

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76294

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AT AUCKLAND

Before: B A Dingle (Member)

Counsel for the Appellants: J Hindman

Appearing for the Department of Labour : No appearance

Dates of Hearing: 17, 18 February 2009

Date of Decision: 30 June 2009

DECISION

[1] These are conjoint 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 married couple in their 20s. They will be referred to as the husband and the wife respectively. They were both born in the north of Sri Lanka and are ethnic Tamils.

[3] The crux of the claim is that the husband fears serious harm at the hands the Sri Lankan authorities, the Sri Lankan army or a para-military group allied to the Sri Lankan army. He claims that he is at risk because he will be targeted for extortion demands from an anonymous group ("the X group") and he will be identified by Sri Lankan security forces as the brother of a (now deceased) Liberation Tigers of Tamil Eelam (LTTE) member.

THE APPELLANTS' CASE

[4] The appeals of the husband and wife were heard together because their respective cases are based on the same events. Both consented to the evidence of each being treated as evidence in support of the other. What follows is a summary of the evidence presented by them. The credibility of this evidence will be assessed later.

The husband's evidence

[5] The husband was one of four male children to Tamil parents in the Jaffna region of northern Sri Lanka. He commenced his primary schooling in Jaffna.

[6] In the mid-1990s, the husband's family were forced out of their home by the Sri Lankan army ("SLA"), but were able to return some months later. As a result of his anger at the displacement, the husband's older brother, GG, joined the LTTE. In an effort to conceal GG's LTTE membership, the husband's family asked the local village authority to remove his name from their household occupant list so that when the list was sighted by Sri Lankan authorities, they would not question his whereabouts.

[7] In 1997, the husband and his family moved to Colombo and the husband began his secondary education there. Since living in Colombo, the husband has been taken to a police station for questioning on two occasions. In approximately 1997, he was taken from his house in the course of a general house to house check by Sri Lankan authorities. He was taken to the local police station but, after an hour or two he was released without further incident.

[8] In approximately 2000, he was stopped while walking down a street and was taken to the local police station for questioning. When he denied LTTE involvement and showed the police his student identity card, he was released.

[9] Between 2000 and 2004, the husband completed various studies.

[10] In 2003, the husband's parents and brothers returned to their family home in Jaffna. The husband remained living in Colombo. The husband's father worked as a professional in the Middle-East, travelling there for months at a time to work.

[11] In early 2004, he began employment with a computer business ("ABC business") where he worked until April 2008.

[12] In late 2004, the husband established his own business partnership with two others to start an internet café. The business commenced in early 2005 and the husband combined part-time work for ABC business with work at his own internet café.

[13] Sri Lankan authorities, usually the police or army officers, would regularly do checks on businesses operating in Colombo. In an effort to avoid difficulties for themselves or their other Tamil employees, the husband and his business partners forged relationships with local police officers by paying them small sums of money or providing with them with free meals and alcohol.

[14] In early 2007, individuals claiming to be from the Crime Investigation Department visited the husband's business on two occasions. They collected information about the owners and employees of the business and behaved in a threatening manner. Because of these incidents and the deteriorating situation between the government and the LTTE, the husband became anxious about his situation and unsuccessfully tried to sell his share in the business.

[15] In mid-2007, the husband and wife were married.

[16] Soon after the marriage, in July 2007, a business owner who operated next door to the internet café was the victim of an extortion attempt. While he did receive some police protection there was an attempt to abduct him from the street near his business which was only thwarted by the intervention of bystanders. Within days, the business had been sold and the owner had moved with his family to Singapore.

[17] At the end of July 2007, the husband received a telephone call at his business, demanding that he pay the unidentified caller five million LKR within 10 to 12 days of the call. He was told that if he did not pay the money, he would be killed. When the husband protested, the caller simply continued the threats and said that he would call again.

[18] The husband could not think of way to escape the situation so he began planning to raise the money. He decided to sell his share in the business and concluded a deal on 5 August 2007. When the sale was completed, the husband asked one of his business partners to keep the money until it was needed. The husband only shared news of these events with his wife.

[19] On 10 August, the husband received a second call, informing him that he should have the money ready that afternoon. He immediately arranged to pick up the money. He received another call directing him to a busy street location and then a further call, directing him to a white van. He was met by someone he recognised as having been a regular user of the internet café and asked him to step into a van in which there were four men. The man in the back seat was holding a pistol.

[20] The husband was spoken to in Tamil by the man in the front passenger seat and when the men talked among themselves, they spoke in Sinhalese. The husband was asked to produce the money, at which point he explained he only had some of it and that he was unable to get any more. The men threatened that if he did not pay more, he would be killed. The husband was then permitted to get out of the van.

[21] When he got home and told his wife about the demand for money, she insisted that they tell her parents. Together they agreed that the husband and wife should make plans to leave Sri Lanka.

[22] The following day, the husband and his father-in-law went to meet an agent who said he could arrange for the husband and wife's travel to Canada for the sum of 55 lakh rupees. He said they must first apply for Indian visas. On 12 August 2007 they applied for Indian visas on the pretext of going to a relative's wedding. The visas were issued three days later. The agent gave them a contact telephone number in India and said that he would meet them in India in three days.

