

AT AUCKLAND

Appellant: **AF (Sri Lanka)**

Before: A N Molloy (Member)

Counsel for the Appellant: Emily Griffin

Counsel for the Respondent:

Date of Hearing: 17 and 18 February 2011

Date of Decision: 30 March 2011

DECISION

INTRODUCTION

[1] The appellant, a citizen of Sri Lanka of Tamil ethnicity, appeals against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining to recognise him as a refugee.

[2] The appeal turns upon the risk arising to the appellant from a paramilitary group in Batticaloa, and upon whether he is able to access meaningful protection elsewhere in Sri Lanka.

[3] The Tribunal will first outline the legislative basis upon which it comes to determine the appeal. It will then summarise the appellant's account before assessing its credibility.

The Legislation

[4] This appeal was lodged with the Refugee Status Appeals Authority ("the RSAA") before 29 November 2010 but had not been determined by that body by that date. Accordingly, it is now to be determined by a member of the Immigration

and Protection Tribunal (the Tribunal): sections 448(1) and (2) of the Immigration Act 2009 (“the Act”). Further, it is to be determined as if it is an appeal under section 194(1) of the Act: section 448(2).

[5] Section 198 of the Act provides that on an appeal under section 194(1) the Tribunal must determine whether to recognise the appellant as:

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

THE APPELLANT’S CASE

[6] The appellant is the eldest of three siblings born and raised in Batticaloa, in the east of Sri Lanka, where his younger siblings still live with his parents. The appellant, who is now in his 20s, had never lived outside Batticaloa prior to coming to New Zealand in early 2010.

[7] To place the appellant’s predicament in some context it is important to understand that Sri Lanka bore the brunt of an uncompromising civil conflict from the early 1980s until 2009. In May that year, Sri Lankan President Mahinda Rajapaksa declared military victory over the paramilitary group which had fought to establish an independent Tamil homeland in the north; the Liberation Tigers of Tamil Eelam (LTTE).

[8] It is also relevant to note that in 2004 the LTTE in the eastern region of Sri Lanka divided into factions. One faction was led by Vinayagamoorthy Muralitharan. He is also known as “General Karuna”, hence the faction became known as “the Karuna Group”. Under his leadership the Karuna Group aligned itself with the Sri Lankan government in opposition to the LTTE.

[9] The appellant’s difficulties began to manifest around mid-2007, while he was still at school. They are attributable to both the Sri Lankan Army and the Karuna Group.

Encounters with the Sri Lankan Army

[10] Because the civil war began before the appellant was born, he grew up accustomed to the presence of the Sri Lankan Army in Batticaloa. They manned checkpoints at various places around the township, including one on the route the appellant followed to school in the mornings. He was frequently stopped at the checkpoint. Almost invariably he was required to produce his identity card, asked two or three routine questions and then allowed to continue his journey.

[11] On one occasion in June 2007 the appellant's experience at the checkpoint was entirely different. He was directed to stand to one side with a number of other young Tamil males. They were placed into an army vehicle, blindfolded and driven to a military camp, where the appellant was detained overnight.

[12] The appellant was interrogated by the Sri Lankan Army. He was verbally intimidated and accused of being a member or sympathiser of the LTTE. He was punched, kicked and beaten with firearms. The appellant denied any involvement with the LTTE (both to the members of the Armed Forces who were accusing him and to the Tribunal during the appeal hearing), and pleaded with the soldiers to let him go. The following morning he was loaded back into an army vehicle and returned to the vicinity of his school from where he walked home.

[13] The appellant's next encounter with the Sri Lankan Army occurred in different circumstances. Late one evening in May 2008, several soldiers came to the door of the appellant's family home. They demanded to see the identity cards of every occupant of the house. The appellant was singled out. He was again blindfolded and driven to an unknown location where he was again beaten and subjected to verbal abuse and accusations of complicity with the LTTE.

[14] The appellant's parents were told to come and collect him the following day. The appellant had sustained injuries and was admitted to hospital for two days.

