

AT AUCKLAND

Appellants:	AH (Sri Lanka)
Before:	A R Mackey (Member)
Counsel for the appellants:	I Uca
Counsel for the respondent:	No Appearance
Date of hearing:	18 July 2011
Date of decision:	16 August 2011

DECISION

INTRODUCTION

[1] The husband is a Tamil Muslim of Sri Lankan nationality. At the core of these appeals made by him and his family, is whether prospective actions by a tenant of a commercial building, partly owned by the husband, present a real chance of the husband and his family being seriously maltreated if they return to Sri Lanka at this time. The Tribunal finds the appellants' evidence substantively lacks credibility and risks to them remote or speculative. Accordingly, the appeals of all appellants fail.

[2] This matter includes several inter-related appeals. It is the third refugee appeal by the husband, his wife and daughter, AA. It is the second refugee appeal by their son, BB, and the first appeal by their son, CC. It is also the first appeal by all members of the family against the decision of the Refugee Status Branch ("RSB") which, on 15 December 2010, refused their claims for protected person status in New Zealand.

[3] The husband, his wife and AA arrived in New Zealand in August 2005 and their first claim for refugee status was lodged soon after. Their two sons have

been born in New Zealand and have been added to subsequent claims.

[4] The husband represented the interests of his three infant children before the Tribunal. He and his wife both gave evidence personally and on behalf of the children. Because the children are aged between seven and two years old, it was agreed that it was inappropriate for them to give evidence to the Tribunal.

JURISDICTION

[5] Section 198 of the Immigration Act 2009 (“the 2009 Act”) requires the Tribunal to determine whether to recognise appellants as:

- (a) a refugee under the Refugee Convention (section 129); and/or
- (b) as a protected person under the Convention Against Torture (section 130); and/or
- (c) as a protected person under the International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[6] As noted above the appellants, (with the exception of the younger son) have made prior claims for refugee status. For the husband, his wife and daughter the first claim, was determined by the Refugee Status Appeal Authority (“RSAA”) on 20 December 2006. Their first appeal to the Removal Review Authority (“RRA”), made in March 2007, was declined by that Authority on 21 September 2007. On 1 October 2007, the husband, his wife, AA and BB lodged another claim for refugee status. After that was declined by the RSB, they appealed to the RSAA. That appeal was declined on 31 March 2008. A further appeal to the RRA was lodged in June 2008. It was declined by the RRA on 2 October 2008. That Authority upheld the previous negative credibility findings stating that the appellant had: “[told] persistent lies during the course of two separate refugee claims”. The third refugee claim to the RSB was lodged on 10 May 2010. That third claim was declined on 29 September 2010 and an appeal to the RSAA was lodged soon after that. That third appeal was not determined by the RSAA at the time that it was disestablished on 29 November 2010. The appeal then passed to this Tribunal under the transition provisions.

[7] On 15 December 2010, the appellants lodged protected persons claims with the RSB. The protected persons claims were declined by the RSB on 18 February 2011 and the appellants then also lodged an appeal with this Tribunal in respect of

their first claim for protected person status.

[8] As the third appeal in relation to the refugee claims by the appellants and the protected persons' claims are based on the same factual matrix, they are dealt with together by this Tribunal.

[9] In respect of the third (subsequent) refugee appeals, it is necessary, as a first step, that the Tribunal establishes it has jurisdiction to hear these appeals. That issue is therefore addressed first.

JURISDICTION TO HEAR SECOND OR SUBSEQUENT REFUGEE APPEALS UNDER THE 2009 ACT

[10] As with the earlier Immigration Act 1987 ("the 1987 Act"), the 2009 Act distinguishes between claimants who have lodged an application for refugee status for the first time, and those who lodge second or subsequent appeals. Under both Acts claimants need to establish that the first instance decision-maker and the appellate Authority (the RSAA under the 1997 Act and the Tribunal under the 2009 Act), have jurisdiction to hear the second and subsequent claims. A useful guidance on the comparison between the jurisdictions in subsequent appeal claims under the 1987 Act and the 2009 Act is set out between [6] and [12] in *AG (Sri Lanka) [2011] NZIPT 800092*.

