

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76534

AT AUCKLAND

<u>Before:</u>	A R Mackey (Chairperson) D L Henare (Member)
<u>Counsel for the Appellant:</u>	D Mansouri-Rad
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	28 June 2010
<u>Date of Decision:</u>	4 August 2010

DECISION

[1] This is an appeal 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 appellant who is a Sri Lankan national of Tamil ethnicity.

INTRODUCTION

[2] The appellant is a married man, aged in his mid-40s, with two children. He arrived in New Zealand in late December 2009 travelling on a false Malaysian passport. He was detained under s128 of the Immigration Act 1987 (“the Act”) because he had inappropriate documentation for immigration and identity purposes. He was transferred to the Mangere Accommodation Centre (“MAC”) where he remains released on conditions. He lodged a confirmation of claim for refugee status with the RSB in early January 2010. He was interviewed by a refugee status officer on 15 February 2010. His application for recognition was declined on 11 May 2010. He then appealed to this Authority.

[3] He predicts he has a real chance of being persecuted if he returns to Sri Lanka for reasons of the profile the Sri Lankan authorities will attach to him on his return. The central issues to be determined in this appeal relate firstly to his credibility and then, on the facts that are established, whether he has a well-founded fear of being persecuted should he now return to Sri Lanka.

Documents

[4] In addition to the RSB file available to the Authority, a memorandum of submissions was received from counsel with a letter dated 24 June 2010. Attached to that letter was a medical report from "Refugees as Survivors New Zealand" ("RAS") dated 15 March 2010. Counsel provided copies of extracts from media websites relating to recent country information. The Authority had obtained two *BBC News* reports and copies of the UK Border Agency *Country of Origin Information Report – Sri Lanka* (18 February 2010) and a UNHCR COIR *Country Report – Sri Lanka* (April 2010). The eight documents received are noted as documents "A" to "H", and referred to later in the determination as relevant. The appellant submitted two photographs, one taken in 2007/2008 at Thirupathi, India, showing the appellant, his wife and son, the second taken in 2009 at Trichey, India, showing his wife, son and daughter.

[5] On 8 July 2010, the Authority received the latest UNHCR *Eligibility Guidelines for Assessing the International protection needs of Asylum-seekers from Sri Lanka*, dated 5 July 2010, from the UNHCR. This was sent to counsel with a letter inviting any submissions on these guidelines to be submitted to the Authority by 30 July 2010. The submissions were received on that date.

THE APPELLANT'S CASE

[6] A summary of the evidence given by the appellant, both before and at the hearing, follows. He adopted a statement, dated 9 February 2010, but added that much of the evidence he had given prior to that, particularly in an airport interview, was incorrect. He apologised for presenting false evidence, stating that it should not be relied on.

[7] At the outset, the Authority referred to the medical information from Dr Galpin at RAS. That report stated that the appellant had an anxious mental state but his insight and judgment were reasonable. Dr Galpin considered the

appellant presented with symptoms highly consistent with post-traumatic stress disorder but it was “less clear whether he had secondary depression”.

[8] The appellant stated that while he had not fully recovered his physical and mental health, he was feeling reasonable and was able to give evidence. He took some medication once or twice during the hearing. Throughout he appeared competent and comfortable in delivering his evidence.

[9] The appellant was born in 1964 in ZZ in the northern province of Jaffna. He is of Tamil ethnicity. His parents owned and operated a vegetable shop which had accommodation attached to it. He has two younger brothers. He entered into an arranged marriage in mid-2003. They met in Singapore and shortly after they moved to Malaysia. Because neither he nor his wife could register legally, they had a religious marriage only at a Hindu temple in Malaysia. His wife then moved with him to India where she has remained since. They have two children, a son born in October 2004 and a daughter born in June 2007. They are both living with their mother in a home she rents in YY, India.

[10] The appellant spent his youth in ZZ, Jaffna. His education was limited to five years. He then began assisting his father in the shop.

[11] As problems developed between the Sri Lankan Army (“SLA”) and the Liberation Tigers of Tamil Eelam (“LTTE”) in the late 1980s and early 1990s, the family from time to time had to take refuge in bomb shelters during shelling raids. The appellant found these incidents traumatic. In 1996, members of the SLA started to call at the shop asking for money. These people wore plain clothes but clearly, by their speech, were Sinhalese. After warning the family that if they did not pay up there would be retribution, a group of about 10-12 men (termed “thugs” by the appellant) came to the shop. The appellant, his father and one brother were in attendance. After some discussions with his father, an argument developed and the three of them were attacked and abused. The appellant and his father did not give money to the SLA. The thugs then beat and kicked the appellant. He and his father and brother, who was also beaten, were terrified and tried to run off. The thugs however set fire to the shop and stole some of the produce and other material from the shop. The thugs then ran away leaving the property and adjacent house to burn.

