REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76192

AT WELLINGTON

Before:	A R Mackey (Chairman)
Counsel for the Appellant:	J Petris & R Woods (for part of hearing)
Appearing for the Department of Labour:	No appearance
Date of Hearing:	16 December 2008
Date of Decision:	13 January 2009

DECISION

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[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 of Tamil ethnicity.

[2] This is the second time the appellant has claimed refugee status in New Zealand. Her first claim was declined by the RSB and, on appeal (the first appeal), by the Authority (differently constituted). The first appeal was *Refugee Appeal No 73778* (20 January 2004). That appeal was heard in conjunction with an appeal by the appellant's youngest daughter, EE, *Refugee Appeal No 73777* (20 January 2004).

INTRODUCTION

[3] The appellant is a widow. She had 10 children. She arrived in New Zealand with her husband in July 2000. Unfortunately, her husband died within a few months of their arrival in this country. The appellant lodged her first claim for

refugee status on 23 October 2000. A refugee status officer declined the decision on 18 April 2002 and the appellant then appealed unsuccessfully to this Authority. The appellant then lodged a judicial review application with the High Court in March 2004. The judicial review was unsuccessful when it came before Goddard J. (See *R & R* v *Refugee Status Appeals Authority* CIV-2004-485-374 (11 June 2004)).

[4] On 18 October 2007, the appellant lodged a second confirmation of claim for refugee status in New Zealand. After an interview with the RSB on 12 December 2007, her second claim was dismissed, purely on jurisdictional grounds, in a decision by the RSB dated 18 February 2008. The appellant then appealed to this Authority on 27 February 2008. Mr Petris, in a letter to the Authority, dated 14 April 2008, stated that there were jurisdictional points, particularly relating to the interpretation of s129J(i) of the Immigration Act 1987 (the Act) that he wished to raise. The matter was then set down for hearing in Wellington.

[5] The appellant stated, in her first application, that she predicted she would be persecuted on return to Sri Lanka because of the past involvement of three of her sons with the LTTE (which had caused them all to flee from Sri Lanka). More specifically, after fighting between the LTTE and the Sri Lankan army became very intense in the family home town, ZZ, she had been forced to flee on a boat to India with her husband and two of their daughters. After remaining in a refugee camp in India from September 1996 until July 2000, the appellant and her husband and one daughter came to New Zealand on valid passports as visitors. They came on the sponsorship of one of her sons, AA, who had obtained refugee status in New Zealand in the mid-1990s.

[6] In the second claim, it is stated that there are significantly changed circumstances in Sri Lanka following the breakdown in the ceasefire between the Sri Lankan government/army and the LTTE. The situation had thus deteriorated sharply over the period 2006 to 2008. Ultimately, in January 2008, the ceasefire was abandoned by both parties. It is claimed that since the first appeal, the risks to the appellant have heightened to the level that there is a real chance of her being persecuted on return to Sri Lanka for reasons of her ethnicity.

[7] It is necessary for the Authority to consider:

(a) whether the appellant meets the jurisdictional threshold of establishing that circumstances in Sri Lanka have changed to such an extent that the second

claim is based on significantly different grounds from the first claim; and (only if so)

(b) whether, on the facts as found, the second claim establishes that the appellant has a well-founded fear of being persecuted for a Refugee Convention reason, if she returns to Sri Lanka.

[8] It is appropriate to consider the question of jurisdiction first. In this regard, both Mr Petris and Mr Woods presented written submissions and followed these up orally at the appeal hearing. These submissions challenged both the approach taken to the interpretation of s129J of the Act by the RSB and the Authority's leading determination on second and subsequent claims; namely *Refugee Appeal No 75139* (18 November 2004).

JURISDICTION OF THE AUTHORITY TO HEAR SUBSEQUENT APPEALS

[9] The jurisdiction of a refugee status officer to consider a second or subsequent refugee claim is governed by s129J of the Act which states:

> **"129J. Limitation on subsequent claims for refugee status—**
> (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.
> (2) In any such subsequent claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer may rely on any such finding."