[11] Section 140 of the 2009 Act relevantly provides:

"140 Limitation on subsequent claims

- (1) A refugee and protection officer must not consider a subsequent claim for recognition as a refugee unless the officer is satisfied-
 - (a) that there has been a significant change in circumstances material to the claim since the previous claim was determined; and
 - (b) the change in 1 or more of the circumstances was not brought about by the claimant-
 - (i) acting otherwise than in good faith; and
 - (ii) for the purpose of creating grounds for recognition under section 129.
- (2) For the purposes of determining the matter in subsection (1), the refugee and protection officer must not treat the actions of any other person in relation to the claim or the claimant as a mitigating factor.
- (3) ..."

[12] In these appeals only the first limb (section 140(1)(a)), "a significant change in circumstances", is relevant. As noted in *AG (Sri Lanka)* a change in

circumstances must be:

- (a) significant,
- (b) post-date the determination of the previous claim; and
- (c) material to the claim.

[13] In addition, pursuant to the terms of section 200(1) of the 2009 Act the test before the Tribunal is of the same nature as that provided in respect of the RSB jurisdiction (section 140(1)).

ASSESSMENT OF THE JURISDICTIONAL QUESTION

[14] Here, the issue is: “has there been a change in circumstances material to the claim?”. It must first be remembered that the comparison of claims does not require consideration of their credibility. The assessment of credibility of the most recent subsequent claim is considered if the jurisdictional threshold is crossed. Thus, for present purposes it is necessary to consider whether the third claim, as asserted, discloses the required change in circumstances from the first and second claims/appeals.

THE APPELLANTS’ FIRST CLAIM

[15] As set out in the first appeal – *Refugee Appeal Nos 75919-22* (20 December 2006) – the appellants’ claim was based on their fears of being persecuted by members of the Liberation Tigers of Tamil Eelam (“LTTE”). They claimed this arose from their failing to deliver materials required to make explosives which were secreted in a chest the husband was transporting. The husband also feared the Sri Lankan police to whom he had reported the attempt made by the LTTE to transport materials to make explosives on his vehicle. The account of all his difficulties in Sri Lanka were found to be untrue by the RSAA and the appeal was dismissed.

[16] The basis of the second claims and appeals made by the family is set out in *Refugee Appeal Nos 76179-76182* (31 March 2008). The husband claimed he faced a well-founded fear of being persecuted by the police Criminal Investigation Department (“CID”) in Sri Lanka. The husband claimed the CID had approached his father on a number of occasions claiming that the husband was suspected of

being involved with the LTTE and/or corrupt police officers. In addition, the husband feared that he could be kidnapped, or seriously maltreated, on return to Sri Lanka because he was a member of a wealthy Tamil Muslim family of business owners. He claimed there had been telephone calls to his elder brother, threatening them with kidnapping. The RSAA accepted jurisdiction but did not accept the husband or his wife had given credible evidence in relation to the second claim. The Authority only accepted the husband was a Tamil Muslim and his family were engaged in business. The Authority then went on to note that while there had been some instances of kidnapping and extortion of wealthy Tamil business people it could not be said that all wealthy Tamil business people faced a real chance of being persecuted for that reason alone. The appeals were therefore dismissed.

[17] The basis of the appellants' third claim (and indeed the derived first claim by the youngest son, CC, and all the protected persons claims now under appeal for the first time) are made on the basis that the husband and his family have a well-founded fear of being persecuted, or seriously maltreated, on return to Sri Lanka by a Sinhalese businessman, DD ("the tenant") and/or his associates. The husband and other members of his family, had rented a shop they owned in Z to the tenant. The husband claims the tenant is now fraudulently transferring ownership of the shop to himself (or his company). As part of the illegal acquisition, the tenant had arranged an attack on the husband's late father and would also target the husband and his family on their return. In addition, the tenant would lay information with the Sri Lankan authorities that the husband was a LTTE supporter.

[18] From the analysis of the above three claims it is clear that this third claim, as presented, is based on a significant change in circumstances from the first and second claims. Those changes post-date the decision in the second appeal. There is no suggestion that any of the appellants acted in bad faith and for the purpose for creating grounds for recognition as refugees or protected persons.

CONCLUSION ON JURISDICTION

[19] Jurisdiction to hear the appellants' third claim/appeal is accepted in accordance with section 198(1) of the 2009 Act. The Tribunal proceeds to consider the entitlement to refugee status before going on to consider the protected persons status issues. The same account is relied on in respect of all

limbs of these appeals. The account which follows is a summary of that given by the husband and his wife at the appeal hearing and in written evidence presented by them.