[12] The appellant and his father and brother were too frightened to remain and save their shop. Accordingly, a substantial amount of the shop and part of the accommodation was burnt down. After staying with relatives during that day, they

returned to their shop in the evening to find that it had been essentially destroyed, although some clothes and documents were recovered from the rear of the property. The property itself was uninhabitable. Accordingly the family was accommodated in different houses with friends and relatives for a short period of time before they all moved to XX to stay with relatives.

[13] The appellant himself stayed with an uncle, AA, who was a farmer who lived there with his wife and two young adult children.

[14] The appellant remained with them for a few weeks. During that time, he was invited to travel to India with AA and his family. Arrangements were made with his own parents that they would remain behind and when the appellant had secured some accommodation in India they would attempt to reunite the family. The appellant had no passport and travelled illegally by boat from WW. They boarded a small fishing boat. There were about 12 people on board. After sailing for about one hour, their boat was attacked by a SLA navy boat that fired upon them from some distance. In this episode five of the 12 on board were killed, including AA's wife and son. The fishing boat was severely damaged and started to sink. However, fortunately, Indian fishermen, who were nearby, came and rescued them taking them on their own boats to a coastal town in southern India close to UU.

[15] The appellant and other survivors were processed by the Indian police, who also treated them for their injuries. (The appellant had a gash to his head.) They were then taken to a refugee camp where a number of other Sri Lankan Tamils were housed. The appellant remained there for two or three years secretly working in nearby gardens and elsewhere so that he could make some money. He did not contact his parents or siblings during this time.

[16] While working in a grocery shop near the camp, he was able to contact a people smuggler who assisted people to go overseas. By selling his gold chain he was able to travel, using a false Indian passport, to Malaysia. In Malaysia he was able to contact his maternal uncle, BB, who arranged employment for the appellant. BB lived in Thailand where he worked as a clothing merchant. From time to time on business he moved to Malaysia and Singapore.

[17] After working in a video shop in Malaysia for approximately one and a half years, the appellant, concerned at his illegal status, met a Sri Lankan "travel agent" who assisted him to buy a Malaysian passport. Later, with US\$3,000 advanced from his uncle BB, the appellant travelled, initially to Indonesia, Thailand

and Singapore, using his Malaysian passport in the name of "Murali". As this short "test" journey was successful, arrangements were then made for him to travel from Singapore via Paris to the United Kingdom. He was able to get a visa to enter the UK while in Paris. He then made contact with a person, whose telephone number had been provided by the agent, and then stayed, living near Croydon, close to London, for two years from 2001 to 2003.

[18] In 2003, his uncle, BB, suggested the appellant should enter into a marriage that he could arrange for him. By this time, the appellant had paid back the money he owed to his uncle. Arrangements were put in place for the appellant to return to Singapore and get married. The marriage took place soon after in Malaysia. His wife, who was a Tamil from the east coast of Sri Lanka, had moved to Singapore approximately a year before this and was trying to move on to Canada. She was alone in Singapore and had there come in contact with BB. The appellant returned to Malaysia on his passport. His wife entered illegally by paying some Malaysian people smugglers.

[19] After going through the religious ceremony, they endeavoured as a couple to travel to the UK or Canada. Unfortunately they were unsuccessful with both attempts to get a visa. The appellant could not get another job in Malaysia at the time. The couple then decided they should travel to India. After staying for a short time with a woman friend of the appellant, whom he had met previously in India, they then rented a house where they stayed together for approximately five months. The wife was living there illegally and has continued to do so since. She has however been able to work as a tailor and making flower garlands to maintain herself and pay her rent.

[20] The appellant himself decided that he had to go overseas again. Initially, after going back to Malaysia, he returned to the UK via Korea and Paris. He entered the UK on a tourist visa and was able to get another job in a grocery shop which had accommodation above. He remained there for a few months before moving to Kent where he became a service station cleaner. After approximately three months, he returned to Malaysia again briefly to renew his passport but did not go on to India. While in Kent he stayed with an Indian man. This colleague said he would, for the sum of £2,000, assist the appellant to get a UK student visa. After two attempts, both of which were unsuccessful, the appellant was unable to get the return of his money. Shortly after this, his friend was caught speeding by the UK traffic police. At that time he provided the address where they both lived. About one month later, UK immigration authorities visited the property and

detained the appellant. Within 24 hours they returned him to Malaysia. The appellant, during all of his time in the UK, had not attempted to claim refugee status. He relied on the false Malaysian identity and passport as his basis for remaining in the UK.

[21] On return to Malaysia, the appellant was able to pay a bribe so that he could enter using both the false passport and an ID card (which was by then out of date). After two weeks in Malaysia, the appellant then returned to his wife and child in India.

[22] After staying a further six months with his family in India, the appellant decided again that he needed to get more money and/or to try and get to Canada. While in India, he felt at risk because he had illegally left the refugee camp some time back and thought that if he was ever to come into contact with the Indian authorities, he could be sent to jail or back to the camp.

