

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76247

AT AUCKLAND

Before: A N Molloy (Chairperson)
B L Burson (Member)

Counsel for the Appellant: D Mansouri-Rad

Appearing for the Department of Labour: No Appearance

Date of Hearing: 25 & 26 August 2008

Date of Decision: 12 November 2008

DECISION DELIVERED BY B L BURSON

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

INTRODUCTION

[2] The appellant claims to have a well-founded fear of being persecuted if returned to Sri Lanka on the basis that he is suspected of associating with the Liberation Tigers of Tamil Eelam (LTTE) and fears death at the hands of the Sri Lankan Army (SLA) or other agents of the Sri Lankan state as a result.

[3] What follows is a summary of the appellant's evidence. An assessment follows thereafter.

THE APPELLANT'S CASE

[4] The appellant was born in the early 1980s in X, a small town in northern Sri Lanka. He is a Tamil. He has four siblings comprising one older brother, two

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older sisters and a younger sister.

[5] The appellant's early life was uneventful for present purposes. His family suffered the usual deprivations associated with the civil war in Sri Lanka. In particular, when the appellant was about four years old, he witnessed his father being beaten by members of the SLA.

[6] In early 1997, the SLA surrounded X and rounded up the villagers, all of whom were accused of supporting the LTTE. As part of this operation, a number of soldiers came into the appellant's family home and began assaulting the appellant's older brother and two older sisters. The soldiers said that they had received specific intelligence that these siblings had been providing food and shelter to the LTTE. These siblings were detained and, along with 10 or 12 other young adults from X who were also in their early 20s, were taken to a nearby army camp.

[7] Five days later, the appellant's older brother was released. The SLA had made enquiries and ascertained that he was employed during the day, [...] with the appellant's father. The SLA was satisfied that he could not have given assistance to the LTTE as their intelligence had suggested. As a condition of his release, the appellant's brother was told that he should report to the army camp on his own to provide them with assistance. The appellant's older brother informed his parents of this request. The appellant's parents were concerned for the appellant's older brother's safety if he went alone to the army camp as many killings and kidnappings were taking place at that time. The appellant's father decided that they would all go to the army camp and, the following day, the appellant, along with his parents, older brother and younger sister went to the army camp. The soldier to whom they reported asked the appellant's older brother why he had brought his whole family. His father informed the soldier that this was because they were worried for his safety. The soldier simply told them to go away and that the appellant's brother should report to them if they required him to do so in the future.

[8] The appellant's two older sisters remained in detention and were taken to a prison in Colombo. The appellant's father's attention then turned to securing the release of his two daughters. He engaged the services of a lawyer who, after nine months, managed to have them released. They were not charged with any

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offence but, thereafter, whenever there was a roundup of the village, the appellant's older sisters were invariably detained for further questioning.

[9] Following his sisters' release after their 1997 detention, the appellant also began to attract the attention of the SLA. His school was located close to an army camp and he was questioned by the army as he approached school. Although the frequency varied he was stopped on numerous occasions – as often as two or three times a week. He was questioned as to whether his family had been providing any assistance to the LTTE or whether he knew any LTTE members. The appellant denied any knowledge of these things. The appellant was detained and questioned in this fashion until the ceasefire was signed with the LTTE in 2002.

[10] Ordinarily he was not mistreated, simply questioned. However, on one occasion in 2000 he was randomly stopped by a SLA patrol which happened to be passing by. This time, when he denied any involvement with the LTTE, he was beaten by the patrol to the point of unconsciousness. Nearby persons who witnessed what was happening came and tended to him after the soldiers had left the scene. He was taken to his family home, where he recovered. He sustained no significant injuries.

[11] Following the ceasefire in 2002, the LTTE began regularly sending representatives to X and to his school. They were told that, as Tamils, it was their duty to support the LTTE. Specifically, they should assist the LTTE with things such as decorating the village on special commemorative days as well as providing food and accommodation. Four boys in the appellant's class became involved with the LTTE. These boys began pressuring the appellant and other students to join the LTTE but the appellant resisted these overtures and did not become involved.

[12] In July 2004, the appellant left school and began working [...] for AA, a friend from X. AA had his own [...] business and employed other young boys from X, including BB, CC, DD and EE.

[13] Approximately one month after joining AA's business, the appellant came to learn that AA and BB were helping the LTTE. He had noticed that sometimes after work, when the boys were socialising together, that AA and BB would absent themselves from the group for a short period of time. Initially, they never said

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where they were going but eventually they approached the appellant and told him that they were helping the LTTE. They said that he should come along and help them on their special days like they were doing. Although unsure, the appellant believes that AA and BB would also have raised the issue with EE, DD and CC.

