

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76352

REFUGEE APPEAL NO 76353

REFUGEE APPEAL NO 76354

AT AUCKLAND

<u>Before:</u>	B A Dingle (Member)
<u>Counsel for the Appellants:</u>	C Curtis
<u>Appearing for the Department of Labour :</u>	No Appearance
<u>Date of Hearing:</u>	20 July & 25 August 2009
<u>Date of Decision:</u>	26 January 2010

DECISION

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

INTRODUCTION

[2] The appellants are a mother and two children (a son and a daughter) who originally travelled to New Zealand in November 2008. They will be referred to in the decision as “the mother”, “the son” and “the daughter”. The mother’s husband (“the husband”) remains living in Colombo, Sri Lanka.

[3] The appellants claim that they are at risk of being persecuted for a number of reasons. The primary claim relates to an allegation that the mother was the victim of extortion demands from the Liberation Tigers of Tamil Eelam (LTTE) in late 2008 which ended with her and the son being threatened with abduction if the

demands were not met. The appellants also claim *inter alia* that: they are at more general risk of harm (in the form of arbitrary arrest, detention or mistreatment) from the Sri Lankan authorities (or associated groups) because of their Tamil ethnicity; the children cannot access school; the son is at risk of forced conscription by the Sri Lankan Army (SLA) or the LTTE; the mother and daughter are at risk of sexual assault.

[4] At the time of the hearing the son was aged 14 years and the daughter was nine years old. They were both represented by the mother pursuant to section 141B of the Immigration Act 1987. The son also appeared briefly to give oral evidence before the Authority.

[5] The central issues to be determined in this case relate to both the credibility of the account and whether, considered on the individual merits of their respective claims, any of the appellants have a well-founded fear of being persecuted should they now return to Sri Lanka.

THE APPELLANTS' CASE

[6] The account which follows is a summary of the evidence given by the appellants at the appeal hearing. Because most of the background involves the mother and she gave evidence on behalf of the children, the narrative necessarily reflects that. The claims of the children are summarised later in this section. An assessment of the evidence will follow later in the decision.

THE MOTHER'S CLAIM

[7] The mother was the youngest of four children born to her parents, both Tamils originating in the north of Sri Lanka. The mother was born and raised in the Hindu faith. The family lived in Z for the first five years of her life and then moved to X village, also in Jaffna.

[8] The mother's father, AA, worked in north Sri Lanka.

[9] The mother began her schooling at a Hindu school in 1974.

[10] In 1985, the government of Sri Lanka appointed AA to a position in the Eastern Province. At that time, her parents moved to live in the Eastern Province while the mother remained in Jaffna with her grandparents.

[11] In 1986, the mother completed her secondary school education. She did not attain sufficient marks to be able to enter the law college in Colombo and she intended to re-sit the final examination the following year. However, events intervened and, in 1987, the Indian Peace Keeping Force ("IPKF") was stationed in Sri Lanka to try and stop the fighting between the LTTE and the Sri Lankan Armed Forces ("SLAF"). The IPKF were deployed in the north of the country and began military operations against the LTTE. As a result of hostilities, the mother did not sit the examination again.

[12] In August 1987, the fighting between the LTTE and the IPKF intensified, causing the mother's family to vacate their home and seek refuge in nearby public buildings. The refuge centres were poorly resourced and suffered from a lack of food and proper sanitation facilities. The family remained there for approximately three months, after which they returned home.

[13] In 1989, the mother completed her secondary school examination and prepared for the entrance examination to the law college in Colombo. She sought LTTE permission to travel to Colombo to sit the examination but was refused, even when she sought help from Tamil MPs.

[14] In early 1990, the LTTE and government of Sri Lanka agreed to a ceasefire. As a result, the mother was able to travel to Colombo where she lived with family friends. However, when she got there she discovered that the law examination had been conducted and she was not able to sit it. After a few months, she returned to Jaffna.

[15] In 1991, AA was appointed to a high-ranking position which required him to move to Colombo. He and his wife were provided with police security at their house, a driver and other security measures.

[16] In late 1991, the mother married the husband in Colombo where he worked in business.

[17] In mid-1992, the mother and husband returned to Jaffna because they were given the responsibility of looking after the family house there. At that time, they travelled regularly to Colombo so that the husband could pursue his business interests. However, in 1993, fighting resumed between the LTTE and the SLAF. As a result, they relocated to Colombo to reside with the mother's family. They arranged for relatives to live in the family home in Jaffna. By this time, the mother's two brothers also lived in Colombo with their families.

[18] In mid-1994, the mother's first child, ("the son"), was born in Colombo.

[19] In 1995, the mother began working for her father as his personal secretary.

[20] In mid-1999, the mother was issued with a genuine Sri Lankan passport.

[21] In mid-2000, the mother's second child, ("the daughter"), was born in Colombo.

