

**AT AUCKLAND**

<b>Appellant:</b>	<b>CK (Sri Lanka)</b>
<b>Before:</b>	A M Clayton (Member)
<b>Counsel for the Appellant:</b>	C Curtis
<b>Counsel for the Respondent:</b>	No Appearance
<b>Date of Hearing:</b>	6 & 7 October 2014
<b>Date of Decision:</b>	28 May 2015

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**REFUGEE AND PROTECTION DECISION**

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[1] This is an appeal against a decision of a refugee and protection officer, declining to grant refugee or protected person status to the appellant, a citizen of Sri Lanka.

**INTRODUCTION**

[2] The appellant claims that he was kidnapped twice in Sri Lanka, once by the Pillayan faction of the Tamil Makkal Viduthalai Puligal (TMVP) to try and persuade him to join their cause, and, on another occasion, by the Criminal Investigation Department (CID) of the Sri Lankan police.

[3] The appeal turns, first, on whether the appellant's account of events in Sri Lanka is credible and, second, on whether the characteristics he is found to have mean he would be at risk of serious harm from the TMVP or the Sri Lankan authorities upon his return.

## THE APPELLANT'S CASE

[4] The appellant gave the following account at the appeal hearing. Its credibility is assessed later.

[5] The appellant, now in his mid-twenties, is a Christian Tamil, the eldest of four children of parents living in the Batticaloa district. His parents remain today in the same house in which he was born and grew up. The house has the family business in front of it. [...] Two of the appellant's siblings still live at home; the eldest of his siblings is at boarding school in Z city.

[6] During his childhood and teenage years, the appellant was exposed to the conflict between the Sri Lankan Army (SLA) and the Liberation Tamil Tigers of Eelam (LTTE). Shells went off close to his school, people were killed in his neighbourhood. In 2006 and 2007, while he was still at school and as part of his association with the church, the appellant would often visit internally displaced person (IDP) camps and resettlement areas.

[7] In 2007 or 2008 the appellant's writing appeared in a publication for poetry written by students in his age group.

[8] In May 2009 the civil war officially ended. In September 2009 the appellant wrote, directed, and introduced a 45-minute stage play, in which he also performed, in front of approximately 100 people. The play's theme was resistance against evil (which could be construed as resistance against the Sri Lankan government).

[9] After the performance the appellant received a lot of congratulatory remarks from people in the audience but, at home that night, he received the first of three or four telephone calls warning him to stop writing anti-government material. He learnt later that other actors in the play were also threatened.

[10] Approximately two weeks later, the appellant accompanied a Father from his church to the IDP camp in Vavuniya and witnessed the awful conditions and suffering there. When he and the Father attempted to return to Vavuniya the next day, soldiers guarding the camp stopped them. They were separated and the appellant was asked if he was an LTTE supporter. The soldiers detained him for approximately seven hours before the Father obtained his release (the appellant does not know how).

[11] Two days after this, three TMVP members came to the appellant's home and told him he should join the TMVP (Pillayan group) as there were good opportunities for him. (The TMVP is a Tamil group that sided with the Sri Lankan government during the war. In February 2009 the Karuna faction of the TMVP joined the mainstream Sri Lankan Freedom Party; the remaining members of the TMVP became known as the 'Pillayan' group.) The appellant assumed they meant there were opportunities in the political wing of the movement and believed he may have been recommended as a good candidate by classmates, some of whom were already TMVP members. When he told the men he wanted to study further, they stopped trying to persuade him to join.

[12] Another three days later, in late September 2009, two armed men came to the door of the appellant's family home and said they needed to question him. He knew they were TMVP members from the distinctive way they dressed. There were two or three other members, also armed, outside in the dark. They warned his parents not to follow them and took the appellant away in a jeep.

[13] The appellant was blindfolded and driven for 15 or 20 minutes. He was taken into a building and escorted through a room where he recognised one of his classmates tied up, and two other classmates whom he knew were TMVP members, one with a gun.