[14] The appellant told them that he did not mind if that was what they wanted to do but he had no intention of doing so. They replied by saying that he should not hold such a view. They stressed that they were all Tamils and, as Tamils, they should help the LTTE. Over the next few days the appellant came under more pressure from AA and BB to join the LTTE. Each time they asked him and told him he should join the LTTE, the appellant refused. He told them that he was too scared and did not want to get involved because his family had suffered greatly in the past, even though they had no association with the LTTE.

[15] Although the appellant continued to work for AA after this he noticed that both he and BB became more absent towards him. They would not speak to him as fairly as they did before. Following the collapse of the ceasefire towards the end of 2005, the appellant became aware that killings and kidnappings of people suspected of helping the LTTE resumed. He began reducing the amount of time he worked with AA and BB but as this was his only source of employment he could not cease the work entirely.

[16] Early in September 2006, AA was killed, while he was in a shop, by unknown persons but thought to be associated with the SLA. On the day of AA's death, the appellant heard from villagers that AA had been killed while travelling home from work. The appellant went home and considered whether or not he should go to the shop. Approximately half an hour later, as he was considering the pros and cons of doing so, some villagers came to his home and informed him they were going to look at the body. Emboldened by the fact he would be going with a group of villagers the appellant decided to go to the shop.

[17] When he arrived there a crowd of around 200 people had already gathered outside the shop including BB, CC, DD and EE. Approximately 15 minutes later, police and SLA personnel, along with a judge, with responsibility for compiling the official report into the killing, arrived at the scene. After they had finished taking measurements and notes, the appellant together with BB, CC, DD and EE along with one of AA's relatives, placed AA's corpse into the shop owner's car for

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transportation to the hospital. The police, judge and army personnel were all present as they did this

[18] The days that followed AA's death became a topic of conversation in the village, the consensus being that anybody who was associated with AA was in danger and would have to be careful. Approximately a week later and fearing for his son's safety, the appellant's father arranged for him to go to the uncle's home in Y. While there, the appellant remained in contact with his father and heard from him that BB, CC, DD and EE had left X and gone into hiding. He then heard from his father, approximately 10-12 days later, that BB had been killed.

[19] After BB's death the appellant's father decided that the appellant should leave the area for Colombo. In order to do so the appellant needed the head of the village to provide written permission to travel which would then be taken to the army for a pass to be issued. Initially, the head of the village declined to give permission as he was concerned for the repercussions for him because of the suspicion now attaching to the appellant. However, the appellant's father eventually managed to persuade him to do so and the appellant and his father went to Jaffna from where the appellant was due to travel by boat. At the final checkpoint the appellant's identification card and written permission to travel were taken by the soldier on duty and his details checked. The soldier returned a short time later and told him that he would not be permitted to travel that day but instead had to report to a particular officer in the army camp the following day.

[20] The following day the appellant, along with his father, went to the army camp and reported to the particular officer. This officer told him that if he wanted to travel to Colombo, as he wished, he should tell them about the names and identities of the LTTE people he knew. The appellant did not say anything. The officer returned the appellant's identification card to him and said that he would not be permitted to travel unless he gave this information.

[21] The appellant returned to Y where his uncle lived. His father, who was well off, approached someone that he knew and paid this person some money. This money was then used to bribe officials to enable the appellant to travel. This process took some time and it was not until mid-2007 that the appellant was finally able to depart from Jaffna. He travelled with his father and they encountered no problems on the journey.

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[22] Approximately a week after arriving the appellant and his father were stopped by an army patrol. The appellant was detained and taken to a local police station. At the police station he was taken to a room where he was interrogated and beaten. He was questioned about what he was doing in Colombo and accused of supporting the LTTE. The appellant denied all these accusations. After being beaten for approximately 20 minutes the appellant was taken to a cell where he remained for the next 16 days. During this time he was not beaten further but was repeatedly threatened with harm, whenever they brought his food.

[23] The appellant's father, who had remained in Colombo, engaged the services of a lawyer called [...] who managed to have the appellant produced before a court. On [...] the appellant was brought before a court where he was bailed. He was required to report to the police station on the last Sunday of every month.

[24] The appellant told his father that he no longer wished to remain in Colombo. He looked Tamil and could not speak Sinhalese. As such, it was dangerous for him to remain in Colombo. He felt he would be safer in the north. The appellant's father set about obtaining a pass for them to travel back to the north. This was not a problem as the authorities were mainly concerned with travel from the Jaffna region to Colombo, not the other way round.

[25] The appellant and his father returned to X where they stayed for approximately one day. From there they next travelled to Z to a home occupied by a cousin of the appellant. Z is located approximately 50 minutes drive by bus from X and approximately half an hour's travel from Y. The appellant remained there for approximately three months.