[10] There is then a right of appeal, pursuant to s129O of the Act 1987 which provides:

> **"129O Appeals to Refugee Status Appeals Authority**
> (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 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.
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> (2) A person who is dissatisfied with a decision of a refugee status officer on any of the matters referred to in section 129L(a) to (e) and (2) in relation to that person may appeal to the Refugee Status Appeals Authority against the officer's decision.
> (3) An appeal must be lodged with the Authority –
> (a) Within 5 working days after the appellant is notified under section 129I of the refugee status officer's decision, or within such further time as may be allowed under subsection (4), in the case of a person who is detained in custody at the time of notification; or

(b) Within 10 working days after receiving notification of the decision under that section, or within such further time as may be allowed under subsection (4), in any other case.

(4) The Authority may extend the time for lodging an appeal where satisfied that special circumstances warrant such an extension."

[11] The question of whether there is jurisdiction to entertain a second or subsequent application was considered in *Refugee Appeal No 75139* (18 November 2004) where the relevant principles, which have continued to guide the Authority since that time, were set out at [54]-[57]:

> "**[54]** In any appeal involving a subsequent claim under s 129O(1), the issues are not "at large". Rather, there are three distinct aspects to the appeal.
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> **[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. As to this:
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> (a) The change of circumstances must occur ***in*** the claimant's home country. It is not open to the claimant to circumvent the jurisdictional bar by submitting that at the hearing of the previous claim the refugee status officer or the Authority misunderstood the facts.
>
> (b) A "reinterpretation" of a claimant's case is neither a change of circumstances, nor is it a change of circumstances ***in*** the claimant's home country.
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> (c) The claimant cannot invite the Authority to sit as if it were an appellate authority in relation to the decision of the first panel and to rehear the matter. The Authority has no jurisdiction to rehear an appeal after a full hearing and decision.
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> (d) A second appeal cannot be used as a pretext to revisit adverse credibility findings made in the course of the prior appeal.
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> (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.
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> (f) Proper recognition must be given to the statutory language which requires not only that the grounds be different, but that they be ***significantly different***.
>
> (g) The Authority does not possess what might be called a "miscarriage of justice" jurisdiction.
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> **[56]** Second, in any appeal involving a subsequent claim, s 129P(9) expressly prohibits a claimant from challenging any finding of credibility or fact made by the Authority in relation to a previous claim. While the Authority has a discretion whether to rely on any such finding, that discretion only comes alive once the jurisdictional threshold for subsequent claims set by ss 129J(1) and 129O(1) has been successfully crossed.
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> **[57]** Third, where jurisdiction to hear the appeal is established, the merits of the further claim to refugee status will be heard by the Authority. That hearing may be restricted by the findings of credibility or of fact made by the Authority in relation to

> the previous claim, or "at large", depending on the manner in which the discretion under s 129P(9) is exercised by the Authority."

[12] Against this background, it is now necessary to consider the submissions made by Mr Petris and Mr Woods and then, on the principles considered applicable, to determine whether the jurisdictional threshold is crossed. A summary of the submissions is set out first, followed by the Authority's conclusions on those submissions. The details of the first and second refugee claims are then set out and then follows the conclusion on the relevant issues.

CHALLENGE TO THE INTERPRETATION OF S129J OF THE ACT

[13] Written submissions, dated 5 December 2008, from Mr Petris, and 15 December 2008, from Mr Woods, were received by the Authority ahead of the hearing and have been considered and discussed in depth at the hearing.

[14] The nub of the submissions is firstly that the RSB acted in error by dismissing the appellant's second claim on jurisdictional grounds only where they concluded:

> "It is accepted that circumstances in Sri Lanka since [the appellant's] first claim was finally determined on 20 January 2004. However, her second claim has been advanced on exactly the same grounds as her first claim, namely that she fears returning to Sri Lanka because of her Tamil ethnicity due to the fact that she was born in ZZ does not have an NIC [national identity card], has not had any contact with any family members in Sri Lanka for several years, and, as an elderly widow, there is no-one to care for her if she returns to Sri Lanka. As such, it cannot be said that her second claim for refugee status is based on significantly different grounds to her previous claim.
>
> Conclusion
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> Circumstances in [the appellant's] home country have changed since the determination dated 20 January 2004, but her subsequent claim is not based on significantly different grounds to her previous claim. Accordingly, there is no jurisdiction to consider her subsequent claim."

