asked him any questions before leaving the airport, the appellant stated “not at that time”.

[36] When the Tribunal asked the appellant to comment on the discrepancy as to whether he had been questioned at the airport, he stated that he simply meant in his confirmation of claim form that he had been told by CID that they needed to make enquiries. When reminded that he had also stated in his RSB interview that he was questioned by the CID officers at the airport, as well as being told that he would be taken for further enquiries, his evidence became mobile. He stated that he had in fact been asked questions but he did not consider these to be “real questions”. They had only asked him questions about his name, and whether he had travelled from London. He did not think these questions serious enough to mention. The Tribunal finds the appellant’s explanation does not sensibly explain the inconsistencies in his account.

[37] Further inconsistencies arose in the appellant’s evidence of his interception by CID at the airport. When asked how he was taken from the airport, the appellant stated he was taken through “a passage” to the van. Asked again how he was escorted from the airport he stated that it was “a separate pathway”. When asked whether he had been taken through the arrivals hall, he stated that he was not sure before reasserting that he had been taken through a route that was “not the normal route” that people travelled through when departing the airport. Later, he modified his account again to state that he was only “assuming” that he had been taken through a different route. Asked to comment on why his evidence was mobile in this regard, he stated that he had been stressed at the time he was intercepted by the CID. When the Tribunal put to him it seemed surprising that he could not recall how he exited the building, given that he had confidently recalled other aspects of the abduction (such as the identity and number of CID officers, and the white van he had been placed inside), he simply stated that he had panicked at the time. Again, the appellant has been unable to sensibly explain the inconsistencies in his account.

Detention and mistreatment

[38] Further inconsistencies arose in the appellant’s evidence of his detention. In the appellant’s two previous statements, and in his RSB interview, he stated that he had woken up from his unconscious state to find himself naked. However, to the Tribunal, he stated that he had woken up to find that his T-shirt had been taken off. Asked to comment on these discrepancies, the appellant stated that he was too embarrassed to tell the Tribunal member that he was in fact naked when he woke up. The appellant was unable to reconcile this explanation with the fact

he had told his female counsel, and reported his naked state in his two statements, and to the RSB, without any apparent hesitation to do so.

[39] The appellant claimed in his confirmation of claim form, statement, and before the RSB that, while held in detention by the CID, he had been slapped by two men and kicked in the stomach, whereupon he fell unconscious to the ground. To the Tribunal, he initially added to this that he was punched, but then later became unsure whether he had been punched at all.

Payment of bribe

[40] In his two statements, the appellant gave an account as to how his mother was contacted for a bribe. He claimed:

“They handed a phone to me and wanted me to call home. I did as I was told to do. When I called home, my mother answered the phone. Before I could speak to her the officer grabbed the phone off me.”

[41] However, before the Tribunal, he stated that he had been asked for his mother’s telephone number and that the CID officer had dialled the number (not the appellant as earlier claimed). The officer then showed the telephone to the appellant, who held it until his mother picked up, then the officer took the telephone from him and conversed with the mother.

[42] Asked to comment upon this discrepancy, the appellant stated that the men had dialled the telephone number and then before placing the call had showed him the number to check that it was correct, and that meant that he had placed the call. The Tribunal rejects this evidence as simply a mobile attempt to reconcile inconsistencies in his account.

CID visits to family home

[43] The manner that the appellant was intercepted by the CID after clearing customs, and his being taken to what appeared to be an unofficial detention site, is largely inconsistent with the reported formal processes for authorities intercepting persons of interest at the airport. As summarised in *GJ and ors (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC), persons on a “stop list” (for whom there exists a criminal record or arrest warrant) are intercepted during immigration checks, while others on a “watch list”, may be visited later in their home area by police or CID. While the Tribunal is aware that there are irregularities to the formal processes of intercepting persons of interest, the

entirety of his account of being sought by the authorities is surprising in the context of Sri Lanka.

[44] The appellant claimed that CID officers visited his home three weeks after his abduction and showed his family a photograph of him at a protest. However, he was able to live in [the east] for several months after his abduction before departing the country without being arrested and detained by authorities. When asked to comment on how this was possible, given the fearsome reports of the authorities' surveillance methods, the appellant simply stated that perhaps the authorities did not know where he was living. However, the appellant had returned to stay in the family home for two to three days after the airport arrest and then had gone to stay with an aunt only an estimated two kilometres away from the family home. While it is reported that the CID visited the family home some three weeks after the incident, there had been no further reports of CID visits since this time. If the appellant was of such interest to the authorities it is surprising that they did not enquire after him more than once, given that they would have been able to see that the appellant had not departed Sri Lanka as claimed by the mother.

