

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76012

AT AUCKLAND

<u>Before:</u>	B L Burson (Chairperson) S L Murphy (Member)
<u>Counsel for the Appellant:</u>	I Uca
<u>Appearing for INZ:</u>	No Appearance
<u>Date of Hearing:</u>	20 and 21 March 2007
<u>Date of Decision:</u>	18 April 2007

DECISION DELIVERED BY S L MURPHY

[1] This is an abridged version of the decision. In this appeal, certain particulars have been removed in total pursuant to s129T of the Immigration Act 1987. Those parts which have been removed altogether are identified by an ellipsis and appear in square brackets.

[2] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of Immigration New Zealand (INZ) declining the grant of refugee status to the appellant, a national of Sri Lanka.

INTRODUCTION

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

PROCEDURAL HISTORY

[4] The appellant, a man in his late 30s, arrived in New Zealand for the first time on 7 July 2002 and claimed refugee status on 11 July 2002 (the first claim). He was interviewed by the RSB on 27 and 29 November 2002 and his application was declined in a decision dated 5 March 2003. On 24 and 25 June 2003, this Authority (differently constituted) heard an appeal in respect of his first claim, and

in a decision dated 3 September 2003 declined the appeal, see *Refugee Appeal No 74581* (3 September 2003). On [...], the appellant was removed from New Zealand to Sri Lanka with a police escort. He travelled on an emergency passport issued by the Sri Lankan Consulate in Canberra.

[5] The appellant returned to New Zealand approximately three years later, on 5 September 2006, and claimed refugee status at the airport (the second claim). He was subsequently detained pursuant to s128 of the Immigration Act 1987 (the Act), in the absence of appropriate identity documents, and was transferred to the Auckland Central Remand Prison.

[6] On 19 and 20 October 2006, the appellant was interviewed by a refugee status officer and, in a decision dated 22 January 2007, the second claim was declined. It is from that decision that he now appeals to this Authority.

JURISDICTION TO CONSIDER SECOND CLAIMS TO REFUGEE STATUS

[7] The Act provides that second applications for refugee status may only be considered in limited circumstances. Section 129J provides as follows:

“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.”

[8] Section 129O(1) of the Act sets out the Authority's jurisdiction to consider an appeal from a decision of a refugee status officer in respect of a second or subsequent claim to refugee status. It provides as follows:

“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.”

CLAIM ADVANCED ON FIRST APPEAL

[9] The appellant's first claim was based on the risk he faced due to suspicions that he was connected with the 2001 bombing of an airport in Sri Lanka. He also claimed to be at risk from Tamil groups because he had refused to help them while outside Sri Lanka during the 1980s and 1990s.

[10] The appellant's refugee appeal was declined by the Authority in *Refugee Appeal No 74581* (3 September 2003). The Authority concluded that the appellant's core claim was not credible.

CLAIM ADVANCED ON SECOND APPEAL

[11] The appellant's second claim relates to risks faced by him from the Sri Lankan government due to a business he set up upon his return to Sri Lanka in November 2003 which fell under suspicion of being linked to the LTTE. It takes place against a breakdown in the peace process in Sri Lanka in late 2005 and early 2006.

JURISDICTION TO CONSIDER SECOND CLAIM

[12] The Authority is satisfied that the circumstances in Sri Lanka have changed to the necessary degree required to confer jurisdiction on the Authority to determine the merits of this appeal.

[13] First, the appellant's current claim relates to events occurring upon his return to Sri Lanka after the dismissal of his first claim. Second, at the time of the determination of the appellant's first appeal, on 3 September 2003, the government and LTTE had signed a permanent ceasefire agreement, paving the way for peace talks. In comparison, 2005 and 2006 have seen mounting violence and the effective end of the peace process.

[14] As a result of the confluence of these factors, the Authority finds the jurisdictional threshold has been met. Given that finding, it is now necessary to record in greater detail the grounds of the second claim, before turning to consider the issues raised by the Refugee Convention.

