

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76322

AT AUCKLAND

Before: C M Treadwell (Member)
Counsel for the Appellant: I Uca
Appearing for the Department of Labour: No Appearance
Date of Hearing: 29 June and 24 July 2009
Date of Decision: 17 March 2010

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch of the Department of Labour, declining the grant of refugee status to the appellant, a national of Sri Lanka, of the Muslim faith.

[2] This is the second time that the appellant has claimed refugee status in New Zealand.

[3] On 12 November 2007, the Authority (differently constituted) delivered its decision on the appellant's first appeal – see *Refugee Appeal No 75313* (12 November 2007). It disbelieved his claim to be at risk for his involvement in a new Muslim political party and on suspicion of aiding an attack by the Liberation Tigers of Tamil Eelam (“the LTTE”) on a naval vessel. It found that summonses and a warrant produced by him were fabricated. It accepted that he is a Tamil Muslim who has spent much of his life in a refugee camp in the north-west but found that he did not have a well-founded fear of being persecuted in Sri Lanka.

[4] On the present appeal, the appellant says that, since his first claim, there have been significant developments in the civil war in Sri Lanka, with the Sri

Lankan Army, with the LTTE being effectively eliminated. At the same time, his parents have gone missing and he believes they have been detained by the Sri Lankan authorities on suspicion of being LTTE supporters.

[5] The crux of this appeal is whether the account of the appellant is credible and, if so, whether he is at risk of serious harm if he returns.

[6] This appeal has taken longer than usual. It was originally scheduled to be heard on 29 April 2009. On the day, the Authority granted an adjournment on the ground that the appellant was not fit to be told news from Sri Lanka that his parents were missing. Evidence to that effect was adduced from Dr Wansbrough (as to his fragile mental health) and Gary Poole, psychologist (as to his IQ level and possible brain damage).

[7] Following the hearing, further developments have occurred in Sri Lanka (the defeat of the LTTE, the detention of Tamils in camps and their eventual release) which have necessitated the appellant being given the opportunity to comment. His final submissions were not received until 5 January 2010.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[8] Second or subsequent refugee claims (including appeals to the Authority) are subject to jurisdictional limitations. Section 129O(1) of the Immigration Act 1987 (“the Act”) provides:

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

[9] It follows that it is necessary to consider the appellant's original claim and his further claim, as presented at the second appeal, with a view to determining:

- (a) whether, in terms of s129O(1) of the Act, the Authority has jurisdiction to hear the second appeal and, if so,
- (b) whether he is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

[10] Jurisdiction to hear and determine subsequent refugee claims under s129O(1) of the Act involves a comparison of the claims as asserted by the refugee claimant. In the absence of significant difference in the grounds upon which the claims are based, there is no jurisdiction to consider the subsequent claim. See *Refugee Appeal No 75139* (18 November 2004).

[11] Where jurisdiction is established, the merits of the subsequent claim will be heard by the Authority. This hearing may be restricted by the findings of credibility or fact made by the Authority in relation to the previous claim. Section 129P(9) of the Act prohibits any challenge to a finding of fact or credibility made by the Authority in relation to a previous claim and gives the Authority a discretion as to whether to rely on any such finding.

THE APPELLANT'S FIRST CLAIM

[12] What follows is a summary of the appellant's evidence at the first appeal hearing. It is recorded in detail in *Refugee Appeal No 75313* (12 November 2007).

[13] The appellant is from a Muslim family. Originally from the north, they were displaced by the LTTE to a refugee camp near Kalpitya on the western coast in 1990. In 1998, his brother came to New Zealand and was granted refugee status for reasons unconnected to either of the appellant's claims.

[14] The appellant was, by then, living with an uncle in another village and working in a dive shop. In mid-1999, the LTTE attacked a nearby naval vessel. The police wrongly suspected the appellant of supplying diving equipment. He was detained, beaten and interrogated over five days. His uncle, a Muslim Congress Party ("MCP") member, secured his release with a bribe, undertaking that he would report weekly. When released, however, the appellant moved to another area and never reported.

[15] After the 2002 ceasefire, the appellant went with others to the family village but armed LTTE demanded money. On complaining to an MCP politician they were detained by the police and beaten, being released after another bribe.

[16] The appellant then joined a new Muslim political party as a recruiter but he was arrested by the police for working against the government and the MCP. The police and MCP officials interrogated him and mistreated him for several days.

[17] In mid-2002, the police detained the appellant for undermining the MCP. He was hit with guns, dislocating his shoulder and breaking a tooth. He was accused of forming a terrorist group and was beaten by the police and the MCP politician. He was warned that if he did not leave the region he would be shot.

[18] At the end of August 2002, the appellant was chased and shot at by the MCP politician while he was out campaigning for the party. His parents warned him that he should leave Sri Lanka and he went into hiding.