[26] In November 2007, Z was surrounded by the SLA. Soldiers came into the cousin's home. They questioned the appellant and took his identity card. They told him to go and wait outside at a temple in the village. The appellant went to the temple and noticed that there were approximately 150-175 people gathered there. They were made to queue in front of an army vehicle in which an officer was seated. A soldier called out names from the identification cards which had been taken and those whose names were called were made to go and stand in front of the officer. If the officer shook his head then that particular person was placed in the back of the army vehicle. The appellant's name was called and he

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was one of 20-25 people who were placed in the vehicle.

[27] The officer told them that they were all involved with the LTTE. The soldiers began hitting them and pushing them around. They were then taken to a nearby army camp. At the camp the officer informed them that anybody who was willing to tell them who were the LTTE people in the area would be released. The soldiers then began individually pulling people out of the group. When it was the appellant's turn he was questioned as to what he was doing in Z. He informed the soldiers that he had come there to help his cousin, who lived there.

[28] After being detained for approximately five or six hours the appellant's cousin arrived and began pleading with the soldiers at the camp to release the appellant. He told the soldiers that the appellant had come to Z at his request to help him. Eventually his cousin managed to persuade the sceptical soldiers that this was the truth and the appellant was released.

[29] He went with his cousin back to the cousin's house. The cousin telephoned the appellant's father and told him what had happened. The appellant's father began making arrangements for the appellant to leave the area. The appellant's father said that he would try and make arrangements to send the appellant overseas. This took some time but in mid-December 2007 the appellant finally left Z. He travelled with his father to Colombo arriving two days later. Again they encountered no problems on the way. In Colombo his father obtained for him a genuine Sri Lankan passport which contained his own name and details. His father made all the necessary arrangements to enable him to travel from Z to Colombo and to obtain the passport.

[30] In mid-January 2008, the appellant and his father went to the airport where they were met by the agent the father had engaged. The agent told him to follow his instructions and do whatever he was doing. The appellant passed through normal immigration control without any difficulties. He then travelled to a south-east Asian country which he now understands to be Thailand. Here the agent took his Sri Lankan passport and issued him with a boarding pass only. He then travelled to New Zealand.

[31] Upon arrival in New Zealand the appellant was detained overnight and then placed into the Mangere Accommodation Centre. He telephoned his sister. On 2 February 2008, a refugee status officer completed a refugee claim form at the

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Mangere Accommodation Centre. The appellant stayed at the Mangere Accommodation Centre for approximately one month and then moved to live with his sister, who had come to New Zealand with her husband in mid-2005.

[32] Since arriving in New Zealand the appellant has had periodic contact with his father by telephone. Communication is difficult because the army controls the communications and sometimes he cannot get through. However, the appellant was told by his father that approximately two months after he left, SLA soldiers came to the home enquiring as to his whereabouts. The appellant's father told him that he had gone overseas. As far as he is aware this is the only visit to the family home since he has been in New Zealand.

Evidence of FF

[33] FF, the appellant's younger sister, gave oral evidence before the Authority.

[34] She confirmed the detention of the appellant's older brother and older sisters in 1997 and that she had gone with the appellant and their parents to the army camp. She confirmed that following this incident, the appellant was regularly stopped and questioned when he went to school and that in 2000 he was beaten by the SLA. She confirmed that following the peace agreement the appellant would often come home and tell the family that the LTTE had started coming to his school and that he had been asked to do various activities for them.

[35] She came to New Zealand in 2005 but has remained in periodic contact with her parents. She stated that she had been informed by her parents that her brother's friends, AA and BB, had been shot dead in 2006. She confirmed that she had been made aware from her father that following the deaths of the two friends the appellant went into hiding and was eventually brought to Colombo by her father but that he had been detained in Colombo. She also heard that he had returned to Jaffna, but had been hiding in Jaffna at relatives' houses.

[36] She also said that during this time her elder brother had been detained and questioned by the SLA and that her father was considering sending him abroad because he was worried about his safety.

[37] She told the Authority that towards the end of 2007, she was told by her father that he wanted to send the appellant overseas because he was worried

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about his safety. They did not, however, discuss him coming to New Zealand. The first she knew of this was when the appellant telephoned her in February 2008 to say that he was in New Zealand at the Mangere Accommodation Centre.

[38] Finally, she confirmed she received a document from their father, regarding the appellant's arrest in Colombo, within a month of him arriving in New Zealand.

Documents and submissions

[39] On 21 August 2008, the Authority received from Mr Mansouri-Rad his memorandum of submissions. Accompanying these submissions were:

- (a) A further statement from the appellant in Tamil;
- (b) A statement from the appellant's father, with a translation thereof;
- (c) A letter dated 15 July 2008 from [...], a lawyer practising in Colombo ("the lawyer's letter"); and
- (d) A letter dated 27 December 2007 from the Sri Lankan Police ("the police letter").

