

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76502

REFUGEE APPEAL NO 76503

REFUGEE APPEAL NO 76504

AT AUCKLAND

Before: B L Burson (Member)

Counsel for the Appellant: I Frengley

Appearing for the Department of Labour: No Appearance

Dates of Hearing: 5 & 6 May 2010

Date of Decision: 29 June 2010

DECISION

[1] These are appeals against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) declining the grant of refugee status to the appellants, nationals of Sri Lanka.

INTRODUCTION

[2] The appellant in *Refugee Appeal No 76502* is the mother of the appellants in *Refugee Appeal Nos 76503 and 76504*. The appellant in *Refugee Appeal No 76503* is her daughter and the appellant in *Refugee Appeal No 76504* is her son. They will be referred to as the “mother”, “daughter” and “son” respectively. The mother’s spouse is not in New Zealand. He will be referred to as the husband or father as context requires. The mother is the responsible adult for the son, who is a minor, for the purposes of s141B of the Immigration Act 1987 (“the Act”).

[3] The appellants arrived in New Zealand on 19 September 2009. They lodged refugee claims upon arrival. They were interviewed by a refugee status

officer in respect of their refugee claims on 30 November 2009 and 1 December 2009. By decisions dated 19 February 2010 their respective claims were declined. Each duly appealed to the Authority.

[4] What follows is a summary of the evidence given in support of these appeals. Ms Frengley confirmed the evidence of each appellant was to be treated as the evidence not only in their own appeal but also in the appeals of the other appellants. An assessment of this evidence follows thereafter.

THE APPELLANTS' CASES

The mother's evidence

[5] The mother was born in Jaffna province in northern Sri Lanka in 1966. She is an ethnic Tamil. Following the outbreak of civil war between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan government in the mid-1980s the mother's family were subjected to the typical vicissitudes of an ethnically driven civil war. Consequently, between the mid-1980s and 1991, each of her four brothers fled Sri Lanka and successfully claimed refugee status in other countries owing to difficulties the experienced with the Sri Lankan Army because they were young Tamil males in a conflict zone. These brothers remain living in their countries of refuge and are now citizens of these countries.

[6] In 1990 the mother married and moved to Colombo to live with her husband. Although originally from Jaffna, her husband had moved to Colombo with his father some 10 to 15 years previously where they set up in business. By the time the mother arrived in Colombo following the marriage, the family business was thriving, so much so that the husband had sufficient savings to purchase a family home with only a minimal amount of financial assistance. Approximately a year later this house was sold and the couple moved into a house in a desirable neighbourhood in Colombo. This remained as their principal family home until circumstances forced them to flee Sri Lanka.

[7] In 1991 the daughter was born. The son was born in 1994. The family remained living in Colombo until 2009. Throughout the mother's residence in Colombo, the intensity of the civil war ebbed and flowed. The Tamil population in Colombo were subjected to constant searches and their home was no exception. On these occasions every room in the house was searched and the family questioned. Also, the family were frequently stopped at checkpoints throughout

the city when going about their daily lives and questioned about their movements and residence. However, as the family were able to produce valid documentation showing that they were lawfully resident in Colombo and were going about lawful business, on no occasion did any family member encounter any problems apart from the inconvenience inherent in the searches of the home or roadblock questioning.

[8] The family's particular troubles began on 16 May 2009. At around 3pm, the mother received a telephone call at home from an unknown person who informed her that her husband had been kidnapped. The caller demanded a ransom of one *crore* (10 million Sri Lankan *rupees*) for his release. The caller threatened the mother that if she complained to the police the husband would be killed. Having heard of similar cases of wealthy Tamil businessmen being kidnapped for ransom, the mother telephoned the family business and was informed by an employee that her husband had already left for the bank. The employee informed the mother that her husband had indicated that after going to the bank, he would come home. As he normally turned his mobile phone off at bank meetings, she decided to wait for him to return home, a journey which would take approximately one and a half hours. When the husband still had not returned after this time the mother called the husband on his mobile phone but it was switched off. The mother then rang her husband's brother ("the brother-in-law") and told him what had happened. The brother-in-law indicated that he would come to the house immediately. However, he lived some distance away and it took approximately an hour for him to arrive.

[9] In the meantime the daughter had arrived home. The mother told her that the father had been kidnapped. The son returned home a short time later and the mother told him also. Some time after that, at around 6pm, the brother-in-law arrived and the mother discussed the situation. The brother-in-law suggested they attend the local police station to make sure that the husband had not been arrested. The mother and brother-in-law did so that evening and were informed by the police that they had no records of the husband being arrested.

[10] The mother and brother-in-law returned to the mother's house and began discussing ways to raise the one *crore* demanded and the issue of possibly selling the family home was discussed. At the time, the family had moved out of the family home and into rental accommodation. They had demolished the existing family home and had almost completed building a larger home on the same site. The building was almost complete when the kidnapping of the husband took place.

[11] The following day, 17 May 2009, the brother-in-law returned to the family house and they discussed options for raising the ransom. The wife had no access to the business funds which were controlled by her and the husband. While she had her own separate bank account, there were only modest funds in it. They discussed taking out a loan against the house but, as the money was needed urgently, decided this involved too lengthy a process. Therefore the decision was made to sell the nearly completed family home. The mother told the brother-in-law to do what he could and she would sign whatever he needed.

[12] On 18 May 2009, the mother and brother-in-law went to see a Tamil minister who had been involved in other cases where Tamil businessmen had been kidnapped. They informed him that the husband had been kidnapped for a ransom. The minister said that these events are done with the indirect involvement of the police or people in government and it was better for them to pay the ransom money. Later that day, the kidnappers telephoned again and spoke to the mother. She told them she was making arrangements to sell the family home but needed four or five days to do so. The kidnappers told her that they would give her this period of time to arrange the money but if they did not get it they would kill her husband.