[14] The appellant was locked in a separate room and asked why he had visited the Vavuniya camp. The TMVP members did not believe that he had gone there simply because he was asked to by a church Father, and beat him.

[15] The next day the local TMVP commissioner came in and offered the appellant a salary and identity card if he wished to [...], to support the TMVP cause. When the appellant refused this offer, he was accused of being an LTTE member and beaten severely.

[16] The appellant was beaten each time he refused the offer to join the TMVP, for five to six days.

[17] Some days into his detention, the appellant was asked by one of the guards whether his mother was a [named occupation]. When the appellant replied that she was, the guard told him that he knew her and warned the appellant that his only option, if he did not wish to join the TMVP, was to flee. Otherwise they would kill him.

[18] The guard said he would help the appellant escape and on 2 October 2009, at approximately 4.00 am, the guard opened the appellant's door and helped him climb over a concrete and barbed wire fence. The appellant went to his Uncle AA's home where he was greeted by his cousin. His cousin telephoned her father (Uncle AA) who came in shortly afterwards with a t-shirt and the appellant's wallet. The appellant believes Uncle AA must have had some contact with his parents but he does not know the details. He and Uncle AA travelled by motorbike, avoiding main routes, to the bus stop. From there they travelled together to Colombo.

[19] The appellant stayed with a widowed aunt in Colombo. The aunt's late husband had been a respected army officer. His aunt took him to the local police station to have him registered, introducing him as her nephew who had come to Colombo to study. The appellant gave all his correct information.

[20] At the same time he applied for a passport, but did not use it then as the family decided he was safe enough for the time being in Colombo. The appellant's mother told him that, after he went to Colombo, the TMVP came and searched the family home.

[21] In Colombo, the appellant attended church and stayed at home with his aunt. Then he did a one-and-a-half-year part-time course in Level 5 Computing. At his computing course, the appellant became acquainted with a student by the name of BB who was rumoured to be a police or CID officer. The appellant tried to avoid him but BB constantly pestered him to eat or drink together. The appellant would do BB's assignments for him when he asked, and also gave him money. The appellant did not want to anger BB as the appellant was clearly Tamil, and it was people like BB who would accuse Tamil people of being LTTE supporters.

[22] After the course finished, and the appellant had assisted BB with his final assignment in January 2012, BB stopped telephoning him. The appellant started working for a respected IT company in May 2012. His workplace was close to his aunt's house.

[23] In July 2012, the appellant met BB by chance in his neighbourhood. BB asked which house was his and the appellant pointed to it. He believes that if he had not done so, BB would have been suspicious of him as a Tamil. A little later, the appellant met BB by chance again on a bus and this time, because BB appeared friendly, the appellant told him where he was working.

[24] At approximately 10.00 pm on [...] August 2012, BB telephoned the appellant and asked him to come out for a drink. As BB had been friendly last time they had met, the appellant agreed to do so. As he approached BB at the designated meeting place, the door of a van was opened and the appellant was pushed inside. He was driven for 25 or 30 minutes to a building, and taken to a room where BB re-appeared and confirmed that he was a CID officer.

[25] The following morning the appellant was questioned by BB and three others, none in uniform. They asked him whether he had come to Colombo to study, or in fact to work for the LTTE. They beat him with broomsticks, poured water over him, put a pen between his fingers and squeezed his fingers together. They would not believe that his father, rather than the LTTE, was paying for his studies. They beat him on numerous occasions over two or three days. Then BB rang the appellant's father and told him they knew the appellant was supporting the LTTE and that they were going to kill him if a ransom was not paid. The appellant was then allowed to speak to his father who told him not to worry as he would make arrangements as soon as possible. BB also rang the appellant's aunt.

[26] The appellant was released on [...] August 2012, after having been kept captive for 14 days. He later learnt that his parents had paid his ransom by mortgaging their house for its full value, LKR30 *lakh* (3 million *rupees*).