[40] On 22 August 2008 the Authority received from Mr Mansouri-Rad:

- (a) A translation of the appellant's supplementary statement;
- (b) A brief of evidence signed on 22 August 2008 by the appellant's younger sister;
- (c) A certified translation of the appellant's father's statement; and
- (d) Certified copies of death certificates for AA and BB, together with translations thereof.

[41] At the conclusion of the hearing Mr Mansouri-Rad addressed the Authority. He submitted that the appellant had given consistent evidence throughout his claim for refugee status and that his account had been significantly and substantially corroborated by his sister's evidence. He submitted the appellant should be found credible. He also submitted the appellant faced a well-founded fear of being persecuted and highlighted the following factors:

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- (a) He was a Tamil from the north of Sri Lanka;
- (b) He was of fighting age;
- (c) He was an asylum seeker who would be returned undocumented to Sri Lanka;
- (d) He was a bail jumper; and
- (e) There was a suspicion of LTTE involvement as evidenced by the initial reluctance of the head of the village to provide him with a letter for travel and his problems in boarding the boat in October 2006.

[42] On the morning of 26 August 2008, Mr Mansouri-Rad submitted three pieces of country information from Tamil.net – a Tamil website – regarding the killings of civilians in the North of Sri Lanka and the arrest of a man for walking near to an army camp during the hours of curfew.

[43] Although the appellant's profile was not high it was sufficient, against a steadily worsening human rights situation, to create a well-founded fear of being persecuted. Mr Mansouri-Rad went so far as to submit that having regard to the worsening situation in Sri Lanka, all young Tamils from the north face continuous harassment and risk extra-judicial execution on an ongoing basis and thus ought to be recognised as Convention refugees.

[44] On 23 September 2008, the Authority served Mr Mansouri-Rad with three articles of country information relating to the procedures on arrival for person removed from other countries. Mr Mansouri-Rad's submissions on this material were received on 26 September 2008.

THE ISSUES

[45] 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."

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[46] 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

[47] The appellant was closely questioned by the Authority for one and a half days. Having seen and observed both the appellant and his sister, the Authority partially accepts the appellant's credibility. Specifically the Authority accepts as credible the evidence as to the:

- (a) Arrest and detention of the appellant's siblings event in 1997;
- (b) Subsequent questioning of the appellant following his sister release from detention in 1997;
- (c) Assault on the appellant in 2000;
- (d) Approaches to the appellant between 2002 and 2005 to become involved with the LTTE, both by LTTE persons who came to his school and by AA and BB;
- (e) Death of both AA and BB in 2006 in the circumstances he described; and
- (f) The appellant's going into hiding and abortive attempt to go to Colombo in 2006.

In relation to all these matters, his evidence in this regard was clear, consistent spontaneous and compelling.

[48] However, the Authority has substantial reservations about the credibility of the remainder of the appellant's story. In particular, it rejects his account of having

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returned to Colombo in 2007 and his subsequent detentions in Colombo and Z. The Authority's reasons for having rejecting these elements of his claim are as follows.

The unsatisfactory nature of the documentary evidence

[49] The Authority has no doubt that both the lawyer's letter and the police letter are not genuine documents. There are substantial problems with both.

The lawyer's letter

[50] The lawyer's letter is inconsistent with the appellant's evidence as to what happened after his claimed arrest. The appellant was clear that he only ever went to the court on one occasion following his detention in 2007. This is reflected in the police letter. However, the lawyer's letter asserts that the appellant made two court appearances. The appellant could offer no convincing explanation for this discrepancy.

The police letter

[51] Second, the letter from the police purports to be issued by the Senior Superintendent of the 'Counter-subversive Unit' of the Sri Lankan police. It states that the appellant was arrested and brought before a magistrate on the date the appellant claimed. It further states that he was released on bail, with a monthly reporting condition. It ends by saying that the Sri Lankan authorities have no idea as to the appellant's present whereabouts.

[52] There are substantial issues of concern regarding this letter. First, it is unclear why such a letter would be written at all as this information would be a matter of official record. Second, the letter does not appear to be an internal letter that the appellant has somehow managed to obtain, but rather an open letter addressed "to whom it may concern". Quite why the counter-subversive unit should do this has not been plausibly explained. The appellant suggested that the authorities wrote this for his benefit to show that if he was ever stopped again by anybody in Colombo that he had been released and bailed. Yet on the appellant's own evidence, not only had he been released and bailed, but he had also failed to report in accordance with the court order. Indeed, his claimed 'bail-jumping' is one

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of the factors upon which he relies to assert he has a well-founded fear of being persecuted. It is nonsensical to the point of absurdity that the senior superintendent of the counter terrorist unit would seek to help the appellant if these were his actual circumstances.

[53] Furthermore, the appellant and his sister were adamant that this letter was received only after the appellant had arrived in New Zealand. The appellant explained that the refugee status officer who completed his Confirmation of Claim form asked him whether or not he was going to get any documents and the appellant replied that he would get this letter from his father. However, the letter is dated December 2007, that is, a number of weeks *prior* to his arrival in New Zealand on 30 January 2008.