[13] The following day, 19 May 2009, the brother-in-law returned with a document for the mother to sign. It was in English and she could not read it. However, the brother-in-law told her that some people he knew had agreed to purchase the property for two *crore* (20 million Sri Lankan *rupees*) for the property. This was a discounted price – the property was worth somewhere between two and a half to three *crore* (25-30 million Sri Lankan *rupees*). However, he told the mother that the purchasers had agreed that if she signed the document they would pay the ransom amount which equalled half the purchase price immediately. The balance was payable within a month's time.

[14] After the wife signed the document the brother-in-law left and she did not see him again until the following day. The next morning, on 20 May 2009, the brother-in-law came to see her. He informed her that everything necessary had been done and that the ransom money was ready. The kidnappers telephoned later that day and asked if the money was ready. The mother informed them that it was and they asked her to bring it to a particular location. The mother explained that she was scared to come on her own and they agreed that the brother-in-law could come with her. At around 3pm that day the mother and brother-in-law travelled to the designated location and paid the ransom to the kidnappers. The

mother asked for the husband but the men informed her that if she returned home the husband would be released that evening.

[15] As promised the husband was released and returned home at about 8pm. He informed her that he had been blindfolded and dropped off a short distance away and had walked home. The husband stayed at home for about a week recovering from his ordeal. Believing they had paid the ransom and complied with the demand, they did not consider themselves at any further particular risk. The husband slowly returned to work although he reduced his working hours.

[16] The next problem occurred early one evening in mid-August 2009. On this occasion the daughter and son left home to walk to a nearby temple to pray. A short while later both returned home in a distressed state. They told the mother that some men in a white van had tried to kidnap them in the street. They screamed and passers-by came to their assistance and the men fled. The wife telephoned the husband who was at work and he returned home.

[17] The husband and mother discussed what to do and decided to report the matter to the police. The whole family went to their police station where the husband tried to make a complaint. However, the police officer on reception duty informed the husband that, as a Tamil, he could not make these complaints against Sinhalese people. At around that time a female police officer asked the daughter to accompany her to another room. Shortly afterwards, the daughter came running out of the police station in a distressed state. She told the mother that the female police officer had asked her to take all her clothes off. Not wanting to do this she fled. The family left the police station and returned home.

[18] Two days later, they received a telephone call from an unknown person who intimated their responsibility for the attempted kidnap of the daughter and son. The caller demanded that they pay a large sum within two weeks and, if they did not, either the children or the parents would be killed.

[19] The family were extremely concerned about their situation. The mother and husband did not think the police would give them any protection. They decided that they should leave Sri Lanka. The husband set about finding an agent who could secure their journey to a safe country. The husband quickly did so but told her the agent had indicated that, while he could get people to Australia, he could only arrange for the mother, son and daughter to travel immediately. He would make arrangements in respect of the husband sometime later. He agreed.

[20] In late August 2009, some 10 days after the threatening telephone call had been received the mother, daughter and son departed Sri Lanka on their own genuine Sri Lankan passports. From there they flew to Singapore then on to a number of other countries including countries in South America. While in South America their Sri Lankan passports were taken from them and they were issued with false Malaysian passports. With these passports they departed the South American country intending to travel to Australia. However, they were stopped in transit in New Zealand and made their refugee claims.

[21] In October 2009, the husband left Sri Lanka for India on his own passport. His departure was a legal one. The mother does not know why the husband could not have come to New Zealand to join her but presumes this was something to do with the agent. She has spoken to her husband some two or three times since she has been in New Zealand. The last time was shortly after he arrived in India. She does not know where he is at present. Her husband has not sold the business. It is being run on his behalf by someone else.

[22] The mother fears that if returned to Sri Lanka they will all be at risk of further kidnap, extortion and possible death if they do not comply with the kidnappers' demands. They could not live safely elsewhere in Colombo because wherever they are required to go they will need to register with the police. She fears that eventually their details as wealthy Tamils will be made known to criminal gangs who will extort money from them.

Evidence of the daughter

[23] The daughter was born in 1991 in Colombo where she lived all her life prior to coming to New Zealand in 2009.

[24] The daughter told the Authority that during the civil war in Colombo the family home was regularly searched by the police who checked everything in the house. On some occasions she was asked questions by the police on other occasions she was not. Sometimes vehicles she was travelling in were stopped at police checkpoints. However, neither the daughter nor any member of her family was ever taken away for further questioning following searches of the family home or searches at police checkpoints.

[25] The daughter told the Authority that on 16 May 2009, shortly before her A Level examinations were due to begin, she had come home and seen her mother crying. Upon asking what was wrong she was informed by her mother that

her father had been kidnapped. The daughter was shocked and upset by this news and began crying. Although she recalls her father's brother coming to the home to talk to her mother the daughter does not recall him being there for a lengthy period of time before leaving. The daughter recalls that her father returned home on or about 20 May in the evening. During the time her father was kidnapped her mother did not speak to her and her brother in great detail about what was happening but simply reassured them that everything would be alright. The daughter explained to the Authority that she was, by nature, timid and prone to being upset very easily.

[26] She said that when her father returned home he looked very scared but did not talk much about what had happened. She noticed that he had a little bruising to one of his hands. The daughter recalled that after a few days her father returned to work.

[27] The daughter told the Authority that the family next experienced problems in August 2009 when some men tried to kidnap her and her brother one evening as they walked from their home to a nearby temple to pray. They were walking on the left hand side of the road when she suddenly sensed a man grabbing at her left hand. Startled, she looked around and noticed another man grabbing her brother. Both she and her brother began screaming for help as she believed the men were trying to pull her towards a white van which had parked nearby. A number of passers-by came to their rescue and, after a struggle, the two men let them go and ran off. She does not know what happened to the white van and she and her brother ran home.

