

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76455**

**AT AUCKLAND**

<b><u>Before:</u></b>	M A Roche (Chairperson) S Aitchison (Member)
<b><u>Counsel for the Appellant:</u></b>	I Uca
<b><u>Appearing for the Department of Labour:</u></b>	No Appearance
<b><u>Date of Hearing:</u></b>	1 March 2010
<b><u>Date of Decision:</u></b>	9 March 2010

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**DECISION**

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

[2] This is the appellant's second appeal before the Authority. He claims to have a well-founded fear of being persecuted in Sri Lanka because he is suspected of sympathising with the Liberation Tigers of Tamil Eelam (LTTE). As will be seen, the central issue to be determined in this appeal is whether the appellant's claim, that he is sought in Sri Lanka as an LTTE sympathiser, is credible.

[3] The appellant arrived in New Zealand on 26 February 2002 and lodged his first claim for refugee status on 7 March 2002. This first claim was declined by the RSB on 30 June 2002, leading to his first appeal before this Authority. The Authority (differently constituted from the present panel) dismissed his appeal; see *Refugee Appeal No 74808* (29 June 2004).

[4] On 28 July 2009, the appellant lodged his second claim for refugee status with the RSB. He was interviewed by the RSB in respect of this claim on

26 August 2009. By decision dated 12 November 2009, the RSB declined the appellant's second claim, leading to the present appeal.

[5] As this is not the appellant's first claim for refugee status, it must first be established that the Authority has jurisdiction to hear and determine the subsequent claim by him.

### **JURISDICTION TO HEAR SUBSEQUENT APPEAL**

[6] Section 129O(1) of the Immigration Act 1987 ("the Act") provides:

"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."

[7] The question of whether there is jurisdiction to entertain a second or subsequent refugee application has been considered by the Authority in *Refugee Appeal No 75139* (18 November 2004). In that decision, the Authority ruled that in a subsequent claim under s129O(1) of the Act there are distinctive aspects to the appeal:

"[55] First, irrespective of the finding made by the refugee status officer at first instance, the claimant must satisfy the Authority that it has jurisdiction to hear the appeal. That is, the claimant must establish that, since the determination of the previous claim, 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] The Authority further ruled at [55](e):

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

[9] In this appeal, therefore, the Authority will consider the appellant's original claim, and the further claim, as presented at the second appeal, with a view to determining:

- (a) whether, in terms of s129O(1) of the Act, the Authority has jurisdiction to hear the second appeal and, if so,
- (b) whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

### **THE BASIS OF THE APPELLANT'S FIRST REFUGEE CLAIM**

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

### **THE BASIS OF THE APPELLANT'S SECOND REFUGEE CLAIM**

[11] The basis of the appellant's second claim is that he participated in an argument between a group of Sri Lankan nationals at an informal cricket match in Auckland on 24 May 2009. The argument concerned the killing of the LTTE leader, Vellupillai Prabhakaran, and the publication of a photograph of his naked corpse. That evening, his Sinhalese friend, AA, visited him and asked him for the names and addresses of people at the cricket match who had taken part in the argument. AA has high level political connections in Sri Lanka. The appellant refused to give AA the information he sought. AA became angry with him and before leaving, threatened him that he would cause difficulties for him in Sri Lanka.

[12] On 10 June 2009, the appellant's mother-in-law and brother-in-law were arrested by police in Sri Lanka. The mother-in-law has since been released but the brother-in-law has disappeared. The police have indicated to the appellant's parents-in-law that their son will be released if the appellant returns to Sri Lanka and surrenders himself. The appellant believes that AA has used his political connections to have his brother-in-law arrested and detained and that if he (the appellant) returns to Sri Lanka, he will be arrested and mistreated by the Sri Lankan authorities.

### **ASSESSMENT OF JURISDICTION**

[13] The Authority determines that it has jurisdiction to hear this matter. The appellant's second refugee claim is based on events which have occurred in Sri Lanka following the determination of his first claim. The second claim is based on significantly different grounds from the first. Jurisdiction to hear the appeal is therefore made out.

## **SECTION 129P(9) – RELIANCE ON PREVIOUS AUTHORITY FINDINGS**

[14] Having found jurisdiction, the merits of the appellant's second refugee claim fall to be determined. In determining the present appeal, the Authority will rely on the findings of fact and credibility made by the Authority in relation to the previous claim. Section 129P(9) of the Act prohibits any challenge to a finding of fact or credibility made by the Authority in relation to a previous claim and the Authority has the discretion as to whether to rely on any such finding. Counsel confirmed at the beginning of the hearing that the appellant did not intend to challenge the previous findings.