[27] The appellant had no further contact with BB but BB did call his aunt about a month after the appellant's release. She said he asked whether the appellant was still in Sri Lanka and told her that, should the appellant ever mention the kidnapping to anyone, "they would have no second thoughts about killing him".

[28] Between his release in August 2012 and March 2013 when he came to New Zealand, the appellant stayed hidden at the home of CC (a friend of Uncle AA), in a suburb 13 kilometres out of Colombo. The appellant stayed in his room at CC's place all the time except when, toward the end of September 2012, he began leaving the house approximately two or three times per month to attend to immigration matters.

[29] The 10 or 15 visits he made out of the house over five months were mostly to see DD, the agent charged with getting him out of the country. DD would call or email the appellant with certain requirements. He wanted bank statements from the appellant and his parents and the appellant gave him those, as well as his passport, birth certificate, educational documents, the deed for his grandfather's

paddy field, deeds for his parents' business, details of his father's passport, and his mother's [...] ID. Someone from his family would bring the documents to the appellant and he would then deliver the documents to DD himself.

[30] DD told the appellant that the financial information he had produced was not sufficient to satisfy Immigration New Zealand that a student visa should be granted so DD arranged a false document, a fixed deposit certificate in the appellant's mother's name, showing a balance of 3.7 million *rupees* (30 October 2012). DD tailored other documents to reflect these savings in the mother's name and told the appellant what to write in his personal statement supporting the application.

[31] The appellant was granted a student visa and arrived in New Zealand in March 2013. He stayed with someone whom he described as a "family friend" on his visa application but it took some months before the appellant trusted this person enough to reveal the true nature of his visit to New Zealand and received help to contact a lawyer.

[32] Since he has been in New Zealand, the appellant's brothers have been involved in suspicious incidents. On one occasion, a man tried to manhandle his youngest brother into a white van when he was cycling in the street, in daylight. There were police officers within sight, but they did nothing to help. His parents lodged a complaint of attempted kidnapping with the police.

[33] Following the appellant's kidnapping experience in Colombo, his other brother was sent to boarding school in Z city for his safety. On a visit home to Batticaloa [in] 2013, this brother was assaulted by known TMVP members who questioned him about the appellant's whereabouts. The appellant believes his brother was beaten by these men for one or two hours on a public street in the evening, near a deserted school. His brother was not taken to hospital and did not suffer any broken bones. The brother and the family did not report his assault to the police because the pro-government TMVP and the police are affiliated with one another.

[34] About six months after this assault, the CID started coming to the appellant's parents' home and asking after the appellant. This has happened four or five times now. Also, now, if a TMVP member sees a family member in the street, they ask them whether they have seen the appellant.

[35] The appellant believes that he is at risk from government forces because he has witnessed war crimes. The public and media were not allowed in the

Vavuniya camp, which the appellant visited. Further, he was accused by BB of being a member of the LTTE. The CID know who he is and know he is in New Zealand. They will detain him as soon as he arrives back in Sri Lanka. He will return to a life of fear and death.

### **Material and Submissions Received**

[36] In addition to the Refugee Status Branch (RSB) files received by both the Tribunal and the appellant's counsel, the Tribunal also received from counsel, under cover of letters dated 1 September, 23 September, and 15 October 2014: submissions; statements from the appellant; letters and evidence from sources in Sri Lanka and New Zealand; and relevant newspaper excerpts and country information.

### **ASSESSMENT**

[37] Under section 198 of the Immigration Act 2009 (the Act), the Tribunal must determine in an appeal under section 194(1)(c) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (section 131).

[38] In determining whether the appellant is a refugee or a protected person, it is necessary to identify the facts against which the assessment will be made. That requires consideration of the credibility of the appellant's account.

### **Credibility**

[39] The appellant's account of events that he alleges led to TMVP and CID interest in him in Sri Lanka was vague and mobile. Specific instances are given below.