THE APPELLANTS' CASE

The appellants' evidence

[20] The husband has four older brothers, EE, FF, GG, HH. He has one younger brother and one younger sister, JJ and KK. His father died earlier in 2011. His mother lives with GG and his family in Colombo. His brother HH lives in Australia, where he migrated some years ago. All of the other siblings remain in Sri Lanka, some in Colombo and some in Z.

[21] The husband is from a wealthy Tamil Muslim family who are primarily involved in trading. They own a number of substantial (in Sri Lankan terms) household properties and business premises both in Z and in Colombo.

[22] In April 2010, when the husband rang his father seeking some financial assistance, because he was struggling to get by in New Zealand, he ascertained that in November 2009 his father had been in a confrontation with the tenant of a family business property/shop in Z.

[23] The husband's father had been told (apparently in October/November 2009) by a local Muslim in Z, who worked for the regional government Local Titles/Land Office, that the tenant was endeavouring to register the shop he was renting, in his own name. Hearing this information, the father went to the shop and confronted the tenant. The father stated that the family wished to resume occupation of the shop in the near future. During an ensuing argument with the tenant, the father was told to leave and was verbally abused. Later that day, while the husband's father was out walking, he was attacked in the street by three people in a small vehicle. He received injuries, requiring hospitalisation for about one day. The father then went immediately to stay in Colombo, fearful for his safety.

[24] The father and other members of the husband's family had not told the husband earlier of the incident because they did not wish to distress him. When the husband sought more information from his father, he was told that, in addition to the abuse by the tenant and the attack by three people, who were presumed to

be acting under his orders, the tenant had threatened to tell the Sri Lankan authorities that the husband was a LTTE supporter.

[25] As a result of this, the husband, after discussing it with his wife, decided to again apply for refugee status and they made their third claim.

[26] Since the dismissal of their claim by the RSB, further matters have been reported to the husband by the family.

Recent information

[27] In November 2010, the appellant's brother HH, who lives in Australia, went to Sri Lanka to see his parents. While he was there he went to the Z shop premises to discuss issues with the tenant. He himself was threatened also and had no choice but to leave. This report frightened the husband. It was soon after this that the appellants filed their protected persons claims fearing torture or serious maltreatment if they were returned to Sri Lanka.

[28] In January 2011, the husband's father was again attacked in Z. This time it was when he was taking a short walk near his home with one of his servants. He was attacked, and an attempted kidnapping was made upon him, by two men in a white van. The servant screamed and fought off the two men and fortunately neighbours gathered round enabling the father to escape. The attackers drove off in their van. The father and one of the brothers, EE reported the matter to the local police and the father returned to Colombo. The husband was not told about this incident until mid-February 2011 by HH, during contact with him from Australia.

[29] It was in March 2011 that HH again returned to Sri Lanka because their father became quite unwell. The father died on 25 March 2011 in a Y hospital. The husband and wife were distressed by their inability to return to Sri Lanka to see the father before he died. They considered that the husband was unable to travel because of the threats and risks to him posed by the tenant.

The lease

[30] A copy of the Deed of Lease in respect of the business premises in Z leased to "ABC Company Ltd", a company evidently owned by DD as tenant, was provided to the RSB. It is on the husband's file. This lease appears to be fully registered and is notarised with an attorney in Z.

[31] The lease is from the husband, his younger brother JJ, the appellant's father and his mother, as the owners/lessor of a three-storied business premises in Z. The lease sets out that the property is leased for a period of 10 years from 2005. A substantive amount of future rent was paid at the time of the execution of the lease and residual monthly rental became payable, at varying rates, during the first three years, second three years and final four years of the term.

[32] The lease provides for the premises to be held peaceably by the tenant, permitting the use of the premises at the tenant's absolute discretion during the term. It provides that if either the lessor, or the tenant, is desirous of terminating the agreement, before the expiry of the full term, either party shall have the right to terminate, after giving six months' written notice (subject to certain conditions set out in the lease).

[33] At the time when the husband's father visited the tenant, at the leased premises in November 2009, the lease had been running for approximately four and a half years. According to the terms of the lease, and confirmed by the husband, after six years he and his brother could resume occupation of the property on certain conditions. The husband considered that, despite it being a further year before legally the six months' notice of resumption of the property could be given, his father may have told the tenant, at the time of the November 2009 visit, that it was the family's intention to take back occupation of the property.