[54] Moreover, on 1 February 2008, the appellant completed a Confirmation of Claim form with the assistance of a refugee status officer. In answer to the officer's question regarding providing further evidence to corroborate his claim, the appellant stated that, at that time, there was a letter already in existence and at his sister's house. This implies that he must have been aware of the letter's existence prior to his arrival in New Zealand, contrary to the evidence he and his sister gave.

[55] For these reasons the Authority finds both documents to be false. This casts a deep shadow over his claim to have ever been detained in Colombo in mid-2007. It also casts a shadow over his claim to have been detained in Z in late 2007 because, on his own account he only went to Z to hide as a result of his claim to have failed to report as requested in Colombo.

[56] Had the matter rested there, the Authority may have been left in some doubt as to these events and found that this was simply a misguided attempt by the appellant's father to prove events which did happen but in respect of which the appellant had no documentary proof. However, when the problems with the documentary evidence are considered alongside the Authority's following concern regarding the appellant's account of events surrounding his decision to 'jump bail', the Authority has no doubt that these events have no foundation in fact.

Implausible and vague evidence

[57] The quality of the appellant's evidence in relation to his claimed bail jumping stands in stark contrast to the compelling, coherent and plausible account he gave

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in relation to the events in his life prior to 2007. The appellant was noticeably vague when discussing the decision he claimed to have taken, to return to Jaffna in breach of his reporting conditions. When first asked, he claimed to have no idea about the consequences of failing to report, asserting simply that his father made all the arrangements. The appellant could not initially say what those arrangements were although later stated he assumed his father may have paid money through the lawyer to make the problem 'go away'.

[58] Furthermore, the appellant stated that the topic of him becoming a bail jumper was not discussed at any great detail between him and his father in the week following his bail. Rather, he stated, that once he mentioned his desire to return to the north, his father simply began making the travel arrangements. The appellant believes his father would have made the necessary arrangements to pay a sufficient bribe to ensure that the appellant's failure to report was no longer a problem. Although nothing was said by the appellant's father to this effect, the appellant has no doubt that his father would have done so because his father was particularly concerned with his safety – after all this was, the appellant explained, the reason why his father had travelled with him to Colombo.

[59] This claimed acquiescence by the appellant's father, without discussion of the bail issue, is at odds with the impression he painted of his father as regards the degree to which his father became involved in decisions regarding the protection and safety of his children. It was his father who would not let his older brother go to the army camp alone. His father obtained legal representation for his elder sisters. In relation to his own situation, his father had obtained legal representation and he claimed that his father intended to remain in Colombo with the appellant for as long as was necessary to see if the problem in the north subsided or eased.

[60] The appellant's evidence that his father did not even raise for discussion or question the appellant's desire to leave Colombo in breach of his reporting conditions, and his failing to take any advice from the lawyers on the appellant's claims his father had obtained for him is fundamentally at odds with the picture painted of a man who micro-managed – as far as he could – of the situations of risk his children found themselves in.

Conclusion on credibility

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[61] For these reasons, the Authority only accepts those matters as set out in paragraph [47]. In short, it does not believe his claim to have returned to Colombo in 2007, to have been detained there and then 'jumped bail'. It does not believe that he had to go into hiding in Z or that he was detained there as he claimed. Nor does it accept, as claimed, that there have been visits by the SLA to the family home since the appellant left.

[62] The Authority finds that these are pre-planned embellishments made in arrangement with his father to facilitate the acceptance of the appellant's refugee claim against the backdrop of a worsening human rights situation. In saying this, the Authority does not doubt for a minute the presentation of these embellishments has been motivated by a genuine concern for the appellant's safety following the collapse of the ceasefire between the LTTE and Sri Lankan government in the context of a long-standing and brutal civil war.

[63] While the appellant and his father may be genuinely concerned about the appellant's safety, the Refugee Convention is objective in nature. Their fears must be well-founded. It is to this issue that the Authority now turns.

A well-founded fear of being persecuted

[64] In this case, the Authority is clear that, as at the time he left Sri Lanka, the appellant did not have a well-founded fear of being persecuted. Quite simply, this is because even allowing for the fact that the appellant was a known associate of AA and BB, it has never been suggested AA and BB were anything other than minor supporters of the LTTE. They were not full-time fighters and their involvement seems to be limited to providing assistance on their special commemorative days. Thus, the appellant's profile is of a very minor nature.

[65] This is reflected in the fact that there was no significant interest displayed in him by the authorities during his time in Jaffna, as a result of this association. There was never a visit to the family home. The one time when the authorities were definitely aware of his presence was when he reported to the army camp following the refusal by the soldier to let him board the boat. Yet he was not detained. He was simply pressured that if he wanted to travel he should tell the authorities what he knew. This suggests the minimum degree of interest in him.

