

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76510

AT AUCKLAND

<u>Before:</u>	B L Burson (Member)
<u>Counsel for the Appellant:</u>	J Hindman
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Dates of Hearing:</u>	31 May 2010 & 18 June 2010
<u>Date of Decision:</u>	20 August 2010

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Sri Lanka. This is the second time the appellant has appealed to the Authority.

[2] The appellant arrived in New Zealand on 30 November 2008 on a limited purpose visa. He lodged his first claim for refugee status with the RSB on 10 December 2008. He was interviewed by the RSB in relation to his first claim on 12 February 2009. By decision dated 16 April 2009, the RSB declined his first claim. The appellant duly lodged an appeal. On 7 July 2009, the Authority (differently constituted) heard the appeal ("the first appeal"). By decision dated 8 October 2009 the first appeal was dismissed by the Authority – see *Refugee Appeal No 76340*.

[3] By notice dated 19 October 2009, Immigration New Zealand ("INZ") issued

the appellant with a Notice of Revocation of his temporary permit granted to him on 8 July 2009 and which was current to 8 January 2010. The notice stipulated that the revocation became effective on 10 November 2009. It advised the appellant that, unless he could before 10 November 2009 show good cause why his permit should not be revoked, he had an obligation to leave New Zealand.

[4] On 9 November 2009, the appellant lodged his second claim for refugee status. By letter of the same date, counsel wrote to INZ's Compliance Section advising them that a subsequent claim to refugee status had been filed. Counsel requested that the Notice of Revocation be withdrawn on the basis the lodging of his second claim constituted 'good cause' as stipulated in the Notice of Revocation. By letter dated 12 November 2009, INZ confirmed that, as a result of the filing of the subsequent claim for refugee status, the Notice of Revocation of his temporary permit had been revoked and the appellant's work permit reactivated to the then current expiry date of 8 January 2010.

[5] The appellant was interviewed by the RSB in respect of his second claim for refugee status on 11 December 2009. By decision dated 26 February 2009 the RSB declined the second claim for refugee status. The appellant once again appealed to the Authority.

[6] Because this is the appellant's second claim for refugee status the appellant must first establish that the Authority has jurisdiction to hear the appeal.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[7] The jurisdiction of a refugee status officer to consider a second or subsequent refugee claim is governed by s129J of the Immigration Act 1987 ("the Act") (which came into force on 1 October 1999). It provides:

"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] There is then a right of appeal, pursuant to s129O(1) of the Act, which provides:

A person whose claim or subsequent claim has been declined by a Refugee Status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that the circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision.

[9] In *Refugee Appeal No 75139* (18 November 2004), the Authority re-examined its approach to second and subsequent refugee claims, in the light of the statutory scheme under the Act, and against the background of case law which had arisen in the preceding decade. The relevant principles extracted by the Authority from this review were conveniently summarised at [54]-[57]:

[54] In any appeal involving a subsequent claim under s129O(1), the issues are not 'at large'. Rather, there are three distinct aspects to the appeal.

[55] First, irrespective of the finding made by the refugee status officer at first instance, the claimant must satisfy the Authority that it has jurisdiction to hear the appeal. That is, the claimant must establish that, since the determination of the previous claim, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim. As to this:

- (a) The change of circumstances must occur *in* the claimant's home country. It is not open to the claimant to circumvent the jurisdictional bar by submitting that at the hearing of the previous claim the refugee status officer or the Authority misunderstood the facts.
- (b) A "reinterpretation" of a claimant's case is neither a change of circumstances, nor is it a change of circumstances *in* the claimant's home country.
- (c) The claimant cannot invite the Authority to sit as if it were an appellate authority in relation to the decision of the first panel and to rehear the matter. The Authority has no jurisdiction to rehear an appeal after a full hearing and decision.
- (d) A second appeal cannot be used as a pretext to revisit adverse credibility findings made in the course of the prior appeal.
- (e) Jurisdiction under ss129J(1) and 129O(1) is determined by comparing the previous claim to refugee status against the subsequent claim. This requires the refugee status officer and the Authority to compare the claims as asserted by the refugee claimant, not the facts subsequently found by that officer or the Authority.
- (f) Proper recognition must be given to the statutory language which requires not only that the grounds be different, but that they be **significantly different**.
- (g) The Authority does not possess what might be called a "miscarriage of justice" jurisdiction.