[19] In mid-2002 the police, looking for the appellant, briefly detained his brother-in-law. His father was also detained for two days and was beaten and accused of being the father of a terrorist. The police continued to visit the appellant's parents, as did the navy, MCP members and others, all looking for the appellant. In October 2002, his brother-in-law and father were again detained and beaten. The appellant remained in hiding until leaving Sri Lanka in October 2002, arriving in New Zealand in December 2003.

[20] Even after he had gone, visits from the police, navy, LTTE and others continued to be made to the appellant's parents' home in search of the appellant. The police delivered two summonses. An arrest warrant followed.

[21] In 2006, the appellant's father came to New Zealand. He gave evidence on the first appeal that, in early 2006, the police came asking for the appellant. They assaulted the family, including the mother. The father was detained, beaten and accused of supporting the LTTE. The brother-in-law was detained by the navy later in 2006, possibly because the police mistook him for the appellant. The appellant's mother moved to Colombo, but was still harassed and questioned by the police as to the appellant's whereabouts.

Conclusion by Authority on first claim

[22] The panel hearing the first appeal concluded that the appellant's account was not credible for the following, summarised, reasons.

[23] The claim to have been implicated in the LTTE attack on the naval vessel was vague and contradictory. He implausibly claimed that he was interrogated and mistreated by police, yet said that his Tamil employer was not.

[24] Implausibly, the appellant's failure to report to the police as undertaken, had no consequences, either for the appellant or his uncle. As to why not, the

appellant said variously that his uncle had told the police that the appellant was living with him and also that the uncle had not told the police where he was living.

[25] The claim to be such a political threat that a politician had tried to shoot him and that the authorities had sought him for years (even long after he left) was in contrast to his brother's return to Sri Lanka without difficulty in 2002 and 2005 and his father's trips to Saudi Arabia in 2005 and to New Zealand in 2006. Such travel undermined the interest the authorities were said to have in him.

[26] There was no evidence of the existence of the new political party. The explanation that it was a "secret party" was at odds with the claim that it had been seeking registration, was campaigning for support and that it had existed since 1990 and had some 5,000 members. Further, the appellant's father could not identify the new party by name or identify its leaders.

[27] The claimed objectives of the new party were indistinguishable from those of the MCP and the Authority found that he had invented the new party. As to his own political views, the Authority found he had conventional Muslim perspectives. It found him to be an ordinary man with no history of significant political activity.

[28] The summonses were for offences in December 2003 and January 2004 (long after he had left in October 2002), the latter purporting to issue under the Prevention of Terrorism Act ("the PTA"), in fact suspended at that time. The documents were late-emerging and the Authority found they were fabricated.

[29] The Authority also rejected the father's claim that he and the family were attacked in early 2006, long after the appellant had left Sri Lanka, finding it implausible that the police had not acted sooner and that the brother-in-law was mistaken for the appellant, who had been absent for years.

[30] The Authority found only that the appellant is a Muslim who spent much of his life in a refugee camp in the north-west. It went on to find that such characteristics did not establish a well-founded fear of being persecuted.

APPEAL TO REMOVAL REVIEW AUTHORITY

[31] On 7 February 2008, the appellant lodged an appeal with the Removal Review Authority, on essentially the same grounds as his first refugee claim. That appeal was dismissed on 29 August 2008.

[32] A second refugee claim was filed seven days later, on 5 September 2008.

THE APPELLANT'S SECOND CLAIM

[33] The Authority heard evidence from the appellant himself, Dr Wansbrough, Mr Poole, the appellant's brother AA and his friend BB.

Evidence of the appellant

[34] The appellant does not recant his first claim and maintains that the account he gave at his first appeal hearing was truthful.

[35] The 2002 ceasefire agreement between the Sri Lankan government and the LTTE formally came to an end in early 2008, after 18 months of escalation of tension and conflict.

[36] In early February 2008, some months after the decision on his first claim on 12 November 2007, the appellant's mother visited him in New Zealand. She told him that she and his father were living in the Puttalam area, staying with the appellant's sister-in-law's family.

[37] The appellant's mother told him that, prior to his father's trip to New Zealand in 2006, his father had begun to have fresh difficulties with the Sri Lankan authorities. Detaining him to try to find the appellant, the Sri Lankan navy had coerced him (the father) into becoming an informer, providing information as to LTTE locations and members in the Mannar region. Fearful for his safety, the appellant's father had gone with the military to point out places where LTTE members would be found. His father had not mentioned this to the appellant when he came to New Zealand because the appellant was mentally unwell at the time.

[38] The appellant's mother returned to Sri Lanka in March 2008 and she and the appellant's father returned to the Kalpitya area, where he was able to find work and accommodation, looking after a coconut plantation.

