

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76272

AT AUCKLAND

Before: C M Treadwell (Member)

Counsel for the Appellant: I Uca

Appearing for the Department of Labour: No Appearance

Date of Hearing: 6 and 7 October 2008

Date of Decision: 23 February 2009

DECISION

INTRODUCTION

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

[2] This is the second time that the appellant has claimed refugee status in New Zealand.

[3] On 30 April 2007, the Authority (differently constituted) delivered its decision in respect of the appellant's first appeal. See *Refugee Appeal No 75972* (30 April 2007). It rejected as untruthful the appellant's claim to have been detained by both the Sri Lankan Army and the Liberation Tigers of Tamil Eelam ("the LTTE") and found that he did not have a well-founded fear of being persecuted if he returned to Sri Lanka.

[4] On the present appeal, the appellant says that, since his first claim, there has been a significant deterioration in the civil war in Sri Lanka, with the Sri Lankan Army making a full scale assault against the LTTE in the Vanni area and on the Jaffna Peninsula in the north.

[5] The central issues which emerge on this appeal are whether the jurisdictional threshold of “changed circumstances” is met and, if so, whether the appellant is now at risk of serious harm if he returns.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[6] Second or subsequent refugee claims (including appeals to the Authority) are subject to jurisdictional limitations.

[7] Section 129O(1) of the Immigration Act 1987 (coming into force on 1 October 1999) (“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.”

[8] It follows that it is necessary to consider the appellant's original claim and his 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 he is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

[9] Jurisdiction to hear and determine subsequent refugee claims under s129O(1) of the Act involves a comparison of the claims as asserted by the refugee claimant. In the absence of significant difference in the grounds upon which the claims are based, there is no jurisdiction to consider the subsequent claim. See *Refugee Appeal No 75139* (18 November 2004).

[10] Where jurisdiction is established, the merits of the subsequent claim will be heard by the Authority. This hearing may be restricted by the findings of credibility or fact 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 a discretion as to whether to rely on any such finding.

THE APPELLANT'S FIRST CLAIM

[11] What follows is a summary of the appellant's evidence at the first appeal hearing. It is recorded in detail in *Refugee Appeal No 75972* (30 April 2007).

[12] The appellant is a Tamil, born in 1977 in Kachai, a village in the middle of the Jaffna Peninsula. His parents and four siblings also live in Sri Lanka. He had another brother who was killed by the Army in detention in 1985.

[13] Detained by the LTTE in February 1995 for several months, the appellant escaped but was caught and sent to an Army camp, where he was interrogated and was beaten with an iron bar, breaking his leg. Sent to a prison in Colombo, he was again tortured. After a month, he was released. Required to report weekly to a police station, he was further mistreated. Accordingly, he left Colombo and went to Z village, to stay with an uncle in an LTTE-controlled area.

[14] The appellant stayed with his uncle until mid-1996, when the Army attacked the area. Fearful of being caught in breach of his conditions of release, he went to W village, where his parents were living. There, he encountered no problems until mid-1998, when he heard increasing reports of people disappearing. In fear, his family arranged for him to go to the United Kingdom.

[15] The appellant sought refugee status in the United Kingdom but a court summons that had followed his failure to report to the police station was lost by his lawyers and was never produced to the adjudicator. His claim was dismissed. Detained, he was returned to Sri Lanka in 2003, where a ceasefire was in place.

[16] On arrival, he was questioned and was released. He returned to Kachai, his parents having gone back at the end of 1999. There, he set up an electronic goods business, obtaining orders from people in his area and purchasing the goods in Colombo, for which he opened an account at the Hatton National Bank. Initially, he worked in Army-controlled areas but, from early 2005, he also went to LTTE-controlled areas.

[17] In August 2003, the appellant met his wife and they married four or five months later. Thereafter, they lived in Y, a town a few kilometres from Kachai.

[18] In mid-2005, fighting between the Army and the LTTE worsened. The LTTE began forcible recruiting and would question travellers about troop movements in the Army-controlled areas. The Army began retaliating against attacks on soldiers

and the appellant decided that it would be safer to leave Sri Lanka again.

[19] An 'agent' agreed to arrange travel to Canada. In Japan, however, he was intercepted and was returned to Sri Lanka, where he was questioned at the airport and accused of being an LTTE member. Held at a camp near the airport, he refused to sign a confession and was beaten and interrogated. Eventually, an officer released the appellant on payment of a bribe of 500,000 rupees.