[23] The appellant could not get a visa to Canada as he had inadequate documentation. However he was readily able to get a visa to go to Japan on his Malaysian passport. He was then offered a ticket to go to Brazil, transiting Canada on the way. It was suggested, while in transit, he should try to remain in Canada.

[24] However once he got to Japan, he found he could not get the appropriate ticketing to transit Canada. He therefore decided to stay on, working illegally as a gardener living on the outskirts of Tokyo. In Japan he associated with some people he termed "Burmese Tamils" with whom he was able to share accommodation.

[25] Unfortunately, while in Japan he developed high blood pressure and heart problems. After initial treatment in Japan, he was told that he would need to go home to India to get treatment. Accordingly, he returned to India where he was able to get treatment for his health problems.

[26] After another five or six months however, the appellant thought he should again go overseas. On this occasion he decided he would go to Australia and seek asylum. He obtained tickets and, using his Malaysian passport, flew to Perth. However, when he attempted to enter Australia, the Australian authorities were able to find that the appellant had previously been on a visa in the UK which had been cancelled. Accordingly, they took steps to put him on a flight which returned him to Malaysia. The appellant was so troubled by this rejection that he

immediately returned to India.

[27] Three months later, the appellant decided that he would travel again. This time, using the Malaysian passport to depart, he came to New Zealand. On arrival in New Zealand, he threw his Malaysian passport and identity card into a rubbish bin at the airport and then claimed refugee status. He claimed that he had recently departed from Sri Lanka where he had been detained in a well-known internally displaced persons (IDP) camp following the final push to eliminate the LTTE by the SLA over the previous year.

[28] After lodging his Confirmation of Claim, Immigration New Zealand obtained information from the Australian immigration authorities which revealed that the appellant had travelled, on his Malaysian passport, not only to Australia but to the UK and several other countries. Subsequent upon this information being put to him for comment, the appellant prepared and lodged a new statement on 9 February 2010 on which he now relies.

Attempted return to Sri Lanka

[29] In addition to the problems the appellant had in 1996 before he left Sri Lanka, the appellant also had other problems which arose in 2007 when he had tried to return to Sri Lanka from India, in an attempt to find his family.

[30] The appellant had met some fishermen in TT, India, who said they would take him to Sri Lanka. He agreed an arrangement with them. However, they had not long been at sea when they were fired upon by the Sri Lankan navy. The navy then came alongside the fishing boat and began checking the documentation of those on board. The navy announced to all on board that they would take them to the SS camp in Sri Lanka. The Indian fishermen however, who had fishing rights to work in the area, showed their documentation to the navy and after a beating and some abuse, when the appellant fainted, the navy personnel departed. The navy did not become aware that he was a Sri Lankan Tamil during this incident. The Indian fishermen decided not to proceed further and returned to India.

Fears on return

[31] The appellant now fears that on return to Sri Lanka he will be detained at the airport and locked up for questioning where he will be abused and tortured. He considers this will happen because he has lived out of Sri Lanka for some 14 years and that he will be suspected, as a Tamil, of being a supporter of the LTTE.

He considers this will still be the case even though the LTTE were defeated approximately one year ago. He thinks there are still problems for people of Tamil ethnicity. He referred the Authority to some of the news articles that he had provided.

[32] He came to New Zealand with his birth certificate, and an amendment to that certificate, which are now held on the DOL file. He has not tried to obtain a passport from the Sri Lankan authorities in New Zealand. He stated that other Tamils he had met in New Zealand had said that on return he would not be allowed to leave the airport and would be maltreated. He also considered that the Sri Lankan authorities would be aware that he had claimed refugee status in New Zealand and this would be looked upon unfavourably. He was unable to give details as to how the Sri Lankan authorities would become aware of his claim when all the process would be carried out confidentially.

[33] Finally, he considered that his sickness could also impact on risks to him on return as, because he was in poor health, any maltreatment of him would have more substantive impact than on an otherwise healthy person. Accordingly, he considered that his total profile as a Tamil man from the Jaffna area, who had never originally had a passport and had left illegally, would place him in a situation of being at a real risk of being persecuted by the Sri Lankan authorities on return.

THE ISSUES

[34] 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.

[35] 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

[36] This appellant's history, as he has now disclosed in his changed story, and following the result of DOL enquiries to the Australian Department of Immigration, shows that he is a consistent liar and fabricator who will adjust his story and persona to meet each immigration and/or protection situation that comes before him.

[37] He has, from the evidence before us, largely obtained from sources other than the appellant himself, shown that he has used at least three different identities in about eight different countries to pursue his predominantly economic migration adventures.