[45] The appellant then travelled to Colombo and, without taking any steps to conceal his identity, simply paid a bribe to an official and departed lawfully. While it is also well-known that bribes can secure lawful departure from Sri Lanka, in spite of a profile with authorities, the cumulative nature of the appellant's ability to remain in Sri Lanka and to depart, undetected, despite strong interest in him, is considered to be implausible, and the Tribunal rejects this account of CID interest in him and his claim to have paid a bribe to secure his departure.

Conclusion on credibility

[46] The Tribunal accepts that the appellant attended two protests against the Sri Lankan government in 2009 and 2012 in the United Kingdom, and was photographed at the first protest (photographs of which appear on a news website). However, considered cumulatively, the inconsistent, mobile and implausible characteristics of the appellant's evidence lead the Tribunal to reject the core of his claim that the CID have detained and ill-treated him and sought him at his home. The appellant has presented a false account of being arrested, detained by CID, and of their continued interest in him.

[47] The Tribunal has not overlooked documentary evidence the appellant has tendered in support of his appeal, including records of complaints made about his missing status to the police and Human Rights Commission in [the east], and the

letter from the appellant's friend, [AA] (5 March 2015), who claimed to have been questioned about the appellant upon return to Sri Lanka in 2014. The Tribunal has not been able to examine this witness to ascertain the credibility of what he asserts. As the Tribunal has previously found, given the ease with which false documents can be prepared, findings as to their reliability tend to follow the findings of credibility of the appellant's testimony. Accordingly, the Tribunal affords the documents no weight.

[48] The accepted facts are that the appellant is a Tamil male who has lived most of his life in [the east] and lived in the United Kingdom for some four years. In his teenage years, [...], he was questioned by police on several occasions in 2007 and 2008. He was assaulted during questioning in August 2007, and detained for four hours while questioned in Colombo in 2008. In the United Kingdom, he participated in two protests in 2009 and in [...] 2012, and in a Tamil referendum in early 2010. There are photographs of his protesting at the event in [...] 2009 on a news website. He has returned to Sri Lanka twice since living in the United Kingdom in 2011 and 2012 without encountering any difficulties at the hands of authorities. He departed Sri Lanka and travelled to New Zealand lawfully in 2013.

The Refugee Convention

[49] Section 129(1) of the Act provides that:

“A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.”

[50] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

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

[51] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[52] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[53] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008), at [57].

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Sri Lanka?

[54] In order to assess whether the appellant holds a well-founded fear of being persecuted by the Sri Lankan authorities, it is necessary first to record a backdrop of country information relevant to his claim.

[55] Despite the cessation of hostilities in Sri Lanka in May 2009, and the demobilisation and rehabilitation programmes instituted for former LTTE combatants, the authorities have continued to regard the LTTE as a potential threat to security in the country. While there has been a recent change in presidency, with Maithripala Sirisena now elected, there have been no reported changes in the government’s approaches to this potential threat.

[56] The former Defence Secretary, Gotabaya Rajapaksa, speaking on future challenges to national security in Sri Lanka at the Sri Lanka Foundation Institute and Associated Newspapers of Ceylon Limited on 26 October 2014, presented primary security challenges in the country as to the reorganisation of the LTTE in the international arena and the possible re-emergence of terrorism within Sri Lanka. Other related threats included the efforts by some to take Sri Lanka’s internal issues in front of international bodies. See Sri Lanka Ministry of Defence

“Sri Lanka is Still Under Threat – Warns Secretary Defence” (11 January 2012)
www.defence.lk:

“The first threat to consider is the on-going activities of LTTE linked organisations outside Sri Lanka. Despite the military defeat of the LTTE and the elimination of its top leadership two and a half years ago, the rump of the LTTE’s global establishment is still active. There are ex-LTTE cadres, pro-LTTE activities and LTTE sympathisers still operating in various guises through various groups in many countries around the world.”

[57] In a Sri Lanka Ministry of Defence and Urban Development document *Evolution of Liberation Tigers of Tamil Eelam (LTTE) International Network* (undated), the Ministry identifies the LTTE leadership and the Tamil diaspora as centres of gravity for the LTTE organisation, the latter of which has provided propaganda, financial and logistic support to the LTTE organisation and its leadership. It reports that with the elimination of the LTTE leadership in May 2009, there remains the “diaspora factor” and the fact that the LTTE’s international network largely remains intact.