[28] At home they told their mother what had happened. Their mother immediately telephoned their father, who was at work. Her father came home. The daughter was very distressed and her mother consoled her. When her father came home they decided to report this matter to the police and the whole family went to the local police station.

[29] At the police station her father spoke to the policeman on reception. She overheard the policeman telling her father that the complaint would not be accepted. Shortly afterwards a female police officer came to her and asked the daughter to accompany her. The female police officer took her to a room and asked her to remove her shirt. The daughter complied, thinking that the police officer was checking her for any scarring. After removing her shirt she was asked by the police officer to take off all her clothes. At this point the daughter became

very scared and so she put on her shirt and ran out of the room. The police officer did not try to stop her. In a distressed state, the daughter ran out of the room to the reception area where her parents and brother were and the family returned home.

[30] The daughter and her brother were told by their parents that they could not go out of the house anymore. Over the next 10 days the daughter and her brother only left the house on one occasion and that was in the company of their mother. They went to have their photographs taken. After approximately a week the daughter and the brother were informed by her father that he had made arrangements for the mother, daughter and son to leave the country. He told them that he would be joining them later on.

[31] Some two or three days after being told this the mother, daughter and son departed Sri Lanka using their genuine Sri Lankan passports. From there they travelled to a number of countries including countries in South America where their genuine passports were taken from them by an agent. They were given false Malaysian passports and they used them to travel to New Zealand.

[32] Since leaving Sri Lanka, she has spoken to her father twice, the last of which was many months prior to the hearing. She understands he was in India at this time.

[33] The daughter is very worried about returning to Sri Lanka. She has been told by her mother that shortly after the kidnap attempt a threatening telephone call was made to the family home that they would all be kidnapped or killed. She believes that if she returns to Sri Lanka this will happen and that the police will not be able, or willing, to protect her.

Evidence of the son

[34] The Authority heard from the son who was born in 1994. He was 15 years old at the time he gave his evidence.

[35] The son told the Authority that he lived in Colombo all his life before coming to New Zealand. He explained that as he grew older he began encountering minor problems with the authorities because he was Tamil. In particular, he was asked more questions than other passengers when the bus he was travelling on was stopped by the authorities at checkpoints. He was questioned as to where he was going, his place of residence and whether he was travelling with anybody on the

bus. However, he always answered these questions truthfully and was never taken away for any further questioning by the authorities on these occasions. On other occasions the family home was searched by the authorities during the civil war and the whole house was searched. Again on these occasions, he was never taken away for further questioning. At no time while he lived in Sri Lanka has he suffered any physical mistreatment by the Sri Lankan authorities because of his Tamil ethnicity.

[36] The son told the Authority that in May 2009 he came home from playing and noticed his mother and sister were crying. His mother informed him that his father had been kidnapped and that the people who had him demanded some money from the family for his release. He was only 14 years of age at the time this took place and he told the Authority that, upon being told this news, he became very scared and went to his room where he stayed for the remainder of the evening. While in his room he heard his uncle come to the house for a while.

[37] The son told the Authority that for the next two or three days he was not allowed to go school by his mother. She told him everything would be alright but otherwise gave him no further details about what was happening. His sister had exams at the time and so was not at school and she too stayed at home.

[38] The son recalls that about four or five days later his father came home. He did not go to work for a week or so after that because he was scared.

[39] The next thing that happened was one day in August some men tried to kidnap him and his sister while they were going to the temple. They were walking up the left hand side of the road when some men tried to pull them into a van which was parked about three metres away on the side of the road. The men were wearing jeans and T-shirts. The man who grabbed the son had his face covered. He cannot be sure about the man who grabbed his sister because he was concentrating on trying to escape. Both he and his sister began shouting for help and in his struggle to get away, he fell over. Eventually some people came to their rescue and the man who had tried to kidnap them ran away.

[40] He and his sister ran home and told his mother what had happened. She then telephoned his father who returned from work and the whole family then went to the police station. At the police station he overheard his father telling his mother that the police did not accept the complaint. Then a female police officer came out and took his sister into a side room. A short while later his sister came running out of the room crying and after that they left.

[41] After this incident he and his sister were not allowed out of the house. His mother told him that a threatening telephone call had been received. They went out of the house on one occasion in the company of their mother to have some photographs taken. After a week or so his father told them that it was dangerous for them to stay in Sri Lanka and that they would be leaving the country. He did not say anything more but the son assumed that this was because of the kidnap attempt. Some two or three days later the son, daughter and mother left Sri Lanka by plane on their normal passports.

Documents and submissions

[42] On 30 April 2010, the Authority received from counsel a written memorandum of submissions together with further supplementary appeal statements from the mother and daughter, each dated 27 April 2010. Attached to the memorandum of counsel were:

- (a) Letter dated 10 April 2010 from the Deputy Minister of Vocational and Technical Training in Sri Lanka confirming his knowledge of the problems faced by the family;
- (b) Statement from employee of the shop relating to the telephone conversation he had with the mother following the kidnap of the husband;
- (c) Statement from the mother's brother-in-law confirming the kidnap of the husband and the steps he took to sell the family home to pay the ransom demand;
- (d) Copy of deed of transfer in relation to the sale and purchase of the family home;
- (e) Letter from the daughter's doctor confirming that she is suffering from stress-related headaches;
- (f) Bundle of country information relating to the situation for Tamils in Sri Lanka.

[43] At the conclusion of the hearing counsel made further oral submissions to the Authority.

THE ISSUES

[44] 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."

[45] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[46] The broad contours of the evidence of all three appellants were consistent with what they had written in their statements filed in support of the original claim and their evidence in interview with the RSB. Furthermore these claims are notable for the fact that, unlike many appellants who have appeared before the Authority during the long years of civil war in Sri Lanka, these appellants have not sought to claim some false security profile with the authorities. These are matters which must be given some weight in assessing the credibility of their account. On behalf of the appellants, Ms Frengley, urges the Authority to make a positive credibility finding. Such inconsistencies as arose were, she submits, of a minor nature and the evidence of each the mother, daughter and son was respectively consistent with their gender, timid disposition, and youth. The core of their account, counsel submits, was credible.

