

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76140

AT AUCKLAND

<u>Before:</u>	A R Mackey (Chairperson)
<u>Counsel for the Appellant:</u>	C Curtis
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	21 November 2007
<u>Date of Decision:</u>	30 November 2007

DECISION

[1] This is the second time the appellant has appealed to this Authority. The first appeal (*Refugee Appeal No 74409/02*) was declined by a differently constituted Authority on 4 June 2003. It accepted the appellant's account of his background but four parts of the claim he made, at that time, were not believed. The Authority rejected that he had been targeted by members of the Liberation Tigers of Tamil Eelam (LTTE) to pay large sums of money to that organisation. An appeal to the Removal Review Authority on humanitarian grounds was also made. That appeal was dismissed on 27 January 2004. The appellant, however, did not return to Sri Lanka and it appears no further removal action was taken by the Department of Labour (DOL), although Ministerial applications were made.

[2] On 7 March 2007, the appellant was served with a removal order from the DOL and detained at Auckland Central Remand prison. After lodging a third appeal to the Minister of Immigration, limited purpose visas were issued valid until 2 June 2007. On 31 May 2007, the appellant lodged a subsequent application for refugee status with the Refugee Status Branch (RSB) of the DOL. That application was declined on 7 September 2007, although the RSB accepted that "renewed fighting in Sri Lanka constitutes a change in circumstances in that country since the determination of the first claim". They cited an Authority decision

in *Refugee Appeal No 75992* (7 June 2007) in support of that conclusion.

[3] The determination of this appeal involves a preliminary jurisdictional issue because it is the appellant's second claim for refugee status. For the reasons set out below, the Authority considers it has jurisdiction and accordingly, the second appeal turns on whether the appellant's second claim is credible and/or, on the totality of the appellant's profile, and evidence before the Authority, the appellant is entitled to refugee status.

JURISDICTION TO DETERMINE SUBSEQUENT CLAIMS FOR REFUGEE STATUS

[4] The DOL and this Authority do not have unlimited jurisdiction to receive and determine further refugee claims after a first claim has been determined. Section 129J(1) of the Immigration Act 1987 (the Act) provides:

“(1) 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”.

[5] When the DOL finds it has no jurisdiction to consider the claim or declines the subsequent claim, the claimant has a right of appeal to this Authority under s129O(1) of the Act which states:

“(1) 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 the 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.”

[6] The jurisdiction under ss129J(1) and 129O(1) is determined by carrying out a comparison of the previous claim as set against the subsequent claim.

FIRST REFUGEE CLAIM FOR REFUGEE STATUS

[7] The appellant arrived in New Zealand in August 2001. He had obtained a temporary permit allowing him to travel to New Zealand to attend his mother's funeral. She had died on 26 July 2001. He lodged that first application in late August 2001 and was interviewed by the RSB on 5 October 2001. A decision

declining refugee status was made by the RSB on 29 October 2001. The appellant appealed to this Authority against that decision. A differently constituted panel of this Authority heard the matter on 28 February 2003 and, as noted, declined the appeal on 4 June 2003.

[8] Summarising that claim, the appellant stated that he was a Sri Lankan national of Tamil ethnicity, aged approximately 50. He had been born in Colombo. As a young child, his parents had moved to the north of Sri Lanka where they lived until he graduated from school. From 1972 until 1980, he worked on various short-term projects around Sri Lanka. He moved to Colombo in 1984. He continued to live there with his wife (who has subsequently died) and his three daughters. During his time in Colombo, he was subject to many difficulties commonly experienced by Tamils, which included police searches and identification checks.

[9] In 1998, the appellant secured a position with a telecommunications company in Saudi Arabia. The position was considerably better paid than employment he was able to secure in Sri Lanka and he was given generous leave. During that leave time, he went on vacation back to Sri Lanka. While on a vacation in May 2001, he claimed that members of the LTTE had approached him, seeking considerable amounts of money from him. He had protested and could not pay the full amount but did end up paying 20% of the amount demanded. He stated that he paid the money and left immediately to return to Saudi Arabia. His family moved to another address 15 kilometres away from their previous one. On his return to Saudi Arabia, he received another job offer but was not permitted to take it up because of rules relating to foreign workers in Saudi Arabia.