[58] On 1 April 2014, the Sri Lankan government announced the designation of 16 Tamil diaspora organisations and 424 individuals under the *Resolution on Counter-Terrorism SC Res 1373 S/Res/1373 (2001)*; see *The Gazette of the Democratic Socialist Republic of Sri Lanka: Extraordinary No 1854/41 (21 March 2014)*. Proscribed organisations include the Australian Tamil Congress (ATC) and the TYO.

[59] Accordingly, Sri Lankan nationals are forbidden from maintaining contact with members of these proscribed organisations. The International Crisis Group reports in *The Sri Lankan Tamil Diaspora After the LTTE (23 February 2010)* (“the ICG report”) that there are substantial diaspora populations with some 200,000 in Canada, 180,000 in the United Kingdom, 60,000 in Germany, 40,000 in Australia, 47,000 in Switzerland, 40,000-50,000 in France, 20,000 in the Netherlands, 25,000 in the United States, 15,000 in Italy, 20,000 in Malaysia, 10,000 in Norway, 7,000 in Denmark, 3,000 in New Zealand and 2,000 in Sweden.

[60] There is some evidence that Sri Lankan authorities are monitoring the diaspora abroad. The ICG report highlights that Sri Lankan embassy and consular staff, with the assistance of some Sinhalese diaspora groups, report to authorities on suspected LTTE individuals and organisations. The Ministry of Defence and Urban Development Sri Lanka in *No intelligence officers were sent to foreign countries as part of an international operation to apprehend LTTE suspects (30 April 2014)* reported that:

“Officials of the Ministry of Defence who visit relevant countries on official duties and diplomats of the Ministry of External Affairs have educated relevant authorities in respect of countries about the threats posed by those organisations and persons listed in recent gazette notification that listed the organisations. Further, diplomats of relevant countries stationed in Sri Lanka have also been educated on government actions with regards to listing those organisations and persons.”

[61] According to the Asylum Research Consultancy report *Sri Lanka COI Query Response* (19 August 2014), counter-intelligence work in Sri Lanka has expanded since cessation of the conflict. They elaborate:

“[W]ith the new political culture of totalitarian and military developments, intelligence services have acquired a much greater role and more state funds are spent on consolidating a larger role for intelligence services. The ultimate aim of these services is to constantly watch and monitor citizens.”

[62] The United Kingdom Upper Tribunal (Immigration and Asylum Chamber) in *GJ and ors (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 report former President Rajapaksa’s repeated statement that the government’s approach to security is intelligence-led. The security services interviewed thousands of Tamils at the end of the civil war and the government has a sophisticated, high quality intelligence enabling it to assess the risk posed by particular individuals within and outside Sri Lanka; see paragraph [306]. Forms of intelligence include monitoring of activities online, on mobile telephones, and in diaspora hotspots, including London, Paris, Oslo and Toronto. It has informers in northern and eastern provinces and in the diaspora, and intercepts electronic and telephone communications and closes websites. Photographs are taken of demonstrators and the government sponsors an image recognition programme at the University of Colombo.

[63] Other reports also reveal that Tamil protests in the diaspora have been monitored. There are also reports of Sri Lankan embassy staff photographing protestors and of face detection taking place at the University of Colombo. Yasmin Sooka (on behalf of the UK Bar Human Rights Committee of England and Wales and the International Truth and Justice Project) in *An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014* (21 March 2014) states at p15:

“There is evidence that Tamil protests in the diaspora have been monitored. In London, Sri Lankan embassy staff were observed photographing protestors. It is not known what happens to the photographs but it is probably reasonable to assume that they are sent to the relevant intelligence section of the State Intelligence Service (SIS). Research on human face detection and research is reportedly underway within the Department of Statistics and Computer Science at the University of Colombo. From a witness protection point of view, there are reasonable grounds to believe that Sri Lanka intelligence is using highly

sophisticated facial recognition software to identify protestors from abroad if they return home.”

[64] The same report further alleges that:

“The supply of intelligence to the security forces and immigration department may extend to the Tamil Diaspora with given allegations that members of the Karuna faction and embassy employees in the European Union continue to supply photographic and video evidence of Sri Lankans engaging in protest action.”