[23] Once in India, the husband tried to contact the agent but was unable to. Because they had no means of travelling on from India, the appellants decided to return home to Sri Lanka in mid-September 2007.

[24] On return to Sri Lanka, the husband asked his friends and business colleagues to tell everyone that he had travelled to India indefinitely and had disconnected his telephone.

[25] Approximately one week after arriving back in Sri Lanka from India, the appellants moved from the wife's parents' house to another address in Colombo. They did so in an attempt to avoid detection from the extortionists. The husband and the wife both resumed employment with their previous employers.

[26] Although he now had a distrust of agents, the husband was persuaded to consult another agent who could arrange for their travel to New Zealand on a student visa. They hoped to complete the arrangements for a February 2008 intake of students. As part of the visa application process, the appellants needed a police clearance certificate which they both obtained.

[27] In December 2007, the husband became concerned for the safety of his parents in the north of Sri Lanka and persuaded them to relocate to Colombo. He arranged accommodation for them near his parents-in-law's house.

[28] On 17 December 2007, INZ New Delhi received the husband's application for a student visa to undertake tertiary studies in computing in Auckland. His file was transferred to Bangkok for further consideration.

[29] In April 2008, a friend and ex-employee of the husband, DD, moved in to the same shared house where the husband and wife were living.

[30] In late April 2008, as the husband left a friend's internet café, a person called out to him, using his brother's LTTE nickname. The person asked whether he was his brother; the husband denied it and hurried off. The husband was concerned because nobody except close family members and other LTTE members knew of that nickname.

[31] Two days later, the appellants were walking home from work when they were greeted at a bus stand near their house by LL, who looked after the house. Her husband, MM, was also waiting but stood some way off. LL told them that unidentified people had visited the house, seeking the husband and that when he was found not to be there, they had taken DD away with them. LL did not know who the people were.

[32] The appellants immediately boarded a bus and went to the wife's family house. Her father was very concerned and immediately arranged for them to go and stay with a friend nearby. They assumed they would be safe there because the friend had some influence with the local police and his house was never searched. Both of the appellants ceased work at this time and remained in hiding.

[33] On 2 June 2008, a student visa was issued to the husband and a visitor's visa was issued to the wife – the expiry dates for both being 31 July 2009. The appellants' passports were returned to them by INZ in mid-June 2008.

[34] In late July 2008, the appellants departed Sri Lanka without difficulty. They arrived in New Zealand on 23 July 2008.

[35] On 13 August 2008, they lodged their claims to refugee status. They were interviewed by a refugee status officer on 17 and 18 September 2008 and a decision declining their claim for refugee status was issued on 20 November 2008. It is from that decision that they now appeal.

[36] On 10 January 2009, the husband's brother, GG, was killed during fighting between the SLA and the LTTE. The family were informed by the LTTE on 11 January 2009. GG's wife was informed by the LTTE and then her neighbour contacted the husband's family. The family did not tell the husband's mother that he was killed because they knew that she would be so distressed that her reaction would alert their Sinhalese neighbours in Colombo of the incident. Instead they just told her that GG had been wounded and made arrangements for the family to go to India for the foreseeable future. The mother was informed of his death after the family moved to India.

[37] Relatives of the husband's family in the north have been questioned by the SLA. The family's house, which is currently rented out, was visited by the SLA. The tenants put them in touch with the husband's great-aunt who lives in the north and was responsible for the house. She was asked to attend the local SLA camp which she did accompanied by her daughter. They were questioned about GG, how they knew of his death and the whereabouts of the rest of the family. She told the SLA that the family were outside of Sri Lanka. They said another relative VV had told them of the death and as a result VV was called to the SLA camp for questions about GG and the family. She lied and said the family were all settled overseas.

[38] As a result of GG's death and the SLA inquiries of relatives, the husband's family quickly arranged to travel to India to avoid any further problems from the SLA. The family were particularly concerned for the safety of the younger two brothers. They all applied for visas to India and were granted them in mid to late January 2009. Once they all had visas, they travelled to India where they remain. The husband's father will continue travelling to the Middle-East to work and therefore can support the family in India. One of his brothers has a student visa for India and can remain there for some time accompanied by his mother. The other brother is intending to move to the UK to study.

The wife's evidence

[39] The wife is the oldest of three children born to her Tamil parents in Jaffna, Sri Lanka. She has two younger brothers. She commenced her schooling in Jaffna but the family relocated to Colombo in 1991 because her father had work there. She completed her school education in 2001 and in 2002 she undertook a computer course in Colombo.

[40] During her school years, she did not experience any significant problems relevant to this appeal. She recalls that on one occasion, the day after a bomb blast in the city, she and a friend were questioned by police as they played near the train tracks. The police threatened to arrest them but when the wife and her friend produced their student identity cards and started crying, the police let them go. The wife also recalls that she has frequently had to produce her identity card and student card when asked to at checkpoints throughout the city and on occasions she would be asked where she was from. She has never been arrested or detained. She also told the Authority that after bomb blasts or other LTTE attacks in Colombo the authorities would conduct house searches in the suburb in which they lived and sometimes would search the appellant's family house. Her family did not experience any further difficulties in relation to those searches.

