

AT AUCKLAND

Appellant:	AL (Sri Lanka)
Before:	V J Shaw (Member)
Counsel for the Appellant:	I Uca
Counsel for the Respondent	No appearance
Date of Hearing:	6 October 2011
Date of Decision:	28 November 2011

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining to grant refugee status and/or protected person status to the appellant, a national of Sri Lanka.

[2] This is the appellant's third refugee appeal. He arrived in New Zealand in February 2002 and his first refugee claim was declined by the RSB in June 2002. His first appeal to the Refugee Status Appeals Authority (RSAA) was dismissed in *Refugee Appeal No 74808* (29 June 2004).

[3] The appellant lodged his second refugee claim on 28 July 2009 and this was declined by the RSB on 12 November 2009. His second appeal was dismissed by the RSAA in *Refugee Appeal No 76455* (9 March 2010).

[4] On 24 November 2010, the appellant lodged his third refugee claim with the RSB. The RSB, in a decision dated 26 May 2011, held that the appellant's circumstances in his home country had not changed to such an extent that his

subsequent claim was based on significantly different grounds to his previous refugee claim. Accordingly, the RSB determined that it did not have jurisdiction to consider the appellant's third refugee appeal.

[5] The RSB also held that the appellant was not a protected person pursuant to sections 130 and 131 of the Immigration Act 2009 ("the 2009 Act") in that there were not substantial grounds for believing he would be tortured or that he was in danger of being subjected to arbitrary deprivation of life or cruel treatment.

Jurisdiction to Hear Subsequent Refugee Appeal

[6] As the appellant lodged his third refugee claim with the RSB on 24 November 2010 and it had not been decided before the Immigration Act 2009 ("the 2009 Act") came into force on 29 November 2010, the RSB determined his claim in accordance with the transitional provisions set out in section 426(2) of the 2009 Act, namely that section 129J of the Immigration Act 1987 continued to apply.

[7] Section 426(2)(c) of the 2009 Act states that if the claim is not accepted for consideration, any appeal must be made in accordance with the provisions of the former Act, but the Tribunal must consider the appeal in accordance with section 449(4) of the 2009 Act.

[8] Section 449(4) of the 2009 Act states that if an appeal is in respect of a decision to refuse to consider a subsequent claim on the grounds that the circumstances in the person's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, the Tribunal must determine the appeal in accordance with the relevant provisions of the former Act. If it determines that the subsequent claim should be considered, the Tribunal must determine the matter as though it was an appeal to the Tribunal under section 194(1)(c) of the 2009 Act.

[9] The question of whether there is jurisdiction to consider a subsequent refugee claim was considered by the RSAA in Refugee Appeal No 75139 (18 November 2004). In that decision, the RSAA found (at [55](e)) that:

Jurisdiction under ss129J and 129O(1) is determined by comparing the previous claim to refugee status against the subsequent claim. This requires the refugee status officer and the Authority to compare the claims as asserted by the refugee claimant, not the facts subsequently found by the officer or the Authority.

[10] The Tribunal will therefore consider the appellant's previous two refugee claims and his present claim, as presented at the third appeal, with a view to determining whether there has been the requisite change in circumstances and, if so, whether the appellant should be recognised as a refugee.

THE APPELLANT'S FIRST CLAIM

[11] The appellant, aged in his mid-thirties, is a member of the Muslim minority from a district in the central province of Sri Lanka. His parents, brothers and sisters remain living in that district. He married his wife in January 2001. The appellant left Sri Lanka in February 2002 to travel to New Zealand on a limited purpose visa. His wife gave birth to the couple's daughter after he arrived in New Zealand.

[12] The appellant's first refugee claim was based on his political activities on behalf of The People's Alliance Party and his consequent fear of being persecuted by supporters of the United National Party (UNP) and the Liberation Tigers of Tamil Eelam (LTTE). The RSAA did not find the appellant to be a credible witness, and accordingly did not accept his claims that he was being pursued by the LTTE or the UNP in Sri Lanka or his claims about the reasons for his departure from Sri Lanka.