[10] In July 2001, the appellant's mother died in New Zealand where she had come to live with two of her three daughters. The appellant obtained a limited purpose visa to travel to New Zealand to attend the funeral. While he was in New Zealand, he claimed that his eldest daughter had been detained by the police overnight following a bomb blast at the airport. He also stated that the LTTE had located his wife while he was in New Zealand and were demanding that she pay money to them.

[11] After his mother's funeral, the appellant discussed his options with his sisters and brother-in-law who live in New Zealand and then concluded he should lodge an application for refugee status. The Authority did not accept the appellant's credibility in respect of the claim that his daughter had been targeted

for recruitment into the LTTE, nor that the appellant had been subjected to extortion at the hands of the LTTE in the past. The situation in Colombo and across Sri Lanka, applying at that time, was taken into account by the Authority.

THE APPELLANT'S SECOND CLAIM FOR REFUGEE STATUS

[12] Since the first appeal was dismissed, the appellant states that circumstances have changed in Sri Lanka such that a second claim is based on significantly different grounds.

[13] The differing grounds he puts forward are that since 2004, the Karuna group (a group that has split off from the LTTE) have visited the home of his mother-in-law where his three children lived after the death of the appellant's wife. They had attempted to extort money from the family as well as enquiring as to the appellant's whereabouts. He claims that his mother-in-law had told him that his daughters had been threatened with enforced recruitment into the LTTE and the Karuna group. She said that since 2005, the Sri Lankan police had visited the home on numerous occasions to enquire as to his whereabouts and threatened that they would kill him as they considered he was a terrorist. He also considered that, as he had misplaced his NIC card in New Zealand, and had been living overseas for several years, he would be at significant risk, on return, through his inability to produce the required card.

[14] Underpinning these more specific claims of changed circumstances, he claimed that the situation in Sri Lanka had changed dramatically since the time when his first appeal was dismissed and the ceasefire agreement (CFA) was then operative. He claimed that at the present time, there was virtually a full resumption of conflict between the LTTE and the Sri Lankan government forces. This caused a vastly heightened level of risk to all Tamils, including those who were validly able to remain in Colombo.

CONCLUSION ON JURISDICTION

[15] The resumption of hostilities, confirmed in the country of origin information (COI) (particularly as it relates to the predicament of Tamils in Colombo), together with the level of interest shown in the appellant and his family by the Sri Lankan

police and a group who the appellant presumes are associated with the Karuna group in Colombo, shows, in its totality, the requisite change in circumstances in Sri Lanka.

[16] The Authority is satisfied that there has been a change in circumstances in Sri Lanka and agrees with the conclusion reached by the RSB on this same issue. In this situation, the Authority has jurisdiction to determine the merits of this second appeal.

THE APPELLANT'S CASE

[17] Having established jurisdiction to consider the appeal, what follows is a summary of the evidence given by the appellant at his second appeal hearing. The credibility of that account is then assessed.

[18] The appellant's family now consists of two older brothers and four older sisters. The eldest brother was, until recently, based in Sri Lanka but moved to Dubai, in July 2007, where his son works. This brother had few problems with the LTTE or the Sri Lankan authorities until very recently but has regularly travelled outside Sri Lanka to avoid the possibility of trouble.

[19] The appellant's next brother lives in Canada where he has been for some 20 years. His eldest sister (S1) lives in Australia. She has been outside Sri Lanka for some 25 years. The next eldest sister (S2) has also lived in Australia for more than 10 years. The next sister (S3) lives in New Zealand with her husband, who obtained refugee status some 10 years ago. They live here with their family. The final sister (S4) also lives in New Zealand and has been here for some seven years. Her husband was an Assistant Superintendent of Police who was killed in a bomb blast in 1998. They have four children who all live in New Zealand.

[20] The appellant's wife died of cancer some two or three years ago and their three daughters, D1, D2 and D3, are aged between 16 and 24. All three had lived with their maternal grandmother in Colombo until recently. At this time, the two elder daughters live with friends in Colombo to avoid targeting and harassment by both the Sri Lanka authorities and LTTE/Karuna faction groups who regularly visited the home of their maternal grandmother. D3 remains with her grandmother.

[21] The appellant is in telephone contact with his daughters on a weekly basis and also regularly with his mother-in-law. The mother-in-law advised that nowadays the local police come to her house regularly checking on the family and asking for the appellant. Often they will come at midnight or 1am. This has continued since 2005, but in recent times the visits have become more regular and sometimes the police will come more than once a night.