[47] However, after carefully reflecting on the evidence in its totality, there are features of the evidence which cause the Authority to conclude that the core of the account is not truthful, these factors notwithstanding. For the following reasons, the Authority rejects the core of the account relating to the alleged kidnap of the appellants' husband/father, and the attempted kidnap of the daughter and son.

Regarding the kidnap of the husband

[48] In the statement filed by the mother in support of the refugee claim she stated that the ransom money was raised through the sale of the house and that the house was sold some two or three days after her husband's kidnap on 16 May 2009. She states that her bother-in-law made all the arrangements and found purchasers who got a bargain on the proviso that they pay half the purchase price immediately and the balance within a month. She states that the purchasers were charged the ransom amount (1 *crore*) to purchase the house.

[49] In her RSB interview, the mother was questioned in some detail about how she secured the money to pay the ransom demand. She confirmed the house was sold, not for the ransom amount but rather for 2 *crore*. A first payment was made in May and the final payment was made in June 2009. When asked whether she signed a sale and purchase agreement or documents relating to the transfer of ownership or registration, she replied "No". The mother said the purchasers made a part payment amount to secure the husband's release and the mother signed a receipt for this. She stated that the sale and purchase agreements were signed after her husband came home and that they both signed the documents. The balance owing was then paid. When asked to provide copies of this document the mother explained that because she left Sri Lanka in a hurry she could not bring all the documents with her and in any event did not know they would be required. She explained her husband was out of the country at that time and could not obtain the documents and her brother-in-law was not in a position to obtain the documents for her.

[50] Following the interview, the refugee status officer prepared an interview report dated 17 December 2009 and in this document asked the mother to clarify when she signed the receipt to secure the initial payment from the purchasers. The mother, via letter dated 21 January 2010 from her then counsel, Ms Griffin, stated that:

At approximately 11am on 19 May 2009 I signed the receipt for the initial payment for the sale of the house.

[51] However, this version of events was significantly undermined by the particulars detailed in a sale of purchase agreement of the house. A copy of this document was provided by the mother to Work and Income New Zealand, despite her telling Immigration New Zealand at around the same time in late 2009 that it was, effectively, an impossible document to obtain in the circumstances. A

photocopy of this deed of transfer was submitted by counsel under cover of her memorandum of submissions. According to this document:

- (a) Both the husband and mother signed the document on 20 May 2009 in the presence of the named notary public. According to the attestation of the notary public, the husband and mother signed the document in her presence and she read over and explained the content and effect of the deed of transfer to the husband and mother.
- (b) The purchase amount was 1.2 *crore* (12 million Sri Lankan *rupees*), receipt of which was expressly admitted and acknowledged by the mother and husband when signing on 20 May 2009 and of which some 4 million *rupees* had been received in a prior payment.

[52] When asked to comment on this by the RSB in a letter dated 28 January 2010, again via her then counsel in letter dated 8 February 2010, the mother maintained that she signed “the deed for sale of our property” on 19 May 2009. She states that she had “now learnt” that her husband’s signature was also obtained. The kidnappers had spoken to her brother-in-law and organised to obtain her husband’s signature on the deed. The mother explains that she only became aware of this when she spoke to her brother-in-law on 2 February 2010 and he gave this information to her.

[53] The mother repeated this final account of the sale and purchase of the house to secure the husband’s release in her evidence to the Authority. She stated that the notary public who signed a personal attestation that they both signed the document on the 20 May 2009, did so knowing this to be untrue, but did so because she wanted to help them. As regards the discrepancy in the sale and purchase amount, she says that she understands this was done to minimise stamp duty. Her account is supported by the undated statement filed by the brother-in-law who confirms he never told the mother about having the husband’s abductors take him a pre-prepared sale and purchase agreement to sign to effect the sale and that the lower sale price recorded in the document is inaccurate and was done to minimise the stamp duty payable.

[54] However, putting to one side the discrepancies over the dates of signature, dates of receipt of the money and the purchase amount, this account is far fetched and fundamentally implausible.

[55] According to the mother she agreed to sell the property to the purchasers at less than its full market value on the basis that they had agreed to pay her half of the purchase amount immediately, and that this initial payment comprised the amount of money demanded by the kidnappers. She was told by the brother-in-law that when she signed the receipt on 19 May 2009 (the document she now agrees is the sale and purchase agreement), the purchasers would release the part payment agreed. If this were true, then it was not necessary for the husband's signature to be obtained in order for the mother to be able to fulfil the ransom demand and secure the release of her husband. The husband's signature had significance only in completing the effective legal transfer of ownership from the husband and mother to the purchasers. The kidnappers simply wanted the ransom sum and how this was obtained would be immaterial to them. The mother had no explanation whatsoever for why it was necessary for the husband's signature to be obtained to secure the release of the moneys if her underlying account of the purchasers agreeing to release the ransom amount as part payment upon her signing the receipt was true.

[56] Furthermore, the mother could offer no compelling explanation as to why she was not told of the brother-in-law's prior contact with the kidnappers about obtaining the husband's signature. The claim that she was kept in the dark and continued to be kept in the dark so as not to worry her until events in New Zealand forced its disclosure is, in the circumstances, fanciful. The mother agreed that she was aware the property was jointly owned and that her husband's signature was required to effect a legal transfer. Far from being a source of worry, that the husband's kidnappers had agreed for the sale and purchase agreement to be taken to them to effect the legal transfer would be a reassuring sign that matters to secure the husband's release were firmly in hand and that the kidnapers themselves had agreed to act to ensure this could happen. How this could be seen as a worrying development to be hidden from the mother has not been credibly explained. This points towards the untrue nature of her evidence regarding the circumstances in which the sale of the house took place.