## **THE APPELLANT'S CASE**

[15] What follows now is a summary of the evidence presented in support of the second appeal. An assessment follows later in this decision.

[16] The appellant is a married man aged in his mid-30s. He is a member of the Muslim minority and is from a district in the Central province of Sri Lanka. His parents, brothers and sisters remain in that district.

[17] In January 2001, the appellant married his wife whose family live approximately one hour from the appellant's family home. The appellant left Sri Lanka in February 2002 to travel to New Zealand on a limited purpose visa. His wife gave birth to the couple's daughter after the appellant arrived in New Zealand.

[18] From New Zealand, the appellant has maintained regular contact with his wife and in-laws and with his own family. Over the years, his wife has repeatedly requested him to return to Sri Lanka. The appellant has agreed to do so on many occasions yet remains in New Zealand.

[19] For some years, the appellant has been on a sickness benefit in New Zealand because he suffers from mild mental illness.

[20] Until May 2009, the appellant frequently took part in cricket games played by members of the Sri Lankan community in Auckland. These games, which took place in school grounds on Sundays, were mainly attended by Muslim Sri Lankans but a few Sinhalese and Tamils also participated.

[21] On 24 May 2009, the appellant attended the usual Sunday cricket game. A photograph of the naked corpse of Vellupillai Prabhakaran had been shown in the

media shortly beforehand. An argument broke out between the Sinhalese and Tamil Sri Lankans present at the cricket game. The Sinhalese were taunting the Tamils about the loss of their leader and the fact that he had been displayed naked. The appellant, along with several other Sri Lankan Muslims present, tried to calm the argument down. The appellant told the group that they should go away "without issues". Another Muslim asked the people arguing to calm down because New Zealand was not Sri Lanka.

[22] The appellant had a close Sinhalese friend, AA. He has known AA since 2002 and, over the years, has met with him approximately twice a week. AA is a New Zealand citizen. On two occasions when AA has visited Sri Lanka from New Zealand, he has taken presents from the appellant to his wife and her family and delivered them for him in Sri Lanka. On the first of these occasions, in or around 2005, he visited the appellant's parents-in-law at their home and had a meal with them.

[23] AA was present at the cricket match on 24 May 2009 and the argument that followed. That evening, he came to the appellant's home. He was drunk and demanded that the appellant provide him with the names and addresses of the mainly Muslim Sri Lankans who had been at the cricket game. The appellant declined to do so, following which AA threatened him that there would be consequences for him in Sri Lanka and left. Two Sri Lankan Muslims were present when AA called around. They were both visiting from Hamilton. Both were without permits to remain in New Zealand and both were subsequently subjected to removal proceedings.

[24] The appellant felt fearful after being threatened by AA and, within a week, changed his address and moved elsewhere. He ceased attending the Sunday cricket games and has not played since. Nor has he seen AA again.

[25] On 28 June 2009, the appellant attended a meeting concerning the removal of Sri Lankans to Sri Lanka, held in Auckland. A petition was circulated at the meeting which the appellant signed. A second meeting was held on 5 July 2009 to collect more signatures for the petition. The appellant also attended this meeting.

[26] On 10 July 2009, the appellant received a telephone call from his wife. She was in Colombo staying with her sister. She told him that her parents' house had been raided by the police that morning. Her father had been absent at work and she had been in Colombo. The police had taken her mother and brother, telling them that the appellant was supporting the LTTE and working against the Sri

Lankan government in New Zealand and that they “needed him”. They then took the appellant’s mother-in-law and brother-in-law to the Dawlagala police station and beat the brother-in-law in front of the mother-in-law. The appellant’s wife told him that her father had been informed by neighbours of what had happened and had gone to the police station. He had been able to see his wife and obtain her release, but his son (the appellant’s brother-in-law) was not there and the police would not tell him where he had been taken.

[27] Since receiving that telephone call from his wife, the appellant has spoken to both his mother-in-law and father-in-law on a number of occasions. His father-in-law has been trying to find his son and obtain his release through the use of political contacts. A government minister has made enquiries on his behalf, but has had no success. The appellant’s father-in-law has not instructed a lawyer to assist with the problem. Nor has he reported his son’s abduction and disappearance to any national agency in Sri Lanka, such as the Human Rights Commission, nor any international agency in Sri Lanka, such as the Red Cross, the UNHCR or Amnesty International. This is because the Sri Lankan way is to use political contacts to resolve such problems.