[15] Mr Petris submitted that in reaching its conclusion in the manner stated, the RSB had adopted a flawed approach because it had only considered elements personal to the appellant in her original claim, and not the totality of the evidence which, of necessity, included any change in country conditions between the time of the first claim and the subsequent claim. By omitting to bring into account the collapse of the ceasefire and the impact this has had on re-igniting the civil war in Sri Lanka, the RSB had, in his submission, wrongly interpreted the provisions of s129J.

[16] He submitted that it was possible that the RSB may have been led to the

conclusions that it did reach by following the provisions of paragraphs [51]-[57] of the Authority's decision in *Refugee Appeal No 75139* too strictly. He referred to paragraph [51] which states:

> "**[51]** Jurisdiction under s 129J(1) is determined by comparing the previous claim to refugee status against the subsequent claim. It is clear from the definitions in s 129B(1) that the exercise requires the refugee status officer and the Authority to compare the claims ***as asserted by the refugee claimant***, not the facts subsequently found by that officer or the Authority."

[17] He submitted that this approach appeared, wrongly, to have led RSB officers to compare strictly the personal circumstances of the claimant in the first and subsequent claims, rather than looking at the totality of the evidence, in the round, in both claims. The terms of [51] were therefore, in his submission, possibly too narrowly expressed.

[18] Mr Woods, in his submissions, also challenged some findings from the decision in 75139, in particular [55](f), which states:

> "[55](f) Proper recognition must be given to the statutory language which requires not only that the grounds be different, but that they be ***significantly different***."

[19] While accepting that the word "significantly" must be given meaning, he submitted that this meant simply "that material differences were evident". He submitted this was a relatively low threshold to surmount, particularly taking into account that it needed to be consistent, as in all interpretations relating to refugee and protection issues, with a human rights oriented approach to statutory interpretation.

[20] He claimed that, accordingly, the Authority and the RSB, at first instance, should adopt a liberal and human rights interpretation of the term "significantly different grounds".

CONSIDERATION OF THE SUBMISSIONS ON JURISDICTION

[21] At the outset, the Authority made it clear that, while this is a "full merits" appeal, it was apparent that the RSB, in its conclusions, had taken an erroneous approach and had failed to consider all of the evidence relating to both the first and second claims. By narrowing the comparison to only the personal aspects of the appellant's claims and overlooking the country conditions, the RSB had, in fact, made an error of law.

[22] As in all assessments of refugee status, the totality of the evidence must be considered once the "facts as found" have been established. As was stated by Sedley LJ some years back in *R* v *Immigration Appeal Tribunal and the Secretary of State to the Home Department, ex parte Shah* [1997] Imm AR 145 at [153] (HC) refugee determination does not involve a conventional lawyer's exercise in applying a litmus test to ascertain the facts but:

> "A global appraisal of the individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has its legal and linguistic limitations, has a broad humanitarian purpose."

[23] To ascertain whether a second or subsequent claim is based on significantly different grounds to the previous claim, it is necessary to consider all the evidence, in the round. *Refugee Appeal No 75139* correctly stated, at [55](e) that it is the claims, as asserted, which must be compared. But it is axiomatic that there will be important country conditions underpinning every claim, even if they are not explicitly articulated by the claimant. Here, for example, the conflict between the state and the LTTE, and its dynamics on the date of determination, were as much a part of the appellant's first claim as anything recorded in her statement. One need only consider the direct bearing that the conflict's ceasefire agreement had on the outcome of the first claim to realise that the underlying country conditions were integral to it and were as much part of the first claim as the appellant's personal experiences.

[24] In this case, the first claim was determined (on appeal) on 20 January 2004. The ceasefire was in place between the Sri Lankan authorities and the LTTE. However, by late 2007, that ceasefire, and the relative peace that built over the period 2001-2005, had deteriorated to the extent that it had almost collapsed at the time when the second claim was lodged and did, in fact, totally collapse in January 2008.