[22] In 2001, the relatives who were living in the family home in Jaffna informed the mother that they had been approached by the LTTE and asked questions about who the house belonged to. The relatives had told the LTTE the name of the owners and provided them with the family's telephone number. Soon after, the relatives told the family that they had been threatened by the LTTE that they must leave the house and they were intending to do so because they were scared for their safety.

[23] In mid-2001, the mother's father died of natural causes. The family remained living in their Colombo house where they continued to receive police security for approximately six months.

[24] Near the end of 2001, the family heard from their neighbours in Jaffna that the LTTE had occupied their Jaffna house.

[25] In early 2005, the LTTE vacated the Jaffna house because the Sri Lankan army moved into the village. Before they left, the LTTE damaged the house and told neighbours that they would return to occupy the property at some later date.

[26] In early 2008, the mother became aware of a Jaffna businessman who refused an LTTE request to donate money to their cause and was subsequently killed on a business trip to Colombo.

[27] In July 2008, the mother received two telephone calls at her mother's house from a woman who said that she was calling from northern Sri Lanka. The caller asked for details about the family house in Jaffna and the mother told her that the family had abandoned the house but that it still belonged to them. The first calls were followed by another series of calls made by a man. He also sought to confirm that the mother's family were the house owners and then, in subsequent calls, he began to ask for money. He identified himself as belonging to the LTTE. The man also referred to the mother's father and his work. The caller appeared to be upset about an historical action of her father and implied that that was a further

reason he was requesting money. These calls continued throughout August and September, approximately every two weeks. At the end of September or October, the caller began giving the mother specific dates by which she should produce this money. At around the same time, they also threatened that if she did not produce the money, they knew her weekly schedule and that of her son, impliedly asserting that they might do harm to them. The mother continued to talk to the callers on the telephone because she thought that she might find a way to resolve the situation. However, she did not seek to make a compromise but rather continued to refuse to pay any money at all.

[28] In response to the threats, the mother approached the son's school and explained the situation. The school teacher advised her to maintain the son's usual routine as he would be safe at school. In approximately mid-October, she did not let him go to school every day and she hired a home tutor for him. Occasionally he would attend school because he was bored and frustrated but by this time he had stopped participating in extra-curricular sports activities. On some occasions, he stayed at home because he was ill. The family did not take any other particular security measures apart from asking friends to drop the son off at school sometimes so that his schedule would vary. Neither did they inform the police about the situation because the LTTE had threatened the mother against such a move and she was scared that the police would mishandle any investigation thereby putting them at more risk.

[29] In approximately September 2008, the mother started a Sunday school class for Hindu children held at a Hindu temple. The son and daughter accompanied her to some of the classes.

[30] In the middle of October 2008, it was agreed by the family that the mother and the two children would attend a relative's wedding in New Zealand so that they could escape the situation in Sri Lanka. The mother arranged the travel through a travel agent. The husband did not accompany them because he was not able to secure a sufficient period of leave from work.

[31] On 15 October 2008, Immigration New Zealand (INZ) received the application for the appellants' visas.

[32] At the end of October, the mother received a further telephone call from the LTTE caller, in which he referred to the change of schedules for her and the son, clearly indicating the LTTE were monitoring their movements. At the beginning of November, he contacted her again and repeated threats to abduct her or the son.

[33] The appellants were issued with limited purpose visas for New Zealand on 17 November 2008 and they arrived in New Zealand in November 2008. They attended the relative's wedding. The mother explained what had been happening in Sri Lanka to various relatives and they suggested that she should apply for refugee status in New Zealand. The mother then gained the permission of the husband in Sri Lanka to do so.

[34] On 22 December 2008, the RSB received the appellants' confirmation of claim forms. The mother was subsequently issued with a work permit and the son and daughter obtained student permits.

[35] In mid-January 2009, the husband moved out of the family home to a smaller apartment in Colombo in order to avoid any further security threats. After a few weeks his landlord required him to move out and so he found a second apartment where he now lives with his mother. Since then the father has had his apartment searched on one occasion by the authorities and he is now required to report to the police in his suburb on a regular basis. He has not been charged with any offence and there is no evidence that he is suspected of any links with the LTTE. He has also had difficulties at work. Initially his salary was reduced and he was told that if his employers can find a Sinhalese worker to do his job then he may lose his position. Since then he has lost his position.

[36] When the husband moved out of the family home, an uncle ("BB") of the mother moved in to take care of it. Throughout January 2009, the mother was informed by her husband that there had been five or six calls to the family home asking for her whereabouts. The calls were answered by the uncle. On one or two occasions in January the mother also talked directly with the uncle. There was at least one further call from the LTTE to the uncle in February 2009 and another in late April or May 2009. The husband has not been directly called by the LTTE on his mobile phone.