[28] When the appellant spoke to his mother-in-law about his arrest, she told him that the police showed her a document which stated that the appellant was an LTTE supporter working against the government, before they arrested her. The appellant believes that his former friend, AA, is behind the arrests of his mother-in-law and brother-in-law and his brother-in-law’s disappearance and he has arranged this to take revenge against the appellant for not co-operating with him after the argument at the cricket match in May.

[29] The appellant’s father-in-law has asked him to return to Sri Lanka because the police have told him that, if the appellant does so, his son (the appellant’s brother-in-law) will be released. The appellant last spoke to his father-in-law on 5 February 2010. His father-in-law informed him that he no longer wished him (the appellant) to be a member of the family because of the pain he had caused to his son and daughter. His father-in-law has not answered any of his telephone calls since.

[30] A few days after this telephone call with his father-in-law, the appellant spoke to his wife in Colombo. She told him that her family wished her to separate from him and said that they blamed him for her brother’s disappearance. She said that she wished to separate from him because she could not join him in New Zealand and he could not return to Sri Lanka for safety reasons. Since then, the

appellant's wife has refused to speak to him on the telephone.

[31] The appellant has been in contact with his own family. They have had no difficulties with the Sri Lankan authorities and have not been approached about him by the police or anyone else. The appellant believes that this is because AA is only familiar with his in-laws and knew where they lived but did not know the appellant's own family and their address.

[32] Initially after the arrest of his in-laws, the appellant did not tell people in the Sri Lankan community in Auckland about what had happened, with the exception of his flatmate. However, when the RSB asked him to provide the names of people who had been present at the cricket game, he told them some details of his current refugee claim prior to providing their names to the RSB.

[33] The appellant is in possession of his Sri Lankan passport which expired in 2007. He has not attempted to have it renewed but knows of no obstacle to this. He is also in possession of his Sri Lankan identity card which he keeps in his home in Auckland.

[34] The appellant does not wish to return to Sri Lanka. He believes that AA has arranged for him to be placed on a wanted list there and that he will be arrested upon his arrival at the airport. All Sri Lankan nationals returning to Sri Lanka after long periods overseas are scrutinised at the airport and, in the course of such scrutiny, his status as a wanted person would be revealed.

#### Evidence of BB

[35] BB is a New Zealand citizen and is from Sri Lanka. Like the appellant, he is a Muslim and met the appellant at a mosque approximately one and a half years ago. They are friends, although BB has not visited the appellant at home; they have met at the mosque and at sports events.

[36] BB was present at the cricket game on 24 May 2009 at which an argument broke out between some Sinhalese Sri Lankans and Tamils and at which a number of Muslims, including the appellant, tried to intervene and calm things down. The appellant and the others managed to separate the people who were arguing and the situation calmed down, following which BB went home. He had no knowledge of subsequent events.

[37] BB recalls that, approximately two months after the argument at the cricket game, the appellant told him that he had problems, but did not tell him any further

details. Approximately three or four weeks ago, the appellant told BB that the argument at the cricket game had given rise to a refugee status claim. BB has no further knowledge of the nature of the appellant's difficulties in Sri Lanka and, apart from the fact that the trouble relates to the appellant's support of "one of the groups", BB has no knowledge of who has caused the problems for the appellant.

[38] BB still occasionally attends cricket games on Sundays, although he is often busy with work and cannot go more than once or twice a month. He has not seen the appellant or AA at any cricket game since the argument on 24 May 2009. The cricket games are mainly attended by Muslim Sri Lankans although occasionally other ethnicities are present. It is not unusual for Sri Lankan politics to be discussed at the cricket games although the argument on 24 May 2009 was the most heated one he has witnessed.

[39] BB has a close Muslim friend who is also a friend of AA but is unaware of whether AA is friends with any of the other Muslim cricket players. He confirmed that the people who played cricket knew each other's names.

#### Documents filed

[40] Counsel filed opening submissions and an updated statement by the appellant on the morning of the hearing together with various items of country information.

[41] There are a number of documents on the appellant's Department of Labour file, supporting his refugee claim. These include

- (a) an affidavit by his father-in-law, dated 27 September 2009, in which the father-in-law states that his wife and son were arrested by the police on 10 July 2009, that his son was still missing and that he had met with a politician and enquired of him as to how his son could be found; and
- (b) a facsimile copy of a letter written in Tamil, together with a translation in English. The author of this undated letter states that he or she is the neighbour of the appellant's parents-in-law and that, on 10 July 2009, a group of plainclothes police officers took the appellant's mother-in-law and brother-in-law, that the neighbour informed the father-in-law who was able to get his wife released but that the son had not been released and his whereabouts were unknown.