[25] In these circumstances, the Authority considers that the subsequent claim must be seen as one based on significantly differing circumstances to the first claim.

[26] In respect of the submissions put forward by Mr Woods, the Authority would agree that the term "significantly" must be given some meaning. In the normal way of statutory interpretation, the ordinary meaning of the words must be adopted from the text and purpose of the Act. Thus, clearly, there must be substance and materiality in any changes. Whilst the Authority would agree, as in all aspects of

interpretation of refugee status issues a human rights approach should be adopted, this must be balanced against the fact that second and subsequent claims can be abusive in nature and merely used as an attempt to prolong the stay of the claimant in the receiving country. The integrity of the first determination itself therefore is often challenged in subsequent claims. It is in this context that there is special legislation in most receiving countries (including New Zealand; s129J and s129O of the Act) to specifically deal with subsequent claims and to ensure that abusive practices do not evolve in this area. The jurisdictional threshold of "significantly" recognises that the claimant has already had a final determination and provides an appropriate limitation in its ordinary meaning, to further claims.

[27] The Authority therefore considers that no additional gloss is required on the wording of s129J of the Act and that the summary set out by the Authority at [54]-[57] in *Refugee Appeal No 75139* is a valid one which should continue to be of guidance to both the Authority and the RSB. The Authority does not consider the provisions of [51] of *Refugee Appeal No 75139* are misleading or express the intentions of the legislature, under s129J(i) of the Act, incorrectly.

[28] The Authority would, however, agree with Mr Petris that the comparison of claims, as asserted by the refugee claimant, must include the totality of the evidence presented, including both the personal circumstances as asserted, and the current country conditions, as at the date when the matter is considered and the decision made. The only gloss therefore that the Authority would add, at this time, to the terms of *Refugee Appeal No 75139* is that refugee status officers, and the Authority, should, when comparing claim with claim in subsequent applications for refugee status, ensure that the totality of each claim is considered in the round and that there is not a selective approach, to only parts of the claim, adopted.

CONSIDERATION OF THE APPELLANT'S FIRST AND SECOND REFUGEE CLAIMS

[29] As has been set out above, in the appellant's first claim, she predicted that when she returned to Sri Lanka, she had a real risk of being persecuted because of her Tamil ethnicity, the notoriety of her home town of ZZ (where the leader of the LTTE, Vellupillai Prabhakaran, was a neighbour), that she did not have a National Identity Card (NIC), had children who were associated with the LTTE, had not had contact with most of her family for several years and, as an elderly widow,

would have no-one to care for her. That first claim was made on the basis of the country conditions existing in January 2004.

[30] In the second claim, the personal circumstances are largely the same as in the first claim, although they are added to and expanded upon as shown later in this decision. However, the appellant now claims that the country conditions at the present time are significantly different from those that prevailed when the first claim was made.

[31] As indicated during the hearing, the Authority agrees there have been significant changes in the country conditions over the past five to six years. In particular, during the period 2006-2008, the ceasefire collapsed to being an agreement in name only and indeed, in January 2008, the Sri Lankan government withdrew completely from the ceasefire agreement. Details of the collapse of the ceasefire are conveniently recorded in *Refugee Appeal No 76193* (22 May 2008) [26]-[32] and in more detail in the UK, Asylum and Immigration Tribunal determination *LP* (LTTE area – Tamil – Colombo – risk?) Sri Lanka CG [2007] UKAIT00076, which was recently noted with approval in the European Court of Human Rights, in *Re NA* v *United Kingdom* (Application No 25904/07, 17 July 2008) at [129].

[32] When both claims are compared, the Authority is satisfied the second claim is based on significantly different grounds from the first claim. The Authority therefore considers it has the required jurisdiction to proceed to the second stage of the assessment and consider the merits, *de novo*, of the further claim for refugee status.

[33] Before setting out the appellant's evidence, and conclusions reached on that evidence, the Authority notes that in the first claim and appeal made by this appellant, her credibility was accepted. Pursuant to s129P(9) of the Act, the Authority takes those positive credibility findings into account as part of the overall assessment that follows.