[41] In early 2005, after further tertiary study, the wife took up employment at the institution where she had studied. She continued that employment until mid-2008. She remained living with her parents and brothers in Colombo until she was married.

[42] The wife gave evidence which broadly corroborated that of the husband in regards to their meeting, courtship and marriage.

Husband's problems in July 2007

[43] The wife first became aware of the husband's problems in mid-July 2007. One Sunday evening he returned home from work and looked worried and upset. He told her that earlier that day he had received a phone call from an unidentified individual who demanded five million LKR and threatened him with abduction and death if he did not produce the money. The husband told her that he did not have the money and he did not know what to do.

[44] Two days later, the husband told the wife that he was going to sell his share of the business to meet the extortion threat. The wife was comfortable with the decision because even before the extortion demand she had been concerned for his safety as a business owner vulnerable to such demands and threats.

[45] On the day that the husband handed the money over the wife was in touch with him by telephone. She offered to accompany him while he met the extortionists because she was worried about his safety but he refused and insisted on meeting them alone. After he returned home at about 7pm, the husband and wife told her parents what had happened and they counselled the appellants to leave Sri Lanka. The wife's evidence as to the arrangements they made to travel to India was the same as the husband's.

[46] As to the incident in April 2008 when DD was abducted, the wife says that after getting a bus from her workplace to that of her husband, she and her husband walked home. When they got there, LL and MM (the two who looked after the house) were waiting near the bus stop for them. LL told them about the incident while MM stood some distance away and did not interact with them in any way. The husband and wife then left the scene and immediately travelled by bus to the wife's family home.

Events relating to the wife's family since the appellants' departure from Sri Lanka

[47] In mid-December 2008 the wife was informed during a telephone conversation with her mother that her brother, SS, had been arrested and detained by the Sri Lankan police for one night. He was taken to court the following day where his father attended and paid a bribe so that he could be released. Apparently the police suspicions were aroused by the fact that his identity card is marked with an "X" for area code, where normally a "V" would be. The "X" indicates that the holder works in the tea plantations in the north. Since that incident the wife's father has arranged through the Grama Sevaga (village head) to have this changed to a "V" on the brother's card in an attempt to avoid future problems. As a result of this incident the wife's brother now feels frightened to leave the house in case he is detained again.

[48] During the hearing, the wife said that she had just been informed by her mother via telephone about her mother's recent return trip from Colombo to Jaffna to visit her father (the wife's grandfather) who still lives there. The wife's mother reported that during her trip to Jaffa she was photographed by officials in the

airport as she left Jaffna for Colombo. She also reported that while she was in Jaffna she was stopped at a checkpoint and was questioned as to her presence in Jaffna.

[49] As to the wife's predicament on return to Sri Lanka, she contends that she is at risk of serious harm because of her association with her husband. She says that because of the problems her husband has had she will be targeted for kidnap, murder or other serious harm. Further, she says that because the husband's brother can be identified as a past LTTE member she will, by association, also be assumed by the authorities to be involved with the LTTE.

DOCUMENTS FILED

[50] On 12 February 2009, counsel submitted a Memorandum of Counsel and additional witness statements from each of the appellants. Attached to those statements were:

1. a printed copy from the Sankathi.com website on which the details of GG's death were published;
2. a copy of a Sri Lankan government direction on 27 January 2009, reproduced online at tamilwin.com, that the "Official Voice of Tamil Tigers' Online News" site was to be banned; and
3. copies of online Skype conversations between the husband and his brother (then in India) in late January/early February.

[51] During the hearing, the husband produced an audio recording which was recorded from an LTTE website (www.pulikalinkural.com). The recording features the announcement of a list of names of deceased LTTE soldiers, their LTTE nicknames and their permanent and temporary addresses. The announcement was dated as being on 13 January 2009. These audio lists were uploaded frequently during hostilities to mark and honour the dead soldiers, sometimes on a daily basis. The interpreter summarised the content of the recording in the hearing and confirmed that the following information was contained in the announcement: the name of the husband's older brother, GG and his LTTE nickname, II, his permanent address (Jaffna) and the fact that he held the title of "Major" in the LTTE.

[52] Also during the hearing the husband filed the following documents:

1. a copy of a document ("Exhibit A") headed "Selling of the shares" which purports to be a memorandum in the name of the husband that records his sale of his one third share of his business to a named individual on 5 August 2007. The document also records that the husband, as at that date, the husband will not be involved in the business activities from that date. It appears to be signed and witnessed although the witness name is not accompanied by any formal stamp or seal.
2. a medical prescription certificate in the name of the husband, dated 18 February 2009, for the dispensing of Citalopram and Zopiclone. The husband explained that these were to address his depression and anxiety and to help him sleep.

[53] Under cover of a letter dated 16 February 2009, counsel also filed submissions addressing various issues relating to the freedom of movement for Tamils throughout Sri Lanka.

[54] On 2 March 2009, the Authority received counsel's closing submissions and a bundle of documents including the following:

1. a photocopy and translation of his older brother GG's birth certificate which states that he was born in the Government Hospital in Jaffna; and
2. partial copies of the husband's family's passports, showing the dates of issue of the passports and the Indian visas and entry stamps dated in January 2009. These copies were sent to New Zealand from India by way of email attachments and the copies of the accompanying emails were also submitted.