[15] The effect of his experiences (some of which are separately outlined below) made the appellant unwilling to risk leaving the house to go to school every day. His teachers sent assignments for the appellant to complete at home. The appellant passed three A-level examinations later that year, but his academic performance suffered and he was disappointed with his grades.

[16] The appellant had one further encounter with the Sri Lankan Army. This occurred in mid 2009, in circumstances somewhat different from either of the previous two encounters. By that time, the appellant was living with his aunt in Town B (about 40 minutes drive from his family home) because of the difficulties

he had experienced with the Sri Lankan Army and the further problems with the Karuna Group which are outlined below.

[17] The appellant was one of a number of local Tamil youths picked up by the Army during a random check of households in the area. He was manhandled and treated roughly, but he was not seriously mistreated on this occasion. While some of the other boys detained were identified as persons of interest, the appellant was among a number who were not. He was released after a short time.

Difficulties with the Karuna Group

[18] From early 2008 the appellant's predicament was aggravated by additional difficulties with the Karuna Group, which had established headquarters adjacent to the appellant's family home in A Street. The Karuna Group began to place pressure upon the appellant's parents to vacate their home so that the Group could take it over. However the appellant's parents refused to move. They had lived in that home throughout their married life and the appellant's maternal grandmother still lives in that street, in the house where the appellant's mother had been raised.

[19] From that time the family members were continually harassed by the Group. Whenever the appellant left the family home he had to pass the Karuna Group's headquarters. Members of the group would call out and demand that he join them. The appellant believed that they were responsible for many criminal activities and he wanted no part of such an organisation.

[20] On one occasion in February 2008 the appellant was walking to school when he was approached by two men. They demanded to see his identity card and asked where he lived. They accused the appellant of having links with the LTTE and said that if he did not join the Karuna Group he would be handed over to the Sri Lankan Army. The men left, but the appellant was unnerved by the experience. He returned home instead of going to school.

[21] Matters escalated late one evening in September 2008. Members of the Karuna Group entered the family home by force. The appellant was blindfolded and driven to a Karuna Group camp. He was physically abused *en-route* and was beaten and kicked once he arrived at the camp. The appellant's captors demanded that he join the Karuna Group and said that if he did not, he would be killed. The appellant's father managed to secure the appellant's release on that

occasion by persuading a local politician to intercede. The appellant was released the following day, into the custody of his father.

[22] The appellant had a further encounter with the Karuna Group in November 2009. Several members of the Karuna Group abducted him from his aunt's home in Town B. The appellant was taken to a remote area where he was beaten at gun point and accused of trying to leave Sri Lanka. The appellant was again threatened and told that if he did not join the Karuna Group he would be killed.

[23] Despite the threats the appellant was released the following morning because his father paid the Karuna group a significant bribe. His release, however, was conditional. The appellant was told to report to the local Karuna Group headquarters every morning. He assumes this was because they believed he was trying to leave the country and wanted to prevent him from doing so. Accordingly, he attended the headquarters every morning until he left Sri Lanka in February 2010. On occasions he was told to perform menial tasks such as cleaning.

The Appellant's Departure from Sri Lanka

[24] From the time he had been abducted by the Karuna Group in September 2008 the appellant felt that he could no longer remain in Sri Lanka. He begged his father to help him to leave. The father helped the appellant obtain a passport, and they began to investigate the possibility of the appellant studying abroad.

[25] The appellant took steps to improve his English and obtained a qualification under the IELTS system. During the same period the father engaged an agent to help the appellant. The agent obtained a falsified educational certificate which eventually enabled the appellant to obtain a visa permitting him to study in New Zealand.

[26] The appellant left Sri Lanka in February 2010 and arrived in New Zealand later the same month. He was able to stay with his maternal aunt, XY (the Aunt), who has lived in New Zealand since 2002.

[27] After briefly attending a university course in New Zealand, the appellant dropped out. He said that the events of the previous two years had left him unable to cope with the demands of undertaking a course of study in a foreign

country. The aunt became concerned for the appellant's welfare. He has received ongoing treatment for depression from a local General Practitioner.