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[66] However, it is necessary to consider Mr Mansouri-Rad's submission that even if that were the case then, the situation in Sri Lanka has now deteriorated to such an extent that the appellant is entitled to be recognised as a refugee. There are two elements to this. First, that as a young Tamil male of fighting age from the north being returned undocumented he would be at risk of detention and ill-harm upon arrival at the airport. Second, that even if he managed to get through the airport checks without suffering harm, the conditions in the north of Sri Lanka where he lives mean that there is a real risk of this happening upon his return to that region of the country.

The risk on return

[67] Country information makes clear that if returned from New Zealand to Sri Lanka, the appellant will be detained on arrival and questioned. First, he will be questioned by the authorities regarding his identity and place of residence. He may well be questioned about what he was doing overseas. The appellant's refugee claim is confidential and its fact and details will not be available to the Sri Lankan authorities.

[68] It is likely that he will then be questioned by the Criminal Intelligence Division in relation to whether there are any security related concerns surrounding the appellant in relation to the LTTE. This process will not reveal anything suspicious about the appellant such as might see him further detained and subjected to serious harm. He has no record of connection with the LTTE. There has been no interest displayed in him by the authorities at all since he left.

[69] In short, the Authority finds that there is nothing in the appellant's characteristics which mean that he faces a real chance of being persecuted as a result of any questioning of him upon arrival in Sri Lanka.

The risk to the appellant in the north

[70] The general situation in the north of Sri Lanka was recently reviewed by the Authority in *Refugee Appeal No 76193* (22 May 2008). It was noted at paragraphs [26]-[30] that there had been a significant deterioration in the security conditions in this part of the country following the collapse of the ceasefire between the government of Sri Lanka and the LTTE. In that decision, the Authority made

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reference to UNHCR guidelines issued in December 2006 which did not call for the recognition of all Tamils from the north as refugees. No new guidelines have yet been published by the UNHCR. The Authority further noted:

"[30] In her submissions, counsel noted the escalating nature of the conflict between government forces and the LTTE in the north. She quoted the following passage from the recent United States Department of State *Country Reports on Human Rights Practices 2007: Sri Lanka*, (11 March 2008) ("the DOS report"):

"In August government security forces expelled LTTE troops from the east. Military confrontations also occurred regularly in the northern districts of Mannar, Vavuniya, and Jaffna, [...] The government's respect for human rights continued to decline due in part to the escalation of the armed conflict. While ethnic Tamils comprised approximately 16 percent of the overall population, the overwhelming majority of victims of human rights violations, such as killings and disappearances, were young male Tamils. Credible reports cited unlawful killings by government agents, assassinations by unknown perpetrators, politically motivated killings and child soldier recruitment by paramilitary forces associated with the government, disappearances, arbitrary arrests and detention, poor prison conditions, denial of fair public trial, [...], infringement of freedom of movement, and discrimination against minorities.

The LTTE, which maintained control of large sections of the north, continued to attack civilians and engage in torture and arbitrary arrest and detention; denied fair, public trials; arbitrarily interfered with privacy; denied freedoms of speech, press, and assembly and association; and forced recruitment, including of children. The LTTE was also active in areas it did not control and during the year carried out at least one politically motivated killing in Trincomalee, a politically motivated suicide attack in Colombo, a suicide attack against a government army base near Batticaloa, a bombing of civilian shoppers in a suburb of Colombo, and bombings of civilian buses in the south.

...There were numerous reports that the army, police, and progovernment paramilitary groups participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity. The situation deteriorated particularly in the government-controlled Jaffna peninsula. By year's end extrajudicial killings occurred in Jaffna nearly on a daily basis and allegedly perpetrated by military intelligence units or associated paramilitaries. (sic)"

[71] In his written submissions Mr Mansouri-Rad refers to decisions of the Authority in *Refugee Appeal No 75897* (9 November 2007); *Refugee Appeal No 76006* (16 July 2007); and *Refugee Appeal No 76140* (30 November 2007). Mr Mansouri-Rad referred to the list of factors cited in *Refugee Appeal No 76140* at para [49] as being relevant generally to the assessment of risk to the appellant. These were listed as being:

- "(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.

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- (x) Lack of ID card or other documentation.
- (xi) Having made an asylum claim abroad.
- (xii) Having relatives in the LTTE."

[72] Of these, Mr Mansouri-Rad highlights factors (i) – Tamil ethnicity; (ii) – Previous record as a suspected or actual LTTE member or supporter; (iv) – Bail jumping and/or escaping from custody and (xi) – Having made an asylum claim abroad.

