

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76525

AT AUCKLAND

<u>Before:</u>	C M Treadwell (Member)
<u>Counsel for the Appellant:</u>	I Uca
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	15 July 2010
<u>Date of Decision:</u>	24 November 2010

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch of the Department of Labour, declining the grant of refugee status to the appellant, a citizen of the Sri Lanka, of the Muslim faith.

[2] This is the appellant's second appeal to this Authority.

INTRODUCTION

[3] The appellant's first refugee claim, lodged in 2007, asserted that he had unwittingly become involved in the transportation of men and materials for the Liberation Tigers of Tamil Eelam ("the LTTE") and the subsequent arrest and death of LTTE personnel, for which he was held responsible by the LTTE. See *Refugee Appeal No 76185* (6 June 2008).

[4] The crux of the appellant's second claim is that, since his first claim was declined, there has been a significant deterioration in human rights in Sri Lanka, both during and after the final assault by the Sri Lankan Army on the LTTE in mid 2009. Further, the appellant says that he took part in protests in New Zealand against the actions of the Sri Lankan authorities in crushing the LTTE and is now at risk of harm for having done so.

- [5] The issues to be determined in this case are:
- (a) whether the Authority has jurisdiction to hear the second appeal; and, only if so,
 - (b) whether or not the second claim to refugee status is credible; and, if so,
 - (c) whether or not the second claim to refugee status is well-founded.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[6] This is the second occasion on which the appellant has appealed to the Authority and it must therefore first be determined whether there is jurisdiction to hear the appeal.

[7] Neither a refugee status officer nor the Authority has unlimited jurisdiction to receive and determine a further refugee claim after a first claim has been finally determined. Section 129J(1) of the Immigration Act 1987 (“the Act”) sets out the circumstances in which a refugee status officer may receive and determine a second or subsequent claim for refugee status (emphasis added):

A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, **circumstances in the claimant’s home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.**

[8] Where the refugee status officer declines the subsequent claim, or finds that there is no jurisdiction to consider the claim on the basis that the statutory criteria are not met, the claimant has a right of appeal to the Authority. Section 129O(1) of the Act provides that:

A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant’s home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer’s decision.

[9] It is intended, therefore, to consider the appellant’s previous claim, together with his second claim as presented at the second appeal hearing, with a view to determining whether it has jurisdiction to consider the second appeal. If so, it will

then determine whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

COMPARISON OF THE FIRST AND SECOND CLAIMS

Summary of first claim

[10] The appellant was born in Panagamuwa in 1981. He is Muslim.

[11] In August 2003, the appellant began employment at an electrical goods shop. His duties included deliveries to Batticaloa by lorry and trying to find new business in that area.

[12] A Tamil friend from Batticaloa, EE, agreed to accompany the appellant and to introduce him to potential customers. On one trip, EE introduced him to two Tamil businessmen, who each asked the appellant to supply goods, which he duly did. Numerous further trips were made in similar vein.

[13] In July 2004, EE asked the appellant to bring people from Batticaloa for the LTTE and to accommodate them and to deliver goods for the LTTE. Worried, the appellant told a relative who had contacts in the Sri Lankan Army. The relative asked him for details and, two weeks later, the appellant advised him that the next trip to Batticaloa would be in five or six days' time.

[14] From Batticaloa, the appellant telephoned his relative and told him when they would be leaving. The relative told him that he would arrange for friends in the Army to check the lorry on the return journey. The lorry was duly pulled over by the Army. Soldiers found "dangerous goods" in the back. Those in the lorry were blindfolded, bound and taken to an army base.

[15] The appellant was held for five days. For the first three days, he was interrogated twice a day. He told the truth. He was released on the intervention of his relative, who told him that he was still suspected of involvement in transporting LTTE goods and that he should try to leave Sri Lanka as soon as possible.

[16] In September 2004 the appellant went to Colombo where he remained in hiding for 10-11 months. There, he learnt from his family that the Army was

looking for him. His relative told him that the two Tamil men had been killed in late 2004 and, in November 2004, the relative himself was killed in an accident.

[17] After the death of the relative the appellant's parents told him of more visits to the family home by unidentified men linked to both the LTTE and the Army. Worried, the appellant contacted an agent who told him that, for a fee, he could send the appellant to New Zealand.