THE ISSUES

[55] 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."

[56] 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

[57] Before addressing the particular issues identified, it is necessary to determine whether the appellants have presented a credible account.

CREDIBILITY

[58] The Authority does not find the entire account presented by the appellants' to be credible. For the reasons which follow, the Authority rejects the husband's claim to have been the victim of extortion, to have been the target of the search by unknown persons which resulted in DD being abducted and to have been approached on the street by someone who used his brothers' LTTE nickname. However, some aspects of the claim are accepted, namely that: the husband's brother was a member of the LTTE and has been killed; that relatives of the husband in the north of Sri Lanka have been questioned about the LTTE brother and their own connections with him; and that the husbands parents and brother have left Sri Lanka for India because they fear retaliation from the Authorities as a result of the publication of GG's association with the LTTE.

[59] In making this finding, the Authority notes counsel's submission that the husband was confused and that any apparent discrepancies in his evidence can be explained on that basis. Counsel also submitted that there were parts of his evidence where the husband could have exaggerated but did not, thereby indicating his evidence was credible. The Authority resists these submissions. At the close of the hearing, the Authority indicated that if counsel wished to make submissions about the state of mind of the appellant then that would require detailed medical evidence were it to be given evidential weight. No further medical evidence has been received. Neither does the Authority accept that because the husband has not exaggerated every piece of evidence where he had opportunity, all of his evidence must therefore be accepted as true. The Authority has carefully

considered the evidence and finds that the husband's assertion that he is confused is self-serving and does not displace the findings below.

[60] This decision first sets out the Authority's credibility concerns in relation to some aspects of the account. It will then turn to consider issues of well-foundedness.

Claimed extortion in August 2007 and Indian visas

[61] The appellants state that they did not make any plans to travel to India until the evening of 10 August 2007 (the day the payment was made to the X group and they threatened the husband). They say it was after this date that they made contact with an agent to arrange travel to India.

[62] However, their evidence as to the timing of these events is not consistent with the Indian visas contained in their passports or information obtained by the RSB as to the process of visa issuance from the Indian Embassy in Sri Lanka. The Indian visas in the appellants' passports indicate that they were issued on 3 August 2007. On any sensible analysis, this indicates that the application for the visas was made even earlier. In short, the visas appear to undermine the appellants' claim that they urgently applied to visit India after the 10 August and only because of the threats made to the husband on the 10 August. On any sensible analysis, this indicates that the application for the visas was made even earlier. In short, the visas appear to undermine the appellants' claim that they urgently applied to visit India after the 10 August and only because of the threats made to the husband on the 10 August.

[63] When asked to explain this discrepancy by the refugee status officer, the husband explained that because an agent obtained the visas he was not sure why date of issuance was 3 August 2007. He said that his father-in-law (who helped with the travel arrangements) asked the agent to explain the dates and that he (the agent) said that the Indian Embassy in Colombo issues visas in batch lots on certain days according to set quotas of visas. Therefore, if the visas promulgated on a certain day were not all issued to specific applicants, they would be used for applicants on a later date. However, this assertion of "batch dates" and quotas is inconsistent with the information provided by the Indian Consulate in New Zealand as to procedures for the issue of visas. The Consulate has informed the RSB that visas are not issued in batches. Therefore, a visa would bear the date on which it was issued in relation to a specific application.

[64] The husband maintained the same explanation when asked about the matter by the Authority and then asserted that in Sri Lanka “even now we could obtain visas with past dates”. He went on to explain that one could also obtain photo substituted passports. However, that assertion does not address the Authority’s concern. The Authority is aware that in almost every country in the world, it is possible to obtain fraudulent and photo-substituted identity documents. However, there is no contention by the appellants that their visas were fraudulently or unlawfully obtained. The issue is simply whether or not the Indian Embassy issues its visas in batches from which individual visas can then be issued at a later date. The evidence before the Authority indicates that this is not so. The Authority finds that the appellants applied for and were issued visas to India before 10 August 2007 for reasons not remotely connected with the claimed extortion or threats against the husband. The Authority rejects the evidence that the extortion ever occurred.

[65] Strengthening that view is the surprising coincidence that when he needed to arrange his urgent departure from Sri Lanka, the wife’s cousin’s wedding was being held, giving them a pretext on which to travel. Although this point is not determinative in itself, it gives a clear impression that the wedding was in fact the real reason for the travel and that is why the visa had been applied for and issued in good time before it.

[66] Also striking, is the fact that when the plan to travel on from India to Canada fell through, the appellants simply returned to Sri Lanka and resumed their old lives. They resumed their previous employment and took up residence in a suburb close to where they had previously lived. The husband says he disconnected his old phone and obtained a new number. Apart from that however, the appellants took no particular measures to increase their safety or security. Nor did they act with any urgency in finding an alternative means of leaving Sri Lanka, waiting for a month after return before approaching an agent and being prepared to wait many months for a New Zealand student visa to be issued. The Authority is not persuaded that the husband was genuinely in fear of his life or safety in September 2007-April 2008.