[28] After exploring alternative options as to how the appellant might be able to remain in New Zealand despite dropping out of his educational course, it was decided that he should apply for refugee status. He lodged an application in early May 2010. After interviewing the appellant in June 2010, a refugee status officer issued a decision dated 30 September 2010, declining the appellant's claim. It is from that decision that the appellant appeals.

Evidence of the Aunt

[29] The aunt is the sister of the appellant's mother. She was born and raised in the family home in A Street, Batticaloa. She is married to a Sri Lankan national. They entered New Zealand in 2002 and are now New Zealand residents.

[30] The aunt outlined the impact of the civil war upon her family in Sri Lanka over a period of more than two decades. In referring to the endemic violence she indicated that over the years para-military groups, such as the LTTE, kidnapped and murdered citizens in and around Batticaloa. One of her brothers had been kidnapped during the 1980s. A substantial ransom was paid to secure his release.

[31] The aunt visited Sri Lanka in July 2009. That was the first time she had been back to Sri Lanka since she had left in 2002. She and her husband had been reluctant to return, despite the military defeat of the LTTE earlier in the year, because they believed the environment to still be volatile in Sri Lanka. However she returned in order to visit her mother (the appellant's grandmother) who was unwell at the time.

[32] Before she returned the aunt had already heard that the appellant had experienced difficulties. She recalled telephone conversations with family members in Sri Lanka in 2008 during which she learned that the appellant had been abducted. However, such occurrences had been a fact of life in Sri Lanka for many decades and the aunt had not taken much notice of this information at that time.

[33] It was not until she returned to Batticaloa in 2009 that she appreciated the true impact of these events upon her sister (the appellant's mother), the appellant and his family.

[34] The aunt stated that when she left in 2002, the para-military groups had no overt presence in the Batticaloa urban area. They tended to concentrate in outlying rural areas. When she returned in 2009 the local environment had deteriorated significantly. She was astonished by the pervasive presence of surly and unkempt young men who were clearly aligned to one or other para-military group. These men routinely carried firearms and the aunt was unnerved by the threatening atmosphere generated by their presence.

[35] The aunt confirmed that the Karuna Group has premises immediately adjacent to the appellant's family home. Her brother, who lived elsewhere in Batticaloa, told her in passing that she should not spend time there because it was unsafe.

[36] So, while she had looked forward to spending time staying with her mother and her sister, she visited the appellant's mother only twice during the month that she spent in Sri Lanka. On the few occasions that she was in the vicinity of the homes of her family members in A Street, the aunt was routinely stopped and questioned by Karuna Group members. They asked her where she was from and why she was in the area. She recalls one occasion when she experienced significant delays caused by a visit to the area by Colonel Karuna in person.

[37] The aunt also noted that the demeanour and morale of her sister had changed significantly. She said that her sister had always been a strong and confident person. By the time the aunt returned to Batticaloa in 2009, she found her sister to be downtrodden and, on many occasions, tearful. The mother's main source of anxiety related to the appellant's difficulties. While the aunt did not discuss the appellant's predicament with her sister in depth, she was left in no doubt about the seriousness of the problems the appellant had experienced.

[38] When asked by the Tribunal whether the family had ever considered relocating in order to avoid these problems, the aunt gave a two-pronged explanation as to why (in her opinion) they had not. She explained that her family felt a strong association with their home. The appellant's mother had been born and raised in A Street, and the grandmother still lived there. However, even putting such feelings to one side, the family had a fatalistic attitude that the Karuna Group could and would find them even if they did relocate elsewhere in Batticaloa.

Material Available to the Tribunal

[39] The Tribunal was provided with a range of information for the purposes of the hearing. In addition to the Immigration New Zealand file, it received letters from counsel for the appellant dated 27 January 2011, 10 February 2011 and 11 February 2011, together with various enclosures including her opening submissions.