[37] In August 2009 the mother was informed that her brother ("DD") had also had recent problems. DD's wife's brother ("JJ") (also a Tamil from the north who had recently relocated to Colombo) was taken into custody by police on 8 August. When DD visited him in custody on 15 August he questioned the police as to why JJ was still in custody and why he appeared to have been physically mistreated. DD became emotional and upset. The police then accused DD of having links with the LTTE because he was a Tamil from the north and took him into custody too. While in custody he was pushed and verbally abused. He appeared in court five

days later and his lawyer successfully argued for his release. He has returned to work but he now thinks that he may be under surveillance. JJ was remanded in custody for further investigations.

[38] If the mother and children return to Sri Lanka now they would have to go and live in her sister's house where the mother also lives. They would have to register themselves there with the police.

THE SON'S CLAIM

[39] The mother gave evidence on behalf of the son although he too appeared briefly before the Authority and gave evidence on his own behalf.

[40] He told the Authority that he had been attending school until late 2008. He reported that he was frequently searched by security staff as he entered the school which accorded with the mother's evidence that this occurred to the students generally because the Sri Lankan President's son attended the school. He said that since grade 4 or 5 he had experienced discrimination whereby he was hassled by his Sinhalese school mates and had noticed that there were unfair rules for Tamil students. For example he said that although he could train with school sports teams he was not able to participate when the team played in competitions because he was Tamil. He initially asserted that he was unable to join any school communities (clubs) but then modified his evidence to say that he was able to join some. He stated that he would find it difficult to return to school because he does not have any friends left there and he would be bullied even more than previously. The Authority understood him to mean that bullying would increase because of the defeat of the LTTE.

[41] He also reported that he was sometimes asked questions by Sri Lankan police as he walked on the street but he had never been detained or mistreated by them.

[42] He said that in mid-October 2008 his parents had said that he no longer needed to attend school and his mother curtailed his sporting activities. He felt frustrated and upset that he could no longer play sport. He says he did not know why he had to stop attending school full-time or about the LTTE threats until he came to New Zealand.

THE DAUGHTER'S CLAIM

[43] The daughter did not appear to give evidence because of her young age.

[44] The daughter has not previously been the victim of discrimination, harassment or threats. For the purposes of this decision, her life until she departed Sri Lanka in late 2008 has been unremarkable. The mother claims that the daughter is at risk of being persecuted on return to Sri Lanka because she would not be able to attend school. Further, she claims that the daughter will be at risk of sexual assault or other mistreatment at the hands of the Sri Lankan authorities, police or army. It is alleged that all of these risks arise because of the daughter's Tamil ethnicity.

OTHER MATERIAL SUBMITTED

[45] The Authority and the appellants have been provided with the files of the RSB, including copies of all documents submitted by the appellant at first instance.

[46] Under cover of a letter of 15 July 2009 counsel filed opening submissions accompanied by a copy of *Refugee Appeal No 76272* (23 February 2009), country information and a supplementary statement of the mother. On 20 July 2009, counsel submitted two further bundles of country information including news articles, internet blog printouts and photographs relating to the general situation in Sri Lanka in the post-hostility period and in particular the situation for Tamil citizens. Further country information (some of which had already been provided) was submitted under cover of letters on 17 August 2009, 1 September and 21 September 2009. Closing submissions and country information were filed on 31 August 2009.

[47] The Authority also received a letter from counsel (dated 27 October 2009) in which counsel reported that the mother had heard from the husband that he had lost his job and could not find other employment in Colombo and could no longer afford to rent accommodation. The letter also refers to the mother's brother DD and the fact that he has not been available to provide information regarding Tamil children in schools because he fears for his safety.

THE ISSUES

[48] 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."

[49] 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 APPELLANTS' CASE

CREDIBILITY

[50] Before turning to address the principal issues identified, it is necessary to determine whether the appellants have given a credible account. In this regard, the Authority concludes that the account about being targeted by the LTTE through telephone calls and threats cannot be believed, for the reasons which follow.

Calls in January and February of 2009

[51] The mother told the Authority that her uncle BB received approximately five or six calls at the family house in January 2009 from people asking about her whereabouts. BB answered the calls and informed the mother's husband about them. The husband then informed the mother whenever he spoke to her on the telephone. The mother confirmed that she herself became aware of the calls within days or a week of each call having been made. In other words in January 2009 she was aware that calls had been made to the house within that month.

[52] To the RSB, the appellant stated that the LTTE calls continued until December 2008. She then speculated that the LTTE had stopped calling after that because they would have been aware that the government authorities were tapping phones (p180 of the RSB file). She did not mention any LTTE calls to the house in January and only mentioned one anonymous call in February 2009 (p188 of the RSB file).

[53] When asked by the Authority why she had not told the refugee status officer about the various January 2009 calls she was unable to give a sensible answer. She first said that because she was tense and worried her husband tried not to make her worry more, thereby implying that he did not tell her about some of the January calls. When asked for a second time to explain her omission to the refugee status officer (and this time the question and answer were interpreted into Tamil to ensure complete understanding) she answered that the callers only wanted to know about her whereabouts and they did not ask about money at that time. Because this answer did not address the Authority's question she was asked again why she did not give the information about the calls to the refugee status officer. Her answer was that she did not know what the particular reason they were calling for was, the calls were "new" to her uncle and that when her uncle received a further call in late April 2009 she had called her lawyer but that the RSB decision had already been delivered. Again this answer does not address the question.