THE APPELLANT'S EVIDENCE

[34] The appellant and her New Zealand-based son, AA ("the son"), both swore affirmations. Because of her general frailty, the son assisted the appellant to answer questions put to her. The Authority adopted this procedure after noting the terms of a medical report supplied by the appellant from Dr Bala Kumarasingham,

general practitioner, Lower Hutt, dated 12 November 2008. In that report, the doctor states that the appellant has been under his care for some seven years and under treatment for depression, having been prescribed an anti-depressant, Fluoxetine. In addition, she suffered from anxiety symptoms, is diabetic and asthmatic. The Authority noted that the appellant, in attempting to answer several questions, became confused and her son, who had obtained refugee status and ultimately citizenship in New Zealand since he had been here over the past 15 years, was called upon to give a necessary amount of clarity and assistance to the appellant's evidence.

[35] In giving her evidence of her personal circumstances, the appellant stated that she had lived all of her life in the town of ZZ, which is north of Jaffna, located on the coast at one of the most northerly points on the island of Sri Lanka. She explained that this town had been an LTTE stronghold until it was recently recaptured by the Sri Lankan army. Attacks had been made on the town for many years over the period 1980 to 2000. In 1991, the appellant's family home was hit by a bomb that killed her daughter, BB. In 1996, the war between the Sri Lankan army and the LTTE intensified and became violent. At that time the remaining members of the family, the appellant, her husband and two daughters, were forced to flee on a small boat to India, ultimately ending up in an Indian refugee camp where they remained until 2000.

[36] The appellant explained that the head of the LTTE, Vellupillai Prabhakaran, and his family had lived less than 100 metres from the appellant's home. The appellant knew his family reasonably well and associated with them at the local temple.

[37] She considered that the town of ZZ was notorious in Sri Lanka because it was the home place of the LTTE leader. Her home town was shown on her passport. This would heighten the risk to her of being seen by the Sri Lankan authorities as a person sympathetic to, or associated with, the LTTE.

[38] The appellant explained the situation, as best she knew it, in relation to all of her 10 children, including one daughter who was killed in the bombing raid. She explained that AA and three of her other sons had been forced to leave Sri Lanka after they had been coerced into serving the LTTE in various supporting functions. These four had all fled Sri Lanka over the period 1990 to 1996. They obtained refugee status in England, Germany, Norway and New Zealand. She further explained that one of her daughters, CC, was living permanently in a refugee

camp in India. Another daughter, DD, had not been heard of for many years. Of the youngest three daughters, BB had been killed in the bombing raid, another daughter had gone to Canada, married and now lived there, and finally, her youngest child, EE, is in New Zealand on a work permit.

[39] The appellant claimed that the past associations of the family, particularly those of her sons with the LTTE, added to her risk on return as reference would quickly be made to their surname and place of origin.

[40] These "family association risks" to her were further heightened, because one of her nephews, Major FF, had been a significant figure in the LTTE, until he died in fighting with the Sri Lankan army in February 1996. The Authority was provided with a copy of a photograph of the nephew in an LTTE uniform. The details under the photograph state his date of birth, that he died in February 1996 and that he was from the town of ZZ. Because of the significant role her nephew had carried out in the LTTE, their surname was a well-known one. When this was put together with all of the other aspects of her case, she believed that the Sri Lankan authorities would detain and maltreat her because she would be seen as a sympathiser and supporter of the LTTE.

[41] At the present time, she did not consider it was possible for her to return to her home town of ZZ as it was occupied by the Sri Lankan army. She had no home to go to as it had been destroyed and she now had no relatives or support that she could turn to if she was actually able to get to her home town. She did not have a NIC as that had been destroyed during the attacks on her home in 1996. Without a NIC, she would not be able to travel from Colombo to her home town. In the circumstances, it was unrealistic to consider that she could return to her home town at the present time. Beyond that, even if she did so, she was at a real risk of serious maltreatment by the Sri Lankan army because of the totality of her personal background and in particular being seen as an LTTE supporter.