[10] Also relevant to this appeal is s129P(9) of the Act which provides:

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

As to this, in *Refugee Appeal No 76139* the Authority observed:

[56] Second, in any appeal involving a subsequent claim, s129P(9) expressly prohibits a claimant from challenging any finding of credibility or fact made by the Authority in relation to a previous claim. While the Authority has a discretion whether to rely on any such finding, that discretion only comes alive once the jurisdictional threshold for subsequent claims set by ss129J(1) and 129O(1) has been successfully crossed.

[57] Third, where jurisdiction to hear the appeal is established, the merits of the further claim to refugee status will be heard by the Authority. That hearing may be restricted by the findings of credibility or of fact made by the Authority in relation to the previous claim, or “at large”, depending on the manner in which the discretion under s129P(9) is exercised by the Authority.

[11] It has not been disputed by counsel that these represent the relevant principles that govern the determination of the jurisdictional question although, as will be seen, counsel made a number of subsidiary submissions as to how they are to operate in practice. In order to determine whether the jurisdictional threshold is crossed having regard to these principles, it is now necessary to have regard to the appellant’s first and second refugee claims

The appellant’s first refugee claim

[12] The appellant’s first refugee claim contained an account of episodic disruption of his life by the civil war in Sri Lanka. Until 1990, the appellant lived in the Jaffna area. While growing up, his home and school were attacked on a number of occasions. During this time the appellant was detained by the Sri Lankan Army on a number of occasions as part of general round-ups of Tamils. In late 1990, he went to India for a short period. On his return to Sri Lanka in 1991, the appellant went to live with an uncle in Colombo where he stayed until the beginning of 1994. During this period in Colombo, the appellant was detained on several occasions during general round-ups of Tamils.

[13] In 1994, the appellant returned to Jaffna to work before returning to Colombo in late-1996 where he found employment at a pharmacy. Again, he was subjected to arrest and brief detention as part of general round-ups, prompting him to travel to the Middle East in late 1997. Following the ceasefire between the Liberation Tigers of Tamil Eelam (“LTTE”) and the Government of Sri Lanka (“GoSL”) in 2000, the appellant returned to Sri Lanka in 2002 and began working in the north of Sri Lanka for a pharmaceutical company as a sales representative.

He married in mid-2003. The couple have two daughters.

[14] Towards the end of 2006, the appellant used his connections to persuade a local coroner to release the body of a deceased friend, who had been killed by members of the Eelam People's Democratic Party ("EPDP"), to the friend's family.

[15] Although the appellant raised other concerns regarding minor problems he or his sister's relatives by marriage encountered with the EPDP and Karuna group (a breakaway LTTE faction), the events which the appellant asserted to have precipitated his flight to New Zealand and lodge the first claim were alleged to have begun in August 2008. By this time, the ceasefire between the LTTE and GoSL had effectively collapsed. The appellant claimed to have now been contacted by a member of the LTTE with whom he had lawfully conducted business selling pharmaceutical supplies during the ceasefire. This LTTE member requested the appellant to provide medicines from his employer's pharmaceutical supplies to save the life of an injured LTTE member. The appellant eventually agreed to this and procured from his company's supply base the required drugs which he handed over to the LTTE member at a pre-arranged contact point.

[16] The appellant claimed that, a few days later, one of his Sinhalese colleagues confronted him about this. Later that evening, members of the police arrived at the appellant's home and requested he accompany them to the police station for questioning. However, as his wife became upset, the police agreed he attend the police station the following morning, which the appellant did accompanied by a lawyer. After the police asked him some basic questions he was allowed to go. They did not ask him any questions about supplying pharmaceuticals to the LTTE.

[17] Following the interview with the police, the appellant applied for a New Zealand visa. Two weeks after the interview he received an anonymous telephone call from a person claiming to belong to the LTTE who asked him to provide more pharmaceutical supplies. When the appellant refused, this person replied that he knew the appellant had been giving medicine to the LTTE and that he had been watching the appellant for a long time. This person threatened to capture the appellant and shoot him.

[18] Later that month some unknown men came to the house asking for the appellant. The appellant did not answer the door and the men left after about 20 minutes. That evening the appellant and his family left their home and moved

between various locations before he eventually left the country.

The basis of the appellant's second claim

[19] The appellant's second claim is recorded in his Confirmation of Claim form filed on 9 November 2009 and in two statutory declarations dated 20 November 2009 and 10 December 2009. He expanded on the basis for the second claim in his evidence before the Authority on 18 June 2010. The events which form the basis of the second claim are threefold in nature.