[18] In August 2005, the appellant travelled to Malaysia. He encountered no difficulties leaving Colombo airport on his Sri Lankan passport due to the agent making arrangements to ensure his safe departure.

[19] In Malaysia the appellant lived with his brothers AA and BB. He remained in contact with his family, who told him of continuing Army and LTTE visits to the home. In January 2006, a friend of EE, who knew that the appellant had identified the LTTE men in Sri Lanka, threatened him. The appellant went to stay with a friend in another part of Kuala Lumpur until late February 2006.

[20] With his brothers AA and BB intending to travel to New Zealand, the appellant convinced BB to let him use his passport in his stead. He arrived here in May 2006. He lodged a claim for refugee status in September 2007.

[21] In his further contact with his family, the appellant learned of more visits to the family home. BB, who had returned to Sri Lanka because their father was unwell, was assaulted at home by unidentified men thought to be associated with the LTTE, on the assumption that the person who had returned was the appellant.

[22] The appellant's first refugee appeal was found by the Authority (differently constituted) to be not credible. It was dismissed. See *Refugee Appeal No 76185* (6 June 2008).

The second claim

[23] On his second claim, the appellant does not resile from the first claim. He maintains the evidence he gave on the first claim and adds:

- (a) Since his first claim, the Sri Lankan Army has crushed the LTTE in a brutal campaign which lasted from late 2008 to May 2009, in the course of which many civilians were killed, wounded, displaced and

otherwise harmed. The Army acted in disregard of human rights, both during the campaign and in terms of detaining tens of thousands of Tamil people afterwards, in their search for the LTTE. Tamil-speaking persons are at risk, he says, of harassment, detention, disappearance and physical mistreatment.

- (b) Tamil-speaking persons returning from overseas after long periods abroad are, it is claimed, at risk of detention, interrogation and harm as suspected LTTE supporters. The appellant's Sri Lankan passport has no Malaysian exit stamp, no New Zealand entry stamp in it (because he entered on BB's passport) and no evidence of his entitlement to be anywhere for several years. He considers that he will appear suspicious to the officials at Colombo airport. This is aggravated by the fact that, when he applied to have his passport renewed at the Sri Lankan High Commission in 2009, he was unable to show a current permit and had to provide a letter from his lawyer to demonstrate that he was not in New Zealand unlawfully. The High Commission will infer that he is a refugee claimant.
- (c) Between January and April 2009, the appellant took part in three peaceful demonstrations in New Zealand, protesting against the human rights violations occurring to the Tamil civilian population during the Army's campaign against the LTTE. He saw Sinhalese persons filming the protests (which involved only some 40 people), including a man known as CC who, in April 2009, abused the appellant and told him that he would soon hear bad news from Sri Lanka. This was followed by telephoned advice from his parents that, in June-August 2009, the Army visited the family home, accusing the appellant of supporting the LTTE in New Zealand. His name was, they were told, on a black list at the airport. Later, when AA visited Sri Lanka in December 2009, the Army tried to detain him, thinking it was the appellant.

FINDING AS TO JURISDICTION

[24] As explained in *Refugee Appeal No 75139* (18 November 2004) at [51]:

Jurisdiction... is determined by comparing the previous claim to refugee status against the subsequent claim. It is clear from the definitions in s.129B(1) that the exercise 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 Refugee Status Branch] officer or the Authority.

[25] Thus, for the purposes of establishing whether jurisdiction exists, the Authority is required to measure claim against claim, without regard to credibility (though, of course, if the jurisdictional threshold is met, credibility is then relevant to the assessment of whether the claimant is a refugee).

[26] The jurisdictional threshold set out in s129O of the Act is met. In essence, significant aspects of the appellant's claim (the deterioration in human rights and the crushing of the LTTE by the Army, as well as the appellant's attendance at protests in New Zealand) constitute significantly different grounds from those advanced in the first claim. Further, those grounds have arisen since the determination of the first claim on 6 June 2008.

[27] Given this finding, it is now necessary to assess the substantive aspects of the appellant's second claim and determine whether or not he has a well-founded fear of being persecuted for a Convention reason should he return to Sri Lanka.

THE ISSUES

[28] The Inclusion Clause in 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.

[29] In terms of *Refugee Appeal No 70074/96* (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 APPELLANT'S CASE

Credibility

[30] It is necessary first to address the question of the appellant's credibility, including the findings of the previous panel on the first appeal.