[34] When it was put to the husband that the tenant, who had a 10-year lease, may have been upset, due to his right to quiet enjoyment being interrupted, when the father challenged the tenant at the shop, the husband considered that the actions taken by the tenant were making it clear to his father that the tenant would not give the property back to the family.

[35] The husband considered this was supported by the manner in which the tenant spoke to his father. The tenant told the father that if he continued to harass him, he would inform the authorities that his son (the husband) was an LTTE supporter. Additionally, the tenant's adamant intentions to keep the property were shown when, later on the same day, three "thugs" told his father not to go back to the shop after running him down, with a motor vehicle and then hurrying away.

[36] The husband and his family have not offered to sell the property to the tenant or to sell it to another party, subject to the lease. The husband thought it would be silly to do so as the tenant wants to get it for nothing and that such an offer could only be made by him in person to the tenant. The husband did not

consider using a lawyer to negotiate with the tenant in any way and, because it was a family property, he “did not want to sell it”.

[37] It was put to the husband that there appeared to be at least four options open to him. These were:

- (a) to take legal action to get the rental paid up to date;
- (b) give formal notice of termination of the lease on six months’ notice;
- (c) take steps, using a lawyer or agent, to sell the property; or
- (d) effectively give up, or “walk away from”, the property so that the potential cause of conflict between the husband (and possibly other members of his family) and the tenant would fall away as there was nothing to dispute.

[38] The comments from the husband on these four potential steps follow.

- (a) He had taken steps, when his brother visited the property recently, to have the rent paid up to date. He agreed however that the rent was, to the best of his knowledge, only four months in arrears at the present time, and that a substantial part of the rent had been paid in advance.
- (b) His father had gone to the property to amicably work out an arrangement whereby the lease could be terminated on six months’ notice. However, following the attack by the “thugs” in November 2009 and the attempted kidnapping in January 2011, if the husband himself went to the property he would be killed. He considered he could not use a lawyer to negotiate on his behalf as Sri Lanka was not like New Zealand and, even if a lawyer was used, the tenant would still maltreat or kill him.
- (c) He was not prepared to engage a lawyer to negotiate a sale with the tenant or another party for similar reasons. This was also because it was “family property”, and they would not sell.
- (d) Even if he, as owner, were to “walk away” from the property, he considered he would still have a fear, in the future, that he could be killed or attacked. Accordingly, if he returned to Sri Lanka he would not be able to relax or “do anything in the future”. The actions

against him, in his view, would not be those of just one person but the government was also involved. The evidence upon which he based the government's potential involvement was that there were a number of reports showing that the government was allowing properties to be seized from Muslim owners and they were doing nothing about the kidnapping of people involved. Indeed, the attempted kidnapping of his father by the men in the white van, he saw as evidence of this. He therefore considered people associated with the government and their supporters could also come after him. He agreed he had other properties that he owned and would be able to live in comfortably if he returned, but:

"I have this fear in my mind. Even if I arrive at the airport, as I have been in New Zealand five or six years without a visa and have children born here, I have a fear."

[39] The additional properties the appellant was referring to were his home in Z and his wife's mother's home in Y that would ultimately pass to his wife. At present a small family of relatives are looking after his quite substantive home in Z.

Evidence of the wife

[40] The wife, in her evidence, confirmed that her claim and that of her children was based on derivative risks to them as members of her husband's family. The risks to all of them were maltreatment and suffering at the hands of the tenant and his associates. There was nothing in her personal profile she considered added risk to herself or the family. Her mother, two brothers and four sisters, who all remained in Sri Lanka, had no problems that she knew of.

[41] She considered that if they were to return to Sri Lanka, there was no place they could go to because they could not get out of the airport. Even if they did go to their home in Z, there would be problems for them there.

[42] The risks to her, or the family, if the business property was sold or the family merely "walked away" from it, would not go away. The tenant would not allow them to sell it. Her father-in-law had gone to the property to try and sort out the problems with the tenant but he was now dead and so nothing further could be done. Even if they did instruct a lawyer, because the tenant would get government support, such a lawyer would not be effective against the tenant. They were not thinking of giving up the property, or selling it, in the current problem that faced them.