[38] Given this history, the Authority would have strong grounds to conclude that none of his evidence, including that related to his actual nationality, has sufficient credibility to be relied upon. However, after hearing his evidence, which was clearly given in Tamil, and his testimony about his life in northern Sri Lanka until approximately 1996, when he left Sri Lanka for India, the Authority is prepared to accept that he is a middle-aged Sri Lankan of Tamil ethnicity, from the Jaffna region. He left Sri Lanka illegally in 1996, following a random attack on the family shop and accommodation by SLA "thugs".

[39] That is the totality of his profile. It is also now the sum of the profile he appears to accept himself when his evidence was summarised to him near the end of the hearing. Additionally, this profile, combined with the manner and place he will return to in Sri Lanka, forms the basis upon which counsel presented his closing submissions to this Authority.

[40] Our assessment of the well-foundedness of his claim thus proceeds on this basis, with the obvious addition of how and where he would return to in Sri Lanka.

[41] Before turning to our assessment of the well-founded nature of his claim, or the real chance of his being persecuted on return, we set out briefly the Authority's well-established principles in the assessment of the inclusion provisions of Article 1A(2) of the Refugee Convention and the relevant country information.

Principles

[42] The Authority has, for many years, interpreted the term “being persecuted” in the refugee inclusion clause (Article 1A(2)) as the sustained or systemic violation of basic human rights, demonstrative of a failure of state protection. In other words, core norms of international human rights law are relied upon to define the forms of serious harm which are within the scope of “being persecuted”. This is often referred to as the human rights understanding of “being persecuted” and is fully explained in *Refugee Appeal No 74664/03* [2005] NZAR 60; [2005] INLR 68 at [36]-[125].

[43] Additionally, as noted above, the Authority carries out its prospective assessment of the appellant’s predicament on return after establishing the facts as found including, in that assessment, a review of the relevant objective country information.

[44] In all cases, appellants must be aware that they bear the responsibility for establishing their claim under ss129P(1) and 129P(2) of the Act, as referred to in the New Zealand Court of Appeal decision in *Anguo Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA).

Country information

[45] The Authority has taken into account all of the country information noted above and counsel’s submissions related to them. A summary of the relevant country information now follows.

UNHCR Eligibility Guidelines 5 July 2010

[46] These Guidelines set out some relevant background information. Under the heading “Eligibility for International Protection” are set out five potential risk profiles. These are:

- (a) Persons Suspected of Having Links with the Liberation Tigers of Tamil Eelam;
- (b) Journalists and Other Media Professionals;
- (c) Civil Society and Human Rights Activists;
- (d) Women and Children and Certain Profiles;
- (e) Lesbian, Gay, Bisexual and Transgender (LGBT) Individuals.

There are then some notes on internal flight or relocation alternatives and “exclusion” provisions.

[47] The “Introduction” section relevantly states:

These Guidelines are issued in the context of the improved human rights and security situation following the end of the armed conflict between the Sri Lankan Army (SLA) and the Liberation Tigers of Tamil Eelam (LTTE) in May 2009, and are intended for the use of UNHCR and State adjudicators in the assessment of claims by Sri Lankan asylum-seekers.

[48] These Guidelines supersede the April 2009 Guidelines noted briefly below.

[49] The Guidelines then go on to state:

Given the cessation of hostilities, Sri Lankans originating from the north of the country are no longer in need of international protection under broader refugee criteria or complementary forms of protection solely on the basis of risk of indiscriminate harm. In light of the improved human rights and security situation in Sri Lanka, there is no longer a need for group-based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country. It is important to bear in mind that the situation is still evolving, which has made the drafting of these Guidelines particularly complex.

[50] In the “Background Information” section the report states:

At the time of writing, the security situation in Sri Lanka had significantly stabilized, paving the way for a lasting solution for hundreds of thousands of internally displaced persons (IDPs) in the country’s north and east. In August 2009, the Sri Lankan Government began to organize the return or release from IDP camps of some 280,000 persons, who were forced to flee their homes during the final phase of the conflict. Many of the initial restrictions on the freedom of movement of IDPs have been lifted, and by mid-June 2010, approximately 246,000 persons had left the displacement camps to return to their places of origin or live with host families, relatives and friends. More returns are expected to take place within the coming weeks and months.

[51] The Introduction also notes that other measures taken by the government since the end of the conflict included the relaxation of the emergency legislation, and the easing of restrictions on freedom of movement. However, it notes that other security measures, including military/police checkpoints along the main roads and a highly visible military presence continues to be maintained through the country, reportedly to prevent re-establishment of the LTTE by cadres still at large. It also reports significant political developments in the first half of 2010, including the election of a new president in January and the first parliament in the post-conflict era and that some areas of the north, which had previously been under the control of the LTTE for decades are now governed by the central authorities.

[52] Also announced was a response to calls for an independent international investigation into allegations of human rights and international law violations by the

parties in the conflict. The Sri Lankan government has recently announced the establishment of a truth and reconciliation commission to examine the “lessons to be learnt from events” between 2002 and 2009.