[42] She explained that to obtain a NIC, she would have to go to the army commander in her home district and, until his clearance was given, she could not go to the local mayor to obtain the certificate. She considered that if she presented herself before the army commander, she would be immediately at a real risk of serious maltreatment because of her ethnicity and background.

[43] The appellant's son, when giving his evidence, submitted that none of the family members had been able to return to Sri Lanka at any time, despite serious

concerns about missing family members, after the tsunami in 2005. He and his mother had made many enquiries relating to a son and daughter of the appellant (the brother/sister of AA). Although there had been previous contact, neither of them had been heard of since the tsunami. Despite a number of efforts to contact them through friends and others, letters had not been replied to and no contact had been established with them. The appellant and her son therefore consider that they have been lost in the tsunami. In his view, there were now no family members alive, or able to be contacted, in Sri Lanka.

[44] The appellant and the son explained that the only way she could possibly return to Sri Lanka would be to go to the airport in Colombo. However, she had never been to Colombo and knew nothing about the city. Given her ethnicity and the fact that she had been out of Sri Lanka for many years, and was not just an ordinary Tamil with no profile, she would be at serious risk, even in Colombo. She would have no possibility of accessing any meaningful protection in that city in the current heightened state of security and unrest between the Sri Lankan army and authorities and the LTTE.

COUNTRY INFORMATION

[45] Mr Petris supplied additional material to the Authority at the hearing, in addition to referring the Authority to the latest United States *Department of State Country Report*, the United Kingdom *Country of Origin Report* (UKCOIR) and the *Hotham Report* (2006).

[46] The additional material provided by Mr Petris included four reports from a website "stuff.co.nz – New Zealand source for world news". A report of 3 August 2008 states that the Sri Lankan military entered the rebel capital of Kilinochchi, where the elusive rebel leader, Vellupillai Prabhakaran, is believed to be hiding. This report states that the Sri Lankan is pursuing a strategy of gradually retaking the Tamil Tigers' northern strongholds in an effort the win the 25 year-old civil war and that this is done amongst a daily barrage by sea, air and land in all northern rebel-held territories.

[47] In a report dated 15 August 2008, from the same source, it is stated that tens of thousands of civilians have been displaced in the latest fighting in northern Sri Lanka, making it difficult for humanitarian workers to give assistance. The fighting in the area is stated to have intensified since the government formally pulled out of the six year-old ceasefire pact in January (2008). This report states

that some 5,748 rebels have been killed in fighting so far this year and 758 government troops have also died. The same report refers to official figures of displaced persons totalling 47,494 in the northern areas.

[48] A report of 8 October 2008, also from the same source, refers to a Sri Lankan suicide bomber killing 26 people in a north central town and that the fighting between the rebel forces and the army still continued in the north.

[49] In a report dated 28 November 2008, also from the same source, it states that torrential rain had bogged down the Sri Lankan siege of Tamil Tigers' headquarters and therefore the President of Sri Lanka, Mahinder Rajapaksa, was not able to declare the capture of Kilinochchi to upstage the annual Heroes' Day speech of Vellupillai Prabhakaran.

[50] Mr Petris also supplied a copy of an article from the *Guardian Weekly*, 11 July 2008, "Quiet war gets louder". This report, written by a journalist who had gone to Sri Lanka to report on the continuing conflicts, states that in a boost by the Sri Lankan army, more than 1,500 rebels have died during this year and that there are checkpoints everywhere, with both the government and the Tigers notorious for making people disappear.

THE ISSUES

[51] The Authority, noting the provisions of ss129J and 129O of the Act, and having reached the conclusion that it has jurisdiction to determine this second refugee claim by the appellant, must now go on to asses the appellant's second claim by considering the following issues.

[52] 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."

[53] 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

[54] The Authority found the evidence of the appellant and her son to be credible. Their evidence at the hearing gave no concerns and was consistent with the claim made in the first appeal, where their credibility was accepted, and with the country information supplied. The Authority found no inconsistencies or significant implausibilities in the appellant's claim.

[55] In this situation, the profile of the appellant as found must therefore be set against the relevant country information that has been covered above.