[43] When it was put to the wife that the loss of the property either by walking away, or through mere criminality on the part of the tenant, may not be a breach of the core rights covered by the Refugee Convention or other international human rights instruments, she stated the problem of the property did not matter. Their problem was also with the government that was trying to take away Muslim property and give it to Sinhalese and who allowed the kidnap and killing of Muslims in so doing.

[44] Apart from her late father-in-law and the family, she knew of no one else who had problems in having their property stolen or being attacked or abused. She considered there were real risks to her and her family as these things had actually happened to her father-in-law. In addition, she feared that, her husband had been reported as a LTTE supporter. She considered that if there were no risks to them they would readily return to Sri Lanka and live well there. In New Zealand life was not easy for them without employment and income.

[45] Both she and her husband considered their risks would be heightened when they arrived at the airport in Sri Lanka due to the fact that their children were registered in New Zealand and not in Sri Lanka. In this situation there would be a presumption that they came to New Zealand to seek asylum and, in doing so, they might have said defamatory things about Sri Lanka. Even though the information relating to the New Zealand-born children would be provided by the New Zealand authorities to the Sri Lankan authorities, so that travel documentation could be obtained for the children from the Sri Lankan authorities, she considered this factor could add to their risk profile on return.

ASSESSMENT OF THE APPEALS

Interpretation of “well-founded fear”

[46] It is relevant firstly to set out some jurisprudence and comments on the objectivity required in assessing refugee and protected person appeals.

[47] The RSAA, whose jurisprudence is adopted by the Tribunal in this regard, for many years interpreted the term “being persecuted” in the “inclusion clause” (Article 1(2) of the Refugee Convention) as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. In other words, core norms of international human rights law are relied on to define the forms of serious harm which may fall within the scope of “being persecuted”. This is often

referred to as the human rights understanding of being persecuted and is fully explained in *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90].

[48] As noted in the issues set out below, an assessment of the “well-founded fear” element of the refugee definition has, at its core reference point, not the facts subjectively perceived by the claimant, but the objective facts as found by the decision-maker. This explanation of the objective standard required was summarised in *Refugee Appeal No 76044* (11 September 2008) at [57] which states:

“THE RISK ISSUE

“A WELL-FOUNDED FEAR”

The legal test

[57] In the Authority’s jurisprudence the well-founded standard has been understood as mandating the establishment of a real chance of being persecuted. See for example *Refugee Appeal No. 72668/01* [2002] NZAR 649 at paras [111] to [154]. The standard is an entirely objective one. The trepidation of the refugee claimant, no matter how genuine or intense, does not alter or affect the legal standard and is irrelevant to the well-foundedness issue. Any subjective fear of harm, while relevant to the question whether the claimant is unable or unwilling to avail him or herself of the protection of the country of nationality, is of no relevance to whether the anticipation of being persecuted is well-founded. See *Refugee Appeal No. 75692* [2007] NZAR 307 at paras [76] to [90] and the *Michigan Guidelines on Well-Founded Fear* (2005) 26 Mich. J. Int’l L. 491.”

[49] Adopting these tests in *Refugee Appeal No 76611* (25 November 2010) at [27]-[33], the Authority noted that subjective fears have “no place within the inclusion clause”. The objective assessment of all the evidence which now follows does not establish a well-founded fear of these appellants being persecuted on return to Sri Lanka.

Credibility

[50] It is necessary to reach credibility conclusions in relation to all of the appellants. This requires assessment of the evidence presented by the husband and wife, and consideration of the submissions presented by their counsel. From this assessment the “facts as found” can be established. Because the same factual matrix is relied upon in both the refugee and protected persons claims these established facts can then be relied on for the assessment of all appeals in regard to the subsequent claims for the husband, wife and first two children and for the first appeal by their younger son.

[51] The Tribunal is satisfied that the core of all the appellants’ claims are based on unreliable evidence and highly speculative, uncorroborated conjecture on their

part.

[52] Subjectively, the appellants may consider they are deserving of a right to remain in New Zealand based on the conclusions they have personally reached from their own perceptions. Their conclusions appear to arise from snippets of evidence from their family, supplemented by their own reading of general conditions in Sri Lanka, particularly as they relate to wealthy Muslim people and landowners. However, the Tribunal's analysis must be a fully objective one. It must establish a real chance, at least, of the appellants being persecuted, or severely maltreated, on their return to Sri Lanka. That case has not been established here. The Tribunal's reasoning follows.