[53] Under the section “Eligibility for International Protection” the report provides that:

All claims from asylum-seekers from Sri Lanka should be considered on their individual merits in fair and efficient refugee status determination procedures and taking into account up-to-date and relevant country of origin information. UNHCR considers that, depending on the particular circumstances of the case, some individuals with profiles similar to those outlined below require a particularly careful examination of possible risks. This listing is not necessarily exhaustive and is based on information available to UNHCR at the time of writing, hence a claim should not automatically be considered as without merit because it does not fall within any of the profiles identified below.

[54] The five potential risk profiles (noted above) are then set out with explanations and comments attached to them.

[55] As the appellant does not appear to fall, in any significant manner at all, into any of the five risk profiles noted, the Authority has gone on to consider other country material and then finally to note some other potential risk profiles, that may have applied in the past to returning Tamils, before going on to complete the assessment of this appellant’s case.

UK Home Office Border Agency *Country of Origin Information Report – Sri Lanka (18 February 2010) (Document H)*

[56] The section in this report, “Tamils” paragraph 20.06 to 20.11, assists. At 20.06, this report states that approximately eight to nine per cent of the population are ethnic Tamils, with 90 per cent of the population in the northern province of Jaffna being Tamil. At paragraph 20.08, a British High Commission letter, dated 10 September 2009, reported a former Chief Justice stating that there were 400,000 Tamils living in Colombo. The historic tensions between the majority Sinhalese and Sri Lankan Tamils is set out in full at paragraph 20.11.

[57] The same report, at paragraphs 28.09 and 28.10, notes a Foreign and Commonwealth Office letter of October 2009 as stating that people who wish to live in Colombo and did not originate from there needed to register with a local police station and this required a national identification card (“NIC”) or full passport, and sometimes a letter from the *Grama Seveka* (local official in the person’s area of origin). This meant that young Tamil men who originally were from the north or the east could encounter difficulties and face close scrutiny.

[58] At paragraph 28.11, it notes a report from the British High Commission in Colombo dated 1 October 2008 stating that Sri Lankan authorities required households to register all residents and that there was emphasis on Tamils who took out temporary lodgings. Those lists were then used in cordon and search operations to identify persons the police considered needed to give fuller explanations as to why they were residing or travelling in a location. It also noted that returned failed asylum seekers could form part of these. Persons identified as not having registered were normally detained by police for further questioning. At paragraph 28.13, the report quotes *The Sunday Times* of 11 January 2009 that the Sri Lankan government had required all Sri Lankan citizens to register online with the Ministry of Defence and those with no access to the internet could register with any government agency.

[59] At paragraph 29.19, a British High Commission letter of 12 January 2010 reports the advice of a government agent that there is no restriction on anyone taking up residency in Jaffna. Once they have found somewhere to reside, they must present themselves to the local police and produce their NIC. Persons are free to reside anywhere in the Jaffna district apart from the HSZ (High Security Zone). The police spokesman states that there is no restriction on anyone coming to Jaffna to live. A humanitarian group also stated that new arrivals into Jaffna received a token and once they found a place of residence they had to report to the local police within 28 days. The IOM states that there have been many voluntary returnees from the UK who have resettled in the district.

[60] At paragraph 28.22, an IOM representative is noted as saying that those temporarily in lodges in Colombo could stay as long as they registered with the police station. The lodges were noted as being monitored by the police but people could stay several months.

[61] The report goes on to note that checkpoints had not reduced significantly, as at October 2009, and it was suggested that these were intended to identify suspicious individuals and deter Tamils from settling in Colombo. Those most likely to be questioned were young Tamils from the north and east and those without identification documents.

[62] At paragraph 20.30, the report refers to the A9 Highway between Colombo and Jaffna had reopened in July 2009 and that, in December (2009), *Reuters* reported that the government had officially relaxed tight security on transport to and from the former northern war zone. They stated:

Since the defeat of the LTTE in May after a 25 year war, the government has been relaxing various tight security measures it adapted to curb rebel activities, but some had remained in place.

[63] The issue of entry and exit from the Jaffna district is covered at paragraph 28.33 where there is reference to another British High Commission letter dated 12 January 2010. This letter provides that in December 2009 the Sri Lankan government allowed Sri Lankans in possession of a NIC to travel freely to and from Jaffna and while the Jaffna peninsula had been an “open prison” and Jaffna a “garrison town”, the relaxation of exit and entry was seen as an improvement. Regular air services had resumed to and from Jaffna although humanitarian groups commented on safety standards.

UNHCR – COIR Country Report, Sri Lanka, April 2010

[64] This report has now largely been superseded by the July 2010 report noted above. It is clear that since the defeat of the LTTE more than a year ago, the situation is a rapidly changing one and thus the most up to date information is essential in the assessment of the predicament of returning Tamils.

[65] This April report refers, at pages 21 and 22 to the United States Department of State (“DOS”) Report 2009 and states:

Tamils throughout the country, but especially in conflict-affected north and east, report frequent harassment of young and middle-aged Tamil men by security forces and paramilitary groups.