Whether to rely on findings of fact and credibility from first appeal

[31] The Authority has a discretion to rely on findings made in relation to an earlier claim. Section 129P(9) of the Act provides:

... the claimant may not challenge any finding of credibility or fact made by the Authority in relation to a previous claim, and the Authority may rely on any such finding.

[32] The findings of fact and credibility made by the first appeal panel, set out at length from [38]-[66] of the decision, are cogent and persuasive. They establish, in particular, that the appellant was not asked by EE to assist the LTTE, that truck was not stopped by the Army, nor the appellant detained and that there was no subsequent interest in the appellant by the Army (or LTTE), by way of visits to the family home. The Authority determines to rely on those findings.

Credibility of the second appeal

[33] It will be evident that, in breach of s129P(9) of the Act, the appellant's insistence that his first claim was truthful amounts to a challenge to the finding to the contrary by the first appeal panel. Given the statutory inability of the appellant to mount such a challenge and the decision by the present appeal panel to rely on the findings of credibility by the first appeal panel, those parts of the second claim which purport to repeat the first claim are rejected as not credible and are given no weight.

[34] As to the balance of the second appeal, a number of further aspects are disbelieved, for the following reasons.

The Auckland protests

[35] According to the appellant, he attended three protests in Auckland, in January, February and April 2009. Shortly after the April 2009 protest, he was

chastised and threatened by the man CC. He was told by CC, he claims, that he would soon hear bad news from home. Then, he says, in late August 2009, he heard from his family that there had been a number of Army visits to the family home between June and August, looking for him and criticising his activities in New Zealand.

[36] These assertions must be viewed in the light of an appeal by the appellant to the Removal Review Authority. That appeal was lodged by him in January 2009, at about the time he attended the first protest. The jurisdiction of the Removal Review Authority is a wide-ranging one. It must consider, *inter alia*, whether there are “exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand” (see s47 of the Act). The appeal to the Removal Review Authority was not decided until November 2009, some months after the appellant had, he says, learned of the Army’s visits to his family.

[37] Notwithstanding its clear relevance, the appellant did not inform the Removal Review Authority of either his involvement in the protests, or of the threats by CC or of the visits by the Army to his family home in Sri Lanka. Given that one might reasonably assume that the appellant would be anxious to inform the Removal Review Authority of any information which might assist his appeal, it is astonishing that he did not do so. Asked to explain this, the appellant’s evidence became facile and then mobile. Initially, he stated that he had been expecting a favourable decision from the Removal Review Authority and so did not feel the need to add anything further. That claim is rejected as specious. Appeals to the Removal Review Authority are on the papers and the appellant could not possibly have had any sense from that body of the success or otherwise of his appeal. Further, he was represented by Ms Uca, who is experienced in both refugee claims and removal appeals. The appeal to the Removal Review Authority was based predominantly upon the appellant’s difficulties with the Sri Lankan authorities as a young Tamil-speaking Muslim (including repeating the content of the first, failed, refugee claim). The relevance of further information about difficulties with the authorities in Sri Lanka could not have escaped the appellant.

[38] When this was put to him, the appellant began to change his evidence, suddenly suggesting that he had actually learned little of the Army’s visits when he

spoke with his family in August 2009. It had not been, he said, until December that his parents had given him full particulars. The surprising emergence of this new evidence and the suspicious timing of his receipt of the full particulars (conveniently, just *after* the decision of the Removal Review Authority had been delivered), is such that it is disbelieved.

CC

[39] The appellant's claim to have been threatened by a Sinhalese man named CC is implausible.

[40] Asked how he knew CC, the appellant told the Authority that he had met him at the house of a Tamil friend, DD, shortly before the protests. He had never met CC before and simply chatted with him at the friend's house. The appellant does not know CC's full name and conceded that CC knew only one of the appellant's four names, being the first name by which he is commonly known.

[41] Asked to explain how CC could possibly inform the Sri Lankan authorities of the appellant's activities in New Zealand if he did not know the appellant's full name, his evidence became increasingly untenable. At first, he claimed that "everyone" knew him by that name. Reminded that there are millions of Muslims in Sri Lanka, he then claimed that the authorities would be able to match the one name known by CC to the appellant's name on "their list". That claim ignores, of course, the reality that his name is not on any "list" because the reasons given in the first refugee claim for it being on such a list were untruthful.