[53] The whole of the appellants' claim relies on an acceptance that the tenant has, or intends, to take all necessary, legal or illegal, steps to establish ownership, in his own name, or in the name of his company, of the commercial property now leased by him until 2015. Coupled to this it is necessary to find, at the level of a real chance, at least, such actions by the tenant will be carried out or enforced with violent or serious maltreatment of the husband and all the other appellants.

[54] The Tribunal finds that the only basis for accepting this is the husband's statement that his father had told him of a Muslim contact of his, who worked at the Lands Office in the local government in Z, had warned that the tenant could be taking (fraudulent) steps to put the property into his own name.

[55] The husband and wife consider that the follow-up actions of the tenant following the "warnings" and assaults given to the father in visiting the shop in November 2009 substantiate this claim.

[56] The Tribunal finds neither the husband nor any member of his family have taken any realistically available steps whatsoever to provide any sort of evidence that might support this. The husband's family is a very wealthy one in the Z district of Sri Lanka. They could readily have instructed a lawyer, possibly even the attorney who acted for the husband and his family in the preparation of the lease in 2005, to carry out checks at the local council Lands Office. Such a search could readily have established, without any realistic risk, whether or not the tenant had fraudulently taken title to the property, or possibly even attempted to become the legal owner. The husband claims that such an issue could not be addressed by instructing a lawyer in Sri Lanka and that clarification of the issue could only be done by direct confrontation between him and the tenant. The Tribunal does not accept this explanation. It is clear that the family were in the practice of using

lawyers and are familiar with buying, selling and leasing of property. This includes knowing the principles of obtaining legal title and using lawyers to protect their rights. While there is evidence, in the country information, of some possible collusion between some Sinhalese business people, and government officials, to take over the ownership of Muslim property in Sri Lanka all other indications are that the legal system operates, albeit slowly in many situations, in matters of property and land law. The Tribunal thus does not accept it is plausible that the husband and his family would fail to carry out the most basic checks, in relation to their expensive property, before taking direct and confrontational steps with the tenant himself. For this reason alone, which is essential to the substance of the whole of the current claim, the Tribunal does not accept the appellants' claim is credible.

[57] The next item the Tribunal finds lacks credibility is the failure by the husband's father, and other members of his family, to inform the husband in New Zealand that they had heard that the tenant was trying to take title to the husband's commercial property. This failure was then followed by the omission to report the confrontation at the shop, and shortly thereafter the attack on the father by some Sinhalese in a three-wheel vehicle. The Tribunal does not accept that it is plausible the family would fail to inform the husband of all or any of these events within a short time after they happened. Even if after the husband's father had been seriously hurt and the family were reluctant to tell the husband, in case he immediately returned to Sri Lanka, it is implausible that, before the assault, when the husband's property was at risk of being taken from him that the husband would not immediately be informed. At that time, prior to the confrontation, it was clearly only a property issue. In a commercially astute family such as this, it is unrealistic that consultation would not take place within the family as a matter of urgency.

[58] The visit by the husband's father to the property, and the confrontation with the tenant, also causes the Tribunal serious reservations. A copy of the actual registered lease is on the file. That shows that the tenant (lessee) is entitled to quiet enjoyment of the property, provided he pays the rent and meets the other obligations, for 10 years until 2015. There is a provision allowing either party to give six months' notice of termination before the end of the second period of three years (ie after six years) of the lease. Accordingly, if the appellant's father "confronted" the tenant some 18 months or more before the expiry of the six years, with or without allegations that the tenant was trying to illegally take ownership, it may be seen as perhaps unsurprising that the tenant would take umbrage at such a breach of his quiet enjoyment. Again, such a confrontation by an experienced,

clearly successful businessman, without checking the true legality or reality of the situation, is highly implausible.

[59] In this situation the Tribunal does not accept that the visit and confrontation took place. It has been contrived to assist another claim after the earlier appeal failed.