[57] Her account about securing the ransom money, when pressed for detail, has been mobile. Her final account is both fanciful and implausible. The Authority is satisfied that the mother has attempted to weave an untrue narrative around an event (the sale and purchase of the property named in the deed of transfer) which could well have taken place.

[58] There were other discrepancies in relation to the mother's evidence reinforcing the finding that this core aspect of the claim is not true.

[59] First, the mother was inconsistent as regards whether or not they informed the police of the fact that her husband had been kidnapped. In the statement she filed in support of her refugee claim, the mother states that, while at the police station:

"We said we had received a phone call and my husband has been kidnapped. They said they do not accept these kinds of cases of Tamils being kidnapped and they do not know anything about it. Went home discouraged."

[60] However, in her RSB interview, the mother changed her evidence and said that the abduction and ransom demand were not reported to the police because the kidnappers had warned her not to say anything. When asked to comment on this in the RSB interview report, the mother, again via Ms Griffin's letter of 21 January 2010, reverted to her first version of events asserting "we tried to make a complaint at the police station about my husband's kidnapping but they refused to accept it". Her evidence changed yet again before the Authority where the mother reverted to the position that she and the brother-in-law had not tried to lodge a complaint with the police about the husband's kidnap.

[61] Thus, at various times the wife changed between making a formal complaint to the police, trying to make a formal complaint to the police and not making a complaint to the police. She had no compelling explanation for this substantial mobility in her evidence. The mobility is too great to be convincingly explained by stress and anxiety.

[62] Second, the mother stated in both her RSB interview and in her evidence before the Authority that, after she and her brother-in-law first saw the Tamil MP on 18 May 2009, they had no further communication with him. However, the letter dated 10 April 2010 from a person purporting to be a Tamil minister tells a different story. The letter states that not only did the mother inform the minister of the abduction of her husband and the demand for payment, but also goes on to assert that "according to her [the mother] ... money had been paid to obtain the release of her husband". Furthermore, the letter goes on to state (*verbatim*):

"She [the mother]" had informed the minister that the same people are still phoning her and threatening to abduct the children and that the mother felt it was not safe for her husband to stay here and she wishes to send her husband abroad."

[63] Yet she could offer no compelling explanation as to why the MP would make this statement about her further communications to him about subsequent

events when she was telling the immigration authorities in New Zealand that there had been no further contact with the MP.

The kidnapping of the son and daughter

[64] In the confirmation of claim forms completed by the mother, daughter and son on their arrival in New Zealand they each gave details about the events that had caused them to flee Sri Lanka. They each stated that they feared being kidnapped and were asked to set out the events which happened to cause this fear. Detailed information was given about the kidnap of the husband and threatening telephone calls. However, neither the mother, son, or daughter mentioned the attempted kidnap of the son and daughter which they now claim to have taken place.

[65] They explain that, because it had only been an attempted kidnapping and not an actual kidnapping as with their father/husband, they did not see why they should mention it. However, this provides no compelling explanation given the nature of the threats and that the daughter and son have each made a claim in their own right that they fear being kidnapped. If the attempted kidnap did take place, it defies any realistic belief that they would not have mentioned it. Nor can this failure be credibly explained by stress or anxiety on arrival given the detail they provided about other aspects of their claim which caused them to fear for their safety in Sri Lanka.

CONCLUSION OF CREDIBILITY

[66] After careful reflection, the Authority is satisfied that the combination of the above matters establishes that the core of the claim is not true. The Authority does not accept that the appellants' husband/father has been kidnapped or that a kidnap attempt was made on the son and daughter in this case. Although statements have been filed by the brother-in-law and an employee, limited weight can be given to them owing to the inability of the Authority to examine the makers of these statements. In any event, the contents of these statements do not resolve the fundamental credibility concerns the Authority has outlined above.

[67] However, the Authority does accept that the appellants are all Tamils who have lawfully resided in Colombo and have a family business there. Their claims will be assessed against this background.

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

The situation for Tamils generally in post –conflict Sri Lanka

[68] In *Refugee Appeal Nos 76294 and 76295* (30 June 2009) the Authority at [78]-[95], extensively considered the situation for Tamils in Sri Lanka following the declaration of victory by the Government of Sri Lanka (GoSL) over the LTTE in May 2009. The Authority noted the substantial death toll of Tamil civilians during the last months of the conflict and the substantial numbers of Tamils being held in internment camps by the GoSL “on the basis that it needs to identify an unknown number of LTTE suspects in the camps” – see [79]-[81].

[69] At [84] and [85], the Authority noted that country information available at that time established that the GoSL was intent on maintaining tight security control over the north and east of Sri Lanka and in Colombo. At [85], the Authority observed that, despite the cessation of hostilities, GoSL maintained restrictive measures which it claims are necessary to maintain the peace and security in Sri Lanka. At [86], the Authority noted that the GoSL:

continues to be highly suspicious of civilian Tamils generally and it is implicated in treating some of those it believes to have been associated with the LTTE with arbitrary brutality.

[70] Country information filed by counsel shows that, while there has been some easing of some of the conditions noted in *Refugee Appeal Nos 76294 and 76295*, substantial humanitarian challenges remain and human rights abuses continue to occur. On the positive side, the International Crisis Group Report “Sri Lanka: A Bitter Peace” *Crisis Group Asia Briefing No 9* (11 January 2010) (“the ICG report”) notes, at pp2-3, that, as at the end of 2009 some 147,000 of the approximately 280,000 civilians detained between May and December 2009 had been released or transported back to their home district or host families. While the camps are less full than before, some 110,000 remain in major camps although these have been partially opened. The process by which this happened has been described as chaotic and disorderly with many likely to remain in limbo or protracted displacement.