[42] As to whether CC had also reported on the presence of the appellant's friend DD at the protests, the appellant initially claimed that he was uncertain whether DD had attended but thought he might have. Asked then whether he had alerted DD to CC's threats, given that a similar risk might exist for AA, the appellant surprisingly claimed that he had not. Asked why not, he stated that he had, in fact, tried to but DD had unfortunately moved to Wellington just at that time. Pressed further, he claimed to have tried to telephone DD "once or twice" but had found his mobile telephone "not working" and did not try further. This convenient series of events obstructing the appellant from warning DD, coupled with his surprising indifference as to the possible risk faced by a friend, simply reinforces the implausibility of the existence of any threat by CC.

Visit by brother AA to Sri Lanka

[43] It will be recalled that the appellant claims that his brother AA visited Sri Lanka in November 2009 and was visited by the Army, who mistook him for the appellant. It was not, the appellant claimed, until AA's father-in-law, who worked for the police, came and verified his identity that the Army accepted he was not the appellant.

[44] These events are disbelieved. The Sri Lankan authorities would know that the appellant had not returned to Sri Lanka because no record of his arrival would exist. Further, it would have been a simple matter for AA to have shown his passport and identity card to establish his identity, without needing to summon his father-in-law. Asked to explain this anomalies, the appellant could only say that the Sri Lankan Army is unlike the New Zealand Army and they "don't believe people".

[45] As to the failure of the appellant to call AA as a witness, he explained that he and AA had fallen out and AA will not now help him. The absence of AA, while insufficient on its own to establish or disprove the veracity of this part of the claim, adds weight to the Authority's other concerns with it, as already explained.

Conclusion on credibility

[46] For the foregoing reasons, the Authority is satisfied that:

- (a) While the appellant may have attended a small number of protests in Auckland in early 2009, there is no credible evidence that the Sri Lankan authorities are aware of his participation, or that they would take an adverse view of it if they did know.
- (b) Neither a man named CC nor anyone else has informed the Sri Lankan authorities of any activity by the appellant in New Zealand;
- (c) There were no enquiries by the Sri Lankan Army for the appellant at the family home between June and August 2009 as claimed;
- (d) The appellant's brother AA was not mistaken for the appellant by the Sri Lankan Army in November 2009.

[47] It is accepted that the appellant is a young, Muslim, Tamil-speaking, male, whose parents continue to reside in the family home in a small town in the west of Sri Lanka. It is also accepted that the Sri Lankan army wiped out the LTTE in a brutal military campaign between January-May 2009 and detained many thousands of Tamil civilians in camps thereafter, in the course of rooting out the last elements of the LTTE. It is also accepted that the appellant holds a passport obtained from the Sri Lankan High Commission in Canberra. The second refugee claim falls to be determined on these limited facts.

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

[48] Persecution is defined in refugee law as the sustained or systemic violation of basic or core human rights such to be demonstrative of a failure of state protection; See J C Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at para 15.

Country information

[49] There is no doubt that the crushing of the LTTE in early 2009 involved significant human rights abuses against Tamils by the authorities. For a fuller account of the post-conflict situation, including such country information as there is on the circumstances for Muslims in Sri Lanka, see *Refugee Appeal No 76322* (17 March 2010) at [97]-[107], an appeal in which Ms Uca also appeared as counsel. In brief, it may be summarised that Muslims suffered significantly at the hands of the LTTE during the 1990s, when tens of thousands were displaced from the north and their homes and property seized. There are likely to be ongoing difficulties for many Muslims from the north in terms of compensation or the reacquisition of their property, much of which has been *de facto* occupied by Tamils in the ensuing decade. There is not, however, any risk for Muslims at the hands of the authorities, in the absence of any suspicion of a link to the LTTE.

Risk posed by the crushing of the LTTE

[50] As to the claim that the appellant is at risk as a result of the human rights abuses against Tamils during, and after, the crushing of the LTTE, the first point to

be made is that the appellant is not a Tamil. While he speaks Tamil, as most Muslims in Sri Lanka do, he is demonstrably not a Tamil, a characteristic which would be immediately apparent to the authorities (including the Army) from his name, which is unequivocally Islamic. Further, his ability to establish his name would be a simple matter, given his passport and the need to carry photograph-bearing identity cards in Sri Lanka.