[20] First, the appellant claims that he omitted to tell the Authority during his first appeal that in April 2005 he was detained by the Criminal Investigation Department ("CID") for one and a half days in Colombo. In the statutory declaration of 20 November 2009, the appellant describes this event as a "critical event". In his evidence to the Authority he stated that he was arrested in Vavunya while travelling between Jaffna and Colombo as part of his employment as a pharmaceutical sales representative on suspicion of assisting the LTTE. He was transferred into the custody of the CID and taken to Colombo. He claims he was released only through the manager of the pharmaceutical company intervening on his behalf.

[21] Second, he claims further an ongoing interest in him by the Sri Lankan authorities. Specifically he claims that, in August 2009, he learnt in a telephone call with his mother that, a week or so previously in late July 2009, the CID came to her house enquiring about him. He claims that his mother informed the CID that he had gone to New Zealand for employment and the CID requested his contact details. Upon being informed by his mother she did not have these details to hand, the CID officers indicated to her that they would return for the information. Afraid, his mother fled Sri Lanka shortly thereafter in early August 2009 for Malaysia where she currently remains living with one of his sisters.

[22] Furthermore, the appellant claims that on 10 November 2009 he was advised by his wife in a telephone call that CID officers had called at her new address in Colombo and enquired about his whereabouts. She informed the police of his presence in New Zealand. Now fearing for her safety, his wife changed her address and began living with one of her aunts in another part of Colombo. She did not register this change of address with the police. He further claims that, in early December 2009 during a routine residential check the police discovered his wife's unregistered presence at the aunt's premises and requested

that she report to the local police station in three days' time. His wife became frightened and did not report as requested and instead moved to a friend's house.

[23] In early December 2009, the appellant's wife left with the appellant's two daughters for India but owing to her having insufficient funds to remain in India for very long, she was forced to return to Colombo after approximately one month or six weeks. She has remained in Colombo since returning from Sri Lanka approximately six months ago. She has registered her new address with the authorities as required. There have, however, been no further visits to the appellant's wife by the authorities looking for him.

[24] Third, the appellant also believes that the general situation in Sri Lanka is such that it is not safe for him to return. Defeated LTTE members are detained in rehabilitation camps and people who are resettled are being shot by paramilitary groups. He cannot go and live in Jaffna peacefully. Life would also be difficult for him in Colombo because he has left his job. If the company finds out about his distribution of the goods to the LTTE IN 2008, his reputation will be destroyed and he will not be able to obtain similar employment elsewhere. The threats against former General Fonseka who is detained and threatened with death illustrate the risk to him. Because the authorities suspect him to be an LTTE supporter and now know he is overseas, he will not be permitted to leave the airport. He will be detained and killed. Unlike Fonseka who is well known, it will be easy for him to disappear.

Documents and submissions

[25] On 26 May 2010, the Authority received from counsel a written memorandum of submissions dated 25 May 2010. Attached to that memorandum were a number of items of country information relating to the situation in Sri Lanka following the defeat of the LTTE together with a letter dated 25 May 2010 from Dr S Garlick who confirmed that the appellant has been treated with medication for symptoms of post-traumatic stress disorder.

[26] On 31 May 2010, counsel submitted to the Authority country information relating to President Rajapaksa's proposals to establish a panel to investigate allegations of war crimes committed by the GoSL forces in the final stages of the conflict with the LTTE and arrest of persons suspected to be active members of the LTTE. On 18 June 2010, the Authority received from counsel further items of country information relating to the situation of Tamils generally in Jaffna, the

continuing arrest of “sleeping tiger cells” and the situation for former General Fonseka.

[27] At the hearing counsel also made opening and closing submissions.

[28] Subsequent to the hearing on 18 June 2010, on 25 June 2009 (incorrectly stamped as 23 June 2009) the Authority received a further memorandum of counsel of the same date. Attached to this were supporting items of country information relating to the general situation in Sri Lanka and the original envelope in which the appellant received documents from his relatives in Malaysia. On 30 June 2009, the Authority received a letter dated 29 June 2010 from counsel making brief further submissions on two further items of country information relating to the general situation in Sri Lanka, copies of which were attached. Finally, on 12 July 2010, the Authority received a letter from counsel dated 9 July 2010 enclosing a further item of country information and making further submissions thereon.