[40] During the course of the hearing, counsel provided the Tribunal with extracts from the United Kingdom Home Office *Country Report: Sri Lanka* (11 November 2010) and extracts from what appears to be (but counsel could not confirm) the United Kingdom: Home Office, *Report of Information Gathering Visit to Colombo, Sri Lanka 23-29 August 2009* (October 2009).

[41] The Tribunal provided counsel with a copy of a report by the Danish Immigration Service: *Human Rights and Security Issues Concerning Tamils in Sri Lanka* (October 2010) (the Danish Report). She was invited to make submissions upon its content if desired. Counsel forwarded additional submissions following the conclusion of the hearing. These were forwarded under cover of a letter dated 13 March 2011.

THE REFUGEE CONVENTION – THE ISSUES

[42] 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.

[43] 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?

[44] On the facts of the present case, the Tribunal is also required to address the following issue:

- (c) Can the appellant access meaningful state protection elsewhere in Sri Lanka?

ASSESSMENT OF THE CLAIM TO REFUGEE STATUS

The Appellant's Credibility

[45] Before turning to consider the issues as framed, it is necessary to determine whether the appellant's account is credible. The Tribunal finds that it is.

[46] The appellant spoke spontaneously and in detail about key aspects of his account. His evidence was broadly consistent with the account outlined in his original written statement dated 10 June 2010 and with the evidence he gave before the Refugee Status Branch. It was also consistent with country information, some of which is discussed below.

[47] His account is also broadly supported by the testimony of his aunt. She too spoke candidly and spontaneously. Her evidence was not implausible and she did not appear to be embellishing her testimony. While she was not able to give direct evidence about all aspects of the appellant's predicament, her account provided credible context for the appellant's claim.

[48] The Tribunal notes the existence on file of various statements purporting to be from people in Sri Lanka who know the appellant. Because the Tribunal has not had the opportunity to hear from their authors in person, they might be afforded little weight if considered in isolation. However their content is not inconsistent with the appellant's account. His core account is accepted as credible.

Summary of Factual Findings

[49] The Tribunal finds that the appellant is a young Tamil male in his early 20s. He was born and raised in Batticaloa in a family home that is now adjacent to premises occupied by the Karuna Group.

[50] In mid-2007 the appellant was abducted by the Sri Lankan Army. He was detained at a checkpoint because he was a young Tamil male. While in detention he was severely beaten. The appellant was subjected to further adverse attention from the Sri Lankan Army in May 2008. He was taken from the family home, verbally and physically mistreated and accused of being linked with the LTTE. He

was detained by the Army for a third time in July 2009 after a general search of local households. After a short period the appellant was released. He was not seriously mistreated on that occasion.

[51] Since early 2008 these difficulties have been interspersed with a series of additional encounters with the Karuna Group. The appellant was detained by the Group in May 2008 and again in November 2009. On both occasions he was beaten. By the time he left Sri Lanka in early 2010 the appellant had been coerced into reporting, daily, to the Karuna Group's headquarters in A Street.

[52] The appellant departed Sri Lanka lawfully using his own valid passport in early 2010. Since his departure the Karuna Group has continued to harass the appellant's family members, and have made ongoing enquiries as to his whereabouts.

[53] It is on this basis that the appellant's claim is to be assessed.

Objectively, on the facts found, is there a real chance of the appellant being persecuted if returned to Sri Lanka?

[54] For the purposes of refugee determination, "being persecuted" has been defined as the sustained or systematic violation of basic or core human rights, demonstrative of the failure of state protection; see *Refugee Appeal No. 2039/93* (12 February 1996). Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection.

[55] In determining what it means that a fear be "well founded", the Refugee Status Appeals Authority consistently adopted the approach set out in *Chen v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), in which it was held that a well founded fear of being persecuted is established when there is a real, as opposed to a remote or speculative chance of such persecution occurring. The standard is entirely objective.

[56] Counsel submits that the appellant is at risk from the Sri Lankan authorities (in particular the Sri Lankan Army) and from the Karuna Group. While it is true that he was mistreated by members of the Sri Lankan Army and the Karuna Group in the past, the Tribunal's task is to determine the prospective risk which the appellant would face if he returns to Sri Lanka now. The Tribunal therefore turns to consider the country information against which the risk to this appellant is to be assessed.