[54] When the Authority asked her to explain for a fourth time why she did not mention the January calls in her RSB interview she repeated her evidence that she had relatives living in Jaffna and they also called to find out where she was. When the question was asked a fifth time (albeit phrased in different words to ensure that she understood) the appellant then said that after her RSB interview was over, probably one or two days later, her husband called her and told her that someone had called the family's house asking for money, again impliedly asserting that that explained why she had not told the refugee status officer about the five or six other calls during January.

[55] The Authority does not accept the appellant's explanation/s for omitting to tell the refugee status officer about the January 2009 calls. The interview was in mid-February 2009 and it is implausible that if the appellant had heard about calls to the family house in the preceding few weeks she would not have told the officer about them. Her evidence to the refugee status officer and to the Authority is marked by an ability to give detailed evidence unprompted; for example, in her RSB interview the transcript records that some of her answers continued for several pages of the transcript and include considerable detail and contextual information. The Authority finds that she did not tell the officer about the calls because they did not occur. Her evidence has been fabricated for the purpose of supporting the refugee claim.

The uncle staying in the family house

[56] The appellant gave inconsistent evidence about who was staying in the family house after she had left in November 2008. She initially told the Authority that when she left Sri Lanka she arranged for an old uncle to come and stay at the house with her husband so that there would be somebody at the house during the day when her husband was at work. She initially said that the uncle began staying at the house in the first week of January 2009 and gave her evidence about him in the first person thereby indicating that she had personally arranged for the uncle because of her own concerns about the safety of the house.

[57] In contrast, the appellant told the refugee status officer that after she had left Sri Lanka the husband arranged for a caretaker who was not a relative to come and look after the house when he (the husband) left in January 2009.

[58] It will be recalled that her RSB interview was in mid-February 2009, some six weeks after her uncle had, according to her initial evidence to the Authority, arrived to live at the house. When asked to explain the apparent discrepancy as to who moved into the house (an uncle or a non-relative caretaker) the appellant said that her husband had first arranged for an outsider to stay at the house but that her mother objected to having an "outsider" in the family house. The appellant then told the Authority that she was not told who was living in the house until after the uncle arrived. At that point in the hearing she said that the uncle moved in after 15 January.

[59] The appellant's answer did not directly address the discrepancy put to her and so the Authority asked her again why she had referred in her RSB interview to the arrangement for an outside caretaker rather than stating that the uncle was staying in the house. The appellant responded by saying that she did not realise the importance of the answer.

[60] Her response does not alleviate the Authority's concerns and is in fact inconsistent with the evidence that she had previously given in the following ways: i) her explanation suggests that her husband and her mother arranged for the uncle to come and stay whereas she had earlier told the Authority that she herself had made the arrangement; and ii) she initially told the Authority that the uncle arrived in the first week of January and then changed her evidence to say that he had come after 15 January. Furthermore, she has not sensibly explained why she refers to an outside caretaker being in the house in her interview in mid-February when on either version of events (that is, that the uncle arrived at the beginning of January or mid-January) she knew by that time that the uncle was staying in the

house and she had in fact talked to him there. Moreover, in the RSB interview she told the refugee status officer that she had heard about the caretaking arrangement one week prior to the interview (that is, in the second week of February). This contradicts her most recent evidence to the Authority which is that she heard about her uncle arriving at the house in mid-January.

[61] The Authority finds that the inconsistency and mobility in the appellant's evidence indicates that it is not true. It finds that the uncle is not staying in the house for security reasons and has not received calls there asking about her whereabouts. The Authority makes no finding as to who is staying in the family house but finds that the account which has been provided is not a genuine one. It has been created to give the impression of the father moving from the house for security reasons, when in fact he may have moved for any other number of reasons.

Other concerns

[62] The Authority finds that the mother's testimony included elements of exaggeration and mobility such that the interpretation she gave to events in Sri Lanka cannot be accepted.

[63] The mother told the Authority that the husband moved out of the family home in January 2009 to an apartment and then in February he moved again, to another apartment. When first asked why he moved the second time she stated that it was because of security reasons. When later asked why the husband had moved, she simply said that the landlord of the first apartment asked him to move but the landlord did not give any particular reasons. There is no evidence that the husband was subject to any security issues. The Authority considers that her first answer alluding to "security reasons" was an attempt by the mother to portray her husband as being in a risky security situation when in fact he was simply subject to the landlord's whim.

[64] Similarly, the Authority finds her evidence about the son to have been exaggerated for effect. At first flush the mother's evidence was that as soon as a threat was made against the son she prevented him from going to school completely and had a tutor for him at home. However, when questioned more closely she conceded that he did attend school for one or two days of each week. She also conceded that at times the reason that he stayed at home was because he was genuinely ill. The Authority finds that the presentation of events in Sri

Lanka has been moulded to fit with the refugee appeal. It is not accepted that the son stopped attending school in mid-October 2008 because of LTTE threats against him.