[29] As indicated above, counsel accepts that *Refugee Appeal No 75139* at [54]-[57] correctly sets out the relevant principles that must guide the Authority’s determination of the jurisdictional issue in this appeal – see para 1.2 memorandum of counsel dated 25 May 2010. However, counsel makes two further subsidiary submissions as to matters which modify the operation of these principles in the circumstances of the present appeal.

[30] The first is that for the purposes of considering a claim under the ‘claim versus claim’ approach adopted by the Authority in *Refugee Appeal No 75139*, ‘claim’, in this context, includes not just what was asserted by the appellant, but also the wider country conditions against which that claim was advanced as the basis for recognition as a refugee. It is submitted that, where a change in country conditions themselves satisfy the jurisdictional criteria, the “personal circumstances” of the appellant can remain the same. In support of this proposition counsel relies on the decision in *Refugee Appeal No 76192* (13 January 2009) at [23].

[31] Second, and more controversially, counsel submits there exists what is describes as a “window of opportunity” which allows for matters which occurred prior to the determination of the appellant’s first claim but which were not before the Authority to be relied on. In support of this proposition counsel relies, at para

1.4 submissions dated 25 May 2010, on *Refugee Appeal No 75386* (27 June 2005) and, in particular, the statement at [69] thereof which reads:

[69] There remains only one further matter to record, namely that there has been no need here to address the fact that parts of the appellant's second refugee claim are said to have occurred *before* delivery of the decision on the first appeal (ie, the appellant's sister's return to Iran and detention on arrival) and, arguably, are not circumstances which have changed "since that determination" – see ss129J(1) and 129O(1) of the Act. Because the events are said to have been part of a continuum of similar activity which straddled the determination of the first appeal, and given the outcome here of the second appeal, there has been nothing to be gained by teasing apart the evidence to isolate what may be considered and what may not. **For the sake of the analysis here, it has all been treated as going to the second refugee claim. That is not to be taken, however, as implying any general principle. In particular, it does not signify that events prior to the determination of a first appeal are able to be taken into account in considering whether there are changed circumstances, *whether or not* they were brought to the attention of the panel hearing the first appeal. Such issues are left to be considered as and when they arise.** (emphasis added by counsel – para [1.4] submissions dated 25 May 2010).

[32] It is submitted that, because these events form part of an ongoing pattern of official interest in him which includes events which post-date the final determination of the first claim, these pre-determination events can nevertheless be weighed in the jurisdictional calculus.

[33] Drawing these strands together, counsel submits that the ongoing approaches by the Sri Lankan authorities to the appellant's wife and mother, considered in light of these 'critical changes' in country conditions, mean that the jurisdictional hurdle is crossed – see para 1.12 memorandum dated 25 May 2010.

[34] On 23 July 2010 the Authority served on counsel a copy of the decision in *Refugee Appeal Nos 76502, 76503 and 76504* (29 July 2010) and UNHCR *UNHCR Eligibility Guidelines For Assessing The International Protection Needs Of Asylum-Seekers From Sri Lanka* United Nations High Commissioner for Refugees (UNHCR) HRC/EG/SLK/10/03 (5 July 2010) ("the UNHCR Guidelines"). Counsel was given leave to file submissions within seven days and on 2 August 2010 the Authority received from counsel a letter dated 29 July 2010 enclosing further memorandum of submissions and further items of country information.

ASSESSMENT OF JURISDICTION

[35] Counsel's first subsidiary submission as to the necessity to consider the wider country information when assessing jurisdiction may readily be accepted. In *Refugee Appeal No 76192*, a case which also concerned a Tamil of Sri Lanka, the

change in circumstances comprised transition from a situation of relative, if imperfect, peace to a situation of full-scale conflict and was rightly found to satisfy the jurisdictional criteria to hear the second appeal.

[36] As regards the second subsidiary submission regarding the ‘window of opportunity’, the Authority has substantial doubt that it is correct but it is not necessary to make a final determination on this submission. Suffice to say, however, that *Refugee Appeal No 75386* does not appear to be authority for the proposition counsel now advances. In that case, to establish jurisdiction, the appellant in *Refugee Appeal No 75386* relied only on issues which occurred after the final determination of the first claim – see [42], [43], [44] and [51]. The appeal failed because these events failed to cross the jurisdictional threshold. The existence of other events which pre-dated the final determination of the claim did not feature in the assessment. Indeed, in *Refugee Appeal No 75386* the Authority made it clear that it was not making a general finding that such a “window of opportunity” existed at all.