Other credibility concerns

[67] The Authority also has concerns as to the evidence concerning the incident in April 2008 in which the husband claims he was called by his brother’s LTTE

name. There were inconsistencies between his written statement and his evidence to the Authority as to whether he fled the incident by bus or taxi. When asked by the Authority why his evidence was inconsistent, the husband explained that he was confused and that he had recalled the incident incorrectly to the Authority. He then corrected his evidence to align with his statement.

[68] The Authority does not accept that the discrepancy was the result of a genuine mistake. The Authority asked him a series of questions to help jog his memory about the details of the event and give him an opportunity to spontaneously correct his evidence. He did not do so. Instead, he gave detailed and unequivocal answers to the questions with no indication that he was confused or uncertain about what had happened in what order. The fact that he only claimed to be confused after the discrepancy was outlined is not believable. The Authority rejects the evidence.

[69] The Authority also rejects the evidence about DD being abducted because the appellants' evidence about this incident was inconsistent. In their statements they stated that they arrived home by bus (confirmed by the wife to the RSB) while to the Authority they said they arrived home on foot. When asked to explain, they suggested that the wife had taken a bus from her work to the husband's work before walking home with him. The Authority does not accept this explanation because the coincidence that the mistake in the statement would be replicated, by chance, by the wife in her RSB interview is too convenient to be believed.

[70] Their evidence was also inconsistent as to whether LL was alone or with MM when she passed on the news about the abductors. The statements indicate that just LL passed on the news. In contrast, the wife's evidence to the RSB was that both LL and MM were there. To the Authority the wife said that they were met by LL and MM was also there, but he was standing some way off and this explains why the husband did not previously refer to MM. She could not explain why she had earlier described being told the news by both LL and MM; why the husband would not have seen MM or why MM stood some way off while the important information was being relayed. The Authority finds that the latest version of the account (that MM was there but distant) has been created to explain the disparate earlier statements. The evidence is rejected.

[71] The Authority also found the evidence about the people looking for the husband and the abduction of DD unconvincing for other reasons, including: the husband's vague and mobile evidence as to who he thought the abductors were

and why they came to the house, and because he could not sensibly explain why he took no action in regards to DD's abduction and disappearance despite knowing DD's relative in Colombo. All of these concerns lead the Authority to conclude that the claimed incident of DD being abducted is not true.

SUMMARY OF FINDINGS OF FACT

[72] For the reasons which are set out above, the Authority rejects the husband's claim to have been targeted for extortion and his claim to have been targeted by an unnamed group who abducted DD. The Authority does not accept that the appellants travel to India in August 2007 was in any way related to difficulties relevant to these refugee claims.

[73] However, the Authority does accept the following:

- (a) The husband's brother was a long-time member of the LTTE who was killed in hostilities in January 2009 and whose death was publicised online in more than one location.
- (b) Relatives of the husband have been approached and questioned by the SLA in Jaffna as to the whereabouts of the husband's family, the relatives' own relationship with GG and whether or not they have any association with the LTTE themselves.
- (c) The husband's remaining family have taken urgent measures in response to GG's death, and the perceived risk related thereto, and travelled to India to stay indefinitely with relatives.

[74] These aspects of the appellants' account are largely corroborated by evidence external to their oral and written evidence. The husband produced several items of documentary evidence to establish that his brother was killed in hostilities in January 2009 while fighting for the LTTE (including an audio tape from the LTTE website announcing his death which was still available online at the time of the hearing). The Authority also observed that the husband seemed genuinely distressed when talking about his brother GG and gave spontaneous and plausible detail about his family leaving Sri Lanka as a result and the prospects for his family now that they are staying in India. The Authority finds no reason to doubt this evidence. The husband also produced limited email evidence in relation to communications between him and other family members relevant to family in the

north being questioned about GG's death. In the context of the generally corroborated claim of GG's death and the country information which indicates that family members of LTTE are routinely interrogated, the Authority also accepts that the husband's family members in the north have been questioned by the SLA about GG's death.

[75] In this situation, the profile of the appellants as found must therefore be assessed against the relevant country information to determine whether or not they have a well-founded fear of being persecuted should they now return to Sri Lanka

COUNTRY INFORMATION

[76] At the outset, the Authority observes that the current situation in Sri Lanka is in a state of significant transition and flux due to the recent cessation of military hostilities between the Sri Lankan Army (hereafter "SLA") and the LTTE after defeat of the LTTE forces. The Authority has considered the most recent reports available to it but in doing so acknowledges that media access to much of Sri Lanka is limited, especially so in the north. Relevant news reports are being filed daily and therefore the information that follows represents a snapshot of the reported situation at the time of writing.

[77] The Authority also notes that the present panel has, contemporaneously, been considering refugee appeals for another Sri Lankan appellant whose predicament bears some similarity to that faced by these appellants (he is Tamil). For that reason, the summary of country information outlined in this decision has also been largely adopted in the contemporaneous decision. The decisions are not related in any other respects and the timing of their determination is entirely coincidental.