THE APPELLANT'S ACCOUNT

[15] The account which follows is a summary of the evidence given by the appellant at the second appeal hearing. It is assessed hereafter.

CHARGES FOR ILLEGAL DEPARTURE

[16] The appellant had no warning of his removal from New Zealand in 2003. When the appellant arrived at the airport in Sri Lanka, he was without documentation; [...]. He was questioned about his departure from Sri Lanka initially by immigration officials. He was then taken into custody by airport police.

[17] He was held in a police cell at the airport for four days, [...].

[18] For the first two days, the police interrogated him about his illegal departure. During the enquiries he was mistreated; for example, he was pushed against the wall, causing his head to hit the wall on several occasions. He did not understand most of the questions, as they were in Sinhalese, but occasionally the police would speak broken Tamil. The police asked him whether he was an LTTE member and when he replied in the negative, he was beaten.

[19] Four days after his arrival at the airport, he was taken from detention to the court and was charged with departing Sri Lanka illegally. He was represented by a lawyer whom a friend, AA, had organised for him. After a preliminary hearing, the appellant was remanded to prison, where he was held for two months in a cell with approximately 40 other people, 10 or 11 of whom were Tamils. The Tamil inmates were mistreated. They were frequently hit by the prison staff, at times with clubs, for minor infringements, for example, failing to follow instructions given in Sinhalese, which they did not understand. The other cell-mates also discriminated against the Tamil inmates, for example, making them sleep in the corner with insufficient space.

[20] [...].

BUSINESS

[21] After the appellant's release from jail, he lived briefly with his nephew before renting a room in a Tamil area of Colombo, E district, with the assistance of money sent by his sister who is resident in [...].

[22] Shortly after his release from prison, the appellant set up a [...] business in E district with the help of BB, a friend with a large [...] business, who lent him equipment, and his own sister, who lent him money.

[23] [...]

[24] The appellant's business was registered under his cousin's name because the appellant did not have a national identity certificate (hereinafter "identity card"). Obtaining an identity card required authorisation from the authorities in a person's home town and travel to Jaffna without an identity card was difficult, due to identity checks performed at road blocks.

[25] The appellant did manage to obtain an identity card through bribing an associate. However, he was reluctant to use the card as its lack of authenticity was readily detectable. He therefore only used it for banking purposes. He did, however, manage to obtain a forged but authentic-looking [...] passport which he carried with him at all times for identity purposes.

MARRIAGE IN JAFFNA

[26] In December 2004, the appellant flew to Jaffna for an arranged marriage. He used his [...] passport for the flight and did not face any difficulties travelling. He did not go to his home town because the Eelam People's Democratic Party and Eelam People's Revolutionary Liberation Front, Tamil factions sympathetic to the Sinhalese-majority government, had set up camp there and he was frightened that they may cause him difficulties. Instead, he initially stayed with a relative and subsequently moved to his in-laws' house after the marriage registration.

[27] Four days after the marriage registration, a member of the LTTE delivered a letter to his wife, while the appellant was attending the temple. The letter requested the appellant to attend the local political office of the LTTE to discuss "important matters". The appellant was unaware of the reason for the letter and was very frightened. Accordingly, instead of staying in Jaffna until January to have the customary marriage celebration, he returned to Colombo the following day. That day, after his departure, the LTTE returned to his wife's house and asked where the appellant was. His wife said he had returned to Colombo. The LTTE left without comment and did not cause her further difficulties.

EVENTS IN COLOMBO

[28] The following month, the appellant's wife moved to Colombo and she and the appellant moved into an apartment in E district.

[29] In March 2005, the appellant stopped taking bookings for the [...] because that company opened an office in the appellant's street. In June 2005, the appellant sent his wife back to her home town. This he did because the situation had deteriorated and his lack of an identity card would have caused difficulties for the pair had they been stopped at a checkpoint. Furthermore, the appellant felt that his wife would be better off in her home town as, if anything happened to him, she would have been alone in Colombo.