[73] As to these matters, the Authority does not accept the appellant's evidence of (iv). Furthermore, in relation to (iii), at no time has the appellant ever been accused or have a record of being a member or supporter of the LTTE. While his elder sisters have been subjected to continuing periodic brief detentions for questioning during round-ups following their release from lengthy detention in 1997, they have never been charged with involvement in the LTTE and the appellant has never claimed that he has had any problems since the collapse of the ceasefire as a result of the predicament of these sisters. At best (or worst), he is suspected of being friends with persons who provided assistance to the LTTE on an occasional basis during the ceasefire. In the context of the long-standing conflict in this part of Sri Lanka, many, if not most Tamils in the north, will know something about LTTE membership in their locality or of people who may have provided such assistance to the LTTE. The level of suspicion attaching to him is at the lowest end of the scale. These factors can therefore be discounted as being of little weight in the calculus of risk to the appellant.

[74] That leaves the appellant being a young Tamil male of fighting age living in the north of Sri Lanka. The Authority is not aware of any country information, and none has been cited, to establish that this group of Tamils presently face a real risk of being persecuted by these facts alone.

[75] In this regard, the Authority takes account of a report by the Law & Society Trust of Sri Lanka which provides some analysis of trends in the disappearances and killing of persons following the collapse of the ceasefire. The data-set used relates to 1,212 persons killed between 1 January and 31 August 2007. See – *Second submission to the Presidential Commission of Inquiry and public on human rights violations in Sri Lanka* Law & Society Trust (www.lawandsocietytrust.org). Significantly for present purposes the report states:

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“Analysis

The following pages break down the 662 killings and 540 disappearances by gender, age, ethnicity and district. In looking at this aggregate data it must be remembered that every number represents a named person on the confidential list. Beyond highlighting the high levels of ongoing human rights abuses, these figures indicate a number of trends.

- Certain sectors of the population are disproportionately affected by disappearances and killings:
 - Men are victims of more than 90% of killings and 97% of disappearances
 - Disappearances and killings affect young people disproportionately – 45% of those killed and almost 60% of those disappeared are 30 years old or younger
 - Tamils are overwhelmingly affected. Although Tamils make up on 16% of the population, 78% of victims of killings and 84% of victims of disappearances are Tamil
 - Amongst the cases are:
 - 14 humanitarian workers and religious leaders killed
 - 9 humanitarian workers disappeared
 - 3 media personnel killed
 - 5 media personnel disappeared
 - 25 children killed
 - 43 children disappeared
 - The majority of disappearances and killings are concentrated in just a few districts, particularly Jaffna. More than half of reported disappearances and 28% of reported killings took place in Jaffna. For disappearances this was followed by Colombo (14.4%) and Mannar and Batticaloa (7% each). For killings Jaffna was followed by Batticaloa (20%) and Vavuniya (18%)
- Seen cumulatively, this means that young, male Tamils face very high rates of human rights abuses, particularly in Jaffna. **Approximately 22% of all reported disappearances from January to August – one in five – affected young, male Tamils in Jaffna.** In contrast, no Sinhalese women were reported disappeared anywhere in the country. This skewed distribution means that risk is highly predictable and suggests that protection measures would be most effective if focused on this group.
- Although incomplete data means that it is difficult to comment on trends, it suggests killings and disappearances gradually fell until July, but rose sharply in August.

[76] This conclusion is echoed in the report Human Rights Watch: *Recurring Nightmare State Responsibility for “Disappearances” and Abductions in Sri Lanka* (March 2008). In its executive summary of its findings Human Rights Watch states:

“The resumption of major military operations between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) in mid-2006 has brought the return of a haunting phenomenon from the country’s past – the widespread abduction and “disappearance” of young men by the parties to the conflict. With the de facto breakdown of the 2002 Norway-brokered ceasefire between the

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parties, and its formal dissolution in January 2008, it is likely armed conflict will intensify in the coming year. Unless the Sri Lankan government takes far more decisive action to end the practice, uncover the fate of persons unaccounted for, and prosecute those responsible, then 2008 could see another surge in “disappearances.”

Hundreds of enforced disappearances committed since 2006 have already placed Sri Lanka among the countries with the highest number of new cases in the world. *The victims are primarily young ethnic Tamil men who “disappear” – often after being picked up by government security forces in the country’s embattled north and east, but also in the capital Colombo. Some may be members or supporters of the LTTE, but this does not justify their detention in secret or without due process. Most are feared dead.* (Emphasis added)

[77] In light of this information, there can be little doubt that being a young Tamil male increases the risk that the appellant might be subjected to disappearance and extra-judicial killing. The question is, whether by these facts alone the risk to the appellant rises to the real chance threshold as opposed to a remote or speculative risk. Here, the Authority notes that other country information suggests that it is the presence of other factors, when combined with these characteristics, which elevate the risk to the real chance level and beyond. In other words, within the generalised grouping of young Tamil males particular sub-groups appear to be at increased risk of being disappeared and killed. These groups comprise:

(a) *Young Tamil men suspected of affiliating with or supporting the LTTE*

[78] This group appears to comprise the most at risk group. The level of affiliation, or suspected affiliation, does not appear to be that high. In relation to this the Human Rights Watch report notes at pages 63-64:

“Some of the victims, especially in Jaffna, were clearly targeted because of their alleged affiliation with or support for the LTTE. The cases documented by Human Rights Watch indicate that this “affiliation” seems to be vaguely defined and could include anything from receiving training in the LTTE camps years earlier (something that many Tamils were forced to do in the territories within the LTTE’s reach), to running a small shop where LTTE cadres might have entered as customers.