The Civil War in Sri Lanka

[57] When it declared victory over the LTTE on 19 May 2009 the Sri Lankan Government brought an end to a conflict that had lasted for more than a quarter of a century.

[58] During that time many thousands of Sri Lankans (including a large number of Tamils) fled the country and sought asylum overseas. The United Nations High Commission for Refugees (UNHCR) has published guidelines from time to time to assist in the assessment of such claims. The most recently published guidelines refer to the “improved human rights and security situation” that has ensued since the conflict ended: *Eligibility guidelines for assessing the international protection needs of asylum-seekers from Sri Lanka* (5 July 2010) (the UNHCR guidelines) (p 1). They state that the risk to Tamil citizens in Sri Lanka generally has dissipated “significantly” (p 3).

[59] However the guidelines also remind of the need to consider the particular characteristics of each appellant (p 3). The Tribunal’s approach was articulated by the High Court in *A v Chief Executive of the Department of Labour* (High Court, Auckland CIV 2004-404-6314, 19 October 2005). Winkelmann J found that the appellate decision-maker must consider whether an individual having all of the characteristics of the particular appellant would face a real chance of serious harm for a Convention reason (para 38).

[60] The appellant has experienced difficulties in the past from both the Sri Lankan authorities, in particular the Sri Lankan Army, and the Karuna Group. His difficulties with the Sri Lankan Army appear to have been the result of essentially being in the wrong place at the wrong time. If he had truly had any real profile as an LTTE sympathiser it is inevitable that this would have been reflected in his treatment when he was picked up for the last time at his aunt’s house in mid-2009. The fact that others were detained and he was released without harm on that occasion is a strong indication that he was not a person of specific interest to the Sri Lankan Army.

[61] His problems with the Karuna Group were, however, more focussed upon the appellant.

Assessment of risk from the Karuna Group

[62] Reference has earlier been made to the breakaway group formed by “Colonel Karuna” when he defected from the LTTE in early 2004 in order to lend support to the Sri Lankan Government. He later established a political party, the Tamileela Makkal Viduthalai Pulikal (Tamil People’s Liberation Party), or TMVP. Karuna then split with the political wing in late 2007. The TMVP came under the leadership of Pillayan, while Karuna joined the Sri Lanka Freedom Party (SLFP). Karuna has since been sworn in as Minister for National Integration and Reconciliation.

[63] From its inception, the Karuna Group engaged in armed activity in support of Government security forces. It is implicated in the enforced recruitment of child soldiers and in the abduction of “hundreds” of young men between the ages of 18 and 30: Human Rights Watch *Sri Lanka: Complicit in Crime: State collusions and abductions and child recruitment by the Karuna Group* (24 January 2007). According to that report by Human Rights Watch, many families whose children had been released did not report the fact they had been released “for fear that their son could be abducted again” (page 31), especially if money was paid.

[64] The activities of the Karuna Group did not come to an end with the Government victory over the LTTE in May 2009. Guidelines issued by the UNHCR in 2009 (which preceded the July 2010 Guidelines) state that the ongoing presence of armed para-military groups including the Karuna Group was a “major source of instability in the East”. Those organisations are implicated in extra judicial killings, deaths in custody, abductions and forced recruitment. Moreover, these were allegedly carried out with the knowledge and acquiescence of the Sri Lankan Government.

[65] This is consistent with the Danish Report, which confirms that the Karuna Group is now closer to the central Government and is “to some extent” working with the security forces in Batticaloa. This is relevant in two ways. It underlines the plausibility of much of the appellant’s account and it qualifies country information as to the improved security situation in Sri Lanka. (Danish Report, page 34).

[66] The Danish report describes Karuna’s cadres as “very powerful and active in the East” (p 35) and asserts that it, along with other para-military groups, is engaged in abductions and extortion and is used to force people to give up their land (p 35). While the incidence of such activities is said to be lower than in previous years, there is a suggestion that this may be because people are too intimidated to report them (p 35). According to the Danish Report the consensus

among various sources consulted appeared to be that the Karuna group and other paramilitaries acting alongside the government have effective impunity (p 37).