*Kidnapping by the TMVP*

[40] Why the Pillayan faction of the TMVP was motivated to try and recruit the appellant by force remains unclear. The appellant told the Tribunal he thinks he may have been recommended to the TMVP by classmates, on account of his writing prowess. The Tribunal accepts that this might explain why the group had left him alone when he said he wanted to continue his studies, but it does not explain why the group would resort to kidnapping and mistreating him only three days later.

[41] The appellant told the RSB that, following his abduction, he was taken to a building where he saw a classmate (whom he named to both the RSB and the Tribunal) tied up in the first room he was taken through. He did not mention to the RSB that there were two other classmates (whom he named) in the same room, one with a gun, as was his account at the appeal hearing. This addition of TMVP classmates to his account of the kidnapping followed the appellant's (also new) evidence to the Tribunal that he believed he had been recommended to the TMVP by classmates who were already members of the organisation. The Tribunal considers that, having added these TMVP classmates to his account to explain the group's interest in recruiting him, the appellant then had them re-appear later, by way of continuity, when he was detained by the TMVP.

[42] In his statement to the RSB, the appellant said that when he escaped from TMVP detention to his cousin's house, his cousin "immediately went out and after a while brought his Uncle AA, who was my mother's brother with her. Uncle at once started to organise to take me to Colombo". In contrast, he told the Tribunal that his cousin had telephoned Uncle AA, emphasising that a telephone call was made with his evidence that he was shaking so much he could not dial the telephone numbers himself.

[43] When asked to explain the difference in these accounts, he said he must have made a mistake in the statement, which he pointed out was in English. He said he had intended to say that his cousin had made all the arrangements and that she had gone to another part of the house to bring Uncle AA to the appellant. However, that version does not explain how Uncle AA arrived with the appellant's wallet and t-shirt which the appellant presumes he collected from his parents. All that the appellant's attempt to reconcile the two accounts of how Uncle AA was contacted succeeds in doing, is produce a third account, that Uncle AA was in the house all along and did not have to be telephoned or collected by the cousin.



*Kidnapping by the CID*

[44] The appellant told the Tribunal that his kidnapper BB spoke to his father and then to his aunt about the ransom money. To explain why the kidnapper made a second call to another family member, the appellant said that after demanding the ransom from his father, BB spoke to the aunt to “make arrangements for the money”. Given that the appellant told the Tribunal that his father had said he would make arrangements as soon as possible, this vague response does not explain satisfactorily why BB made this second call.

[45] The appellant said his parents had to mortgage their property for 3 million *rupees* to pay his ransom. When the Tribunal asked for evidence of this, he said this was by way of private loan. His parents had no copy of the loan document and he did not want to ask them to get one from the man who lent them the money, because he did not want his situation “to become public”. The Tribunal does not accept this explanation for the lack of evidence of a mortgage. It is reasonable to expect that if such a large amount had been borrowed by his parents, using their home as security, a loan document or evidence of a charge over their property would be available. There is no reason why asking for such a document would lead to the appellant’s situation becoming public. His reason for not trying to obtain this evidence is vague and unconvincing. The Tribunal finds that no such loan was taken out.

*After the second kidnapping*

[46] About a month after he had been released, the appellant said that BB telephoned his aunt and told her that if the appellant told anyone about being kidnapped, they would have no second thoughts about killing him. This was different from his initial description of the telephone call to the RSB; that BB had told his aunt that he wanted to kill the appellant and wanted to know his whereabouts. Even accepting the later account, it remains unusual that BB should become worried about the appellant talking about the kidnapping a full month after he had released him, having revealed himself to the appellant during the course of his alleged detention by the CID.

[47] Immediately following his release, the appellant claims to have gone into hiding at a friend of his uncle’s for six or seven months in Colombo. He said he stayed for the entire time in his room in the friend’s house, other than going out 10 or 15 times to have interviews and deliver documents to his agent. Asked to explain why, if he was so frightened, he risked going out to deliver documents, he

said he wanted to make sure everything was in perfect order as he did not want anything jeopardising or delaying his travel plans. He believed that, while his parents were knowledgeable, they could make mistakes because they did not have much experience in “immigration matters”. The Tribunal notes that the appellant had no such experience himself. It does not accept that he would have risked delivering documents which had been delivered to him by family members who could just as easily have delivered them to DD, after the appellant had checked them, if he was genuinely afraid. The appellant’s explanation for leaving the house on these occasions is wholly unconvincing and it is not accepted that he was living in hiding prior to coming to New Zealand.