...

Security forces reportedly identify many of their targets by examining video and photographic materials from the ceasefire period, when many people openly participated in LTTE-organized demonstrations and parades in the north. In the north and east, a significant number of victims of abductions and “disappearances” are students. Since the LTTE recruits children for its forces in various capacities, security forces are particularly likely to target students as suspected LTTE supporters.”

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(b) *Young Tamil male internally displaced persons (IDPs)*

[79] The representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, recently conducted an official mission to Sri Lanka from 14-21 December 2007. In his report, *Mission to Sri Lanka* (UN doc A/HRC/8/6/Add.4) (21 May 2008) Kalin notes, at paragraph 38, the “pervasive often disabling, sense of fear among those [IDP’s] he met. While he does not visit the appellant’s area of habitual residence, the conditions he describes in his report are likely to be similar throughout the Tamil areas held by the SLA. The report notes at paragraph 41 that IDP’s who return to areas formerly under LTTE control were issued with a particular card which identified their place of origin. Returnee communities were often, he noted, subjected to cordon and search operations particularly following security incidents. The representative noted:

“Confidence in the security forces is undermined by routine disregard of procedures for arrest and detention, including notification of family members of the reasons for and location of the individual’s detention. The fact that women simply do not know where their son or husband is, who he is with, or why he was taken, turns their fear into terror. Ultimately, when asked, returnees said that they felt less – rather than more – secure due to the presence of the many army and STF outposts that had cropped up in return and transit areas.”

He continues at paragraph 42:

“...the impact of such a pervasive military presence, and the heavy procedures used , has been to severely restrict and control movements of IDPs and returnees and undermine their own sense of security. In some instances, men are made to report to the nearby army camp on a daily basis and told to report their whereabouts if they do not intend to return at night. Movement may be prohibited after 7 pm. The resulting fear and vulnerability have broad-ranging consequences for IDP’s and returnees’ ability to regain normal and self-sustaining lives. Families fear sending men to work, or boys or girls to school, noting that men and boys have been abducted and detained, and girls harassed, when passing military camps or checkpoints.”

And, at paragraph 43:

“Entire communities now feel under suspicion because of their place of origin or ethnicity, rather than on the basis of individual behaviour. IDPs are asked for their identity cards at checkpoints, and Tamil IDPs feel that they are interrogated and searched while Sinhalese travellers are not. Moreover, they feel that they have no recourse when wrongs are committed, because the civilian police are not there or they fear retaliation. The lack of prosecution of serious crimes has further bred a sense of impunity and increasing alienation.”

[80] However, none of these factors are present in this case. The appellant does not have any association with the LTTE. While the deaths of AA and BB appear to fit within this pattern of killing and disappearance as a result of their

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post-ceasefire affiliation with the LTTE, there is no question of the appellant showing up in any surveillance. The appellant's claim was that, contrary to AA and BB, he assiduously avoided any involvement with the LTTE during the ceasefire period. He is not a student. He is not from an area formerly under LTTE control but now under government control. In short, none of these risk enhancing factors are present.

[81] For these reasons, the Authority does not accept that the appellant has a well-founded fear of being persecuted in Sri Lanka. In arriving at this conclusion, the Authority has at all times borne in mind the decision in *A v Chief Executive of the Department of Labour* (CIV 2004 – 404-6314, 19 October 2005) that in conducting its assessment of risk, the Authority must assess whether persons having all of the appellant's characteristics face a well-founded fear of being persecuted. Having taken these characteristics into account, the Authority has concluded that risk of serious harm befalling the appellant because of his combined characteristics does not reach the real chance threshold.

[82] The Authority has given anxious scrutiny to the appellant's predicament given the plain deterioration in the security situation following the resumption of open conflict between the LTTE and the government of Sri Lanka. While the Refugee Convention is underpinned by broad humanitarian considerations, this does not mean that all persons facing a situation of broad humanitarian concern in a civil war context are, by this fact alone, entitled to be recognised as Convention refugees. While not a refugee, whether the appellant should be removed back to Sri Lanka at the present time on this basis is not, however, a question the Authority has any power to answer.

CONCLUSION

[83] 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.

"B L Burson"

B L Burson
Member

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