[37] Rather, the Authority appears to have been signalling no more than that, once the jurisdictional threshold has been crossed, the fact finder (whether the RSB or the Authority) would be obliged to consider all of the evidence advanced in the context of the second claim, including evidence that the appellant had “forgotten” to mention something which occurred during the currency of the first claim.

[38] Furthermore, there appear to be powerful reasons why no such window exists to allow for pre-final determination events to be relied on as the basis for crossing the jurisdictional threshold in second or subsequent appeals. As mentioned, however, it is unnecessary to come to a final conclusion on this submission. This is because the Authority accepts that the appellant’s assertions of continued visits to his family home by the authorities in late 2009, despite their being made aware he is overseas, represents an assertion of intensification of risk to him in Sri Lanka that has taken place in part since the final determination of the appellant’s claim. The Authority is satisfied on this basis that the jurisdictional threshold is crossed.

ASSESSMENT OF THE APPELLANT'S SECOND CLAIM

THE ISSUES

[39] 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?

Credibility

[40] In order to answer these questions, it is first necessary to make an assessment of the credibility of the assertions the appellant has made in his second claim. Although the assertions by the appellant that he has learnt from his mother and wife that there has been continued interest in his whereabouts by the Sri Lankan authorities suffice to cross the jurisdictional threshold, the Authority is satisfied that there is no truth to these assertions.

[41] The significant feature of these assertions is that, at their core, the claimed visits to the mother and wife all relate back to the assertions he made in the first appeal, namely, that the authorities are interested in him because he was suspected of having provided pharmaceutical supplies to the LTTE.

[42] For example, in the affidavit dated 26 November 2009 purportedly made by the appellant's mother, the statement is made at para [4] that two of the officers who searched the house asked her

in which country is your son working for the Tigers *now?* (emphasis added)

The clear implication is that this visit was prompted by belief by the authorities that the appellant had *previously* been working for the LTTE; something he claims only arose because of his supply of pharmaceuticals to them as stated in his first claim.

[43] Similarly, when asked in his RSB interview in respect of the second claim, why the authorities would want to obtain details of his telephone number in New Zealand from his wife during the visits to her, the appellant replied that he assumed the CID “wanted to contact him” and “somehow see me deported from [New Zealand]”. When asked why they would want to contact him and see him deported, the appellant replied “because I distributed the medicines, they wanted me for questions they want to interrogate me”. In his evidence to the Authority during his present appeal, the appellant also clearly linked the visits to his wife and mother to his having supplied medicines to the LTTE during and after the ceasefire.

[44] A similar position exists in relation to the country information relied on. In this context counsel, at paras [1.7]-[1.10] of memorandum dated 25 May 2010, refers to a number of general factors in particular:

- (a) Former General Fonseka’s alignment with Tamils, his arrest and treat of execution;
- (b) The displacement of Tamils post-conflict;
- (c) Interferences with the “right to life”; and
- (d) The continuing “passive war through the Sinhalisation of former Tamil areas”.

[45] When asked by the Authority what these country conditions meant for him in terms of his current predicament, the appellant said his core concern was that because the authorities were aware that he was in New Zealand he would not make it out from the airport and rather would be killed and disappeared. If they were making threats of this nature against someone as well known as General Fonseka it would be easy to do the same to him. Yet, as with the visits to his mother and wife, the appellant did not claim before the Authority any different basis exists for the authorities detaining him at the airport and killing or otherwise seriously harming him apart from their suspicion that he is Tamil who has supported the LTTE by supplying pharmaceuticals to them.

[46] That underlying coterminous nature of the appellant's fears of harm in both his first and second refugee claims is further evidenced by the particulars of the Confirmation of Claim form initiating the second claim filed on 9 December 2009. When asked at question '12' why he fears he would be killed if returned to Sri Lanka, the appellant names the same agents of persecution as in the first claim. When asked what happened to cause the fear at questions '13' and '14' he states:

Refer previous claim. New SOC to follow.