*Arrangements for coming to New Zealand*

[48] The appellant told the Tribunal that, in order to show sufficient funds to obtain a New Zealand student visa, DD organised a false bank certificate showing savings of 3.7 million *rupees* in the name of the appellant’s mother. DD was said to have ‘bought’ the certificate from a finance company in the same building as his office. When asked to explain how Immigration New Zealand was able to have the statement verified as authentic (when it checked by way of telephone call to the finance company in November 2012), the appellant said he believed that DD was clever and dealt with high-ranking officers in the finance company whom he could rely upon to perpetrate the charade of his mother having sufficient funds. The Tribunal notes that the verification was made by Immigration New Zealand without the appellant’s prior knowledge and, while it accepts that false documents are easy enough to come by in Sri Lanka, it does not accept that DD’s methods were so sophisticated as to arrange that a spontaneous verification call to the finance company would be consistent with the false document.

[49] The Tribunal also notes the appellant’s extensive preparations for departure. He says he was kidnapped by the CID in August 2012. In September 2012 his statement of academic record was issued. On 7 November 2012 he applied for a visa. On 21 December 2012 he was issued a police clearance. On 28 February 2013 he was granted a student visa and on 7 March 2013 he left Sri Lanka.

[50] The appellant left for New Zealand on his own passport, without attracting attention from the Sri Lankan authorities. On arrival he took up his course of study.

[51] It took him another three months after his arrival in New Zealand, he says, to trust a person whom he had described as a family friend; enough to divulge his real reason for coming to New Zealand and to seek directions as to how to go about getting a lawyer to help him apply for refugee status.

[52] The pace at which these actions were taken does not imply any particular urgency to bring about the appellant's departure from Sri Lanka (seven months after the alleged kidnapping) or to lodge his claim for refugee status (three months after his arrival in New Zealand).

[53] For all the reasons given above, the appellant's account of being kidnapped in, and then 'fleeing', Colombo, is rejected.

*Subsequent trouble experienced by family*

[54] The appellant described attacks on his two brothers which he says post-dated the RSB hearing in June 2013. The Tribunal does not accept that his brother was attacked by TMVP members interested in the appellant. The description of the assault on his brother by the TMVP expanded in the telling. When the Tribunal expressed some surprise that his brother was beaten for one or two hours on a city street, the appellant's evidence became mobile and the locale of the attack became outside a deserted school. Also surprisingly, despite such a sustained attack, his brother did not require any medical treatment. Further, the appellant's claim that his brother told the TMVP that he was in New Zealand does not adequately explain why the CID should subsequently take such an interest in the appellant that they began visiting his home and, given he alleges they had been told he was in New Zealand, questioning his family members in the streets about his whereabouts.

[55] To explain why a complaint was not lodged in regard to the attack on his brother, the appellant said that that attack was clearly triggered by the TMVP's interest in the appellant. Like everyone else, he said his parents did not make complaints to the police when the TMVP were involved. This is in contrast to the would-be kidnapper of his youngest brother whom his youngest brother did not recognise and who did not ask about the appellant. It seems unusual that a complaint about the attempted kidnapping of the youngest brother was assiduously lodged, despite the fact that police had been in the vicinity of the attempt, witnessed it, and done nothing.

[56] The appellant told the Tribunal that when his parents are approached by the TMVP they tell them that they do not know what the appellant is doing in New Zealand. He told the Tribunal that it is better they say this, than tell the TMVP that he is a student or he is working here because, by giving them less information, there will be less trouble. Given the appellant's claim that the TMVP suspect him of working for the LTTE it is surprising, at the very least, that his parents would decide to pretend they do not know what he is doing in New Zealand when they could just as easily say he is studying or working here (and he will have the visas in his passport to show for it upon his return), thereby quelling suspicion that he may be here for other purposes.