[66] The same report states that in January 2010 the International Crisis Group reported that more than 12,000 Tamils were still held in irregular detention centres on suspicion of ties to the LTTE.

[67] It goes on to refer to a *BBC News* report of March 2010 that the Colombo police force had opened four special units in Colombo suburbs where statements in Tamil could be taken and there were plans for setting up more. It notes:

People living in cities in the north and the east of Sri Lanka, where Tamils are the majority, have told the BBC that in recent months Tamil-language facilities at police stations have expanded markedly.

[68] The same 2009 DOS report states that IDPs in the largest camp were given freedom of movement in December although some observers had stated that the “exit pass system” used still did not qualify as freedom of movement.

Additional documentation

[69] The following comments are made in the additional documentation noted below:

- (a) *BBC News* report (Document E) also makes reference to police stations in the Sri Lankan capital opening special units to take statements in Tamil and that these facilities had expanded markedly in the north and east. In a report from the *Daily News* 26 February 2010 (Document F) it is noted that President Rajapaksa had made assurances to solve Tamil problems in the Colombo district. The president of the Colombo District Tamil Organisation stated they would support the President's United People's Freedom Alliance in the election and that it was the duty of all Tamils to strengthen the President's hands to fulfil his development objectives. The report notes that Tamils in Colombo faced immense problems with housing, education and employment and that while Tamils in the Colombo district underwent immense difficulties including registration at the police stations in the past, President Rajapaksa had relieved the people from that problem.

- (b) The *ABC News* report (Document B) dated 19 May 2010, reports that Phil Glendenning, the Director of the Catholic Church's Edmund Rice Centre, who had recently returned from Sri Lanka, stating that the country was in danger of becoming a police state. It also states that refugee advocates claimed that at least nine asylum seekers returned to Sri Lanka by the (Australian) Howard government (which went out of power almost two years ago) were killed and those sent back in the past have been held in police custody and some were assaulted. (The Authority notes that these two sources clearly have potential inherent bias and so diminished weight is attached to them.) It also notes that Australia has suspended its processing of Sri Lankan asylum seekers pending a review of conditions in Sri Lanka. The Immigration Minister Chris Evans is reported as saying that the Federal Government had major problems returning asylum seekers: "who have been involved with the Tamil Tigers".

Mr Glendenning is reported as stating that of the 11 people removed over the last year or so all of them had been arrested at the airport. Some of them had been assaulted. One man suffered a hearing injury and another, injury affecting his vision. Glendenning noted that:

"The thing is they arrive at the airport, they're immediately handed over to the CID which is the Sri Lankan Police".

He notes that:

The difficulty here is that there is a view in Sri Lanka that anybody who left the country through an unauthorised manner of unauthorised means, is an LTTE sympathiser and if they are Sinhalese people who left, then they must therefore be traitors.

That is the assumption. People have been put into prison and held there and the key thing is here that detention can be indefinite. There are people who have been removed from Australia at the beginning of this year who are still in prison.

He also stated that “there is a fear in Sri Lanka that anybody from the LTTE outside the country might be one of the LTTE to somehow reform it internationally. I think Sri Lanka is in danger of being seen as a police state”. He also noted while the Federal government urged caution in returning asylum seekers connected to the Tamil Tigers, in the eyes of the Sri Lankan government all those who fled are branded the same way.

- (c) Report from the *Tamil Guardian* of 24 February 2010 (Document C) states that soon after the Sri Lankan government declared victory over the LTTE in May 2009 the British newspaper “The Times” concluded an extensive investigation over the last days of the offensive and confirmed that up to 20,000 civilians were slaughtered. The same paper stated that the silence of those who warned of civilian deaths was shameful and that they must speak out for the future.
- (d) A *BBC News* report of 12 January 2010 “Sri Lankan President Woos Tamils” (Document D) states that the President announced a \$4 billion fund to rebuild the war shattered north. In an effort to woo voters he stated that “the needs of Tamils needed to be politically addressed” and “that the 0.5 million Tamils make up 12.5 per cent of the population could be critical to the outcome of the election”.

[70] Mr Mansouri-Rad submitted that the Authority should consider the country information carefully and take into account the cumulative situation for this appellant. The Authority agrees that considering known risk factors (predominantly but not exclusively) for returning Tamils, both individually and in a collective manner, is a valid approach.

[71] In relation to the UNHCR report of 5 July 2010, noted at [5] above, counsel submitted that the UNHCR report supports the submission that the Sri Lankan authorities are keen to prevent the “re-establishment of the LTTE” and maintain heavy security and a military presence throughout the country. He further asked that the Authority note that the UNHCR considers that, depending on the particular

circumstances of each case, some individuals with “profiles similar to those outlined” [in the report itself] require a particularly careful examination as to possible risks and that while the listing is not exhaustive, it is based on information available to the UNHCR at the time of writing and that thus, any claim should not automatically be considered without merit because it does not fall within one of the profiles identified.