[22] The mother-in-law also reports that there are visits requesting money and causing harassment to the family by people she suspects are members of the Karuna group. It was particularly because of these visits that the two older daughters have gone into hiding. The appellant claimed that these visits became more regular from approximately April or May 2007. The group always asked where the appellant was because they wished to kill him or extract money from him. The visits from the Sri Lankan police were accompanied by requests to see the appellant himself, claims that he was a terrorist and that he would be killed on return.

[23] The appellant claimed that the same people, who it is presumed are from the Karuna group, commenced their visits to the family in 2003/2004 when his wife was still alive and, at that time, during one of the visits, out fear she had paid money to them. After her death, no money was available from the daughters but the visits continued as the group wanted to obtain money from the appellant or otherwise to maltreat him.

[24] He claimed from the telephone calls from D1, she had been harassed at the local bus stop and place of work and, as a result of that, had been forced to leave her job in February/March 2007. She had also been asked to join the Tamil terrorist group by a group of people in civilian clothes. D1 did not know for sure that they were from the Karuna group, but that was her presumption. When it was put to the appellant that the Karuna group had predominantly been a group that operated in the east and were now virtually eradicated by the activities of the SLA, the appellant replied that there were many supporters of this group in Colombo and that his daughter had only managed to avoid these people by going into hiding and giving up her employment. However, they continued to visit the mother-in-law's home, seeking out all members of the family.

[25] The appellant considered the reason this group kept returning was because they wished to find him and kill him, as the family had paid them, under extortion, in the past. In addition, they knew that the appellant himself had been a virulent

opponent of Tamil separatist groups, particularly following the death of his brother-in-law in a bomb blast.

[26] Since the death of his wife, the reports to the appellant were that there had not been any more demands for money but to find the appellant himself.

[27] The appellant stated that he did not know the group who had targeted the family personally and that his daughters had not told him whether it was the same people who always came asking for him.

[28] In addition, the appellant claimed while he had a valid Sri Lankan passport, his NIC identification card, a copy of which is held on the RSB file, had been lost somewhere in Auckland and thus, if he was returned, he would not have a valid NIC.

[29] In close questioning on the issue of this card, it was ascertained that the appellant had indeed seen the card on the file of one of his previous lawyers, some four or five years ago. However, when his file had been sent to the offices of his current representatives, the identification card was missing.

[30] After discussion with the appellant and counsel on this point, it was agreed that between them they would undertake a detailed search for the card by contacting all of the previous representatives of the appellant and trying to track down whether the card was held on any of the files or in the records of the several firms and organisations with whom he had contact for the purpose of representation in Auckland. Counsel and the appellant undertook to carry out this search over a period of three to four weeks and to report to the Authority with the results of their search and details of how that had been carried out.

[31] In respect of the card, it was ascertained and confirmed by translation from the interpreter, that it stated the appellant came from Colombo and that it was dated in 1996. It recorded his correct date of birth and had no expiry date, so therefore, if the original was found, the appellant agreed it could be validly used.

[32] The appellant claimed that the risks to him on return as a Tamil without an NIC were significant at the current time. Even though he had a passport and a copy of the NIC, he could not readily obtain a new NIC without putting himself at risk from the Sri Lankan authorities.

[33] In respect of his passport, it is noted that it has been renewed by the Sri

Lankan consulate in Sydney for a period of five years to expire in May 2008. The appellant stated that he had sent his passport to a niece in Sydney who carried out the renewal for him on the basis of forms that he had completed and posted. No problems at all arose in this renewal.

[34] Additional problems predicted by the appellant were that at the Colombo airport, it would become known that he had come from overseas where he had been for many years. By having no NIC, customs officers would rigorously question him and detain him where he would be severely maltreated because he would be presumed to be a terrorist. He claimed that when the authorities looked at his passport, they would note he had lived overseas for many years without a valid visa to remain in New Zealand. In that situation, he considered it would be presumed that he had been seeking refugee status in this country and that would create a lot of problems for him.

[35] The appellant confirmed that both D1 and D2 had identification cards, which they had obtained through their work, and that his mother-in-law also had a valid identification card and household registration certificate which, he presumed, would have included his daughters.