THE APPELLANT'S CURRENT PROFILE

[56] The appellant is an elderly woman with some mental and physical health problems. Obviously she does not have the profile of a young Tamil man or woman with either past or potential direct involvement in the LTTE. However, on the totality of the evidence presented she does have a number of features about her claim that differentiate her from other elderly Tamil women returning to Sri Lanka. These features relate to her past family background, including neighbourhood association with the LTTE leader and the connections of her nephew and sons to the LTTE, albeit some 10 to 15 years ago.

THE CURRENT RISK IN HER HOME DISTRICT

[57] As noted, the appellant's home town is now effectively a piece of occupied territory held by the Sri Lankan Army in the current, resumed, civil war. If she were physically capable of returning to her home district, overcoming the problems of passing through checkpoints without an NIC, the Authority is satisfied that there is a real chance, based on her profile, that the Sri Lankan authorities/army will subject her to serious maltreatment, tantamount to being persecuted. That treatment, would be by way of detention, interrogation, and the risk of physical harm to extract information from her about her children and family situation. The risks of being persecuted, in the current environment prevailing in her home district, the Authority considers is heightened because of the notoriety of the town that the appellant comes from and her family name. There is also the real risk that officials in the district would know that her nephew had been a senior LTTE operative some years ago.

[58] The Authority therefore concludes that the appellant faces a real chance of being persecuted in her home district for reasons of her imputed political beliefs, and membership of a particular social group (her own family).

[59] In this case, as the risk of being persecuted arises from state actors, the question of a potential "internal protection alternative" is a much reduced one from that that would arise if her predicted risks were at the hands of non-state actors.

[60] On the facts of the present case there is some limited potential for the consideration of an internal protection alternative. This is because, while the appellant's profile is, for the reasons explained above, clearly one that would resonate in her home district, this risk of recognition is more remote in Colombo

and other parts of Sri Lanka.

[61] For the reasons more fully explained in *Refugee Appeal No 76044* [2008] NZAR 719 (NZRSAA) and *Refugee Appeal No 71684/99* [2000] INLR 165 (NZRSAA), once a refugee claimant has established a well-founded fear of being persecuted for a Convention reason, recognition of that person as a Convention refugee can only be withheld if that person can genuinely access in his or her home country domestic protection which is meaningful. Such protection is to be understood as requiring:

(i) that the proposed internal protection alternative is accessible to the individual. This requires that the access be practical, safe and legal;

(ii) that in the proposed site of internal protection there is no risk of being persecuted for a Convention reason;

(iii) that in the proposed site of internal protection, there are no new risks of being persecuted or of being exposed to other forms of serious harm or of *refoulement*; and

(iv) that in the proposed site of internal protection basic norms of civil, political and socio-economic rights will be provided by the State. In this inquiry reference is to be made to the human rights standards suggested by the Refugee Convention itself.

[62] Only if an affirmative answer is given to each of these four elements of the inquiry can recognition of refugee status be withheld.

[63] Turning to the appellant's particular profile, on the facts as found the Authority finds that a proposed internal protection alternative in Colombo is, at the level of a real chance, accessible to the appellant given that she has a valid current passport which she could present on return and, whilst she has no NIC, she has a remote risk of being detained at the airport for that reason and is unlikely to be a person listed on any computer record held on arrival. However, the ability to live and remain in Colombo as a site of an internal protection alternative is, on the facts of her case, impractical, unsafe and illegal. With no support systems, her inability to speak Sinhalese and general physical incompetence, the appellant would not be in a position to find practical support in a place of safety. Beyond that, as she does not have a NIC, she would not be legally resident in Colombo.

[64] While the risk of her being persecuted by the Sri Lankan authorities in Colombo, given her age and the lesser risk of family recognition, must be seen as a remote or speculative one, there are clearly additional risks to her in Colombo because of her complete lack of relatives, friends or others who would support her and her total lack of knowledge and personal ability to survive in Colombo. The Authority is satisfied that, in the proposed site of internal protection, she would not be able to access several basic norms of civil, political and social economic rights from the state of Sri Lanka.

[65] Based on this collective assessment, the Authority considers that an internal protection alternative is not available to this appellant.

CONCLUSION

[66] 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
Chairman