[51] Any risk of the appellant suffering harm as a result of the antipathy between the authorities and the LTTE, or towards any section of the Tamil community, is not more than speculative as best. It falls short of the real chance threshold by a significant margin.

Passport

[52] The appellant also claims that he is at risk of being detained on arrival at Colombo airport because his passport and his past dealings with the Sri Lankan High Commission will excite suspicion. His passport bears no trace of his departure from Sri Lanka, nor of any permit to be in New Zealand. These characteristics, coupled with the fact that the High Commission will have inferred from the lack of permits in his old passport that he has been a refugee claimant in New Zealand, are said to put him at risk.

[53] As the Authority noted in *Refugee Appeal No 76428* (10 June 2010) at [82]:

“The particular characteristics which might attract attention are identified in a report prepared following a visit undertaken in order to gather information about circumstances faced by Tamils since the end of the civil conflict in May 2009: the United Kingdom Home Office *Report of Information Gathering visit to Colombo* (August 2009) (the Home Office report):

All enforced returns (of whatever ethnicity) were referred to the Criminal Investigations Department (CID) at the airport for nationality and criminal record checks, which could take more than 24 hours. ... Those with a criminal record or LTTE connections would face additional questioning and may be detained. In general, non-government and international sources agreed that Tamils from the north and east of the country were likely to receive greater scrutiny than others, and that the presence of the factors below would increase the risk that an individual could encounter difficulties with the authorities, including possible detention:

- outstanding arrest warrant
- criminal record
- connection with LTTE
- illegal departure from Sri Lanka
- involvement with media or NGOs
- lack of an ID card or other documentation.”

[54] The appellant is not from the north or east, is not subject to any outstanding warrant, has no criminal record or connection with the LTTE, no involvement with media or NGOs and has a valid Sri Lankan passport. As to the question of whether his passport might make it appear that he had departed Sri Lanka illegally, that is simply not the case. The passport was clearly renewed outside Sri Lanka and carries a stamp indicating the appellant's lawful departure from Sri Lanka. The passport is not suspicious. Passports with such characteristics will be seen by border control officers routinely.

[55] As to the absence of a full complement of New Zealand permits in the passport (it bears at least one permit issued in December 2009, valid to June 2010), it is accepted that this might signal that the appellant has been staying in this country unlawfully. Again, given the vast Sri Lankan diaspora, this will hardly excite suspicion. It is not suggested by the appellant that it is an offence under Sri Lankan law to overstay in another country and, given the appellant's clear Muslim ethnicity and lack of any adverse record with the authorities, it is entirely speculative to assume that immigration officials at Colombo airport will have any concern about his time in New Zealand or his reasons for being here.

[56] It is not overlooked that the appellant claims that the High Commission in Canberra will have inferred that he has sought refugee status in New Zealand. Even if that is so, a degree of reality needs to be allowed to intrude. Seeking refugee status is widely recognised as a means of trumping ordinary immigration procedures by those who would not ordinarily meet a country's residence requirements. The huge numbers of Sri Lankans (Tamil, Muslim and Sinhalese) who have left their country since the communal riots of 1983 and the ensuing civil war, are not immune from the temptation to lodge false refugee claims. That the authorities are aware of this, and do not take an adverse view of persons solely for that reason, is indicated by the absence of country information as to any difficulties arising for the majority of the many failed asylum seekers who have returned to Sri Lanka in the past two and a half decades.

[57] The appellant points to a lack of a Malaysian departure stamp or a New Zealand entry stamp (he having used his brother's passport to travel from Malaysia to New Zealand) as likely to excite suspicion. That is not accepted. There are many reasons why passports might not carry a full account of the holder's travels, including the increasing tendency of some countries not to stamp

passports and the use of a second passport by persons with dual nationality. In any event, buried among the chaos of visas and entry and exit stamps in the appellant's passport the absence of two stamps from five years ago is unlikely to be noticed.

[58] If more were needed, there is nothing to prevent the appellant obtaining a fresh passport from the Sri Lankan High Commission which would obviate any concern about the state of his travel documents on his return, because it would clearly have been recently issued by an overseas post.

[59] For these reasons, the Authority is satisfied that the appellant does not face a real chance of serious harm on return to Sri Lanka. He does not have a well-founded fear of being persecuted there.

[60] Given this finding, it is not necessary to address the question of a Convention reason.

CONCLUSION

[61] For the reasons mentioned above, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"C M Treadwell"

C M Treadwell
Member