However, the report does not specify the timeframe these practices took place or whether they still continue in 2014.

[65] A clinician working for Freedom from Torture reported that some of the individuals he saw told him that they had been arrested, detained and tortured by authorities specifically because they were considered to have taken part in anti-government demonstrations in the United Kingdom. Some stated that their interrogators had shown them pictures of the protest that took place at Heathrow Airport when the then Sri Lankan president was visiting and told them that they were identifiable in the crowd; John Hayward (Freedom from Torture) “The International Community Must Shine a Light on Human Rights Abuses in Sri Lanka, Past and Present” (18 March 2014).

[66] Tamils Against Genocide (TAG) in its report *Returnees at Risk: Detention and Torture in Sri Lanka* (16 September 2012) state that their sampled cases (having analysed 27 recent asylum appeal determinations) revealed significant interest in political activity in London, including protests. Of the 26 cases found to be credible, 10 claimants were interrogated under torture about protests held against the Sri Lankan government. The report further details:

“Of these, one was arrested initially in a case of mistaken identity: he was thought to be a British Tamil who had participated in a protest at the United Nations in Geneva. Another was interrogated on his work for assisting the media during protests against President Rajapaksa’s December 2010 visit to London. A further torture victim was interrogated on the activities of a well-known European NGO.

...

At least five of our determinations found that appellants had been shown photos of protests including photos of themselves at the protests and/or photos of their other activities. For example one appellant was shown a photo of himself taken with the Head of the Tamil Rehabilitation Organisation in London...”

[67] The Human Rights Watch report *We Will Teach You a Lesson* (26 February 2013) cites reported instances of returning Tamils being tortured in Sri Lanka and being questioned about participation in peaceful criticism of the government. The report states that:

“Since the end of the armed conflict, other Tamils, living abroad, returned to Sri Lanka only to be arrested immediately or soon after arrival, and they too have been subjected to torture, including rape, while in custody. A number of these were questioned about alleged activities abroad, including peaceful criticism of the Sri Lankan government...”

[68] From this factual backdrop, the United Kingdom Upper Tribunal in *GJ and ors (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 formulates a risk profile, extrapolating that the fact of participation in demonstrations against the government abroad is relevant only “to the extent to which it will cause a person to be perceived as seeking to destabilise the GOSL [Government of Sri Lanka] and work for the resurgence of the LTTE or a similar Tamil separatist organisation”; see paragraph 263. At paragraph 336 the Upper Tribunal further states (emphasis added):

“The former Tamil areas and the diaspora are heavily penetrated by the security forces. Photographs are taken of public demonstrations and the GOSL may be using face recognition technology: it is sponsoring a face recognition technology project at the University of Colombo. However, the question which concerns the GOSL is the identification of Tamil activists working for Tamil separatism and to destabilise the unitary Sri Lankan state. **We do not consider that attendance at demonstrations in the diaspora alone is sufficient to create a real risk or a reasonable degree of likelihood that a person will attract adverse attention on return to Sri Lanka.**”

[69] The United Kingdom Upper Tribunal at paragraph 356 considered the current categories of persons at real risk of persecution or serious harm on return to Sri Lanka were as follows (emphasis added):

“(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived **to have a significant role** in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.

(b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.

(c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.

(d) A person whose name appears on a computerised ‘stop’ list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appear on a ‘stop’ list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.”

[70] Notably, the approach of the United Kingdom Upper Tribunal has been upheld by the Court of Appeal in *MP (Sri Lanka) & Anor v Secretary of State for the Home Department* [2014] EWCA Civ 829.

[71] The UNHCR have also produced revised guidelines including risk profiles for Sri Lankan returnees in *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (21 December 2012). Particular risk profiles for individuals considered likely to be in need of international refugee protection include:

- “(a) persons suspected of certain links with the LTTE;
- (b) certain opposition politicians and political activists;
- (c) (certain journalists and other media professionals;
- (d) certain human rights activists;
- (e) certain witnesses of human rights violations and victims of human rights violations seeking justice;
- (f) women in certain circumstances;
- (g) children in certain circumstances; and
- (h) lesbian, gay, bisexual, transgender and intersex individuals in certain circumstances.”