[36] When asked why there would be any difference between his own return to Sri Lanka and that of his brother-in-law who went back and fourth to Dubai, the appellant claimed that his brother-in-law would be viewed as a person returning after short holidays whereas, in his own case, because of the long absence, lack of identification and household registration, he would be rigorously questioned and detained.

[37] The appellant claimed it would be very difficult for a Tamil person, such as himself, to get a new NIC because Tamils are not respected by the police in Colombo and were looked upon as terrorists. He also feared that he could be sent back to Jaffna as part of recent projects by the Sri Lankan authorities in Colombo to return Tamils to the north where they had had an association with those districts in the past. He agreed that it had been 24 years since he had spent time in Jaffna.

[38] The appellant gave a detailed account of how he had gone about obtaining his NIC card in 1996 and the requirements at that time for him to provide information relating to his background from people who could authenticate it in Jaffna. He explained that the process, even in 1996, took some two to three months.

RESULTS OF SEARCH IN AUCKLAND FOR THE NIC CARD

[39] In a letter dated 27 November 2007, counsel advised:

- “4. We have contacted all counsel in seeking a response concerning the original Certificate of Identity. No counsel can remember having retained the card and we wonder whether it is actually still with the Refugee Status Branch. Our client gave evidence that he believes he last saw it on his previous counsel’s file, but the document is unable to be located counsel and unfortunately the passage of time has meant that previous counsel cannot fully recall what might have happened to the document. It is certainly missing.
5. Its significance is the fact that this leaves this client at real risk because he does not have this document which is required to prove his identity. He cannot receive another identity document here in New Zealand, he must go to a police station in Sri Lanka to receive another CID and once that happens, he is then at risk of being questioned as to why he does not have the document and where he has been all these years. The police will then know he has returned from overseas and we have already referred to the risk of kidnappings or returned Tamils who are perceived as being wealthy and can be held to ransom.
6. Our client fears ever having to go to a police station because it is also the police who have been harassing his family.”

[40] Additional country of origin information was also provided with this letter and has been noted.

SUBMISSIONS AND COUNTRY OF ORIGIN INFORMATION

[41] Shortly before the hearing, Ms Curtis had submitted a considerable amount of country of origin information. All of that information has been taken into account by the Authority in reaching its conclusions. Additionally, she referred to comments in the paper completed by the Australian charity "Hotham Mission (Asylum Seeker Project)", 15 November 2006, which is set out between pages 674 and 729 of the appellant's file. Specifically, from that report (704) at p27 in relation to checkpoints, the Authority was asked to note:

"The key concern for individuals at checkpoints relates to:

- ethnicity
- place of birth
- suspicion of being connected to the LTTE
- not having an ID card
- address
- not speaking Sinhalese."

[42] Ms Curtis submitted, therefore, that the lack of a card and the lack of household registration requirements (also referred to in the Hotham Report), would place the appellant in a position where he would be at risk in the hands of the Sri Lankan police who would demand his identification at checkpoints or elsewhere.

[43] In addition to referring the Authority to the country of origin information, counsel agreed that guidance could also be obtained by reference to a recent UK "Country Guidance" decision in *LP (LTTE area - Tamils - Colombo - risk?) Sri Lanka* CG [2007] UK AIT 00076.

THE ISSUES

[44] 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."

[45] 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

[46] The appellant's case in relation to his second appeal is strongly dependent on information he has received from Sri Lanka through his mother-in-law and his adult daughters. Whilst the credibility of his claims in relation to earlier extortion and visits from the LTTE was rejected in the first decision, the evidence given before this Authority was consistent, particularly with country of origin information, and was not implausible or significantly at variance with the up to date reports on conditions for Tamils in Colombo. In this situation, there was no basis for disbelief for the purposes of this second appeal.

[47] The first limb of the appellant's claim was that he would be at risk of detention at the airport because of his lack of an identification card (NIC) and that this would lead to him being detained and severely maltreated in accordance with the impunity with which the Sri Lankan police treat Tamils, particularly those who have been living illegally out of the country for many years.

[48] The appellant, however, would be returning on a valid Sri Lankan passport with no past record of involvement with the LTTE or any police record of any nature that would be likely to be on any computer system held at the airport. In addition to that, he has the capability of taking with him a copy of his NIC and the possibility of the actual card itself, if a continuing search in Auckland is able to bring the card to light.