[71] More broadly, the report observes that the shift in GoSL policy towards resettling previously detained Tamils may be borne more of domestic political pressures. It should, the International Crisis Group says, be seen as a tactic for controlling the population given that the bulk of the displaced released from the

camps have, in fact, not been resettled but are instead scattered in government controlled 'transit centres' in their home districts with little oversight by the international community or aid/humanitarian agencies. The ICG report states, at p7, the rationale behind this policy as being:

Given their close association with and sympathy for the LTTE, Tamils from the Vanni and Jaffna are neither liked nor trusted by the government. It will likely seek to control them for some time.

[72] The ICG report states, at p8, that the military has been maintaining "extra-legal" detention centres for an estimated 11,000-13,000 people suspected of LTTE ties. The GoSL announced that, of these, approximately 200 will be put on trial, the remainder detained for a further unspecified period of 'rehabilitation' before release. As at the date of this report (January 2010), the bulk were stated to continue to "exist in legal limbo, with no clear recourse to challenge their detention".

[73] On the political level, the ICG report observes, at p12 that :

The Rajapaksa government has shown no interest so far in constitutional or other reforms to address the ethnic tensions that gave rise to – and were deepened by – nearly 30 years of civil war. It has launched no major political initiatives to bridge the gaps between Tamils, Sinhalese and Muslims and pave the way for lasting reconciliation.

[74] Commenting on the recent elections, the ICG report states, at p17, they took place in context where the ruling Rajapaksa family:

have relied on emergency laws, popular fears of terrorism, and latent anti-Tamil sentiments to maintain their power and have continued to do so after the military victory.

The UNHCR *Country of Origin research and Information Country Report; Sri Lanka* (April 2010) ("the CORI report"), at pp14-15, also refers to allegations of unfairness and political violence which occurred in the January 2010 presidential elections.

[75] Commenting on the human rights situation, the ICG report notes, at p18, that there had been some improvement in the human rights situation in the final months of 2009:

with very few reports of extrajudicial killings, abductions and enforced disappearances received in the final months of 2009. Nonetheless, the structures that enable violations and impunity – chiefly the anti-terrorism regulations promulgated under the state of emergency and the Prevention of Terrorism Act – remain in place. Despite strong domestic and international pressure to repeal these measures and re-establish the rule of law, there is little sign the Rajapaksa government is interested in changing course.

[76] Unsurprisingly, the absence of the rule of law in post-conflict Sri Lanka means that reports of serious human rights abuses including arbitrary detention, torture, and inhuman or degrading treatment or conduct continue to be received – see, for example CORI report at pp89-90 and 109-11; ICG report at pp17-19; *Spectator video captures SL police, SLA kill mentally ill Tamil youth* TamilNet (31 October 2009).

[77] Having briefly sketched the broader political context and pattern of ongoing human rights abuses in post-conflict Sri Lanka, it is necessary to examine for the purposes of these appeals, how this translates into risk for these appellants. In particular, what risk of detention and subsequent ill-treatment do they face on arrival at the airport and post arrival in resuming their lives in Colombo.

The risk of detention at the airport

[78] The United Kingdom Border Agency Country of Origin Information Service *Report on Information Gathering Visit to Colombo Sri Lanka 23-29 August 2009* (22 October 2009) (“the UKBA report”) contains interviews with a number of state officials at Sri Lanka's Department of Immigration and Emigration (DIE), Sri Lanka's Deputy Solicitor General, as well as consular representatives and representatives from the International organisation for Migration (IOM) and United Nations High Commissioner for Refugees (UNHCR). Although this report is some months old now, the Authority believes that it is likely to represent the current state of affairs on this issue. In any event, the report, helpfully provided by counsel, is the most recent available to the Authority.

[79] According to a DIE official consulted, DIE recorded details of all returnees. Returnees were referred to the Criminal Investigations Department (CID) or State Intelligence Service (SIS) as necessary. DIE operated an alert list relating to court orders, warrants of arrest, bail jumping and the like, as well as information from Interpol and the SIS. If an alert was triggered, the returnee will be referred to the CID or SIS as required. Additionally, the DIE operated its own alert system but the criteria for alert were not disclosed – see [1.4]-[1.5]. Background checks will be carried out on deportees/returnees and, under new policy guidelines, they may be photographed and fingerprinted. If a person is suspected of having committed immigration and passport offences (false passports/visas) or breaches of anti-terror legislation they will be questioned further by the CID and SIS – see [1.6]-[1.7]. Remands in detention by the CID must be authorised by a magistrate.

Detention under the emergency regulations or anti-terror legislation need only be authorised by the Ministry of Defence however – see [1.29]-[1.30].

[80] As far as advanced warning of returnees, the position is unclear. Certainly in relation to the United Kingdom, an established centre of LTTE funding, a “senior intelligence official” is reported (at [1.6]) to state that the SIS were “often” notified about “planned enforced returns” from London and who interviewed every deportee to ascertain the grounds of deportation, how they left Sri Lanka and their background. It is not clear from the UKBA report whether this relates to all deportees/returnees or just those from London. Further complications arise from the fact the report, in places, uses the terms ‘deportee’ and ‘returnee’ interchangeably despite these terms not being synonymous from an immigration perspective. However, the notion that there is a particular sensitivity to returns from only specific destinations is bolstered by comments made by an opposition party leader and MP who reported as stating (at [1.30]) that Tamils returning from Europe and Canada are especially likely to have background checks conducted as “the diasporas funded the LTTE and they were considered the enemies of the nation”.