[30] Around this time, the appellant started to feel particularly insecure because successful Tamil business owners were coming under mounting suspicion of being linked to the LTTE. The appellant had periodic discussions with the proprietor of the next-door business about rumours they had heard that each of them were suspected of having links with the LTTE. Other people also advised him of such rumours. It was believed that, because their businesses had been established and flourished under the ceasefire, they would be connected to the LTTE.

[31] In August 2005, three men in civilian clothing came to the appellant's shop in a white van and asked his employees about him. They asked his employees to provide them with details of the business owner and showed them a photograph of the appellant. The appellant was at home at the time. One of the employees contacted the appellant after the men had left. The appellant was unaware of the purpose of the visit, but the men's clothing and vehicle indicated that they were from the intelligence branch. Accordingly, the appellant was frightened and reduced his visits to the shop significantly, working mainly at home via the Internet.

[32] In January 2006, CC, [...], was shot dead when coming home from his shop. His jeep was stopped and he was subsequently shot. The appellant said while there was no official confirmation as to who the assassins were, it was common knowledge that they would have been government agents, [...]. [...] later the owner of [...], was also shot and killed. Again, it was assumed that the assassins were the government.

[33] In mid-May 2006, plain-clothed men visited the appellant's shop for a second time. This time, he was at the temple. The appellant's employees advised

the men that he was out of Colombo for a few days.

[34] The following month, the appellant's friend, BB, was abducted as he was driving home. He was taken home and robbed and the abductors attempted to steal his vehicle. They were unsuccessful as the vehicle stalled. BB left the country for India five days later and the appellant's other friend, AA, departed for Indonesia at the same time.

[35] The following month, a third visit occurred. This time, there were five plain-clothed men. They held a gun to the head of one of his employees, forcing him to give them the appellant's address. The employee telephoned the appellant on his mobile telephone immediately after the men had left. The appellant was at the bank. The intelligence officers, in the meantime, went to the appellant's house and questioned the appellant's friend's father, into whose house the appellant had moved in July 2005 following the return of his wife to Jaffna.

[36] Fearful of going home, the appellant booked into a hotel for two nights. During this time, he organised, in consultation with his sister in [...], to go to the house of that sister's brother-in-law, who lived approximately 70 kilometres from Colombo. The appellant spoke to his wife on her mobile telephone while he was staying with his sister's brother-in-law. His wife and her family had been displaced by the fighting and had had to move to X.

[37] On 29 August 2006, the appellant left the country on a false [...] passport, organised through an agent. He did not use his [...] passport, on the advice of his agent, who maintained that the presence of certain stamps and the absence of others could alert international authorities to the falsity of the passport.

[38] Since arriving in New Zealand, the appellant has been unable to contact any of his family members.

DOCUMENTS

[39] The appellant's counsel tabled written submissions both before and after the hearing which were of considerable assistance with this decision. Also provided by the appellant were:

- (a) A copy of the emergency passport he used to return to Sri Lanka in 2003;

- (b) A copy of the letter from the LTTE, which had been given to the appellant in Jaffna in December 2004, at the time of his marriage.

THE ISSUES

[40] Having found jurisdiction to determine the second appeal, the Authority must determine whether the appellant meets the refugee definition.

[41] In this regard, 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."

[42] 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

[43] The Authority found it necessary to scrutinise the appellant's evidence closely on account of his previous claim having been found to be fabricated by the Authority. To that end we carefully tested the appellant's evidence over the course of two hearing days.

[44] Having seen and heard him at length, we accept the appellant's account. His evidence about the circumstances occurring subsequent to his return to Sri Lanka, including his detention, business activities, living circumstances and the situation of his friends and business associates was notably understated, highly detailed, and consistent, both internally and with country information.

Is there a real chance of the appellant being persecuted if returned to the country of nationality?

[45] For the reasons that now follow, the Authority is satisfied that the appellant's circumstances give rise to a real chance of him being persecuted if he returns to Sri Lanka.