THE APPELLANT'S SECOND CLAIM

[13] In May 2009 the appellant participated in an argument amongst Sri Lankan nationals at a social cricket match in Auckland. A photograph of the naked corpse of the LTTE leader, Vellupillai Pradhakaran, had been published in the media shortly before and an argument ensued between the Sinhalese and Tamils present. Later, the appellant was visited by a close Sinhalese friend who asked him for the names and addresses of those present at the match. The friend's father was a diplomat with high level political contacts in Sri Lanka. When the appellant refused to give his friend the information requested, the friend threatened to cause difficulties for the appellant in Sri Lanka.

[14] The appellant's mother-in-law and brother-in-law were arrested by police in Sri Lanka in June 2009. The mother-in-law was soon released but the brother-in-law disappeared. The police indicated to the appellant's father-in-law that his son would only be released when the appellant returned to Sri Lanka and surrendered

himself. The appellant believes his former friend is behind the arrest of his mother-in-law and brother-in-law.

[15] The father-in-law also informed the appellant that he no longer wished him to be a member of the family because of the pain he had caused to his son and daughter and he had refused to answer any further telephone calls from the appellant.

[16] In February 2010, the appellant spoke with his wife who advised that her family wished her to separate from him as they held him responsible for her brother's disappearance. She also said that she wanted to separate from the appellant as she could not join him in New Zealand and he could return to Sri Lanka for safety reasons. She too has refused to speak further to the appellant on the telephone.

[17] The appellant did not wish to return to Sri Lanka as he believed his friend had arranged for him to be placed on a wanted list there and that he would be arrested on arrival at the airport. Additionally, the appellant was a failed asylum seeker and Sri Lankan nationals returning after long periods overseas are scrutinised at the airport.

[18] The RSAA held that the appellant's claims about the threats made by his friend following the cricket match were not credible. Similarly, his claims that his mother-in-law and brother-in-law had been arrested and his brother-in-law disappeared were held not to be credible, as was his profile as a wanted person in Sri Lanka.

THE APPELLANT'S THIRD REFUGEE CLAIM

[19] The basis of the appellant's third refugee claim is that since his second appeal was determined, his wife has obtained a divorce without his knowledge and consent, and has remarried. She refuses to communicate with the appellant and his parents have been told that if he tries to disturb her, her new husband will "torture him". His former parents-in-law also refuse to talk to him. The appellant fears he will be targeted by his wife's parents and her new husband as his father-in-law is a powerful man and is angry that his son is missing and he wants to take revenge.

[20] The appellant also fears that he will be questioned by the Sri Lankan authorities on arrival in Colombo as they will see that he has been overseas on an expired passport for many years. His poor mental health will cause him to panic and lose concentration thereby causing suspicion.

Documents Filed

[21] As well as counsel's submissions, dated 3 October 2011, the Tribunal received computerised medical records relating to consultations the appellant had with his general practitioner between March and September 2011, plus various items of country information primarily relating to the situation of failed asylum seekers

[22] At the completion of the hearing on 6 October 2011, 14 days leave was granted to file medical evidence relating to the appellant's mental health and further submissions from counsel clarifying the nature of the changed circumstances relied on to establish jurisdiction. On 28 October 2011 the appellant lodged a humanitarian appeal against deportation and counsel requested a further 21 days to provide her closing submissions and submissions in support of his humanitarian appeal. Ms Uca was advised that closing submissions in respect of this appeal were to be filed no later than 17 November 2011. No closing submissions were received.

ASSESSMENT OF JURISDICTION

[23] In essence, the appellant's third refugee claim repeats aspects of his second claim with some minor variations.

[24] At the time his second appeal was determined relations with his wife had already broken down. She had advised the appellant that she was intending to separate and was refusing further communication. The fact that she has now obtained a divorce, has remarried and still refuses to communicate with the appellant is simply a further development of the situation prevailing at the time the appellant's second appeal was finally determined.