## **THE ISSUES**

[42] 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."

[43] 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**

[44] Prior to determining the framed issues, it is necessary to make an assessment of the appellant's credibility. The appellant's credibility has been assessed previously by a different panel of this Authority in relation to his first refugee appeal. The Authority found, on that occasion, that the appellant was not a credible witness and that his evidence was vague and mobile. His claim that he had fled Sri Lanka to avoid persecution was contradicted by a visa application made prior to the events he claimed precipitated his departure. Enquiries made pursuant to s129P(4) of the Act revealed that the appellant had applied to attend an English-language school in New Zealand in 1999 in contradiction of his evidence not to have made any attempt to go overseas prior to 2000. In determining the appeal, the Authority considered information provided by the appellant's father-in-law in Sri Lanka in support of the appellant's claim.

[45] At the commencement of the present hearing, the appellant confirmed that he did not challenge the credibility findings made by the previous panel and, as noted earlier in this decision, the Authority is entitled to rely on those findings, pursuant to s129P(9) of the Act. This does not mean that the Authority must reject the appellant's credibility in respect of his present claim, but it does mean that it is

entitled to bear in mind that the appellant has previously been willing to present a false claim to the Authority and to give false evidence after taking an affirmation pursuant to the Evidence Act.

[46] The Authority accepts that a heated argument took place between Sri Lankans of Sinhalese and Tamil origin following the cricket match on 24 May 2009. It also accepts that the Sri Lankan Muslims who were present, including the appellant, tried to break up this dispute.

[47] The Authority does not accept that the appellant is now a wanted person in Sri Lanka because of his role in the argument, or that his former friend, AA, has arranged for the arrest of his mother-in-law and brother-in-law and the disappearance of the brother-in-law. For the reasons that follow, his evidence in this regard is rejected.

[48] The appellant claims that on the evening of 24 May 2009, his friend, AA, came to his home demanding the names and addresses of the people who were participating in the argument. He requested that the appellant provide him with their names and addresses. The appellant gave evidence that he understood that AA was seeking information about eight to 10 Muslims who had been present at the game. The suggestion that AA did not know the identities of the group of Muslim cricket players was contradicted by the appellant's witness, BB, who stated that the players knew each other's names and that AA had at least one other close Muslim friend.

[49] The appellant claims that AA was so incensed by his lack of co-operation that he accused him of supporting the LTTE. This claim is rejected. The appellant gave evidence that he and AA had been close friends for approximately seven years and had met several times a week during this period. He had never made a statement in favour of the LTTE to AA and, in his earlier refugee claim, had claimed to fear persecution at their hands. Even during the argument, according to the appellant's evidence, neither he nor any other Muslims present made a statement in favour of the LTTE. Their statements were to the effect that Sri Lanka's problems belonged in Sri Lanka and that Sri Lankans here should be peaceful.

[50] Even if AA had the ability to influence the Sri Lankan police to take steps against the appellant as an LTTE supporter, his doing so would seem to be irrational to the point of implausibility. In a similar vein, it is noted that in the course of the close friendship between the appellant and AA, AA visited the

appellant's parents-in-law's home to deliver presents and shared a meal with them. The suggestion that AA would subsequently arrange for the torture and disappearance of his dinner hosts because he was annoyed at the appellant, again is irrational to the point of implausibility.

[51] The appellant claims that his brother-in-law has been missing in Sri Lanka since July 2009, following his abduction by the police. However, he also claims that his parents-in-law have made no attempt to locate him, other than trying to have a politician use his influence to find out his whereabouts. The appellant claims that his parents-in-law have not instructed a lawyer in this regard, although they are people of means. Nor have they contacted any of the agencies in Sri Lanka who maintain records of "disappearances" and have the capacity to assist in such cases. Such agencies include the Red Cross, Amnesty International, the UNHCR, the Sri Lankan Human Rights Commission, the Centre for Human Rights and Development and the Institute for Human Rights. The Authority finds it implausible that, should the appellant's brother-in-law genuinely be missing, his family would have taken so few of the steps available to them to locate him.