[72] The Guidelines emphasise that individuals with real or perceived links to the LTTE are at risk upon return to Sri Lanka. They explain:

“However, previous (real or perceived) links that go beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment which may give rise to a need for international refugee protection, depending on the specifics of the individual case. The nature of these more elaborate links to the LTTE can vary, but may include people with the following profiles:

- 1) Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
- 2) Former LTTE combatants or ‘cadres’;
- 3) Former LTTE combatants or ‘cadres’ who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, “computer branch” or media (newspaper and radio);
- 4) Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
- 5) LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE;
- 6) Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.”

[73] Having regard for this country information, the Tribunal sees no cause to depart from the risk profile it has consistently applied in its recent decisions, that

persons with real or perceived links to the LTTE may be at risk of serious harm upon return to Sri Lanka; see *BO (Sri Lanka)* [2014] NZIPT 800597; *BX (Sri Lanka)* [2014] NZIPT 800620.

[74] In the case of the appellant, there is no evidence that the authorities consider him to have any real or perceived links to the LTTE. There is the fact that he was photographed at a small protest in [Z] in 2009, some six years ago. These photographs are located, together with a news article on an online news website and reveal the appellant holding anti-government placards with the LTTE flag visible in the background. However, the appellant has returned to Sri Lanka on two further occasions since this time, in 2011 and 2012, and there has been no interest shown in him by authorities. Relevantly, he has not engaged in any further protests since [...] 2012. The appellant has no background as an LTTE supporter, or any role in fundraising or propaganda. There is no evidence of him having any ongoing profile of interest to the Sri Lankan authorities.

[75] The Tribunal acknowledges that there are some reports of Tamils who have been photographed at protests being mistreated by authorities on return to Sri Lanka. It is also cognisant of the surveillance methods of the authorities as reported in the above country information. While the exact profile of the mistreated persons is difficult to establish from the country information, it appears, for example, from reports such as Tamils Against Genocide (TAG) *Returnees at Risk: Detention and Torture in Sri Lanka* (16 September 2012), referred to in the United Kingdom Upper Tribunal (Immigration and Asylum Chamber) decision: *GJ and ors (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC) paragraph 351, that amongst those arrested by authorities for attendance at protests, are persons who are alleged to have provided assistance to the media during protests; a Tamil who was photographed together with the Head of the Tamil Rehabilitation Organisation; and another who was questioned about activities with a well-known European NGO. The appellant does not have a profile as having engaged in any such activities.

[76] The reality is, that there have been a great number of protests against the Sri Lankan government in the Tamil diaspora abroad. Such protests continue at the present time. Hundreds of thousands of Tamils have participated in them and a great many have been photographed and the photographs are available on the internet. The Upper Tribunal has held that mere participation in protests, alone, is not sufficient to raise any risk profile with Sri Lankan authorities. Notably, the

UNHCR Guidelines also do not highlight any risk to persons who have solely attended protests or been photographed at protests.

[77] In this context, given the historic nature of the appellant's participation in two protests in the United Kingdom, his safe return and departure from Sri Lanka (on two occasions since his attendance at the first protest, and on one occasion since the second), and the lack of any profile or activities that could be perceived to be against the Sri Lankan government since this time, the Tribunal considers it speculative that there is any risk of the authorities demonstrating any interest in him. Any risk to him of serious harm at the hands of the authorities is remote and does not reach the real chance threshold.

[78] Accordingly, the Tribunal finds that the appellant does not hold any well-founded fear of being persecuted upon return to Sri Lanka on account of the risk of his being perceived by authorities as an LTTE supporter or for any other reason.

The Convention Against Torture

[79] Section 130(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

[80] The appellant relies on the same evidence in support of his claim under the Convention Against Torture as he did to support his claim under the Refugee Convention. For the reasons already given, and having taken into account the appellant's circumstances, the Tribunal finds that there are no substantial grounds for believing that the appellant would be in danger of being subjected to torture if deported from New Zealand. Accordingly, the appellant is not a protected person under section 130(1) of the 2009 Act.

The ICCPR

[81] Section 131 of the Act provides that:

"(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

...

- (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.”

Conclusion on Claim under ICCPR

[82] For the purposes of his claim for protected person status under section 131 of the 2009 Act, the appellant has not advanced any evidence of a prospective risk of harm other than evidence relied upon in connection with his refugee and protection claim.

[83] For the reasons already given, the Tribunal finds that there are no substantial grounds for believing that the appellant would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

[84] Accordingly, the appellant is not a protected person under section 131 of the 2009 Act.

CONCLUSION

[85] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) is not a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture;
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[86] The appeal is dismissed.

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Member

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