[25] It was also a feature of the appellant's previous claim that his wife and her parents blamed him for the arrest and disappearance of the wife's brother. His father-in-law had already warned him that he no longer wished him to be part of the family because of the pain he had caused to his son and daughter and cut off

communication. The appellant's current claimed fear of his father-in-law is based on nothing more than the father-in-law's continued anger with him over the disappearance of his son. Yet, both the disappearance of the son and the father-in-law's consequent anger with the appellant, were key matters advanced in support of the previous appeal. The latest claim has the addition of the wife's new husband as someone also available to threaten and target the appellant, but this is not significant in the context of the claim that the wife and her family, which now includes the new husband, are angry because they hold the appellant responsible for the disappearance of the wife's brother.

[26] The appellant's claim that he will come to the attention of the Sri Lankan authorities because he is a returned asylum seeker who has been outside the country for a lengthy period is also no more than a repetition of a ground of his previous appeal.

[27] The RSAA considered this in its decision dated 9 March 2010. It held that as a Sri Lankan Muslim who made a legal departure from Sri Lanka and who lacked any links to the LTTE, he was unlikely to have any difficulties returning to Sri Lanka or his district in the central province where his family lived. There has been no new country information advanced that would indicate any change in the risk to a Muslim with the appellant's background and characteristics.

[28] The Tribunal does not overlook the appellant's claim that his mental health has deteriorated since he received word of the divorce. He claims that this will make him especially vulnerable to abuse because it will cause him to panic and be slow and uncertain in his responses to questions by the Sri Lankan authorities. The RSB had access to the medical records held by the appellant's general practitioner for the period May 2002 until December 2009. Additional medical records covering the period from March to September 2011 were provided to the Tribunal.

[29] It is clear from the medical records that the appellant has suffered from headaches, low mood, insomnia and depression over many years, as well as chronic pain in his neck and left shoulder relating to a work accident in 2003. Since this time, he has been prescribed medication for depression and insomnia. Perusal of the records since the RSAA decision in March 2010 reveals no apparent deterioration. Stress triggers noted in the records include mention in February 2010 of the appellant's wife wanting a separation and various immigration interviews or outcomes. The RSAA also noted that the appellant suffered from mild mental illness. The medical evidence does not establish any

apparent change in the appellant's mental health since his last appeal and certainly not to such an extent that his subsequent claim is now based on significantly different grounds.

[30] In her submissions dated 3 October 2011 counsel submits that the appellant may be a target of kidnapping or extortion because his lengthy stay in this country may create a presumption that he is well off. However, the appellant has provided no country information establishing that the risk to the appellant from this source is any different now that at the time of the determination of his last refugee claim. Nor is the Tribunal aware of any such information from its own research.

[31] As noted the Tribunal provided counsel with the opportunity to submit closing submissions that identified the changed medical and other circumstances that were being relied on, but no submissions were received.

Finding with Respect to Jurisdiction

[32] The Tribunal finds that since the determination of the appellant's last appeal in March 2010, circumstances in Sri Lanka have not changed to such an extent that his subsequent claim is based on significantly different grounds to his previous refugee claim. Accordingly, there is no jurisdiction for the Tribunal to consider the appeal.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[33] 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."

ASSESSMENT OF THE CLAIM UNDER THE CONVENTION AGAINST TORTURE

[34] Section 130(5) of the Act provides that torture has the same meaning as in the Convention against Torture, article 1(1) of which states that torture is:

"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third

person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

[35] It is submitted that there is a risk that the appellant will be tortured in Sri Lanka because he will be suspected of being an LTTE supporter.

[36] Section 231 of the Act provides that the Tribunal may rely on any finding of credibility of fact by the Tribunal or any appeals body in any previous appeal or matter involving the appellant and the appellant may not challenge any finding of credibility or fact so relied on.

[37] As explained above, the RSAA held, in its decision dated 9 March 2010, that the appellant’s claim he was wanted by the Sri Lankan authorities because of suspected LTTE sympathies was not credible.

[38] The RSAA also held that the fact that the appellant was a failed asylum seeker did not put him at risk of being harmed by the Sri Lankan authorities on his return to Sri Lanka. The Tribunal has considered the country material provided in support of the present appeal relating to the situation for failed asylum seekers. It primarily concerns the predicament of Tamils and does establish that there has been any relevant change in conditions in Sri Lanka since the RSAA’s earlier finding: Immigration and Refugee Board of Canada, *Sri Lanka: Information on the Treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport*, 22 August 2011 LKA 103815.E.