[78] As is well known, the Sri Lankan President Mahinda Rajapaksa declared victory in the decades-long conflict with the LTTE on 18 May 2009. The declaration followed months of intense conflict during which the SLA pushed north into areas previously considered LTTE strongholds, and overwhelmed the remaining LTTE fighters with considerable military firepower. The final months of the conflict is usefully summarised in the report of the International Crisis Group *Conflict history: Sri Lanka (May 2009)* ("the 2009 ICG report") It records:

"Following the 2 January 2009 capture of de facto LTTE capital of Killinochchi, government forces won back all but small amount of territory held by LTTE in the

Mullaitivu District. Between 250,000 and 300,000 civilians were trapped in areas of fighting, with limited access to food, water or medical assistance. The LTTE forcibly conscripted civilians and prevented others from fleeing LTTE-controlled areas by firing at them, killing many. Government repeatedly bombed and shelled densely populated areas, including its own unilaterally declared “no fire zone”. UN Agencies estimated more than 7,500 civilians dead and over 15,000 wounded between mid-January and early May 2009.”

[79] Since that report, the figure for civilian deaths as a result of the last two months of fighting has been revised upwards to a figure of 20,000 with many more listed as wounded. (“UN chief knew Tamil civilian toll had reached 20,000” *Times online* (30 May 2009)).

[80] The 2009 ICG report summarises the current fate of the 300,000 mostly Tamil civilians in the north and east who were forced to flee the fighting.

“With the military phase of Sri Lanka’s thirty-year civil war apparently over, major challenges remain before a lasting peace can be found. Nearly 300,000 civilians who escaped the fighting are now held in overcrowded government-run internment camps. The displaced are denied the right to live with relatives or host families and UN agencies and humanitarian organizations have not been granted full and unimpeded access to the camps and are thus unable to deliver adequate supplies and services. There are also serious concerns about the protection of residents from threats from government-backed Tamil paramilitaries, government security forces, and remaining LTTE cadres within the camps. Government officials have sent conflicting signals on how long people will be forced to remain within the camps, with estimates ranging from six months to three years.”

[81] The Sri Lankan government justifies the internment of Tamil civilians on the basis that it needs to identify an unknown number of LTTE suspects in the camps. (“Sri Lanka’s post-war resettlement stalls” *Christian Science Monitor* 19 June 2009). Human Rights Watch reports that the government is developing a system of registration and passes which those in the camps will be able to use to travel in the area but “young or single people would not be allowed to leave” (“Sri Lanka: End Illegal Detention of Displaced Population” Human Rights Watch (11 June 2009)).

[82] In addition to the civilian internments, Human Rights Watch report that the Government has also detained more than 9000 alleged LTTE fighters and those suspected of having LTTE connections in separate camps (“Sri Lanka: Avoid a Postwar Witch Hunt” *Human Rights Watch* 3 June 2009). The same report records that international agencies have little or no access to the suspected LTTE detainees or oversight of the “screening process” which the government is undertaking to identify former LTTE fighters. There appears to be no formal registration of those detained and in many cases, families of the suspects have no idea of their whereabouts.

[83] In the initial period following the death of the LTTE leader Vellupillai Prabhakaran, there appeared to be disagreement amongst the remaining LTTE leaders about what direction the organisation would take. However, in mid-June 2009, the LTTE international relations chief, Selvrasa Pathmanathan, announced that the LTTE would continue to pursue its aim of securing a separate Tamil state. Such announcements will likely heighten the sensitivity of the Sri Lankan government to the potential re-emergence of Tamil resistance.

[84] The country information confirms that the government is focused on maintaining tight security control in all areas of country and particularly in the north east and in Colombo. This appears to be both to ensure that no further pockets or LTTE or Tamil resistance emerge and to identify those who have links with the LTTE. To that end, the military presence in the north and east is highly concentrated and army leaders have announced an intention to recruit a further 100,000 army soldiers, to boost the army numbers to 300,000 (Human Rights Watch ("Sri Lanka: Tigers under the bed" 18 June 2009)). One reporter recently witnessed hundreds of armed SLA soldiers lining the roads near an eastern town, waiting to respond should there be any further outbreaks of LTTE violence ("The Disappeared" *The Observer* (14 June 2009)).

[85] Despite the cessation of hostilities, the government is maintaining other restrictive measures which it claims are necessary to maintain the peace and security in Sri Lanka. In fact, some observers have expressed fear that the government, encouraged by its own recent military success, will use the post-war situation to impose more restrictive and oppressive measures on those it considers to be opponents. ("Sri Lanka: Avoid a Postwar Witch Hunt" *Human Rights Watch* 3 June 2009). The Prevention of Terrorism Act, which was fully implemented in 2006 and which is used to arrest and indefinitely detain LTTE suspects and government critics, remains in place. On 9 June 2009 the Parliament voted to extend the State of Emergency for another month under which the security forces have sweeping powers to arrest and detain suspects on vague grounds relating to national security ("Sri Lanka extends emergency laws" *BBC News* 9 June 2009). Both of these laws are used routinely to detain people indefinitely, often without charge, legal representation or access to the courts.