Business activities

[46] The appellant was a successful businessman in a Tamil area of Colombo whose business was established during the cease fire. He and other successful Tamil businessmen whose businesses had flourished under the ceasefire had come under suspicion of connections with the LTTE at the time.

[47] The appellant's business had, between March 2004 and March 2005, [...]. This connection appears to have resulted in the January 2006 extrajudicial killings of [...].

[48] Counsel submitted a report indicating that the establishment of a prosperous business during the ceasefire may indicate links with the LTTE. According to a publication by the University Teachers for Human Rights (Jaffna) Sri Lanka "A part of the inspiration behind the CFA, misplaced though it was, was to transform the Tigers through a surfeit of commercial activity into captains of commerce. Many businessmen took advantage of this and prospered. It went without saying that the Tigers would get their share. This was how the CFA was meant to work..."; University Teachers for Human Rights (Jaffna), Sri Lanka, UTHR(J), Bulletins No. 42, 43 and Supplement to SpR. (23 October 2006).

[49] Country information available to the Authority clearly establishes that as a person suspected of LTTE connections, the appellant is at risk of serious human rights abuses by the authorities or government sponsored paramilitary groups. In a recent report, *UNHCR Position on the International Protection Needs of Asylum-Seekers from Sri Lanka* (UNHCR December 2006), at pp1–5, UNHCR details a deterioration in the security situation in Sri Lanka since 2006. Commenting on the protection needs of specific groups of persons, the report states at pages 9-10 that Tamils in Colombo and its outskirts are especially vulnerable to abductions, disappearances and killings by paramilitary forces in the ubiquitous "white vans", suspected of being associated with the security forces. UNHCR further states that particular groups within this community, including businessmen, can be

“specifically targeted” by such persons and notes the abduction of some 25 Tamils in one two-week period in Colombo in mid-2006, only two of whom have ever been accounted for. Similar observations are made in United Kingdom Home Office *Country Reports: Sri Lanka* (8 February 2007) para 20.12; Canadian Immigration and Refugee Board Research Directorate: *Sri Lanka: Security measures in place to control the movement of Tamils between Northern and Southern Regions of the Country* (22 September 2006); United States Department of State *Country Reports on Human Rights Practices for 2006: Sri Lanka* (6 March 2007).

[50] That the appellant’s particular past business activities expose him to a risk of being persecuted is reinforced by country information submitted by counsel on the killing of the [...].

[51] Even if the appellant is to reside elsewhere in Colombo, away from EE district, his identity will come to the notice of the security forces either by the need to produce his identity card at checkpoints or in the course of house searches. Bearing in mind his evidence that he cannot even obtain such an identity card without returning to Jaffna, it is noted that in a door-to-door search for LTTE members in Colombo in December 2005, Sri Lankan security forces detained over 900 people for failing to produce their identity cards or not having a valid reason to stay in the city; Canadian Immigration and Refugee Board Research Directorate: *Sri Lanka: Security measures in place to control the movement of Tamils between Northern and Southern Regions of the Country* (22 September 2006).

[52] The inference we are asked to draw from the appellant’s agency work for [...], the murders of the [...] at a time of renewed tensions and hostilities between the SLA and the LTTE and the three enquiries made by the men in the white van for the appellant within a few months of those deaths, is that he too is at risk of being extrajudicially executed or otherwise seriously harmed.

[53] We bear in mind that the threshold is whether or not there is a real chance of the appellant being persecuted. While there remains uncertainty as to the identity of the killers of [...], we are satisfied that the totality of the circumstances establishes that the real chance threshold is met. We find that the appellant’s fear of being persecuted if he returns to Sri Lanka is well-founded. The first issue is answered the affirmative.

[54] The persecution he faces is on account of his race and imputed political opinion. The second issue is also answered in the affirmative.

CONCLUSION

[55] For the above reasons, 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.

.....
S L Murphy
Member