[72] He also notes in his submissions that some reports state that 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 and those with suspected links may be at risk. Thus, he summarised that this appellant was at risk because he was a Tamil from the north, he left the country illegally and has never had a passport. Additionally, he has spent considerable time outside Sri Lanka and his health was fragile, making him more vulnerable to stressful situations.

[73] As noted above the Authority has carefully considered the latest UNHCR (July 2010) Eligibility Guidelines. As, *prima facie*, the appellant does not fall into any of these five categories, to ensure that an appropriate assessment is made, the Authority has also noted in this regard recent country guidance decisions from the UK which give some assistance in the items that may put returning Tamils at potential risk. Before going on to consider those “guidelines” from the UK decisions, the Authority notes particularly that relevant cases from the UK were assessed and decided over the past three to four years and that because of the rapidly changing situation in Sri Lanka it cannot be said that the situation is deteriorating, although obviously looking at even the most recent country information, careful assessment must still be carried out.

[74] Turning to the UK country guidance material on Sri Lanka there are two significant decisions. The most recent is *TK* (Tamils – *LP* Updated) (Sri Lanka) CG [2009] UKAIT 0049, a decision published in late October 2009 by a panel presided over by Lord Justice Carnwath, Senior President of Tribunals. That decision, which took note of the extensive country information and analysis carried out in the earlier relevant decision of *LP* (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG [2007] UKAIT 00076, and the approval of the approach taken in *LP* by the European Court of Human Rights in *NA v UK* App No 25904/2007. The panel in *TK* also heard extensively from country experts on Sri Lanka and took into account updated country information.

[75] In the *TK* decision it noted that the decision in *NA v UK* at paragraph 129 stated that when considering the individual risk to returnees it was: “in principle legitimate, to carry out that assessment on the basis of the list of “risk factors” as identified by the AIT (Asylum and Immigration Tribunal UK) in *LP*”.

[76] The “*LP* risk factors” from paragraph 238 of the *LP* decision are then set out at [123] and state:

During the course of the determination we have considered a list of factors which may make a person’s return to Sri Lanka a matter which would cause the United Kingdom to be in breach of the Conventions. As in previous country guidance cases, this list is not a checklist nor is it intended to be exhaustive. The factors should be considered both individually and cumulatively. Reference should be made to the earlier parts of this determination where factors are considered in more detail but for ease of reference they are set out here. There are twelve and they are not in any order of priority:-

- (i) Tamil ethnicity.
- (ii) Previous record as a suspected or actual LTTE member or supporter.
- (iii) Previous criminal record and/or outstanding arrest warrant.
- (iv) Bail jumping and/or escaping from custody.
- (v) Having signed a confession or similar document.
- (vi) Having been asked by the security forces to become an informer.
- (vii) The presence of scarring.
- (viii) Returned from London or other centre of LTTE activity or fund-raising.
- (ix) Illegal departure from Sri Lanka.
- (x) Lack of ID card or other documentation.
- (xi) Having made an asylum claim abroad.
- (xii) Having relatives in the LTTE.

[77] The *TK* decision then turns to consider the 12 items noted above.

[78] Firstly, in relation to Tamil ethnicity, after considering the most recent available evidence (*TK* was decided in late October 2009) the UK AIT states that they were not persuaded that Tamils from the north and east constitute either a stand alone risk category or a separate risk factor. They were prepared to accept that a person found to be from the north, especially an area where the LTTE previously used as a stronghold, would be regarded with an increased level of suspicion and thus Tamil returnees from abroad, whose home areas are either from former conflict areas or places where there are still SLA-run camps, require a nuanced treatment having particular regard to their past history and circumstances. They go on to note that there is a different question in the risk of return to Sri Lanka for Tamils from the north if they are returned to Colombo.

At [133] they state that for Tamils originating from the north who seek to stay in Colombo, the thrust of the evidence before them was that this category faces a higher risk of being arrested and treated adversely than Tamils who are resident in Colombo but however they conclude that “the totality of the evidence appears to show that the level of risk to Tamils of being arrested and/or detained is lower today. In addition, the evidence before us does not support the proposition that the authorities in Colombo can be continuing with their reported policy of pressurising or forcing Tamils from the north to return”.

[79] The next category that is potentially relevant to this appellant is “(viii) Return from London or other centre of LTTE activity or fund-raising”. The *TK* decision states that from their analysis there may be increased concern and a priority by the Sri Lankan government to dismantle overseas procurement networks but that the level of risk was only likely to be enhanced for those persons “who are high profile figures in overseas fund-raising activities”. The *TK* decision then states:

...it will not raise the level risk to failed asylum seekers returned from the UK who simply happen to arrive back in Sri Lanka following removal from London.