[65] The Authority's concern about the assertion that the son was prevented from attending school because of threats is underlined by other flaws in the evidence. The mother could not sensibly explain why she let him attend school after there had been a threat of abduction against him. Her suggestion that she let him go to school on some occasions because he was bored at home is implausible when considered in the context of a direct threat of abduction and her claimed terror that it would eventuate. The evidence is rejected.

[66] In making all of the credibility findings above the Authority has considered counsel's submission (p5 counsel's memorandum dated 14 July 2009) that the mother's credibility should not be impugned simply because of vagueness or inconsistencies in peripheral details. The Authority does not accept that submission. The credibility findings made above are based on matters which are at the core of the mother's evidence (the LTTE phone calls, arrangements made for the care of the house in her absence and threats against the son) and not related simply to trivial or peripheral details. Counsel's submissions do not, in the circumstances, negate the Authority's view of the mother's account.

[67] In summary, the Authority makes the following findings:

- i. The mother was not approached, threatened or otherwise harassed by the LTTE during 2008. Nor have LTTE persons tried to contact her through the family home in early 2009.
- ii. The children have both been voluntarily withdrawn from their previous schools by the mother and her husband;
- iii. The appellants are all Tamils who are officially recognised as residing in Colombo.
- iv. The mother has a valid national identity card which records that she was born in north Sri Lanka but resides in Colombo.
- v. Neither of the children have current postal identity cards which are normally obtained by students (the son's most recent one having been returned to Sri Lanka in early 2009);

- vi. The father is currently living in Colombo.

DO THE APPELLANTS HAVE A WELL-FOUNDED FEAR OF BEING PERSECUTED IN SRI LANKA?

[68] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of basic or core human rights, demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996).

[69] It is well established in the Authority’s jurisprudence that the standard for establishing that a fear of being persecuted is well-founded is an entirely objective one. See for example *Refugee Appeal No 72668/01* NZAR 649 at [111] to [154]. A subjective fear, however strong, is not sufficient to establish the well-founded element of refugee definition. There must be a real or substantial basis for the harm which is anticipated.

[70] The appropriate question to be considered is whether considering the totality of the evidence, individuals having each of the appellants’ characteristics would face a real chance of serious harm for a Convention reason if sent to Sri Lanka. See *A v RSAA* (CIV 2004-4-4-6314, 19 October 2005, HC, Auckland, Winkelmann J) at [38].

[71] The Authority now turns to consider the country information against which the risk to these appellants is to be assessed.

SUMMARY OF COUNTRY CONDITIONS

[72] While the country information about the situation facing some Tamil civilians in Sri Lanka, particularly those with known or suspected connections to the LTTE, indicates that they may be subject to arbitrary arrest, detention and mistreatment such information does not establish that every Tamil citizen is at risk of serious harm to the real chance level. In other words, while there is a risk of serious harm for some Tamil individuals in Sri Lanka, for others there is no such risk.

[73] It is well known that the decades long civil conflict which has been fought between the Sri Lankan government and the LTTE was brought to an end by the defeat of the LTTE in May 2009. While this means that outright hostilities and military conflict has ceased, there is still a significant level of government suspicion of Tamils. The post conflict situation was reviewed in *Refugee Appeal No 76294* (30 June 2009) where the Authority noted the situation in Sri Lanka is one of transition (at [76]). This state of transition continues and the predicament of Tamil

citizens must be assessed carefully having regard to their particular profile and personal circumstances.

[74] For the purposes of this decision, the Authority accepts that the Sri Lankan authorities maintain a high level of vigilance as to individuals and groups who may be members or supporters of the LTTE. Country information indicates that there is tight security throughout the country, including in Colombo where there are frequent checkpoints (*Refugee Appeal No 76294* (30 June 2009) at [84]). Throughout Sri Lanka individuals who are suspected of LTTE links may be subjected to brutal and arbitrary treatment in violation of core human rights. Many have been detained indefinitely, tortured or beaten and some are reported to have been killed: "The tragedy of refugees in Sri Lanka, hidden from the eyes of the world" *Asia News* (19 June 2009).

[75] The intense security is also manifest in the city streets of Colombo where there are checkpoints and a high police and army presence: *Refugee Appeal No 76294* (30 June 2009) at [91]. The country information indicates that those most likely to be of interest to authorities at the checkpoints are individuals with: a profile or history of LTTE links; scarring consistent with wounds sustained in hostilities; no identity card or a card issued in the north; no permanent Colombo address; no employment or other verifiable reason (such as study) for being in Colombo and those without family or other networks in Colombo on which to rely for support. Young Tamil males with these characteristics are particularly at risk. See UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (April 2009), particularly Section D: Groups at Risk of Targeted Human Rights Violations.