[81] The superintendent of the airport branch of the CID is reported to have stated that airline officers “tend to notify” the DIE of returnees although this may refer more to the situation where the person is arriving having been issued with an emergency travel document only – see [1.7]. As against this, commenting on whether procedures were in place to identify failed asylum seekers, a representative of the Australian High Commission is reported to state that “if the failed asylum seeker returned unaccompanied, the authorities would not be aware of this fact”. This official comments that, while an alert list was maintained, unless the person’s particulars such as name, date of birth, and passport number matched, the person was not stopped. However, if the airline or IOM notified the authorities that the failed asylum seeker was a deportee or was otherwise being escorted, the authorities would then be alerted to this – see [1.10].

[82] Commenting on the situation for failed asylum seekers, a representative of UNHCR is reported to have stated that UNHCR were aware of some asylum seekers being interviewed by the CID but it is unclear from the report whether this was because they had been identified as asylum seekers or because they possessed some other characteristic or background which prompted the inquiry.

[83] As to whether simply being Tamil increases the risk of detention at the airport, some persons consulted in this report did not indicate that, without more, simply being a Tamil resulted in any different treatment. In contrast, the UNHCR representative opined that “in general” Tamils were “more likely” to be questioned by the CID, as did a non-governmental organisation although the latter stated that not all were referred for investigation as a terrorist by the Terrorist Investigation Department (TID) or sent to the CID. A consular representative stated that it was young Tamils with ID cards from Jaffna or the Vanni who were most likely to be targeted for detention. Persons with criminal records would be detained and investigated. If there were outstanding warrants or information the person had escaped custody the person will be arrested – see [1.34]-[1.35].

[84] From the above country information it is clear that there are formal and overlapping procedures to control entry into Sri Lanka by citizens returning from abroad. Those Tamils who are returnees or deportees may have their fingerprints and photographs taken, although it is not clear this extends to all or just those who have returned from centres of suspected LTTE fundraising in Europe and Canada. In general, given the history of the conflict, it can be accepted that Tamils may be more likely to be stopped on arrival and their backgrounds checked. However, if the person has no outstanding criminal matters or is not suspected of being a supporter or member of the LTTE, any detention they may face at the airport will be relatively brief. Should they be suspected of breaches of immigration legislation or other criminal matters they will be referred to the CID for further questioning. If they are suspected of breaches of anti-terror legislation or the emergency regulations, the TID and/or the SIS will become involved. As to this, young Tamils who have ID cards showing residence in Jaffna or the Vanni may face an increased risk of detention for further questioning.

[85] There does not appear to be any procedure or interest in identifying whether or not a person is a failed asylum seeker, although should they be suspect of breaches of the anti-terror legislation, the person concerned may well be interrogated about this.

Application to the facts

[86] Each of the appellants left Sri Lanka lawfully using legitimate passports. They have each resided lawfully in Colombo for many years and their ID cards show a Colombo residence. There is nothing in their backgrounds to excite any official interest in them at the airport on their return. Even if they were to be

deported and were to be detained on arrival for a background check on the basis of being Tamils, there is nothing in their background to reveal any matter of concern of a criminal or terrorist nature. Once this was established, they would be allowed to go on their way without further hindrance and without suffering anything other than temporary inconvenience. The risk to these appellants suffering serious harm as a result of any airport detention falls well below the real chance threshold.

The situation for Tamils in Colombo

[87] As to the situation in Colombo, in *Refugee Appeal Nos 76294 and 76295* the Authority noted:

The situation in Colombo

[91] In Colombo too, frequent military checkpoints and roaming military patrols are continuing the long-established pattern of house searches and the arrest and detention of Tamils, particularly young men. A short *Tamilnet* article on 23 June 2009 states that "search and check operations have escalated in Colombo in recent times" ("7 Tamil youths arrested in Colombo" *Tamilnet* 23 June 2009). This statement aligns with other country information which indicates that young Tamil men are being arrested on an almost daily basis in Colombo, some being held indefinitely and without access to family or legal representation. Those without a Colombo identity card and with only casual employment or temporary accommodation are most at risk of being detained for longer periods. (See, for example, *Tamilnet* 20 June 2009 "12 Tamils arrested in Wellawatte" and "Police detains 3 Tamil youths in Colombo" and 16 June 2009 "9 Tamil youths arrested in Colombo" and 4 June 2009 "25 Tamil youths arrested in Colombo").

[92] In addition to arrests, "disappearances" of ethnic Tamils in the north and in Colombo remains a serious problem. (*Human Rights Watch* "Sri Lanka: Avoid a Postwar Witch Hunt" (3 June 2009)). Such disappearances are most often attributed to the SLA or paramilitary groups aligned with the army. The International Crisis Group estimates that "at least 2,000 people - possibly many more - have been forcibly "disappeared" in Sri Lanka since early 2006". ("Sri Lanka: after the war" ICG (updated 16 June 2009) at www.crisisgroup.org).

[93] Recent Tamil arrivals at the international airport in Colombo are being subjected to increased scrutiny with multiple instances of returnees being interrogated, arrested and some being detained on arrival on suspicion of being LTTE operatives from overseas. The *Sri Lankan Guardian* reported that two Tamil youths were arrested after arriving from Doha ("Two Tamils arrested in Katunayake Airport on arrival from Qatar" 17 June 2009). They were arrested by police as they were leaving the airport grounds with relatives. The report states that the relatives were also taken into custody and questioned, but were released the same day. The two youths were still in custody at the time the article was written. In another reported incident, 15 Tamils arriving from London were detained incommunicado for nearly two weeks during which time they were interrogated by security about their connections with the LTTE in London ("Sri Lanka harass visiting Tamils at the Colombo airport" *Sri Lanka Guardian* 10 June 2009). In the same article it is reported that a young Tamil woman was also searched, held and interrogated for three hours on arrival. After denying she was involved in the London protests criticising the Sri Lankan military offensives she was released.

[88] The UKBA report observes that there exists a substantial Tamil population in Colombo, who form a majority in certain areas in the city. Estimates suggest that they number between 300,000 to 500,000, and constitute between 16-20 per cent of the population in Colombo District. The UKBA report examines in some detail the risks faced by Tamils in Colombo. Broadly, it examines three issues: the risk of being detained during cordon and search operations, at police checkpoints and the risk of kidnapping and abduction.