[20] The appellant returned to Y. His wife, pregnant at the time, miscarried because of the stress of his detention. He resumed his trading but mainly in his local Army-controlled area. Once, in late 2005, he went to an LTTE-controlled area where an LTTE official asked him why he did not trade in their area anymore and wanted to know what had happened at the airport.

[21] In January 2006, while the appellant was in Jaffna, strangers came to his house and told his wife that he was to report to an LTTE camp in Y or be killed. BB, a local MP, told the appellant that there was nothing that he could do and advised him that it would be dangerous to go to the camp as requested.

[22] The appellant's parents agreed that he should try again to leave Sri Lanka. An 'agent' was found and he travelled to New Zealand in early 2006. When he left Sri Lanka, his wife went to stay with his parents.

[23] In New Zealand, he learned by telephone that his wife had moved to live with her parents in late 2006, because of fighting in the area. She told him that even though his family lived only two or three kilometres away she had no news of them and it was dangerous to go outside the house.

[24] The appellant's wife wrote him a number of letters, in which she told him that while she was with his parents in Kachai, officials from the Army's Central Intelligence Department ("CID") came and questioned her as to his whereabouts. In another letter he was told that, in March 2006, the CID had searched "the whole house" and enquired about the appellant.

Conclusion by Authority on first claim

[25] The panel on the first appeal rejected his claimed difficulties with the LTTE and the Army as not credible. In brief, though, it accepted that he is a Tamil from the north of Sri Lanka, that he was in the United Kingdom from 1998 to 2003 and

was returned to Sri Lanka. It assessed whether those aspects of the claim which it did believe brought the appellant within the Refugee Convention.

[26] The panel found that the appellant did not face a real chance of being persecuted in Sri Lanka. After reviewing the country information, it concluded:

- (a) In the past 18 months there had been some escalation in the conflict, resulting in a deterioration in the human rights situation. A heightened state of security existed, including cordon and search operations and the checking of identity papers of young Tamils.
- (b) Even so, the situation had not deteriorated so much that all young Tamil males faced a real chance of being persecuted. UNHCR did not call for the recognition of all Tamils from the north as refugees but only that their cases be “favourably considered”. It distinguished between those targeted by the state, LTTE or other non-state agents and those who faced levels of generalised violence, recommending that only the former should be recognised as refugees.
- (c) The chance of the appellant being caught up in an Army or LTTE attack was speculative and did not rise to the level of a real chance.
- (d) In ‘cordon and search’ operations in Colombo most Tamils were detained briefly and were released after being fingerprinted and photographed. The appellant had no characteristic, beyond being a young Tamil male from the north, which would expose him to detention or ill-treatment. His tattoo is faint and has no link to the LTTE.
- (e) The Authority accepted that the appellant, as a young Tamil male from the north of the country, may well be detained and questioned at the airport but found he would face only routine questioning.
- (f) UNHCR noted that young Tamils in the north continued to be at some risk of forced recruitment by the LTTE. The risk of the appellant being recruited was, however, seen as speculative.

[27] For these reasons, the panel concluded that the appellant was not a refugee.

THE APPELLANT'S SECOND CLAIM

[28] The appellant does not resile from his first claim and maintains that the account he gave at his first appeal hearing was truthful. Nevertheless, he does not rely directly on past events as the grounds of his second claim. Rather, he relies upon developments in Sri Lanka since his first claim was declined.

[29] In essence, the appellant says that, since his first claim, there has been a dramatic escalation in the conflict in the north of Sri Lanka, such that it is unsafe for him to return there. A major Army offensive has seen the LTTE driven back to the point that it is besieged in a small area in the northeast of the Vanni (the administrative districts of Mannar, Mullaitivu and Vavuniya). The whole of Jaffna Province is in Army hands, including the appellant's home village of Kachai.

[30] In April 2007, shortly after the appellant's first claim was declined, his brother left Sri Lanka because of the worsening situation in the north. The brother's son had been detained and interrogated by the Army and the brother feared that worse would happen the next time. Accordingly, he obtained Indian visas for the family and they are now living in a refugee camp in Tamil Naidu.

[31] Other relatives have also suffered harassment and harm. The appellant's brother-in-law's nephew was threatened by the Army at about this time and surrendered himself to the Sri Lankan Human Rights Commission for protection.