[39] In summary, the appellant is a Muslim who departed Sri Lanka legally. He has no history of connection to the Tamil Tigers or of opposition to the Sri Lankan government. There is nothing in his profile and background that places him at risk of being identified as a person of interest to the Sri Lankan authorities upon his return.

[40] It is acknowledged that he suffers from mild mental illness. Yet despite an earlier unsuccessful request for an adjournment supported by a doctor’s certificate stating that the appellant was suffering from tension headache, hyperventilation and anxiety, he was able to adequately answer the Tribunal’s questions and explain his situation. There is no reason to doubt his capacity to answer routine questions on arrival at Colombo airport.

[41] The Tribunal finds that there are no substantial grounds for concluding that the appellant would be in danger of being subjected to torture if deported from New Zealand.

THE ICCPR – THE ISSUES

[42] Section 131(1) of the Act provides that:

“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.”

ASSESSMENT OF CLAIM UNDER ICCPR

[43] Pursuant to section 131(6) of the Act, “cruel treatment” means cruel, inhuman or degrading treatment or punishment but, by virtue of section 131(5):

- (a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards; and
- (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.

[44] The appellant is concerned that because of his poor mental state he will not be able to work in Sri Lanka so that he will be without accommodation or means of support. Counsel also submits that his deportation will have “a devastating effect on his physical and mental integrity and would constitute psychological torture that would have an irreparable effect on him”.

[45] As explained in *AC (Syria)* [2011] NZIPT 800035 (27 May 2011) at [81]–[86] the level of harm required to constitute cruel treatment is high.

[46] The appellant has his parents, one sister and five brothers living in Sri Lanka and another brother lives in Japan. Apparently a further brother has been missing from before the appellant came to New Zealand. The appellant’s parents live in their family home, along with their married daughter and her family.

The youngest brother, a student, also lives in the family home. Three of the brothers operate their own businesses in the appellant's home province and the fourth brother works with them.

[47] The appellant maintains regular telephone contact with his parents in Sri Lanka and through them obtains family news. He describes his family home as big and comfortable and his family as middle class. When he was growing up, he and his siblings had everything they needed. His brothers are able to adequately provide for their families' needs.

[48] The appellant has not held permanent employment in this country since around 2003. The reason for this is not clear, but probably relates to the problem he has with pain in his neck and left arm (he says his arm gets numb after a few minutes use), his depression and his immigration status. However, this does not prevent him from assisting at a local mosque each morning with cleaning and other tasks and playing cricket and volleyball in summer. Even if his physical and mental health issues prevent him from obtaining permanent employment in Sri Lanka, he will not be without accommodation and family support. He has not demonstrated that in Sri Lanka he would be deprived of the basic means of survival.

[49] The claim that deportation will have a devastating effect on the appellant's physical and mental integrity is rejected. There is no medical or other evidence to support such a contention. The medical history establishes that over the years the appellant has suffered from mild depression for which he has been prescribed medication by his general practitioner. Some of that depression appears to be linked to such matters as his separation from his wife and child and the eventual collapse of the marriage and his inability to obtain residence here. Returning to Sri Lanka, where he will have the emotional support of family may well be beneficial for the appellant. There is also no suggestion that he cannot obtain appropriate medical treatment or medication in Sri Lanka for either his depression, should it persist, or the pain he experiences in his neck and arm.

[50] The Tribunal finds that there are no substantial grounds for believing that the appellant would be in danger of being arbitrarily deprived of life or subjected to cruel treatment if deported from New Zealand.

CONCLUSION

[51] For the foregoing reasons, the Tribunal finds that:

- (a) it has no jurisdiction to consider the appellant's third refugee appeal;
- (b) the appellant is not a protected person within the meaning of the Convention Against Torture;
- (c) the appellant is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[52] The appeal is dismissed.

"V J Shaw"

V J Shaw

Member

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V J Shaw
Member