[49] The determination in *LP* was concluded after an extremely detailed analysis of country of origin information up to late 2006, including reports from experts. That determination concluded that there were some 12 (non-exclusive) factors that needed to be taken into account in assessing the risk on return for Tamils. Those factors, set out at paragraph 161, stated:

- “(i) Tamil ethnicity.
- (ii) Previous record as a suspected or actual LTTE member or supporter.
- (iii) Previous criminal record and/or outstanding arrest warrant.
- (iv) Bail jumping and/or escaping from custody.
- (v) Having signed a confession or similar document.

- (vi) Having been asked by the security forces to become an informer.
- (vii) The presence of scarring.
- (viii) Returned from London or other centre of LTTE activity or fund-raising.
- (ix) Illegal departure from Sri Lanka.
- (x) Lack of ID card or other documentation.
- (xi) Having made an asylum claim abroad.
- (xii) Having relatives in the LTTE."

[50] The only possible factors relative to this appellant are the first, "Tamil ethnicity", the 10th, "Lack of ID or other documentation" and the 11th, "Having made an asylum claim abroad". As stated, the lack of an ID card would not be a comprehensive failing on this appellant's part as he would be able to produce a copy of it, if he is unable to find the original before his return. In addition, there is no reason why there would be evidence that he has made an asylum claim abroad, unless he disclosed it himself.

[51] From careful analysis of the information in the COI, and *LP* decision, before the Authority, it is satisfied that there is not a real risk that this appellant would be detained at the airport. Indeed, there appears to be no risk that his name would be on any "black list" at the airport and he holds a valid passport.

[52] The appellant is thus in the situation where he would move into Colombo, his home district, and reside with his mother-in-law and daughter (or possibly with his brother, currently in Dubai). He is thus not in a situation where he has no support system or address that he could go to in Colombo. A copy of his NIC clearly shows that he is from Colombo and that was established in 1996. Any risk of his being returned when stopped at a checkpoint and sent to Jaffna is highly remote.

[53] The remaining ground, however, was the risk to him on return to the home of his mother-in-law and daughter. The evidence provided by the appellant in this regard has been accepted as largely credible, although it is based almost totally upon his reports and the information passed to him by his family. That information is, however, consistent with the country of origin information. Although it is noted that the Karuna faction has been largely defeated militarily in the east, there is evidence of continuing pockets of support and that this group, or supporters of them, are still active in Colombo. Based on the regularity of the interest shown in the appellant and his family, the Authority is satisfied that there is a real chance that the appellant would be discovered within a relatively short time at the home of his mother-in-law. At that time, there is a real chance that he would be subject to

extortion and serious maltreatment or death for the failure to pay up immediately and/or in the past.

[54] The difficult question to assess in this case is whether the group or groups who have been regularly visiting the home are purely opportunist extortionists or whether they are, in some way, associated with Tamil separatists and thus the persecution predicted would, at least partly, be for a Convention reason. It is at this point that the benefit of the doubt must be given to the appellant based on the rest of his evidence being accepted as credible in this appeal. If the appellant was discovered by the group who have been regularly visiting his home and who are claimed by the family as most likely to be from the Karuna group, his failure, or the failure on the part of his family to pay previous demands for money, would be seen as a contributory factor, as antipathy towards Tamil separatism. The Convention reasons of imputed political belief and Tamil ethnicity are thus found to be contributory factors to possible criminal extortion.

[55] Thus, assessing the full profile of this appellant against his predicament and the totality of the objective evidence available, the Authority is satisfied, perhaps by a somewhat narrow margin, that there is a real chance of him being persecuted by non-state actors on return. The country of origin information indicates that he would not be able to access meaningful state protection. Constant surveillance and harassing of his family in Colombo by the Sri Lankan police is consistent with the objective evidence and also consistent with the conclusion that he would not be able to access state protection. In this situation, both of the required elements for establishing persecution in non-state actor cases has been established.

CONCLUSION

[56] On the first principal issue, the Authority finds, that objectively on the facts as found, there is a real chance of the appellant being persecuted if he returns to Colombo, Sri Lanka. There is no internal protection alternative available to him as clearly his identification documentation sets out that he is from Colombo. The reasons for the appellant being persecuted are, at a reasonable contributory level, on account of his race and imputed political opinion.

[57] For the above reasons, the Authority finds that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

"A R Mackey"
A R Mackey
Chairperson