[67] In this context it is unsurprising that the Danish Report also cites the Director of a human rights organisation as saying that people in opposition to Karuna's armed group could be in trouble.

Assessment of risk to the appellant if he were to return to Batticaloa

[68] In all of the circumstances, the Tribunal finds that there is a real chance that the appellant would again be a target of the Karuna Group if he were to return to Batticaloa. The context for this finding includes the antagonism expressed towards the appellant and his family since early 2008. It takes into account the proximity of the family home to the Karuna Group headquarters. The Tribunal also takes into account the incidents of physical mistreatment the appellant has experienced in the past, and the ongoing interest expressed in the appellant.

[69] If the appellant were to return to Batticaloa there is a real chance that he would be abducted and mistreated by the Karuna Group, as happened in the past. Karuna is aligned with the Sri Lankan government and the group is clearly powerful in the appellant's locality. It appears to be able to act with impunity and the appellant has no realistic prospect of seeking protection from the Sri Lankan state against that harm.

[70] For these reasons the Tribunal finds that the appellant has a well-founded fear of being persecuted if he were to return to Batticaloa.

Convention Reason

[71] The Tribunal finds that the context in which the Karuna Group has obtained and seeks to maintain its influence in the east makes it clear that the appellant's predicament is due, at least in part, to an imputed political opinion. It therefore arises for a Convention reason.

Internal Protection Alternative

[72] Having found that the appellant has a well-founded fear of being persecuted for a Convention reason in Sri Lanka, it is necessary to determine whether there is an “internal protection alternative”.

[73] For the reasons more fully explained in *Refugee Appeal No 76044* [2008] NZAR 719 and *Refugee Appeal No 71684* [2000] INLR, once the appellant has established a well-founded fear of being persecuted for a Convention reason, recognition of him as a Convention refugee can only be withheld if he can genuinely access protection in his home country which is meaningful. This means:

- a) that the proposed internal protection alternative is accessible to the individual; the access must be practical, safe and legal;
- b) that in the proposed site of internal protection there is no well-founded risk of being persecuted for a Convention reason;
- c) that in the proposed site of internal protection there are no new risks of being persecuted or of being exposed to other forms of serious harm or of refoulement; and
- d) that in the proposed site of internal protection basic norms of civil, political and socio-economic rights will be provided by the State. In this inquiry reference is to be made to the human rights standards suggested by the Refugee Convention itself.

[74] Recognition of refugee status can only be withheld if each of these four elements is satisfied.

Whether the appellant can access meaningful state protection elsewhere in Sri Lanka

[75] Sri Lanka is a small island. Its populace is dealing with the social and economic impact of a long and vicious internal conflict that led to the displacement of many thousands of its citizens. In this context the UNHCR guidelines refer to the ongoing inadequacy of essential services such as water, sanitation and healthcare, as well as the presence of “landmines and unexploded ordinance”. It also refers to “continued economic and security restrictions” preventing civilians from accessing locations used to earn a livelihood (p 10).

[76] These factors are relevant because the appellant cannot simply pick, at random, a place in Sri Lanka to which he might notionally return. In most parts of the country the appellant would be forced to compete with thousands of others for access to an inadequate and over-burdened infrastructure. The only realistic site of internal protection would be the capital city, Colombo.

[77] The Tribunal finds that the appellant could safely access Colombo by air, as his aunt did, comparatively recently. The aunt, who is also Tamil, returned to Sri Lanka in 2009, for the first time in several years. There is no suggestion that she experienced any difficulty arriving in or departing from Colombo airport. There is no reason why the appellant would be subjected to any greater level of scrutiny. He has a valid Sri Lankan passport, and has no particular characteristics that would identify him as a person of interest to the Sri Lankan authorities immediately upon his return. He was not of interest to the authorities at the time he left Sri Lanka lawfully in 2010 and there is no credible evidence that he has been sought by the Sri Lankan Army or by the Sri Lankan authorities since that time. Once in Colombo, however, the appellant's predicament is less straightforward.