[76] There is also some evidence that Tamil arrivals at the international airport in Colombo are subject to increased scrutiny. Some arrivals have been detained and questioned on the grounds that they are suspected of having LTTE links overseas. *Refugee Appeal No 76294* (30 June 2009) at [93]. Again, the authorities are particularly vigilant with those who possess the characteristics outlined above in [75].

[77] This decision now turns to consider the specific predicament of each of the appellants.

The mother

[78] The Authority finds that the mother is not at risk of being persecuted in Sri

Lanka to the real chance level. The reasons follow.

[79] The country information put before the Authority does not support a finding that all Tamil women who return to Sri Lanka from abroad are at risk of being persecuted for a Convention reason. In fact the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka (April 2009) and the supplementary guidelines of July 2009 do not include Tamil women who habitually reside and are registered in Colombo as among those who should *prima facie* be considered to be at risk of serious harm. See in particular Section D (viii): Groups at Risk of Targeted Human Rights Violations: Women and children, in certain circumstances.

[80] The Authority finds that the profile of the mother is that of a Tamil woman who was born in the north of Sri Lanka but has lived in Colombo continuously between 1993 and 2009. She owns a house in Colombo where she and her extended family lived until late 2008. Her husband is also of Tamil ethnicity, born and raised in Colombo. She has been officially registered as living in Colombo since 1993 and her identity card records her place of residence as Colombo.

[81] The mother contends (by way of her own evidence and counsel's submissions) that she is at risk in Sri Lanka for the following reasons:

- (a) She will be targeted by the LTTE on return and will suffer serious harm if she does not acquiesce to their demands.
- (b) She will be mistreated because of the defeat of the LTTE and because there is now general mistreatment of Tamils.
- (c) She may suffer sexual assault from the Sri Lankan armed forces or other state agents.
- (d) She will be at risk of arbitrary arrest and detention and possibly sexual assault at the airport on return.
- (e) She cannot live with her husband because his present accommodation is too small and if they lived anywhere else they would have to register again with the police.
- (f) She cannot live with other relatives because she will have to register that new residence with police which will bring scrutiny upon their relatives.

- (g) Her husband has no employment and is required to report to police regularly.
- (h) Her father's previous high profile position may exacerbate her situation of risk both from the LTTE and the Sri Lankan authorities

[82] However, the Authority finds that the specific characteristics relied upon by the mother to support her claim to be at risk of being persecuted to the real chance level in Sri Lanka have either not been established or do not expose her to a real chance of being persecuted for Convention reason.

[83] As already noted, the Authority finds that the mother and family were not threatened by the LTTE in late 2008 or early 2009. There is no other credible evidence before the Authority on which a finding that the mother is otherwise at risk of serious harm from the LTTE can be made and therefore claim (a) above must fail.

[84] The Authority's finding that she has not been targeted by the LTTE in her home in Colombo means that there is no credible evidence why the appellants and the father cannot move back into the family home on the appellants' return to Sri Lanka. On that basis, claims (e) and (f) also fail. In any event, the mother's assertion during the hearing that her husband's present accommodation is unsuitable because of his tenancy agreement is not relevant to her claim to refugee status. There is no evidence before the Authority that the appellants would be unable to access adequate accommodation because of their Tamil ethnicity even if they did not return to the family home.

[85] As to the claimed risk from the Sri Lankan authorities neither the mother, her family or her husband have any known link to the LTTE. There is no reason to believe that they would suddenly become suspected of such links. The mother has not established that she has any other characteristics that would elevate her risk of being targeted by the Sri Lankan authorities to the real chance level. Counsel has referred to other decisions of this Authority in which it was found that there was a real chance of Tamil appellants being persecuted on return to Sri Lanka. However those decisions can be distinguished from the present appeals because the characteristics and predicament of the appellants were different from these appellants in significant ways. For example, in *Refugee Appeal 76294* (30 June 2009) (referred to in counsel's submissions of 31 August 2009 at [5]), the appellant's brother was a long-time member of the LTTE who was publicly reported to have been killed in hostilities in January 2009. Further, the appellant's

relatives had been questioned by the SLA as to the whereabouts of the appellant's family and the appellant did not have employment, a residential address or a Colombo identity card. None of these characteristics are shared by the mother in this appeal. Similarly in *Refugee Appeal 76272* (23 February 2009)(submitted by counsel on 15 July 2009) the appellant can be distinguished because he was a Tamil male from the north with no employment, residence or other reason for being in Colombo and the decision was made at a time when hostilities in the north were continuing and therefore travel north was almost impossible.