[32] As to the appellant's wife and parents, they left the north of the country in January 2008 and moved to Colombo, where they have remained ever since. The appellant's parents, who are elderly, do not encounter significant difficulties. All three have had to re-register with the police, who have required them to produce 'Army identity cards', issued in their home area, to show that they have come from an Army-controlled area in the north. Even though they have no reason to be in Colombo, they have so far persuaded the police to allow them to stay by explaining that they are waiting on a visa application for the appellant's wife to join him in New Zealand. The appellant's parents have accompanied her to Colombo, they explain, for the sake of propriety. The appellant has concern at whether this explanation for their presence in Colombo will be accepted much longer.

[33] To support his wife and parents in Colombo, the appellant sends money from New Zealand regularly. This has enabled them to rent accommodation. If he returns, however, this income will disappear. They will have no means of surviving

in Colombo and will likely be compelled by the authorities to return north because the appellant cannot produce an 'Army identity card' to show that he is from an Army-controlled area.

[34] If he is returned north, the appellant says, he cannot reach his home village because of the present conflict in the Vanni and, even if he could, he is at risk there of detention and mistreatment because he is a Tamil male returning to an area from which tens of thousands of people are fleeing. He will be suspected of LTTE links and will be detained and interrogated, during which he will suffer serious physical mistreatment.

[35] Most recently, the appellant heard from his wife on 30 January 2009. She advises him that the police are pressuring her to return to the north. She is under great stress and her health is suffering.

[36] In support of his second claim, counsel has made both opening and closing submissions and has submitted a substantial quantity of country information. It is referred to hereafter.

CONCLUSION ON JURISDICTION

[37] As noted in *Refugee Appeal No 75139* (18 November 2004):

[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 s129B(1) that the exercise requires the refugee status officer and the Authority to compare the claims **as asserted by the refugee claimant**, not the facts subsequently found by [the Refugee Status Branch] officer or the Authority."

[38] On this analysis, the Authority is satisfied that, in the present case, the jurisdictional threshold is met.

[39] At the time of his first claim, determined on 30 April 2007, the resumption of hostilities in Sri Lanka, following the failure of the 2002 ceasefire, was sporadic and still relatively low-key. The decision of the Authority on the first appeal reviewed the country information at that time (see [76]-[88] thereof). It is clear that, at that time, the position could be summarised as:

- (a) renewed concern by human rights observers at the resumption of checkpoints, 'cordon and search' operations, disappearances, targeted killings and curfews; and

- (b) the resumption of sporadic fighting between the Army and the LTTE on the Jaffna Peninsula. The level of the conflict in the north at that time was described by UNHCR as:

“...frequent confrontations between the parties to the conflict, which included aerial bombings, long-range shelling and claymore mines.”

and Human Rights Watch similarly noted that:

“The Sri Lankan armed forces have engaged in indiscriminate shelling and aerial bombing with little regard to the expected harm caused to civilians.”

[40] The second claim asserts that the conflict has escalated dramatically, with the Army launching a major sustained offensive in September/October 2008, which is still ongoing. The whole of the Jaffna Peninsula has fallen to the Army and the LTTE has been driven into a small area of the Vanni around Kilinochchi, in which it is besieged. An estimated 250,000 civilians have been displaced in a matter of a few months.

[41] For present purposes, it is sufficient to record that the claimed dramatic escalation in the intensity of the conflict in the north is such that the Authority is satisfied that, since the first claim, circumstances in Sri Lanka have changed to such an extent that the second claim is brought on significantly different grounds. Indeed, such significantly different grounds have arisen since the Refugee Status Branch declined the second claim on 3 July 2008.

[42] Given that finding, it is necessary to consider the second claim in the context of the Refugee Convention.

THE ISSUES

[43] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

"... owing to a 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."

[44] 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

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

[46] The Authority has a discretion to rely upon findings made in relation to an earlier claim. Pursuant to s129P(9) of the Act:

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

[47] The Authority finds the reasons given by the panel on the first appeal for its conclusions on credibility to be cogent and persuasive and determines to rely upon the findings of credibility made therein. It follows that, of the evidence which was before the panel on the first appeal, the Authority accepts only that the appellant is a young Tamil male from the north of the country, with a faint tattoo on his arm, who lived in the United Kingdom from 1998 to 2003 and who was returned to Sri Lanka as a failed asylum-seeker.

[48] For reasons which will become clear, it is not necessary to address the issue of the truthfulness of the first claim in any greater detail.