[80] A further relevant category to this appellant could be “(ix) Illegal departure from Sri Lanka”. The conclusions in *TK* at [147] states:

...we think that by virtue of the conflict having ended, the level, however described, cannot be as high as it was then. In the recent August 2009 FCO report there is very little to suggest that illegal exit is treated as in itself a basis for arrest or detention at the airport or subsequent checkpoints. Given that a claim by Sri Lankan failed asylum seekers to have made an illegal exit is not uncommon, it is surely significant that, in the words of Dr Smith before us, very large numbers of failed asylum seekers would be seen by the authorities in Sri Lanka as having been economic migrants and would be of no interest to them at all; and, in the words of Professor Good in his main report, “it seems always to have been the case that most returnees pass through the airport successfully”.

[81] The next relevant category to this appellant is “(x) Lack of ID card or other documentation”.

[82] Here *TK* finally states at [148]:

However, the evidence we have from the BHC [British High Commission], Colombo and the August 2009 FCO report demonstrates that failed asylum seekers are issued with emergency travel documents after checks have been made with the Sri Lankan High Commission in London. Ordinarily, possession of such a document enables returnees to pass through airport controls. There is very little evidence to suggest that for returnees (even if their emergency travel documentation is taken from them at the airport) the process of applying for ID documentation in Colombo is either difficult or subject to significant delay. The authorities appear well-used to dealing with the issuance of replacement passports/travel documents.

[83] The final risk factor potentially relevant to this appellant is “(xi) Having made an asylum claim abroad”.

[84] Here, the determination in *TK* notes at [149]:

Like the Tribunal in *LP* we have no hesitation in accepting that the process for putative returnees applying for travel documentation (or replacement passports) from the Sri Lankan High Commission in London is likely to result in information regarding such persons being passed on to the authorities in Colombo. ...Whether, however, such information is treated by the Sri Lankan authorities as a cause for any particular interest appears even more doubtful now than before ... we regard it of some significance that there is no evidence whatsoever of any one [of 13 failed asylum seekers returned in 2009] met with difficulties.

[85] Finally, in that paragraph the AIT in *TK* concluded:

We think it justified to retain this as a risk factor, but would regard it as likely now to be a relatively minor contributing factor at best.

[86] These appear to be all of the risk factors that could have any potential relevance to this appellant.

ASSESSMENT OF THE APPELLANT’ S WELL-FOUNDED FEAR ON RETURN

[87] Noting the totality of this appellant’s profile, as found above at [35]-[38], and the principles and country information set out above, the Authority considers that the appellant does not have a real chance of being persecuted on return to Sri Lanka either through the most likely return destination of Colombo airport or indeed to any other part of the country.

[88] The appellant has brought with him what appears to be a valid birth certificate, with a valid amendment to that certificate. This document will assist significantly in his obtaining a Sri Lankan passport from the Sri Lankan authorities in New Zealand, and if necessary at a later date his obtaining a national identity card as well. The appellant’s evidence is that he has no profile whatsoever, apart from Tamil ethnicity, and had no past association with the LTTE. That appears to apply to his family as well. He has no previous criminal record. He gave no evidence of being an informer, or indeed a fundraiser of any significance whatsoever while he has been out of Sri Lanka. He made some small donations only in the UK. He has made only one application for asylum abroad, that is, here in New Zealand. As this claim is made and assessed under the confidentiality procedures adopted in New Zealand, particularly s129T of the Act, there is no reason why the Sri Lankan authorities would be aware that if he returned it would be as a failed asylum seeker. His profile is very much one of a returning economic migrant. He can truthfully state that all of his overseas travel was taken with the

objective of economic betterment for him and his family.

[89] The situation, therefore, is that on return either he will carry with him a valid passport or if he arrives on a travel document at the Colombo airport there will be no record at all that would create any form of risk alert to the Sri Lankan authorities. At most, therefore, he could be questioned about why he departed the country illegally some years ago. The country evidence, particularly the recent UNHCR (July 2010) information, shows that any risk of serious maltreatment for this reason alone is highly speculative, if not non-existent.

[90] Given an apparent ability to pass through Colombo airport, without anything but the most speculative risk, the appellant could then return to his home district of Jaffna, where it appears, on the latest country evidence set out above, he would be able to obtain identification documentation. The same UNHCR July 2010 report indicates that there is no apparent current risk from generalised violence. While he may have difficulty in obtaining accommodation and employment, this appellant has shown himself, over many years, to be extremely resourceful. He clearly has contacts in India and Malaysia and he has his uncle in Thailand who could potentially assist him financially on a short-term basis.

[91] Assessed in the round, the Authority is satisfied that the appellant does not have a well-founded fear of being persecuted on return to Sri Lanka. The first issue is therefore answered in the negative. The second issue, therefore, does not fall for consideration in this case.

CONCLUSION

[92] 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.

"A R Mackey"
A R Mackey
Chairperson