#### *Conclusion on credibility*

[57] Taking the above concerns as to credibility cumulatively, the Tribunal rejects the appellant's evidence that he has been kidnapped twice in Sri Lanka and his claim that he has been of interest, or is of continuing interest, to the TMVP or the CID in Sri Lanka. It follows that the Tribunal does not accept the evidence that the TMVP or CID suspect him of receiving money from, or working for, the LTTE. Nor is it accepted that there have been any difficulties for his family since he left Sri Lanka.

[58] The accepted facts are that the appellant is a young Tamil Christian male who grew up in Batticaloa and also lived and studied for some time in Colombo. His parents have a business as well as working [...], and they and two of his three siblings still live in the same home in which he was raised in the Batticaloa district. One of his siblings is at a boarding school.

[59] It is accepted that when the appellant was approximately 17 or 18 he wrote [...] in a publication for students' [...] and, when he was 19, he staged a short play with a theme of public resistance. Extending him the benefit of the doubt, it is accepted he also visited IDP camps as part of his association with the church and that the TMVP expressed interest in recruiting him to their cause in 2009. (It is not accepted, however, that he was kidnapped by the TMVP for recruitment purposes or that he has an ongoing adverse profile with them.)

#### **Assessment of the Claim to Refugee Status**

[60] Section 129(1) of the Act provides that:

A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.

[61] 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.

[62] In terms of *Refugee Appeal No 70074* (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?

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

[63] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]–[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000) at [67].

[64] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

[65] Before turning to an assessment of the appellant’s situation on his return to Sri Lanka, it is useful to refer to a summary of relevant country information.

[66] It is acknowledged that Sri Lanka remains a country with issues of ethnic-based civil and political conflict and a record of significant human rights violations against some groups within society. As the United States Department of

State notes in its *Country Reports on Human Rights Practices 2013: Sri Lanka* (27 February 2014):

Sri Lanka is a constitutional, multi-party republic. President Mahinda Rajapaksa was re-elected to a second six-year term in 2010. The Parliament, which was elected in 2010, shares constitutional power with the president. The president's family dominates government. Two of the president's brothers hold key executive branch posts, as defense secretary and economic development minister, and a third brother is the speaker of Parliament. A large number of the president's other relatives, including his son, also serve in important political and diplomatic positions. Independent observers generally characterized the presidential, parliamentary, and local elections as problematic. Polls were fraught with election law violations by all major parties, especially the governing coalition's use of state resources for its own advantage. Authorities maintained effective control over the security forces. Security forces committed human rights abuses.

The major human rights problems were: attacks on, and harassment of, civil society activists, journalists, and persons viewed as sympathizers of the Liberation Tigers of Tamil Eelam (LTTE) terrorist organization by individuals allegedly tied to the government, creating an environment of fear and self-censorship; involuntary disappearances and a lack of accountability for thousands who disappeared in previous years; and widespread impunity for a broad range of human rights abuses, particularly torture by police and attacks on media institutions and the judiciary. Disappearances and killings continued to diminish in comparison with the immediate postwar period. Nevertheless, attacks, harassment, and threats by progovernment loyalists against critics of the government were prevalent, contributed to widespread self-censorship by journalists, and diminished democratic activity due to the general failure to prosecute perpetrators.

Other serious human rights problems included unlawful killings by security forces and government-allied paramilitary groups, often in predominantly Tamil areas; torture and abuse of detainees by police and security forces; poor prison conditions; arbitrary arrest and detention by authorities; and neglect of the rights of internally displaced persons (IDPs).[.]