[78] The appellant is at risk from the Karuna Group, whose area of influence exists only 200 or so kilometres from Colombo. The Danish report suggests that protection may be available in Colombo to anyone targeted by the TMVP (Pillayan) group, as that faction does not have any power to target individuals outside the east (p 37). However that is of little assistance in the present appeal. The appellant's ongoing difficulty is with the Karuna faction, rather than the Pillayan. Karuna himself is in Parliament, in coalition with the ruling party. That does not of itself mean that the Group would have influence in Colombo, but it may place it in a different category from the entirely local reach of the Pillayan faction.

[79] In the past, all young Tamil males from the North and the East of Sri Lanka faced significant scrutiny in Colombo, where they were regarded as potential LTTE recruits. This period of heightened security awareness continued throughout the conflict and during the period immediately after the conflict ended in May 2009.

[80] More recently the Danish Report refers to a significant "sense of easing" within Colombo. It states that the security situation for Tamils in Colombo has improved: the number of checkpoints has reduced and the risk faced by Tamils who are stopped is less arbitrary (p 29).

[81] It also appears that the need for all Tamils to register with police upon arriving in Colombo has been relaxed (the Danish Report p 28). However this

requirement is subject to fluctuation and has been applied in discriminatory fashion “exclusively to those of Tamil origin” (p 28). The UNHCR guidelines state that a young Tamil male from the east is still likely to be subject to closer scrutiny at checkpoints and during any police registration process. This is also reflected in the Danish Report, which cites a human rights lawyer who considered that even ordinary Tamils who travel to Colombo from the north or east would still face some risk of being stopped and questioned at checkpoints, of arbitrary detention and (presumably) mistreatment by a police force which is not subject to independent oversight (p30).

Assessment

[82] It is apparent that the risk to an individual in Colombo bearing the appellant’s characteristics is now lower than in the past. However, that is not the same as saying that the appellant can genuinely access meaningful protection there. While registration requirements may have been relaxed, it is still foreseeable that any such initiative could be reversed. The UNHCR guidelines go so far as to say that a young Tamil male could still be denied a residence permit entitling him to remain in Colombo (UNHCR guidelines, p 10). If that were the case the appellant would have little realistic option but to return to his family home, where, it has been found, he is at risk of being persecuted.

[83] The Tribunal has found the appellant to have a well-founded fear of being persecuted in part of his country of origin. Under the Refugee Convention he is a person in need of protection. The Tribunal is not satisfied that there is available in Sri Lanka a site of internal protection in which the appellant would face no new risks of being persecuted or of being exposed to other forms of serious harm or of refoulement to his home in Batticaloa, where he is at risk of being persecuted. The appellant is presently unable to genuinely access meaningful protection elsewhere in Sri Lanka.

THE CONVENTION AGAINST TORTURE – THE ISSUES

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

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

Conclusion on Claim under Convention Against torture

[85] The appellant is recognised as a refugee. In accordance with New Zealand's obligations under the Refugee Convention, he cannot be deported from New Zealand, by virtue of section 129(2) of the Act (the exceptions to which do not apply). Accordingly, the question whether there are substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand does not arise. He is not a person requiring protection under the Convention Against Torture. He is not a protected person within the meaning of section 130(1) of the Act.

THE ICCPR – THE ISSUES

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

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

Conclusion on Claim under ICCPR

[87] For the reasons already given, the appellant cannot be deported from New Zealand. Accordingly, the question whether there are substantial grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand does not arise. He is not a person requiring protection under the ICCPR. He is not a protected person within the meaning of section 131(1) of the Act.

CONCLUSION

[88] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) Is a refugee within the meaning of the Refugee Convention;
- (b) Is not a protected person within the meaning of the Convention Against Torture;
- (c) Is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[89] The appeal is allowed.

"A N Molloy"

A N Molloy
Member

Certified to be the Research Copy
released for publication.

A N Molloy
Member