[39] Two months later, in May 2008, the appellant's friend BB, a New Zealand citizen, travelled to Sri Lanka to visit his own family there. The appellant asked him to visit his (the appellant's) parents and to deliver to them some small gifts.

[40] BB duly contacted the appellant's parents and arranged to meet them at the house of a friend of the appellant's parents. He then borrowed a van and drove to Kalpitya, where he met the appellant's parents for about an hour. The appellant's father told BB that he had recently been detained by the police and questioned about his connections to the LTTE. On the way to and from the meeting, BB was stopped at a number of routine checkpoints.

[41] The following day, BB parked his van in a suburb of Colombo while visiting a friend. When he returned to the van, he found it surrounded by police cars, with police officers trying to break in to the van. He was detained and taken to a police station.

[42] There, BB was questioned about his visit to Kalpitya and was accused of being the appellant. He denied this and pointed to his identity card and driver's licence. Accused of being an LTTE member, he was detained overnight and questioned again the following day. Eventually, an uncle came to secure his release. Thereafter, BB remained in Colombo and had no further contact with the appellant's parents, until his departure from Sri Lanka in July 2008.

[43] Harassment of the appellant's sisters (one in Kalpitya, one in Colombo and one in Puttalam) continued throughout the first half of 2008, resulting in one sister leaving the country for India. The other two sisters followed her in October 2008. The sisters' whereabouts are unknown, though it is assumed they have gone to a refugee camp in Tamil Naidu.

[44] In late 2008, the appellant's brother AA contacted their parents in Sri Lanka. He learned that the father's co-operation as an informer meant that he was no longer suspected of LTTE activity, though the appellant remained a suspect.

[45] In early 2009, the appellant's parents moved to stay with a friend in Negombo. Shortly before the intended hearing of this appeal in April 2009, AA lost contact with them. On learning that they had left for parts unknown, AA called his uncles and asked them to try to locate their parents. His wife's father travelled to India at AA's request, to try to locate the appellant's sisters, in the hope that the parents had gone there as well, but was unable to find either the sisters or the parents in the refugee camps.

The appellant's mental health – evidence of Dr Wansbrough and Mr Poole

[46] The Authority heard oral evidence from Dr Tony Wansbrough, who has been the appellant's doctor for five years, and Gary Poole, a psychologist with the Refugees As Survivors centre. Their evidence was given both for the purpose of the April 2009 adjournment application and for the appellant's appeal generally.

[47] In brief, it is said that the appellant is suffering symptoms of prolonged stress and trauma and is also abnormally low in IQ. Both concerns, it is said, have caused him to present unimpressively at past interviews and are relevant characteristics in terms of the risk of harm to him if he is returned to Sri Lanka.

[48] As to the appellant's trauma, Dr Wansbrough describes him as suffering post-traumatic stress disorder. She has been treating him for a long period and knows his symptoms to be withdrawal, insomnia, nightmares, flashbacks and an inability to care for himself. He has to be reminded to wash and has difficulty coping with everyday tasks. He is not well enough to work. Since at least 2006, he has been on the anti-psychotic Risperidone and on Clonazepam for anxiety and Citalopram for depression, secondary to the post-traumatic stress disorder. He was referred to counselling but it caused him too much anxiety to recall past events. He usually visits Dr Wansbrough with his brother, to ensure that he goes to appointments. He lives with, and is cared for by, AA.

[49] As to his low intelligence, the appellant was assessed by Louis van Niekerk, registered psychologist, in November 2008. In a report dated 28 November 2008, Mr van Niekerk found numerous neurological deficiencies in the appellant, including fine visual motor co-ordination abnormalities, with immediate visual memory of only 28%, reflecting serious visual memory dysfunction and a total IQ on the Weschler Adult Intelligence Scale of 78 (verbal at 86 and performance at 70), where 100 is average.

[50] Gary Poole is a psychologist of 24 years' experience. He has spent the past five years working with trauma victims, including the appellant for the past year. He advises that the appellant suffers severe occipital headaches and has cognitive deficits. He agrees with Mr van Niekerk that the appellant is only borderline intelligent. His score on the Weschler Scale renders him "very dull", such that it would be hard for him to grasp abstract thinking and to understand consequences. Further, the verbal score of 86 was reasonable and suggests that the very low performance score may well be the result of a head injury.

[51] As to the finding on the first appeal that there was no evidence of the appellant suffering mental health issues, the Van Niekerk report and the evidence of Mr Poole and Dr Wansbrough were not adduced at that time. Further, Dr Poole points out that his very low performance IQ score had not been identified prior to November 2008 and it is likely that his better verbal skills masked this.