[47] The difficulty for the appellant is that the core of his account was rejected by the Authority hearing the first appeal. The Authority in that appeal accepted that the appellant may have been employed as a sales representative for the particular pharmaceutical company he claimed. However, the Authority, at [23], rejected the appellant's claim that he agreed to supply drugs to a member of the LTTE in August 2008 or that he had been pursued by state and non state agents ever since. The Authority considered it implausible that his employer had never discovered his action given his claims that a colleague had raised this allegation and the claimed involvement of the police – see [28]-[32]. It was also implausible in the context of the civil war in Sri Lanka that the police would allow him the luxury of reporting to them the following morning in the company of his lawyer if they genuinely thought he was suspected of supplying pharmaceuticals to the LTTE. It was further implausible that, if the police believed him to be an LTTE collaborator, they would not, as the appellant asserted, have asked him a question about supplying pharmaceuticals to the LTTE when he reported for interview or at any time subsequently– see [33]-[40].

[48] At paragraph [2.1] of her memorandum of 25 May 2010, counsel states “the appellant challenges the findings of the Authority in his first appeal as to credibility on the critical events establishing his LTTE profile”. When reminded by the Authority at the commencement of the hearing that s129P(9) of the Act expressly prevents the appellant from doing so, the submission was modified to a request that the Authority consider exercising its residual discretion under the Act as to whether or not to rely on these findings favourably. In support of this application counsel relied on:

- (a) Letter dated 22 December 2009 from Dr T Wansbrough stating that the appellant had presented with a stress disorder and sleeplessness and had been prescribed medication. Dr Wansbrough states that the appellant was currently suffering from “flash backs, anxiety, poor

memory and poor concentration". His mood was described as "disordered" and that he was "easily angered, and easily tearful";

- (b) An "updated medical certificate" dated 21 May 2010 from Dr Garlick which simply states the appellant "is being treated with [medication] for the symptoms of post-traumatic stress disorder".

[49] Counsel submits that the appellant's "mobile evidence to date can be assisted by the mental health problems" (*sic*) and that this also can explain his failure to remember the 2005 detention. The Authority rejects this submission.

[50] The medical evidence provides no compelling basis to depart from the previous credibility findings made by the Authority hearing the first appeal regarding his supply of pharmaceuticals to the LTTE in 2008 and the subsequent problems he claimed to have had as a result of doing so. These findings were made after a full and thorough examination of the appellant's assertions against the wider country conditions prevailing and his own asserted personal history. The appellant's assertions in this regard were not rejected because of mobility in his evidence but that the claim advanced by the appellant was, in context, implausible.

[51] At best, the medical evidence in this appeal establishes that the appellant may be suffering from the various symptoms associated with post-traumatic stress disorder and may have a poor memory. It barely even does that. Dr Wansbrough's letter simply asserts the fact without explanation or analysis. The 'updated medical certificate' of Dr Garlick, in particular, is notable for its perfunctory nature. It wholly fails to provide any detail as to what symptoms the appellant has presented with and the reasons for the diagnoses. Even taking the medical evidence at face value, it does not establish the reason why the appellant may be suffering these conditions. For these reasons, the medical evidence provides no sufficient basis to depart from the findings of the Authority hearing the first appeal.

[52] For the same reason, the medical evidence in this appeal fails to provide a cogent and compelling explanation as to why the appellant may have 'forgotten' to mention his 2005 detention during his first claim. The Authority further notes that in the statement filed and oral evidence given by the appellant during his first claim and appeal, he gave a detailed account of various detentions and other problems he encountered occurring many years prior to 2005. His failure to recall this detention occurring at a more recent date is therefore surprising; all the more so

given that this was the one detention he claims to have suffered where his employer at the pharmaceutical company had to vouch for him to secure his release. Given the emphasis placed on this same employment in the first appeal, it is implausible that the appellant's memory would not have been jogged to recall this event at some point if it in fact happened. The Authority has no doubt that this now 'remembered' event is simply a fiction designed to bolster the second claim.

[53] The Authority does not overlook in assessing the appellant's credibility that he has filed an affidavit purporting to come from his mother which also asserts the fact of visits to her by the Sri Lankan authorities looking for the appellant in respect of suspected LTTE ties. However, the weight that can be attributed to this is limited because her evidence has been unable to be tested by the Authority because she is overseas. This, however, is often the case in refugee matters and cannot in itself cause the Authority to give it little or no weight. However, assessment of this type of evidence must necessarily occur within the context of the wider assessment of the appellant's credibility. It is a relatively straightforward matter for failed appellants to have someone in a foreign country provide an affidavit or statement purporting to establish as 'the truth' something that had been previously rejected as being not credible. The Authority is not obliged to accept these documents at face value in its credibility assessment but rather can accord such weight to them as is appropriate in the circumstances of the particular case. In this case, where there is no compelling basis to depart from findings of previous Authority panel's findings as to the veracity of the underlying claim of official interest in the appellant, no weight can be afforded to the affidavit.