[60] The attacks in November 2009 and January 2011 on the husband's father are not found to be corroborative of the evidence of the family and thus the husband's core claim. The reasons for this are:

- (a) The husband has submitted a copy of a "diagnosis ticket" from a [doctor] at the teaching hospital in Z which states that "[the husband's father]", aged 80 years, was admitted on 21 November 2009 and discharged on 22 November 2009 and that the patient was (verbatim) "observed for head injury LOC due to knocked down by a vehicle". There is then reference to the patient having scalp laceration and haematoma. The report appears to indicate that the father was seen by the police and received stitches and was provided some medication.

This report, of itself, does not confirm that it was the same day that the father had a confrontation with the tenant nor does it confirm any other factors about who caused the injuries. In the circumstances, particularly noting the earlier findings and the husband's poor history of credibility in his earlier claims and appeals, the Tribunal considers this report does nothing more than confirm that his father suffered head injuries in a road accident, that was reported to the police. No police record of the event has been provided that may possibly have been corroborative of the husband's claim.

- (b) The husband claims that he became aware of this incident some five months after it had taken place when he called his father seeking some financial assistance. There had been other contact between them during that four and a half month period. For reasons explained above, the Tribunal considers it is implausible that neither the confrontation with the tenant, nor the attack and apparently serious injury sustained by his elderly father, would not have been brought to the attention of the husband during the period from the date of the motor vehicle accident and the call for financial help four

to five months later. Even if the father himself had been reluctant to tell the husband of the incidents, given that there was reasonably constant contact with other members of the family, and the shop is a major asset primarily owned by the husband, the Tribunal finds the husband's evidence in this regard, and thus the incidents themselves lack credibility.

- (c) The Tribunal also found the husband's linkage between the attempted kidnapping/"white van" incident and risks to himself and his family from the tenant, or his agents, to be highly speculative and lacking in plausibility. If the "white van" incident were accepted and there had been an attempt to kidnap the appellant's late father, given that this event took place over a year after the alleged confrontation between the father and the tenant, there is virtually nothing in the evidence adduced that in any way links such an unfortunate incident to risks to the husband and his family. The country information does reveal random kidnappings and attempts on wealthy Sri Lankan Tamils. However, any linkage between an attempt on the father and continuing targeting of all or any members of the whole family by the tenant or his associates is found to be speculative uncorroborated conjecture at most.
- (d) The letter of 13 June 2011 received from the husband's brother, EE, does not add any corroboration to the "white van" kidnapping incident. The letter refers to the father being "terribly beaten by two unknown people down the street close to his residence". There is no mention of any "white van". The letter also reports that EE, with whom it is stated the father was staying with at the time in Z, has not been able to obtain a copy of the police entry in relation to the incident even though, according to the letter, EE attended the police station with his father at the time when a complaint was made. The Tribunal finds it implausible that EE, as one of the reporters of the incident, would not be entitled to a copy of the police entry. The Tribunal therefore attaches no weight to this document which it considers to have been contrived for the purposes of supporting a weak claim.

[61] The credibility of the husband's claim is also further undermined by the lack of apparent fears of the tenant and his agents by his brothers, in particular, his

younger brother, JJ, who is a co-owner of the leased property. Even though the husband may have been, along with his father, the principal operators of the business in the property, prior to its being leased to the tenant, the terms of the lease make it quite clear that both the husband and his brother JJ are beneficial owners. Accordingly, if the tenant was wishing to kill or otherwise ensure he could take over the property by intimidation not only would he have to eliminate the husband, but also his brother JJ. No evidence has been provided as to any imminent risks to JJ or why the husband alone has a well-founded fear of being seriously maltreated or killed by the tenant. This inconsistency in the claim, the Tribunal finds, seriously undermines it.

[62] Additionally, the Tribunal notes that the husband's brother from Australia, HH, states that he visited the leased property and spoke with the tenant. He may have been asked to leave but it is apparent that he did not consider himself at personal risk by making such a visit. The Tribunal considers it is inconsistent for the husband to claim he and his family are at a high level of risk from the tenant while two of his brothers, seeking to carry out the wishes of the husband and JJ, to have the rent paid, are not at any significant level of risk.

Conclusion on credibility

[63] Assessed in the round, taking into account all of the above reasoning, the Tribunal is satisfied that the appellants' subsequent claim lacks credibility to such an extent that the whole story is rejected.