Evidence of AA

[52] The appellant's brother AA was granted refugee status in New Zealand in the late 1990s. After being granted permanent residence, he returned to Sri Lanka in 2002, during the ceasefire and escorted the appellant out of the country, as far as Malaysia.

[53] AA learned that their parents were missing in January 2009. He did not tell the appellant of this immediately, fearing that the news would exacerbate his already-fragile mental health. AA's most recent contact with relatives in Sri Lanka was two nights before the appeal hearing, when he again telephoned his father-in-law, to be told that there was still no sign of his parents and they were believed to be in custody.

[54] As to why the Sri Lankan authorities would detain a man who had helped them by informing against the LTTE, AA could not say, except to speculate that the authorities may have learned that his parents wished to leave the country.

[55] AA has also tried to find his parents through the Red Cross or Red Crescent. Mr Poole has assisted him by sending emails to the Red Cross in Auckland, who have initiated enquiries.

Evidence of BB

[56] BB confirms that he is a New Zealand citizen of Sri Lankan origins, who went to visit his family in Colombo in 2008.

[57] While there, BB was telephoned by the appellant, who asked him to visit his family in Kalpitya. BB agreed and called the mobile telephone number provided to him by the appellant. He then drove the next day to Kalpitya, passing through several checkpoints. He spent about an hour with the appellant's parents at the house where they had agreed to meet him. While there, the appellant's father told

him that he had been having difficulties with the Sri Lankan authorities. BB then returned to Colombo without incident.

[58] The following day, BB went to visit a friend in another part of Colombo. On returning to his van, he found it surrounded by police who detained him and took him to a police station. There, he was accused of being the appellant and was slapped in the face. He denied it and explained his identity and asked to call his uncle for confirmation. This was not allowed until the following day, however, on which he was released. He then kept a low profile for several weeks, until he left Sri Lanka.

[59] BB has made one further trip to Sri Lanka, in mid-2009, for a family function, and experienced no difficulties on that trip. He confirms, however, that checkpoints were still prevalent in Colombo, notwithstanding that the LTTE had been eliminated as a military force. There is, he says, a greater military presence on the streets now than there was a year ago.

[60] In support of his second claim, counsel has made both opening (24 April 2009 and 25 June 2009) and closing (21 August 2009 and 4 January 2010) submissions and has filed a substantial quantity of country information. It is too voluminous to list and is referred to hereafter as relevant. Further relevant documents submitted are:

- (a) Exchange of emails between Refugees as Survivors and Red Cross;
- (b) Exchange of emails between counsel, Refugees as Survivors and Amnesty International;
- (c) Exchange of emails between Immigration New Zealand (Bangkok) and AA;
- (d) Exchange of emails between counsel and UNHCR (Canberra).

[61] On 27 November 2009, the Authority forwarded to counsel a number of items of country information relating to the unfolding events in Sri Lanka since the hearing and invited comment. That letter resulted in counsel's submissions of 4 January 2010 and the submission of much of the country information which is now before the Authority. Counsel's efforts in the collation of a significant body of material is recognised.

CONCLUSION ON JURISDICTION

[62] As noted in *Refugee Appeal No 75139* (18 November 2004):

[51] Jurisdiction under s 129J(1) is determined by comparing the previous claim to refugee status against the subsequent claim. It is clear from the definitions in s129B(1) that the exercise requires the refugee status officer and the Authority to compare the claims **as asserted by the refugee claimant**, not the facts subsequently found by [the Refugee Status Branch] officer or the Authority."

[63] The Authority is satisfied that, in the present case, the jurisdictional threshold is met.

[64] Put shortly, the second claim asserts that, since the first claim was determined, the appellant's parents have gone missing and are believed to be in custody. Further, there has been a significant change in circumstances in Sri Lanka, with the wholesale destruction of the LTTE by the Sri Lankan Army in mid-2009. The Authority is satisfied that these changes satisfy the jurisdictional requirement and it is necessary for it to address the substance of the second refugee claim.

THE ISSUES

[65] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

"... owing to a 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."

[66] In terms of *Refugee Appeal No. 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

[67] It is necessary first to address the question of the appellant's credibility, including the findings made by the panel on the first appeal.

Whether to rely on findings of fact and credibility from first appeal

[68] The Authority has a discretion to rely upon findings made in relation to an earlier claim. Pursuant to s129P(9) of the Act:

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

[69] Notwithstanding this, Ms Uca seeks to urge the Authority to disregard the findings of the panel on the first appeal as to the appellant's lack of credibility and the facts. Without conceding that the appellant has any right, at law, to challenge those findings, it is appropriate to refer to two aspects of counsel's argument.