[67] Given that the appellant is a young Tamil male from Batticaloa, who has also lived in Colombo, the Tribunal must look at the particular risk profiles for individual Sri Lankans considered likely to be in need of refugee protection. In the aftermath of the Sri Lankan conflict, the UNHCR produced the *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*. These Guidelines (revised on 21 December 2012) identify the following risk profiles for Sri Lankan returnees:

- (a) persons suspected of certain links with the LTTE;
- (b) certain opposition politicians and political activists;
- (c) certain journalists and other media professionals;
- (d) certain human rights activists;

- (e) certain witnesses of human rights violations and victims of human rights violations seeking justice;
- (f) women in certain circumstances;
- (g) children in certain circumstances; and
- (h) lesbian, gay, bisexual, transgender and intersex individuals in certain circumstances.

[68] It is clear that individuals with real or perceived links to the LTTE are potentially at risk upon return to Sri Lanka. The *Guidelines* elaborate:

However, previous (real or perceived) links that go beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment which may give rise to a need for international refugee protection, depending on the specifics of the individual case. The nature of these more elaborate links to the LTTE can vary, but may include people with the following profiles:

- 1) Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
- 2) Former LTTE combatants or 'cadres';
- 3) Former LTTE combatants or 'cadres' who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, 'computer branch' or media (newspaper and radio);
- 4) Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
- 5) LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE;
- 6) Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.

[69] In his youth the appellant lived in Batticaloa, one of the provinces at the heart of the LTTE efforts to create a Tamil homeland. However, he is not a person who fits any of the profiles above. The performance of his play, publication of his poetry and his visits to IDP camps all occurred between six and eight years ago, and the Tribunal finds that such historic activities do not put him at risk of harm. They did not put him at risk of harm in the past, and there is no reason, now that more time has passed, they would cause him any difficulty in the future.

[70] Further, as already found, the appellant does not have an adverse profile with the CID or the TMVP and there is no credible reason established why he would be of any interest to them now on return.

[71] It follows that, other than “prior residency within an area controlled by the LTTE”, the appellant does not have any of the characteristics or profiles which would, according to the UNHCR Eligibility Guidelines, put him at risk of harm.

[72] Even recognising the concerns about the respect for human rights in Sri Lanka (set out in the United States Department of State report above), the evidence does not disclose that the appellant is at any risk of serious harm if he returns there. Significantly, the appellant left Sri Lanka lawfully and without difficulty in March 2013 on his own Sri Lankan passport, which remains current and on which he can return.

[73] The Tribunal has considered whether a person having all the characteristics of the appellant, facing the particular circumstances that he will experience on return to Sri Lanka, would face a real chance of being persecuted there. For the reasons given, the Tribunal concludes that the answer is “no”. The appellant does not therefore have a well-founded fear of being persecuted in Sri Lanka.

*Is there a Convention reason for the persecution?*

[74] The foregoing issue being answered in the negative, no question of a Convention reason arises for the appellant.

### **Conclusion on Claim to Refugee Status**

[75] The appellant does not have a well-founded fear of being persecuted in Sri Lanka. He is not recognised as a refugee.

### **Claim under the Convention Against Torture**

[76] 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.

[77] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It



does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[78] The findings of credibility and fact are the same under this limb of the appellant's claim.

[79] For the reasons already given, and having taken into account all of the appellant's circumstances, the Tribunal finds that there are no substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand. Accordingly, the appellant is not a protected person under section 130(1) of the Act.

### **Claim under the International Covenant on Civil and Political Rights**

[80] Section 131 of the Act provides that:

(1) 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.

...

(6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.

[81] Again, the findings of credibility and fact are the same under this limb of the appellant's claim.

[82] For the reasons already given, and having taken into account all of the appellant's circumstances, the Tribunal finds that there are no substantial grounds for believing that the appellant would be in danger of being subjected to arbitrary deprivation of life, or to cruel treatment, if deported from New Zealand. Accordingly, the appellant is not a protected person under section 131 of the Act.

### **CONCLUSION**

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

- (a) is not 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.

[84] The appeal is dismissed.

"A M Clayton"  
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Member

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