[52] The appellant gave evidence that his own family, who live only one hour from his parents-in-law, have not been contacted by the police or had any difficulties relating to the appellant's claimed profile as an LTTE sympathiser. He also claims that his profile is such that he fears being arrested on return to Sri Lanka because of his imputed association with the LTTE. The Authority does not accept that, had the appellant genuinely been a person of interest to the authorities, to the extent that they have taken his brother-in-law as a hostage to force him to return to Sri Lanka, they would have made no enquiries about him with his own family. When this point was raised at the hearing, the appellant responded that AA had only visited his parents-in-law and would not know the address of his parents. That does not, however, address the fact that, had the police been genuinely interested in making enquiries about the appellant, they would have located and contacted his family, whether or not this address was provided to them by AA.

[53] The above reasons lead the Authority to the conclusion that the appellant's claims about the arrest of his mother-in-law and brother-in-law and his own profile as a wanted person in Sri Lanka are false.

[54] It may well be the case that the appellant's wife is seeking a separation from him. The appellant has not seen his wife since late 2001. Despite her repeated requests that he return to Sri Lanka to fulfil his duties as a husband and

father, and despite his many promises to her that he would do so, he has remained in New Zealand. It may be that his effective abandonment of her has caused the wife and her family to resolve to end the marriage. The Authority does not accept, however, that the decision of the wife and her family in this regard is related to an abduction of the wife's brother for which they blame the appellant.

[55] The appellant raised his attendance at two community meetings in 2009 as matters which may have increased his risk profile on return to Sri Lanka. The purpose of these meetings was to obtain signatures for a petition requesting that Sri Lankan nationals not be returned to Sri Lanka because of safety concerns there. Copies of several pages of this petition are on the appellant's Department of Labour file. The petition makes no criticism of the Sri Lankan government or comment on the civil war or the parties thereto. The appellant does not claim to have addressed these meetings. It is not accepted that his attendance at the meetings and his signature on the petitions would in any way affect his safety on return to Sri Lanka. The evidence does not establish that the Sri Lankan authorities are aware of the petitions, or that they know who was at the meetings, or who signed the petition or, even if they knew all of this, that they would take any degree of adverse view of it.

[56] At the hearing, the appellant expressed fear that his status as a failed asylum seeker could put him at risk on return to Sri Lanka. Country information filed by counsel states that Sri Lankan nationals forcibly returned from the United Kingdom were interviewed by the State Intelligence Service (SIS) on their arrival, concerning their background and how they departed Sri Lanka. The report stated that the SIS was often notified of these returns by the Sri Lankan High Commission in London. The same report stated that an official from the Australian High Commission thought that no procedures were in place in Sri Lanka to identify returning failed asylum seekers and that the authorities were only alerted to this if they were notified that the person was a deportee or was being escorted; see Refugee Documentation Centre (Ireland) Legal Aid Board, *Sri Lanka – Information on the treatment of failed asylum seekers returned to Sri Lanka*, 22 January 2010.

[57] The appellant made a legal departure from Sri Lanka in 2001, having been granted a limited purpose visa for New Zealand. The previous panel of this Authority found that he had no political problems in Sri Lanka but accepted that he had been a member of the Peoples' Alliance which is now part of the coalition that forms the present Sri Lankan government. He is in possession of an identity card and, on his own evidence, could have his passport renewed. Even should the

appellant be subjected to some scrutiny on return to Sri Lanka following a lengthy period in the west, including a long period of unlawful residence in New Zealand, there is nothing in his background or current circumstances that would cause him difficulty and no reason why he would be suspected of being an LTTE member or sympathiser and mistreated on his arrival (the Authority having rejected his claims concerning AA and his in-laws). This is especially the case given that as a Sri Lankan Muslim, he is a member of a minority that was mistreated by the LTTE during the Sri Lankan civil war: International Crisis Group *Sri Lanka's Muslims caught in the crossfire* (May 2007) p8.

[58] Given the history of inter-ethnic tension between Tamils and Muslims in Sri Lanka, the appellant's political allegiance (to the Peoples' Alliance) and his lack of any link to the LTTE, it is unlikely that he would have any difficulty on return to Sri Lanka or on return to his district in the Central province area where his family remain and where he is most likely to reside should he return to Sri Lanka.

[59] The Authority finds that there is no real chance that the appellant would be persecuted for a Convention reason should he return to Sri Lanka. The first principal issue is answered in the negative and accordingly, the second principal issue does not fall for consideration.

## **CONCLUSION**

[60] For the above reasons, the Authority finds that 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.

"M A Roche"

M A Roche  
Chairperson