[70] First, counsel points to the appellant's low IQ, exemplified by Mr Poole's assessment of him as “very dull”. In contrast, the statement submitted on the first appeal is of such linguistic complexity that it could not have been written by him. Mr Poole was emphatic that the appellant does not have the intellect to have written it. It follows, Ms Uca argues, that the Authority was misled at the time of the first appeal and would have credited the appellant with far more ability than he actually has. Thus, she argues, its findings as to his credibility are unsafe.

[71] Second, counsel submits that the appellant's mental state is one of chronic depression and post-traumatic stress disorder, to the point that his ability to give evidence is affected. His fragility is such that he cannot be told bad news, cannot live independently and cannot hold down employment. This too, Ms Uca says, would have affected his ability to give evidence coherently and impressively.

[72] The Authority has regard to counsel's submissions on this point not because the appellant has any right to challenge prior findings of fact or credibility (he has not) but because the concerns to which she has alluded appear to be ones which it ought to consider, in the context of the discretion it has to rely on its prior findings of fact or credibility.

[73] Notwithstanding counsel's submissions and the assistance of both Dr Wansbrough and Mr Poole, however, the Authority finds that the appellant's IQ

and his mental state do not impugn the findings by the panel on the first appeal. It reaches this view for the reasons which follow.

[74] First, before his first appeal hearing, the appellant attended a lengthy Refugee Status Branch interview and would not have been taken by surprise by the questions on appeal. On appeal, his evidence was taken over four days. He was represented by experienced counsel who had acted for him since the first claim was lodged. The file was comprehensive at over 1,000 pages. His case included evidence from his brother (by letter) and his father (in person). The part of the decision which addressed his credibility exceeded seven pages. While it is accepted that the first appeal statement is too sophisticated to be his own work, that is not to say that he was unaware of it or that he was not closely consulted during its drafting or that he did not endorse it. Indeed, it is clear that he did.

[75] Second, the grounds on which the first appeal panel rejected his credibility are not ones for which either his IQ or his mental impairment were at issue. Significant aspects of the Authority's disbelief arose from concerns unrelated to his demeanour or presentation, such as:

- (a) the absence of any country information confirming the existence of the new political party;
- (b) the implausibility of him working as an active campaigner for a new Muslim political party – a finding reinforced (not undermined) by the assertion, now made, that he is of very low intellect only;
- (c) the failure of the authorities to take any steps when the appellant immediately breached his obligation to report weekly to the police; and
- (d) the significant discrepancies on the faces of the summonses and warrant.

[76] None of these arose from the appellant's incomprehension, confusion or poor presentation. Put simply, the credibility findings of the first appeal panel were not the result of the appellant's IQ or his mental state.

[77] The Authority finds the reasons given by the panel on the first appeal for its conclusions on credibility to be cogent and persuasive and determines to rely upon the findings of credibility and fact made therein.

[78] Given the decision to rely on the findings of fact and credibility from the first appeal, it is now possible to turn to the assessment of the appellant's credibility in terms of the second appeal.

Effect of findings from first appeal on second appeal

[79] Significant aspects of the second appeal derive from the appellant's assertion that his first claim was truthful – a finding which is, in itself, rejected.

[80] The appellant says, for example, that the ongoing harassment of his father and family by the Sri Lankan authorities was a continuation of their interest in him. Given that the first claim (which included the supposed origins of the authorities' interest in him) is not credible, it follows that the claim of ongoing harassment of the family, for the same reason, is also disbelieved.

[81] Other aspects of the second claim are also disbelieved, for the following reasons.

Disappearance of parents

[82] The core of the second claim is the supposed disappearance of the appellant's parents in early 2009. It is believed, the Authority is told, that they are in custody.

[83] The chief difficulty with this assertion is that the appellant's father is said to have become an informer for the Sri Lankan authorities, helping them by pointing out likely LTTE meeting places. It is illogical that he would be, on the one hand, trusted to provide such sensitive information and yet, on the other, detained and held incommunicado by the same authorities.

[84] Asked to explain this, the appellant's brother AA (who had provided the information of their parents' disappearance and custody) suggested that they may have been detained because they were trying to leave the country. Not only, however, had there been no prior evidence that they were trying to leave the country, it must be remembered that both the appellant's mother and father have made trips to New Zealand in the last few years without difficulty. The speculation that they might have been detained for planning a further trip carries little weight.

[85] It is also suspiciously fortuitous that the appellant's parents should have disappeared at a time at which the appellant required grounds for a second

refugee claim. The second claim was filed seven days after the decline of the Removal Review Authority appeal on 29 August 2008, Ms Uca acknowledging that she lodged the second claim on the appellant's behalf without, in fact, knowing of any grounds upon which a 'changed circumstances' argument might be mounted. Predictably, the Refugee Status Branch then dismissed the second claim on 19 February 2009, on the ground that there were no changed circumstances.