The appellant's current profile

[64] The Tribunal is thus left accepting that the husband is a wealthy Tamil male who would be returning to Colombo and/or Z after several years in New Zealand. He is a part-owner of a commercial property in Z. It is his choice as to whether he wishes to seek legal remedies to recover rental that is outstanding. His father was injured and briefly hospitalised after a road accident in November 2009. He died in March 2011. There are no core human rights at issue in this appeal as this is, at most, purely a potential landlord and tenant dispute. The Tribunal is satisfied that the husband has the ability to instruct lawyers on his behalf and access the Sri Lankan judicial system to pursue matters relating to his property. Flaws in the Sri Lankan police or judicial system and random violence against wealthy Tamil Muslims are not at a level such that these appellants are at a real chance of being persecuted or suffering serious maltreatment.

[65] The appellants have also not established there is a real chance they will be found to be failed asylum seekers, who may have insulted Sri Lanka, while they were in New Zealand. The documentation they would return on will not, on the evidence, indicate such information. The country information does not disclose real risks of detention and maltreatment of returning Tamil Muslim Sri Lankans, who have no other profile and would, to all appearances, be returning as persons who had been overseas for economic or other migration reasons. (See *TK* (Tamils – LP updated) Sri Lanka CG [2009] UK AIT 00049 and *AG* (Sri Lanka) [2001] NZIPT 800092 [42] to [46]).

THE REFUGEE CONVENTION – THE ISSUES

[66] Section 129 of the Act provides:

“129 Recognition as refugee

- (1) A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.
- (2) A person who has been recognised as a refugee under subsection (1) cannot be deported from New Zealand except in the circumstances set out in section 164(3).”

[67] 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.”

[68] The Tribunal has adopted the jurisprudence of the RSAA where applicable. The principal issues to be addressed in refugee status claims for recognition have been established for many years, going back to *Refugee Appeal No 70074* (17 September 1996). Those 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?

CONCLUSION ON REFUGEE STATUS ISSUES

[69] As the husband's and wife's credibility is not accepted in respect of this subsequent claim, and indeed it was substantially rejected in all of their previous claims, the Tribunal does not accept that the husband, his wife and his two elder children have a well-founded fear of being persecuted in Sri Lanka based on their subsequent claim. The youngest son, CC, in his first appeal, similarly does not face a well-founded fear of being persecuted in Sri Lanka.

[70] The wife and children, as noted above, have pursued their claims as derivative from the husband. Their risks, if any, are found very subsidiary and at a much lower level than those of the husband. There is no "reality" to them. Accordingly, having found that all appellants do not have a well-founded fear of being persecuted on return, their claims must fail.

[71] The first principal issue is therefore answered in the negative. There is no need to consider the second issues as it does not arise.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[72] Section 130(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

ASSESSMENT OF THE CLAIM UNDER THE CONVENTION AGAINST TORTURE

[73] Section 130(5) of the Act provides that torture has the same meaning as in the Convention against Torture, Article 1(1) of which states that torture is:

"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[74] None of the appellants in this appeal are recognised as refugees. Their claims under the Convention Against Torture are based on the same factual matrix as that presented in respect of the refugee claim and appeal. Based on the assessment set out above the Tribunal is satisfied that none of the appellants have substantial grounds for believing that they would be in danger of being subjected to torture if deported from New Zealand.

CONCLUSION ON CLAIM UNDER CONVENTION AGAINST TORTURE

[75] For the foregoing reasons the appellants are not protected persons within the meaning of the Convention Against Torture in 130 of the Act.

THE ICCPR – THE ISSUES

[76] Section 131(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

ASSESSMENT OF THE CLAIM UNDER THE ICCPR

[77] The same analysis as referred to in the CAT claim above applies to this limb of the claim. The appellants are not recognised as refugees or as protected persons in terms of the CAT.

[78] As the ICCPR claim is made on the same factual matrix as the other two claims for the reasons set out above the Tribunal finds none of the appellants are in danger of being subjected to cruel treatment and thus they are not persons to whom New Zealand owes protection obligations under the ICCPR and section 131 of the 2009 Act.

CONCLUSION

[79] For the foregoing reasons, the Tribunal finds the appellants:

- (a) are not refugees within the meaning of the Refugee Convention;

- (b) are not protected persons within the meaning of the Convention Against Torture; and
- (c) are not protected persons within the meaning of the Covenant on Civil and Political Rights.

[80] The appeals are dismissed.

"A R Mackey"

A R Mackey
Member

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A R Mackey
Member