[86] The Sri Lankan government continues to be highly suspicious of civilian Tamils generally and it is implicated in treating some of those it believes to have been associated with the LTTE with arbitrary brutality. In May 2009, there were

several reports of suspected LTTE fighters being identified by authorities within the internment camps and being killed or seriously mistreated (See for example “The tragedy of refugees in Sri Lanka, hidden from the eyes of the world” *Asia News* 19 June 2009). In one incident, the bodies of eleven women who had been living in the Menic Farm camp and had been identified as LTTE fighters (because of their short haircuts) were found outside the perimeter fence of the camp with their throats cut. (“In Sri Lanka the war is over but Tamil Tiger remnants suffer brutal revenge” *The Guardian* (21 May 2009)). Also reported is the abduction of young children by paramilitary groups from the internment camps from where they are taken to nearby army camps and questioned about ties to the LTTE which was well-known for recruiting child soldiers. (“Tamil children ‘being abducted’” *BBC News Online* (20 May 2009); “Women killed and children kidnapped as Tamil Tiger remnants suffer brutal revenge” *The Guardian* (22 May 2009)).

[87] The intolerance for those perceived to have been aligned with the Tamil cause is not limited to suspected LTTE members. Journalists, aid workers and witnesses who have visited LTTE controlled areas or who have spoken critically of the Government face arrest, prosecution, intimidation and abduction (see, for example “Journalists trying to cover the fate of Tamils are threatened, obstructed” *Reporters Without Borders* 29 May 2009 online at www.unhcr.org). On 1 June a journalist and free press activist who has openly criticised the Government was abducted and beaten by unidentified thugs in Colombo (“Poddala Jayantha: Sri Lanka Free Press Advocate Abducted, Beaten As Part Of Ongoing Trend” *Huffington Post* 1 June 2009). International journalists are subjected to similar intimidation, a number having been deported after criticizing the government or reporting on conditions in the internment camps (“Sri Lanka throws out three Channel 4 journalists” *The Guardian* (10 May 2009)).

[88] Humanitarian aid workers too have suffered arbitrary arrest, detention or “disappearance” with some being accused of smuggling LTTE members out of the camps. (“Sri Lanka’s postwar resettlement stalls” *Christian Science Monitor* 19 June 2009). The attitude of the government has been recorded by Human Rights Watch (“Sri Lanka: Tigers under the bed” 18 June 2009) as follows:

“The government is also systematically harassing and threatening aid workers, the media and Sri Lankans who question the detention policy. It has refused visas to some humanitarian workers and kicked out others. Many Sri Lankan journalists and activists have fled the country recently, fearing the notorious “white vans” that have for so long picked up dissidents in the night and made them disappear ...Virtually anyone who had any contact with the LTTE, whether Sri Lankan or foreign, is now a suspected LTTE sympathiser.”

[89] Travel throughout Sri Lanka, while marginally improved by the re-opening of roads, train lines and airplane flight paths, is still characterised by frequent militarised checkpoints and comprehensive screening of travellers by the security forces. One *Observer* reporter described his recent trip north as being punctuated by frequent military checkpoints. He recorded that the military is “on every corner” and has effectively created a border across the entire north of the island (“The Disappeared” *The Observer* (14 June 2009)).

[90] Most of the roads recently re-opened are only for use by pre-authorised trade vehicles transporting approved supplies to the north. (“Sri Lanka to open key highway in north” *Xinhua News Agency* (20 May 2000); “Restoration of Yal Devi train service the beginning of restoring dignity to Tamil people - President” *Reliefweb* (22 June 2009)). These vehicles are all required to pass through checks by security personnel before they can travel north, sometimes under the direct supervision of an army convoy. Some commentators suggest that the number of checkpoints has increased since the cessation of hostilities in May 2009 (See for example “The Disappeared” *The Observer* (14 June 2009)).

The situation in Colombo

[91] In Colombo too, frequent military checkpoints and roaming military patrols are continuing the long-established pattern of house searches and the arrest and detention of Tamils, particularly young men. A short *Tamilnet* article on 23 June 2009 states that “search and check operations have escalated in Colombo in recent times” (“7 Tamil youths arrested in Colombo” *Tamilnet* 23 June 2009). This statement aligns with other country information which indicates that young Tamil men are being arrested on an almost daily basis in Colombo, some being held indefinitely and without access to family or legal representation. Those without a Colombo identity card and with only casual employment or temporary accommodation are most at risk of being detained for longer periods. (See, for example, *Tamilnet* 20 June 2009 “12 Tamils arrested in Wellawatte” and “Police detains 3 Tamil youths in Colombo” and 16 June 2009 “9 Tamil youths arrested in Colombo” and 4 June 2009 “25 Tamil youths arrested in Colombo”).

[92] In addition to arrests, “disappearances” of ethnic Tamils in the north and in Colombo remains a serious problem. (*Human Rights Watch* “Sri Lanka: Avoid a Postwar With Hunt” (3 June 2009)). Such disappearances are most often attributed to the SLA or paramilitary groups aligned with the army. The

International Crisis Group estimates that “at least 2,000 people – possibly many more – have been forcibly “disappeared” in Sri Lanka since early 2006”. (“Sri Lanka: after the war” ICG (updated 16 June 2009) at www.crisisgroup.org).