Conclusion on credibility

[54] For the reasons noted above, the Authority relies on the findings of the first Authority as it relates to his claim to have provided the LTTE with pharmaceutical supplies in 2008 and to have encountered the various problems he claimed. It follows that the Authority rejects his evidence as to visits by Sri Lankan authorities to his mother and wife in 2009 because of this. It rejects his evidence that he was detained in 2005.

[55] The Authority does, however, accept that the appellant is a married Tamil man who has lived and worked in both Jaffna and, more lately, in Colombo. His claim will be assessed against that background.

Objectively on the facts as found, does the appellant have a well-founded fear of being persecuted?

Country conditions

[56] In her memorandum of 25 June 2010, counsel cites *Refugee Appeal No 76352* (26 January 2010) where the Authority considered conditions in Sri Lanka for ethnic Tamils. The Authority found that those Tamils with known or suspected LTTE associations may still be subjected to arbitrary arrest, detention and mistreatment. However, not all Tamils were at risk to the real chance level – [72]. The GoSL retained a high degree of vigilance as to individuals who may be member or supporters of the LTTE and, accordingly, security in Colombo and throughout the country remained tight. In Colombo there were frequent checkpoints – [74]. Similar observations have been made in the recent decision in *Refugee Appeal Nos 76502, 76503 and 76504* (29 June 2009) – see [78]-[91] and, more recently, in the UNHCR Eligibility Guidelines.

[57] The country information filed by counsel confirms this picture and little useful purpose is served by going through it in any detail. Suffice to say counsel has filed country information as to:

- (a) The continued arrest of suspected LTTE associates – see, for example, *SLA arrests sixteen Tamils civilians in Eastern provinces* TamilNet (23 June 2010);
- (b) Vigilance by GoSL against LTTE resurgence – see, for example, *Emergency needed to nab sleeping Tiger Cells: Sri Lanka PM* TamilNet (9 June 2010); *Police registration made mandatory to Wellawatte Tamil residents* TamilNet (8 July 2010); and
- (c) The general weakness of the rule of law and concentration of power in the hands of the president and his family – see, for example, S Sakur “Fonseka threatened with execution” *BBC News* (7 June 2010).

[58] While much has been made of the detention and threat by Gotabaya Rajapaksa (the Defence Secretary and brother of the President) to kill former General Fonseka, it is not at all clear that this threat has anything to do with his new-found political alignment with Tamil interests. Rather, what seems to have sparked this threat was Fonseka’s assertion that eyewitness evidence established

that the Defence Secretary had ordered the commission of war crimes during the final hours of the war against the LTTE. Even if his post-conflict Tamil alignment and electoral success in Tamil areas has some part to play in his detention this simply confirms the point made in *Refugee Appeal No 76532* at [73] that, although the war may have formally ended, there is still a significant level of government suspicion of Tamils generally, as well as of their political resurgence.

[59] None of the country conditions or conclusions reached on those conditions in *Refugee Appeal No 76352* remains open to question at the present time. The fundamental issue for the Authority to determine is the extent to which these conditions translate into a risk of the appellant being persecuted.

[60] In her closing oral submissions, counsel confirmed she was not contending that all Tamils were at risk in Sri Lanka at the present time. Asked to specify what characteristics and attributes the appellant possessed which exposed him to a risk of being persecuted at the real chance level, counsel identified that he was a male Tamil who was suspected of being an LTTE sympathiser. Although not articulated in her closing submissions, the Authority notes that in the memorandum dated 25 June 2010, counsel also referred to the fact that the appellant would be a person who has unsuccessfully made an asylum application abroad – see para [4.2].

[61] Counsel expanded on these submissions in her memorandum dated 29 July 2010. At para 1.3, counsel cites the UNHCR Guidelines which, at pp3-5, refer to allegations of enforced disappearances of persons suspected of LTTE links and notes UNHCR's concern that Tamils suspected of LTTE links have in a number of cases been arrested "allegedly on limited evidence and often extended periods". The UNHCR Guidelines note that human rights observers have also expressed concern that the broadly defined offences under emergency regulations allow for detention without charge for up to 18 months and the use of informal places of harm. The UNHCR Guidelines state:

according to some reports of "young Tamil men, particularly those originating from the north and the east of the country may be disproportionately affected by the implementation of security and anti-terrorism measures on account of their suspected affiliation with the LTTE.