[86] It is fortuitous, then, that in the brief period between the Refugee Status Branch's decision of 19 February 2009 and counsel's submissions of 24 April 2009, 'changed circumstances' in the form of the disappearance of the appellant's parents should have arisen. The serendipity is implausible.

[87] It is not overlooked that Mr Poole has been involved on behalf of the appellant in seeking the assistance of the Red Cross/Crescent in trying to locate the appellant's parents. The sincerity of Mr Poole is not in doubt. He, however, has no greater personal knowledge of the actual circumstances as does the Authority and is reliant on information given to him by either the appellant or his brother AA. It is also significant that there is no evidence of any meaningful response from the Red Cross/Crescent, confirming whether or not the parents have been found to be in custody.

[88] Finally, the claimed disappearance of the appellant's parents needs to be seen in the wider context. They are Muslim – a group who have never been associated with the LTTE, who evicted the Muslim population *en masse* from the north of Sri Lanka in the early 1990s. Further, the appellant's parents are not destitute refugees living in impoverished circumstances, as the appellant asserts. His father admitted that he owns property and a plantation in the north. While it is accepted that they were displaced some twenty years ago to a refugee camp, it is not the case that they continue to languish there. As the second appeal hearing progressed, it emerged that they have been most recently living on a plantation which his father manages. They move freely between places such as Puttalam, Negombo and Kalpitya, all on the west coast. They travel overseas on valid passports. These are neither the characteristics of persons suspected by the Sri Lankan authorities of associating with the LTTE nor of destitute persons.

The detention of the appellant's friend

[89] It will be recalled that BB claims to have been detained when he was mistakenly thought to be the appellant.

[90] The difficulty with that claim is that it builds upon the appellant's first refugee claim and the assertion that the appellant was being sought by the authorities at the time he left Sri Lanka. That account has already been found to be untruthful and the underlying premise of BB's account is without foundation.

[91] There are further difficulties with the account.

[92] According to BB, he was detained because his van was seen at the third party's house at which the appellant's parents had met him. For him to be mistaken for the appellant, it would have been necessary for the informant to have known the appellant's parents were there, known they were the parents of the appellant, known that BB was visiting them rather than the owner of the house, known that appellant was of BB's age, known that the appellant was wanted by the authorities and been interested enough to inform the police. That chain of events would then need to be followed by the extraordinary coincidence that the police should spot the van at a random location in Colombo the next day and realise that it was one in which they were interested. Nor does it explain why, if the authorities knew the identity of the van, which was owned by BB's family, they had not simply called to his house.

[93] Finally, the evidence of the appellant and BB was inconsistent. According to the appellant, he had asked BB to visit his parents before BB left New Zealand for Sri Lanka and he gave BB presents to take to his parents. BB, however, told the Authority that the appellant telephoned him while he (BB) was in Colombo, to ask him to visit his parents. As to why the appellant had given a different account, BB had no explanation, except to assert that he must have been mistaken. It would be difficult, however, to make a mistake as to the giving of gifts in New Zealand to be taken to his parents in Sri Lanka. BB cannot fail to know whether he had carried gifts from New Zealand or purchased them himself in Sri Lanka.

Conclusion on credibility

[94] Taking these concerns into account, the Authority finds that the appellant's second refugee claim is not credible. It is disbelieved. As the first appeal panel found, it is accepted that the appellant is a Tamil Muslim who spent much of his life in a refugee camp in the north-western region. To that, the Authority now also adds that it is accepted that he is of low IQ and is suffering mental health issues including depression and post-traumatic stress disorder of unspecified origin. His parents continue to reside in the Puttalam, Negombo and Kalpitya regions.

[95] Given these characteristics, it is now necessary to consider the issues raised by the Convention.

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

[96] “Being persecuted” comprises two elements – serious harm and the failure of state protection; see *Refugee Appeal No 71427/99* (16 August 2000) at [67]. Further, the appropriate standard is a sustained or systemic violation of core human rights. See in this regard *The Law of Refugee Status*, J C Hathaway (Butterworths, Toronto, 1993) at p108 and *Refugee Appeal No 2039/93* (12 February 1996).

Country information

[97] In spite of the destruction of the LTTE in May 2009, a state of tension remains in Sri Lanka generally. Checkpoints still exist in Colombo and across the country (see “Sri Lanka’s Post-war Scenario”, *Dawn* 11 November 2009) and the predicament of many dispossessed and impoverished Tamils remains. Further, there is concern that the end of the LTTE will not prevent the authorities from arbitrarily detaining and mistreating LTTE suspects – see “Sri Lanka: Free All Unlawfully Detained”, *Human Rights Watch*, 24 November 2009. The barring of journalists from parts of the north and media censorship has exacerbated such concerns (see “Journalist Jailed for Criticising Sri Lankan Government”, *New Zealand Herald*, 1 September 2009 and “Sri Lanka’s Post-war Scenario” (*supra*)).