[49] As to events since the appellant's first refugee claim, the Authority accepts the appellant's evidence as truthful, in particular regarding the circumstances of his wife and parents in Colombo. As to the dramatic escalation of the conflict in the north, the assessment of country information which follows concludes that that too is accepted.

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

[50] “Being persecuted” comprises two elements – serious harm and the failure of state protection; see *Refugee Appeal No 71427/99* (16 August 2000) at [67].

Further, the appropriate standard is a sustained or systemic violation of core human rights. See in this regard *The Law of Refugee Status*, J C Hathaway (Butterworths, Toronto, 1993) at p108 and *Refugee Appeal No 2039/93* (12 February 1996).

[51] The nub of the appellant's second claim is that, as a Tamil male from the north, he is at risk of serious harm. He says that, if he returns to Colombo, where his wife and parents are currently staying, he has none of the trappings of stability which would satisfy the authorities at the many checkpoints and 'cordon and search' operations which have been resurrected. He has no 'Army identity card' from his home area to enable him to register, he has no employment in Colombo nor other reason to be there, he will likely have no adequate accommodation or means and he has no support network of residents to vouch for him. Enquiry will reveal that he has been overseas for extended periods. He is at risk, he says, of being detained and seriously mistreated in Colombo.

[52] If he tries to return to the north, he says, he faces the difficult task of attempting to cross the Vanni region. The A9 motorway is closed and there are numerous Army checkpoints. As a Tamil trying to enter the conflict area, he will be suspected of LTTE links, particularly at a time when many thousands are in fact attempting to flee the area. He risks being detained, interrogated and mistreated. Such mistreatment by the Army routinely includes torture and can lead to arbitrary killing or disappearance.

[53] Given the nature of the appellant's claim, it is necessary to consider the current country information, which, since August 2008, has documented a rapid and sustained escalation of the conflict.

[54] While there has been a gradual escalation of the conflict ever since the ceasefire broke down in early 2007, a major offensive in July/August 2008 saw the Army push towards, and reach, the LTTE 'capital' of Kilinochchi, just south of the foot of the Jaffna Peninsula (*Reuters* – 3 August 2008, "Sri Lanka Military Enters Rebel Capital" and 15 August 2008, "Thousands displaced by Fresh Sri Lanka Fighting").

[55] In September, the focus of attention was also on the deteriorating human rights situation for Tamils in Colombo (*New Zealand Herald* – 11 September 2008, "Police Arrest 56 Tamils in Colombo" and 18 September 2008, "Sri Lanka Orders Tamils in Colombo to Register"). Military action in the north continued to be

reported (*New Zealand Herald* – 29 September 2008, “Suicide Bomb Kill One, Wounds Eight in Sri Lanka” and 23 October 2008, “Sri Lanka’s Navy Destroys Bomb Boats”).

[56] By late November, the sustained offensive by the Army had reached the point that the fall of Kilinochchi was reported as imminent (*Reuters* – 28 November 2008, “Sri Lanka Awaits Tiger’s Speech, Rain Slows Assault”) and the LTTE had withdrawn from it completely by 3 January 2009 (*New Zealand Herald* – 5 January 2009, “Sri Lanka Wages War on Tigers’ Last Stand”). By 9 January 2009, the Army had seized the town of Pillai at the foot of Elephant Pass, forcing the LTTE into the small jungle area around Mullaittivu on the north east coast by 19 January 2009, raising concerns for some 350,000 civilians trapped in the area. (*New Zealand Herald* – 9 January 2009, “Army Captures Another Tamil Tiger Base” and 19 January 2009, “Fears For Trapped Refugees”).

[57] In spite of the offensive in the north, the LTTE has continued to conduct random bombings, including a bomb blast in Colombo on 21 January 2009 and a suicide bomb on 10 February 2009 (*New Zealand Herald* – 21 January 2009 “Bomb Blast Kills Policeman in Sri Lanka” and 10 February 2009, “Suicide Bomber Strikes as 15,000 Flee Tamil Tigers”).

[58] The current situation is reported by the *New Zealand Herald* on 15 February 2009, in the following terms:

“All but hidden from view of the outside world, a bitter and savage war being waged in the north of Sri Lanka is creating a humanitarian crisis in which hundreds of thousands of civilians are at risk.

In what may be the final chapters of one of the world’s longest-running civil wars, Sri Lankan troops say they are close to crushing the remnants of the once-potent Liberation Tigers of Tamil Eelam (LTTE). Yet the military operation comes at a high price for civilians.