[93] Recent Tamil arrivals at the international airport in Colombo are being subjected to increased scrutiny with multiple instances of returnees being interrogated, arrested and some being detained on arrival on suspicion of being LTTE operatives from overseas. The *Sri Lankan Guardian* reported that two Tamil youths were arrested after arriving from Doha (“Two Tamils arrested in Katunayake Airport on arrival from Qatar” 17 June 2009). They were arrested by police as they were leaving the airport grounds with relatives. The report states that the relatives were also taken into custody and questioned, but were released the same day. The two youths were still in custody at the time the article was written. In another reported incident, 15 Tamils arriving from London were detained incommunicado for nearly two weeks during which time they were interrogated by security about their connections with the LTTE in London (“Sri Lanka harass visiting Tamils at the Colombo airport” *Sri Lanka Guardian* 10 June 2009). In the same article it is reported that a young Tamil woman was also searched, held and interrogated for three hours on arrival. After denying she was involved in the London protests criticising the Sri Lankan military offensives she was released.

[94] As to the fate of those arrested and detained on suspicion of association with the LTTE, it is widely acknowledged in international reports that intimidation, mistreatment and torture are routinely employed by the security forces. Representative of the prevailing view, the UN Special Rapporteur on Torture, Manfred Nowak, concluded that “torture is widely practiced in Sri Lanka” after a visit there in October 2007 (United States Department of State *Country Reports on Human Rights Practices for 2008: Sri Lanka* (25 February 2009)).

[95] Also generally acknowledged is that Sri Lanka’s domestic institutions are demonstrably unwilling or unable to deal with the systemic violation of human rights within the security forces. Illustrative of international reports the Human Rights Watch report “Return to War, Human Rights under Siege” (5 August 2007) noted that:

“Impunity for human rights violations by government security forces, long a problem in Sri Lanka, remains a disturbing norm. As the conflict intensifies and government forces are implicated in a longer list of abuses, from arbitrary arrests and “disappearances” to war crimes, the government has displayed a clear unwillingness to hold accountable those responsible for serious violations of

international human rights and humanitarian law. Government institutions have proved inadequate to deal with the scale and intensity of abuse." (Section X, Impunity for Rights Violations)

[96] The information cited above is representative of the abundant international news reports recording the current situation and there is no benefit in further recording them.

OBJECTIVELY, ON THE FACTS FOUND, DO THE APPELLANTS' HAVE A WELL-FOUNDED FEAR OF BEING PERSECUTED ON RETURN TO SRI LANKA?

[97] 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).

[35] In determining what it means that a fear be "well-founded", the Authority has consistently adopted the approach set out in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), in which it was held that even a low likelihood of harm can be enough to afford an appellant the benefit of the protection conferred by the Refugee Convention. A well-founded fear of being persecuted is established when there is a real, as opposed to a remote or speculative, chance of such persecution occurring.

The husband

[98] The Authority accepts that, given the present heightened state of sensitivity by the Sri Lankan government and security forces to those suspected of being connected to the LTTE, the husband would face a real chance of being persecuted should he attempt to return to the north at this time. He could not travel north to his relatives without being stopped at the many checkpoints in place and, as a Tamil male whose brother was an LTTE member and was publicly declared to have been killed in hostilities, there is a real chance that he would be suspected of LTTE links and would suffer arbitrary arrest, detention and physical harm.

[99] The Authority also accepts that in the present situation of intense military presence throughout Colombo, the husband faces a real chance of being detained and mistreated at the airport, during a "cordon and search" house search or at a military checkpoint. The appellant's identity card will identify that he is from the

north. That, without evidence that he has permanent employment or other reasons for being in Colombo, will invite careful scrutiny by the authorities. Again, there is a real chance that should the husband's identity be investigated further, the link with his LTTE brother will be identified and will cause the husband to be at risk of serious harm.

Convention reason

[100] The husband faces a real chance of being persecuted in Sri Lanka, at least in part, on account of his race.

The wife

[101] For the wife, the Authority finds that she will not face a real risk of being persecuted on return to Sri Lanka. The risk faced by her husband is because of his situation as a relatively young, Tamil male who has an immediate family connection with a (now deceased) LTTE member, GG. The link with GG is by name and through birthplace and, if the authorities investigate carefully, through the household occupation records of the husband's family prior to 1996. There is no such connection with the wife. Her family are living and are registered in Colombo. As she concedes, although she has been questioned on previous occasions (years ago), she has not experienced arbitrary arrest or detention in the past. Neither has her family in Colombo been questioned by the authorities in relation to GG's death. The wife does not possess the characteristics of being a young male Tamil which expose individuals generally to a greater risk of being stopped, questioned and taken into custody from a checkpoint in Colombo. As to the risk of her being exposed to serious harm simply on the basis of her association with her husband, the Authority does not find that contention is established by the evidence before it.

[102] The Authority finds that, based on the country information and the particular personal characteristics of the wife, she does not face a well-founded fear of being persecuted on return to Sri Lanka. The first principal issue having been answered in the negative for the wife, there is therefore no need to address the second issue.

CONCLUSION

[103] For the above reasons the Authority finds that the husband is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted to him. His appeal is allowed. The wife is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Her appeal is dismissed.

"B A Dingle"
B A Dingle
Member