[98] Much of the country information before the Authority relates either to the predicament of ordinary Tamils or to abuses which occurred during the offensive against the LTTE in mid-2009, or in its aftermath. While providing a backdrop, that country information is of limited relevance for two reasons – first, there is little discussion of the Muslim population and second, those events are now in the past. The military offensive is ended and the internment camps are all but emptied. It is not intended to traverse here the substantial information which relates to the plight of Tamil civilians, the human rights abuses perpetrated by both sides during the conflict or the legality of, or conditions in, the post-conflict internment camps. The information is not germane to the circumstances of the Muslim population today.

[99] The country information on Muslims remains sparse, though their predicament was considered in *Refugee Appeal No 76228* (8 December 2008),

which reviewed the country information since the decision on the first appeal of this appellant (*Refugee Appeal No 75313* (12 November 2007)) and noted:

[86] The UNHCR report [*UNHCR Position on the International Protection Needs of Asylum-Seekers from Sri Lanka* (December 2006)] identifies some circumstances in which individual Tamil Muslims might be recognised as refugees under the Refugee Convention. For example, where the asylum seeker is “subjected to targeted violations of human rights by the LTTE, the authorities or paramilitary groups”; if he is an informer, or if he is perceived to be opposed to the LTTE.

[87] However, the UNHCR report did not state that Muslims in Sri Lanka are generally at risk of being persecuted for a Convention reason, and in *Refugee Appeal No 75313* (12 November 2007) the Authority specifically found that:

[97] There is no evidence on which we could reach the conclusion Muslim people as a whole, or generally have a well-founded fear of being persecuted in Sri Lanka or in a region of Sri Lanka.”

[88] It continued:

[101] While a minority group, there are significant numbers of Muslim people in Sri Lanka. Neither the material provided, nor the Authority’s own research, establishes that a Tamil Muslim male from the north-western region, for that reason alone, is currently at risk to the extent that he has a well-founded fear of being persecuted. Muslims are a vulnerable group, but that does not meet the threshold for recognition as a refugee under the Convention.”

....

[89] The Authority has been provided with no country information, and it has found none through its own research, which indicates that a young Muslim Tamil male would, without more, be at risk of being persecuted for a Convention reason in the west of Sri Lanka, or elsewhere in Sri Lanka.”

[100] In April 2009, UNHCR published its “Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka.” Among groups at risk of being targeted, UNHCR included Muslims, stating:

“In the context of the inter-ethnic and political tensions, Muslims have experienced targeted violence and other human rights violations by Government actors as well as pro-Government Tamil groups, in particular in the North and East. In addition, Muslims who are perceived to oppose Government policies or to be outspoken against the LTTE or other Tamil groups, in particular [humanitarian workers and human rights advocates, journalists, government officials or other political actors and some women and children], are considered to be at greater risk of harassment, threats and violence.”

[101] With the elimination of the LTTE in the next month, UNHCR issued, in July 2009, “Notes on the Applicability of the 2009 Sri Lanka Guidelines”, recommending that the Guidelines still be followed, “pending a more detailed assessment of the situation on the ground in the near future”.

[102] Among the substantial country information provided by counsel, the small number of reports about Muslims paint a picture of a group which has harboured

long-held antipathy towards the LTTE and which, now that the LTTE is gone, is re-emerging from the camps on the west coast.

[103] As to the background to the plight of Sri Lanka's Muslims, see "Sri Lanka: About 100,000 Muslim Refugees Victim of Tamil Tiger Ethnic Cleansing Go Home", *Asia News*, 7 December 2009, which noted:

"About 100,000 Muslim Internally Displaced Persons (IDPs) will go home before the end of the year. For the past 20 years, they have lived in refugee camps in Puttalam District and neighbouring areas. Tamil Tigers had expelled them.

The repatriation of northern Muslim communities will begin on 26 December in a ceremony in the presence of Sri Lankan President Mahinda Rajapaksa. The announcement was made by Vanni Member of Parliament and Resettlement Minister Rishard Bathiyutheen who himself lived for a while in the Puttalam refugee camp.

The war between Tamil Tigers and the army deeply marked the fate of the Muslim population from northern Sri Lanka. In 1990, the Liberation Tigers of Tamil Eelam (LTTE) forced Tamil-speaking Muslims to leave their homes in what constituted to an act of ethnic cleansing.

The first to leave were some 1,500 people from Chavakacheri, followed by more from Kilinochchi, Mannar and Jaffna. The latter were rounded up and held in Osmania College and force to leave the city in two days, taking only the clothes they had on their back and 50 rupees.

At least 10,000 families, or 75,000 people, were expelled from the northern region occupied by the Tamil Tigers...."