[86] The mother also claims that when she reaches the immigration officer at the airport on arrival in Sri Lanka they will check her details and discover that she is related to Judge AA, for which reason they will keep her under surveillance. The Authority does not accept her contention. Judge AA was promoted to high judicial office by the Sri Lankan government and provided with comprehensive security and protection. There is no evidence before the Authority to suggest that he ever had problems with the government or that his family have any risk associated with him. In fact, given his high level appointment and the continued security provided by the government to his family for a period after his death, it is reasonable to assume that the government view his family with great respect and may accord them a measure of security not provided to other Tamils. In any event, there is no evidential basis on which to find that the appellants' relationship with Judge AA puts them at any risk of harm on return.

[87] The Authority has considered the mother's evidence about the husband's employment situation and his requirement to report to the police twice weekly. In doing so the Authority reminds itself that it is not required to consider the husband's predicament in Sri Lanka vis-à-vis refugee status – only to consider any effect his circumstances may have on the predicament of these appellants.

[88] As noted above, counsel asserts in her letter of 27 October 2009 that the husband has now lost his job. That assertion is unsupported by any evidence from the appellant mother and therefore deserves no weight. However, for the sake of completeness the Authority has considered the predicament of the mother and children on the basis that the husband has lost his job. The Authority finds that the situation of unemployment, while regrettable, does not ground a well-founded fear of being persecuted for the appellants. The husband is an experienced professional with a long-standing work history and there is no reason to believe that he would be unable to obtain another job. Even accepting that some employers may discriminate against Tamils, there is no evidence before the

Authority to establish that Tamils are systematically prevented from working in Colombo. Furthermore, the wife has worked outside the home before and could presumably do so again if that was necessary thus ensuring the family has some income. Concerning the police reporting, there is no reason why this should cause any difficulty for the appellants and no direct evidence or submissions as to specific difficulties which would arise from his reporting have been provided.

[89] The Authority has also considered the evidence concerning the mother's brother DD and his recent experience with the Sri Lankan authorities. It finds that DD's difficulties will not expose the mother or the appellant children to a risk of serious harm to the real chance level. DD's short period of custody occurred in particular circumstances (questioning the authority of police in relation to JJ). There is no real chance that such circumstances would arise for any of these appellants. In any event, DD was brought before a court, represented by a lawyer and released from custody within five days. He was "pushed" while in detention but did not suffer any further physical mistreatment. There is no evidence to suggest that he has been subject to further harassment since his release. Nor is there any evidence that other family members have had any difficulties as a result of his detention. On that basis, the Authority finds there is no real chance that these appellants will experience difficulties because of DD's detention.

The son

[90] The Authority finds that there is no evidence to support a finding of the son being at risk of serious harm should he now return to Sri Lanka.

[91] As already noted, the Authority does not accept that the mother has received threatening phone calls from the LTTE. It follows therefore that the son was not the subject of abduction threats from the LTTE or otherwise at risk of any harm from them. Nor is there any credible basis on which to find that he will be at risk from the LTTE to the real chance level in the future.

[92] The Authority also rejects the contention that simply because the son is a Tamil youth he is at risk of arbitrary arrest and detention by the Sri Lankan authorities and/or forced conscription to the Sri Lankan Army. The mother claims that because the son does not have a current postal identity card (the identity card for school students) he will be detained indefinitely by the Sri Lankan authorities.

[93] The Authority resists this claim. The mother confirms that she has the son's birth certificate and that once in Sri Lanka he can go through the normal process

of obtaining a new identity card. The mother herself has a national identity card which identifies her as being a resident of Colombo and the son's birth certificate establishes his familial relationship to her. The son has no other exacerbating factors (such as lack of residence or family in Colombo, scarring, links to the LTTE, presence in a displaced persons' camp or attempts to travel north) which will put him at risk of detention and mistreatment by the Sri Lankan authorities. He may be questioned about his circumstances at checkpoints or at the airport but such questions do not amount to serious harm. He has been questioned by authorities on the street previously and has never suffered any mistreatment as a result. As to the assertion that he may suffer forcible conscription to the SLA, there is no evidence before the Authority to establish that Tamil youths in his circumstances are at real risk of such treatment. The Authority finds that any risk of him being subject to a serious violation of core human rights at the hands of the SLA or government authorities is speculative and remote.

[94] The Authority accepts that the son may have suffered harassment and discrimination at school including not being chosen for competition sports teams. It accepts that he found this upsetting. While this is unfortunate and undoubtedly unpleasant for the son, it falls well short of being a "sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection". It is well established in refugee law that persecution must be distinguished from discrimination which is not sufficient to establish a case for refugee status (*Refugee Appeal No 71404* (29 October 1999) [65]-[67]). At [65] the decision states:

"It is important to bear in mind that discrimination *per se* is not enough to establish a case for refugee status. A distinction must be drawn between a breach of human rights and persecution, a distinction the Authority has repeatedly emphasised in its jurisprudence. See for example *Refugee Appeal No 30/92 Re SM* (26 November 1992) 22; *Refugee Appeal No 2039/93 Re MN* (12 February 1996) 15-16 and *Refugee Appeal No 70618/97* (30 June 1998) 22."