[62] Against this background, counsel submits that the appellant's supply of medicine to the LTTE means he would be perceived by the Sri Lankan authorities as a suspected LTTE sympathiser and, on this basis alone, satisfied the well-foundedness limb.

[63] As to these matters, the Authority has already dealt with the appellant's claim that he is a person who is suspected of being a LTTE supporter because he has supplied pharmaceuticals to them. This is an assertion without credibility. As for his making an unsuccessful asylum application, the New Zealand claim is shrouded with confidentiality vis-à-vis GoSL and there is no country information before the Authority or of which it is otherwise aware to establish that this is routinely sought to be ascertained from all returning Tamils. In any event, the appellant has had a work permit in New Zealand and would simply be one of the thousands of Tamils who have gone aboard during the civil war. He has already been abroad to the Middle East for work for a number of years so his time in New Zealand would be unremarkable.

[64] Counsel further submits in her memorandum of 29 July 2010 that, should the Authority reject the appellant's account of supplying pharmaceuticals to the LTTE, he nevertheless has a well-founded fear of being persecuted because prior to the appellant's residence in Colombo between 2006 and the end of November 2008 when he fled Sri Lanka, the appellant had lived in Jaffna. Counsel notes that the appellant's national identity card (a certified copy of which is on the file) records a Jaffna residential address. Attached to counsel's submissions of 29 July 2010 was a scanned copy of the appellant's Sri Lankan driver's licence issued in July 2006 which also records a Jaffna place of residence. As his identity documents show him to be a Tamil originating from the north, counsel submits this will expose him to a real chance of suffering serious harm.

[65] In support of this submission counsel cites *Refugee Appeal Nos 76502, 76503 and 76504* where, at [78]-[85], the Authority examined in some detail the question of Tamils being detained at the airport on suspicion of involvement with the LTTE. At [83]-[84] the Authority stated:

[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.

[66] In this case, the appellant's identity card shows his place of birth as being in Jaffna. It also gives a residence in Jaffna. On this basis, the Authority accepts that the risk to the appellant of his being detained at the airport for further questioning is greater than would exist for Tamils whose identity card shows a place of birth and residence in Colombo. As against this, however, the Authority notes that the appellant had been lawfully residing in Colombo for two years prior to his departure from Sri Lanka. That residence was a lawful residence in that the appellant registered his place of residence with the authorities. The appellant also had lawful employment with the same company both prior to and after his move from Jaffna to Colombo in 2006. Therefore, while the Authority accepts that there is an increased risk that the appellant would be detained at the airport for further questioning, that further questioning will reveal that he is no more than a Tamil who, although originating from the north of the country in Jaffna, had spent considerable periods of his life in Colombo both as a student and as the lawful employee of a legitimate corporate enterprise. Upon giving this information to the authorities, any background check would reveal the truth of his assertions of his having a legitimate reason for being in Colombo. On this basis, the risk that any detention for further questioning at the airport will lead to the appellant being subjected to serious harm is remote and speculative.

[67] Equally, as noted in *Refugee Appeal No 76502* at [87]-[91], there remains in place in Colombo a heavy security presence consisting of cordon and search operations and checkpoints. As a Tamil, particularly one who may have a place of birth registered in the north, the appellant can be expected to be stopped and detained for questioning during such operations at the real chance level. However, just as with his predicament upon arrival at the airport, a check of his background will reveal a lawful and legitimate presence in Colombo and any checkpoint detention will not result in a real chance of him suffering serious harm.

[68] As to his simply being Tamil, counsel makes no submission that simply being Tamil gives rise to a risk of serious harm at the real chance level. She is right not to do so. The UNHCR Guidelines do not suggest that simply being Tamil is in itself enough to amount to a well-founded fear of being persecuted on the basis of suspected LTTE sympathies.

[69] Given the history of the conflict and the brutality to which those suspected of LTTE links have been subjected and, according to some reports, continue to be subjected the Authority has given the appellant's situation the most anxious scrutiny. Notwithstanding counsel's forceful submissions on behalf of her client, the Authority finds that the risk of the appellant being persecuted on return and thereafter upon his resumption of his life in Colombo or Jaffna falls below the real chance threshold. The first principal issue is answered in the negative. The need to consider the second does not, therefore, arise.

CONCLUSION

[70] For the reasons mentioned above, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"B L Burson"

B L Burson
Member