Aid groups and officials say that dozens of civilians trapped in the war zone are being killed and wounded every day. Determined to press ahead with its operation against a guerrilla force that has in the past ruthlessly attacked both military and civilian targets, the Sri Lankan government refuses to effect a ceasefire that would allow the evacuation of wounded people. It has also shut off the area from the outside world.

‘Civilians are continuing to be killed in large numbers,’ said Gordon Weiss, a UN spokesman. ‘There are still a lot of people trapped up there and there is no sign of a ceasefire. We have no real access to the area.’

The fighting taking place in the Mullaittivu district of Sri Lanka is the conclusion of more than a year of renewed conflict between the LTTE and government troops following the termination of a shaky ceasefire agreement in January 2008. Sri Lanka’s President, Mahinda Rajapaksa, has been determined to crush the rebels,

seemingly with little regard for the civilian population in a state of affairs he claims has been exaggerated by aid groups and the media.

This week, however, the world had a rare glimpse of the horrors suffered by the Tamil population, trapped between the government troops and rebels. Hundreds of wounded people were taken by the Red Cross by ferry from a makeshift clinic in the war-zone town of Putamattalan to a hospital in the eastern city of Trincomalee. Many of those who were injured reported that they had been fired on by LTTE fighters when they sought to cross the front line to the government side.....

Yet the Sri Lankan government has also been widely criticised. Humanitarian officials have said that civilians inside a supposed safe zone were killed by artillery shells fired by both sides. A hospital also came under fire and had to be evacuated, meaning there was no longer a proper medical facility inside the war zone....

The Sri Lankan government appears determined that the war being waged in the north remains out of sight of the international community. Journalists have been banned from the war zone, except those travelling on specially escorted tours. Sri Lankan journalists, meanwhile, have suffered a wave of intimidation. Editors have been threatened and many others detained without charge. Around 14 journalists have been murdered by unknown assailants, most recently Lasantha Wickrematunga, editor of The Sunday Leader.”

[59] The articles cited here are representative of the numerous reports in the international press and nothing would be gained by further recording them.

[60] It is possible, given the wholesale advances made by the Army, the uncertainty over the fate of the LTTE leader, Velupillai Prabhakaran, and the crackdown in recent years on the LTTE's ability to source funding and armaments from overseas, that the end of the conflict is in sight. That, however, is not certain. The ebbs and flows of the conflict have produced similar possibilities in the past and it is too early to say with confidence that a cessation in hostilities is imminent.

[61] The Authority accepts that, given the present heightened state of the conflict, the appellant would face a real chance of being persecuted by the Sri Lankan authorities if he attempted to return to the north at this time. He could not cross the Vanni without being stopped at checkpoints and, as a Tamil male travelling towards the conflict, there is a real chance that he would be suspected of LTTE links and would suffer arbitrary detention and serious physical harm.

[62] It is also accepted that he faces a real chance of being detained and mistreated at checkpoints in Colombo, or in 'cordon and search' operations. The characteristics of the appellant are that he is a Tamil male from the north, whose ordinary identity card discloses his origins, who lacks an 'Army identity card' necessary for newly-arrived Tamils from the north registering in Colombo and who lacks employment or other reason for being in Colombo as well as any support

network of relatives or friends who would be able to vouch for him. He risks being detained and either mistreated or forcibly returned to the north.

[63] Bearing in mind that tensions are currently at a high point in Sri Lanka because of the conflict in the north, the Authority is satisfied that there is a real chance of the appellant suffering serious harm if he attempts to remain in Colombo.

[64] The appellant has also made submissions as to the risk to him at the airport as a returned asylum-seeker. Given the foregoing, it is not necessary to address this, save to note that the Tamil diaspora is vast and the authorities are well-used to unsuccessful Tamil emigrants being returned by other countries. Absent any pre-existing difficulties with the authorities, it is unlikely that a deportee would face any difficulties, beyond being questioned, at the airport.

Convention reason

[65] Such mistreatment as the appellant faces if he returns to Sri Lanka would be, at least in part, for reasons of race.

CONCLUSION

[66] It is concluded:

- (a) The Authority has jurisdiction to consider this second appeal.
- (b) For the reasons given above, the appellant is a refugee within the meaning of Article 1A(2) of the Convention.

[67] Refugee status is granted. The appeal is allowed.

"C M Treadwell"

C M Treadwell
Member