[95] Taking into account all the characteristics of the son and the predicament he will face on return to Sri Lanka the Authority finds that his claim of discrimination falls short of the "being persecuted" threshold by a demonstrable margin.

[96] As to the contention that the son cannot be enrolled in a school, there is no credible evidential basis on which it is made. The mother concedes that the children were withdrawn from the private schools they had previously attended because they could not pay the school fees and the children were in New Zealand. There is nothing discriminatory or persecutory about the children not now being

able to automatically enrol in those same schools again or in the fact that the parents cannot afford to pay the school fees.

[97] The claim that the children cannot be enrolled in state schools because they are Tamil is not established by the country information provided. Nor has the Authority been able to locate any country information which supports that view. During the course of the hearing the Authority specifically identified what appeared to be a lack of evidence on the point and sought further information from the appellants. The Authority acknowledges the information that has been provided but finds that it does not establish that all Tamil children are prevented from accessing education in state schools in Colombo. One internet article refers to the experience of a Tamil girl who, despite obtaining high marks in a scholarship exam, was refused permission to attend a top Sinhalese school by the Education Minister because her ethnicity would have caused her problems. ("Education Minister Prevents Tamil Girl Admission to Sinhala School" *Trancurrents.com* 17 February 2008). While the article refers to a discriminatory and discreditable act, it reports an isolated incident and does not suggest or refer to widespread impediments to Tamil children attending school generally. The core human right in question is the right to education (Convention on the Rights of the Child Articles 28 and 29) which does not extend to the right to attend elite schools or to be accepted for enrolment by the school of your choice.

[98] Another article submitted refers to a national exam question which was racist in nature: "Now a racist question in A/L paper: UNP" *Daily Mirror Online* (21 August 2009). Again however, while this may indicate there is anti-Tamil sentiment amongst some in the education sector, it does not establish that the appellant children will be unable to enrol at school or will suffer discrimination to the level of being persecuted if they do enrol. Counsel also submitted an article about a father who allegedly committed suicide because his son had faced cruel treatment at one school and was refused permission to enrol in two others. The article also refers to financial difficulties the parents had in paying for some school fees and that police reported one school would have enrolled the child if the correct documentation had been produced. ("Father's suicide caused by schools cruel treatment of his children, says mother" *The Sunday Times* (12 July 2009)). Again, the Authority can place very limited weight on this article because while it reports a tragic incident it does not record a systemic or sustained policy of excluding Tamil children from schools. The article also suggests that there may have been other reasons for the enrolment problems such as lack of documentation.

The daughter

[99] The Authority finds that the daughter is not at risk to the real chance level of being persecuted should she now return to Sri Lanka. She has not suffered serious harm in the past and although past experience is not in itself determinative of the question of future risk it does provide a good indicator of what may happen if she now returned – see *Refugee Appeal No 70366/96* (22 September 1997).

[100] The country information does not establish that an individual with the characteristics and profile of the daughter faces a risk of serious harm in Sri Lanka. Like her brother, she was born in Colombo and has a birth certificate which states that. There is no reason she cannot be enrolled in school and continue to be educated. Nor is there any reason why she cannot obtain a postal identification card. The reasoning outlined above in relation to the son's education apply equally here (see [95]-[97] above).

[101] The mother and counsel have also suggested that the daughter may be at risk of sexual assault or other mistreatment at the hands of the SLAF, other Government agents or paramilitary groups. The country information does not support that claim. While the Authority has been provided with country information outlining the risks to women and girls in the north and in particular to those interred in the displaced persons' camps, the daughter will not be returning to a camp should she now return to Sri Lanka. She will be returning to Colombo to live with her immediate family and possibly other relatives. She has no profile with the authorities, no connection with the LTTE and no characteristics which would raise the level of her risk of serious harm from the SLAF or any other groups to the real chance level.

[102] Counsel has also provided the Authority with a significant amount of country information relating to the situation for: Tamils living in the north, women and children in displaced persons' camps, individuals publicly voicing dissent about the government, people who have suspected links with the LTTE, people who work for aid organisation and journalists. While all of this information details potential risks of harm for certain individuals, these appellants do not share the characteristics or predicament of those to whom the information directly relates.

CONCLUSIONS ON WELL-FOUNDED FEAR

[103] Having considered each of the strands of the appellants' claims separately and cumulatively, the Authority finds that none of them on their own or taken

together satisfy the Convention requirement that there be a well-founded fear of being persecuted for any of the appellants. For each appellant the Authority has also separately considered whether a person having all of the characteristics of that appellant facing the particular circumstances they have identified would face a real chance of being persecuted in Sri Lanka. For the reasons given, we have concluded that the answer for each appellant is “No”. None of the appellants face a real chance of being persecuted should they return to Sri Lanka.

[104] The first principal issue identified for determination is answered in the negative for each of the three appellants. That being the case, the second principal issue does not fall for consideration for any of the appellants.

CONCLUSION

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

“B A Dingle”
B A Dingle
Member