Detentions during cordon and search operations

[89] As to the risks associated with cordon and search operations the UKBA report, at pp19-20, notes that these operations continue. Indeed, an IOM representative stated they were happening “frequently”. According to one NGO representative, in poorer Tamil areas they could take place once or twice per week, with less frequency in other Tamil areas – see [2.4]. As to who was at risk of being detained during these operations, there was some consensus that young Tamils aged 20-30 were at greater risk of being detained, more so if their ID showed an address in the north (presumably Jaffna and the Vanni). Similarly, the UNHCR representative noted that “a lot of questioning was going on” and those without ID’s could face problems. In contrast, a consular official stated, “Colombo Tamils were hardly ever taken”– see [2.16].

Detention at checkpoints

[90] As for detention at checkpoints, the sources cited in the UKBA report at p31, paint a picture of a heavy police presence in Colombo with frequent roadblocks and checkpoints. At pp33-34, the sources all point to inquiries at checkpoints being made as to identity and place of residence, as well as searches of belongings taking place. The UKBA sources point towards a more brusque treatment of Tamils but not necessarily harassment. According to a UNHCR protection officer, those Tamils from the north and east were asked at checkpoints to show their police registration certificate in addition to their national ID card. Tamils with long standing Colombo residence did not face any particular problems but those whose ID card showed an address in the north (again, presumably Jaffna and the Vanni) may be detained briefly for further questioning. However, one embassy is reported to have received asylum applications from persons who had been arrested at such checkpoints, detained and sent to a detention centre (Boosa) where ‘hundreds of persons detained under anti terror legislation are

reportedly held, often without charge' (see p20 at [2.9]). The background of the persons sent to Boosa after arrest at checkpoints in Colombo is not specified.

[91] Similarly the CORI report, at p105, also notes reports that checkpoints in Colombo remained in force and that Tamils were harassed at these at checkpoints.

Kidnapping and abduction

[92] Finally, the sources cited in the UKBA report at pp26-27, all state that the overwhelming impression is that there had been a substantial decrease in the number of abductions since June 2009. While from time to time some were reported in the press, the incidence was fewer. This picture of a decline in the incidence of abduction is echoed in the CORI report at p101.

[93] At p28, the sources cited in the UKBA report agree that a mixture of motives lie behind the kidnappings that have taken place. Some are a purely criminal enterprise; others have a political motive. Sometimes, the two were interrelated with some criminal enterprise being carried out by paramilitary groups or by persons otherwise with 'connections' to the security forces. There was, at the very least, some complicity by some security personnel who let vans with kidnapped persons through checkpoints.

[94] As for the police response to reported kidnappings, the picture is mixed. The article *Tension Grips Tamil Business Community in Colombo* TamilNet (10 October 2009) refers to anxiety among the Tamil business community in Colombo about forms distributed to them by the army requiring them to register their assets with the local authorities. The fear is this information will be passed on to criminal gangs by elements within the police/security apparatus associated with criminal elements engaged in the kidnappings.

[95] However, the CORI report, at p20, notes a *BBC* report in March 2010 that the Colombo police had opened four additional units in Colombo with the capability of taking statements in Tamil reflecting broader trends across the country. Moreover, the report *Jaffna Tamil Girl abducted in Colombo* TamilNet (20 December 2009) is notable for the fact that police are reported to have lodged a complaint and were pursuing an investigation. However, the UKBA report, at p31 paints a picture of a police force that is, at best, ambivalent to such complaints. If complaints are pursued at all, they are not pursued with great vigour, in part because of the acknowledged links between some police and the perpetrators.

Summary of country information

[96] The above country information shows that life in Colombo is subject to restrictions. Cordon and search operations continue. Police roadblocks and checkpoints are frequent. Some Tamils are arrested and detained as a result of these operations and at checkpoints. Those most at risk of being detained for further questioning are Tamils in Colombo whose ID cards which show a current registered residence in Jaffna or the Vanni. Nevertheless all Tamils may be dealt with brusquely by security and police officials.

[97] As for kidnapping and abduction, this does continue albeit at a greatly reduced incidence since mid-2009. Such abductions as do occur continue to be a mixture of outright criminal enterprise and those that are politically motivated. Elements within the police and security apparatus continue to be suspected of involvement. Police will register a complaint, although investigation of it may not be pursued with full force.

Application to the facts

[98] Each of these appellants can be expected to be stopped at checkpoints and during a cordon and search operation. However, the Authority is fully satisfied that, as with similar occasions in the past, they will not be detained for further questioning as they have nothing in their backgrounds to excite any interest in them. Having rejected their account regarding the kidnapping incidents, the chance of them being kidnapped is essentially conjecture and falls below the real chance threshold.

Conclusion on well foundedness

[99] For these reasons, the Authority finds that none of the appellants has a well-founded fear of being persecuted. There is nothing in their background to give rise to any adverse interest in them by the Sri Lankan authorities either on arrival at the airport, or at any time subsequently should they be stopped at checkpoints or questioned during ongoing cordon and search operations. The risk of them being subjected to a kidnap or abduction is remote and speculative. These appellants have had an adequate standard of living in the past. The son and daughter have each had an adequate education. The husband remains the owner of the business and can continue to provide them with an adequate standard of living in the future. While life for Tamils in Colombo may be fraught

with a certain amount of uncertainty as Sri Lanka heads further into uncharted post-conflict waters, there is no real chance at the present time that these appellants will be persecuted as a result. The first principal issue is answered in the negative. The need to consider the second does not, therefore arise.

CONCLUSION

[100] For the reasons mentioned above, the Authority finds the appellants are not refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeals are dismissed.

"B L Burson"

B L Burson
Member