[104] The role of Muslims in the dying days of the LTTE is also evident. See, for example, "Armed Muslim Youth in East Instructed to Surrender Their Weapons", *TamilNet*, 22 June 2009, which stated:

"...Provincial Government Minister Mr M L A M Hisbullah publicly acknowledged through media that Muslim youth took arms to help the Sri Lankan forces during the war against the Tigers."

[105] It is accepted that there are many unresolved issues for Muslims in Sri Lanka, including resettlement on land which may now be hard to identify or for which ownership is difficult to prove, that homes may have been occupied by Tamil squatters for many years and that there may be significant levels of antipathy from the majority Tamil community. Such issues are well-canvassed by M H M Salman, writing for *Peace Secretariat for Muslims* on 28 September 2009, in "Abandonment and the Secondary Occupation of Property in the North". Mr Salman recognises that there are legal channels for such dispute resolution but also notes the difficulties which will arise, including rights of ownership arising from occupation after abandonment.

[106] Also submitted by counsel is a further *Peace Secretariat for Muslims* article, dated 28 September 2009, by Latheef Farook, entitled "Treatment of Tamil IDPs and Muslim Refugees". Polemic in its view of the neglect by foreign governments of Muslim refugees, it does, however, highlight the fact that not only Tamil civilians but also the 130,000 Muslims who are long-term refugees require assistance to rehabilitate and resettle.

[107] In general, the picture emerging from the country information is that Muslims are not the subject of adverse interest by the Sri Lankan authorities, unless there is suspicion of pro-LTTE activity or support. The vast majority of Muslims do not support the LTTE, which evicted them from their homes in the north twenty years ago. Muslims face the inconvenience of checkpoints that all civilians face but, absent an adverse record, they are not detained or harassed. Many Muslims will, it is accepted, face challenges in reclaiming land in the north. Some may be unable to. Others, like the appellant's parents, will have forged new lives in the western and southern provinces and may elect to remain there.

[108] It is against this backdrop that the appellant's claim falls to be measured.

Real chance

[109] There is not a real chance of the appellant being persecuted if he returns to Sri Lanka. He has no adverse profile with the authorities. He will be able to reside with his parents and, as a Muslim, will not attract the attention of the authorities. It is accepted that he will be returning to Sri Lanka after many years overseas, but the reality is that the Sri Lankan diaspora is vast. As a returning Muslim national with no adverse record, he will be of no interest at the border.

[110] Counsel refers the Authority to *TK (Tamils – LP Updated) Sri Lanka CG* [2009] UKAIT 00049, a decision of the English Asylum and Immigration Tribunal. She urges the Authority to disregard the findings therein and to accept the opinions of two witnesses, Dr Smith and Professor Good, who gave evidence as to country conditions in Sri Lanka. On the contrary, the Authority takes the view that the criticism in *TK* of the evidence of Dr Smith and Professor Good is cogent. But there are stronger reasons for placing little weight on the evidence of either man, or on *TK* generally. Put simply, *TK* concerns a Tamil refugee claimant, not a Muslim. Neither Dr Smith nor Professor Good purported to address anything more than the predicament of returning Tamils. Even for Tamils, however, the Tribunal

found that the military defeat of the LTTE in May 2009 has not aggravated the risk on return and that, if anything, the risk has decreased.

[111] There is no evidence that the appellant's refugee claims in New Zealand are known to the Sri Lankan authorities or that, even if they were, they would take an adverse view.

[112] The Authority has particular regard to the mental state of the appellant. It is accepted that six and a half years of uncertain status in New Zealand have led to depression and trauma for him. Coupled with his low IQ, he will likely require careful support and monitoring, both on being further declined refugee status and in confronting the reality that he must return to Sri Lanka. It is equally evident, however, that he has such support from his family and his mental health workers. In Sri Lanka, he will have the care and guidance of his parents. His depression and trauma will improve once the uncertainty of his future is resolved.

[113] As to the reality that the appellant will be required to negotiate checkpoints in Sri Lanka, it is accepted that he will experience the same inconvenience at checkpoints as all nationals. His status as a Muslim will, however, be immediately apparent from his name and his identity card and there is no reason why he should be subjected to anything more than brief routine questions at the roadside. Such inconvenience falls well short of amounting to serious harm.

[114] The Authority finds that the appellant does not have a well-founded fear of being persecuted in Sri Lanka.

Convention reason

[115] The first issue being answered in the negative, the second issue does not arise.

CONCLUSION

[116] It is concluded:

- (a) The Authority has jurisdiction to consider this second appeal.
- (b) For the reasons given above, the appellant is not a refugee within the meaning of Article 1A(2) of the Convention.

[117] Recognition of refugee status is declined. The appeal is dismissed.

"C M Treadwell"

C M Treadwell
Member