REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 74813

AT AUCKLAND

Before:	E M Aitken (Chairperson)
Counsel for Appellant:	C Amery
Appearing for NZIS:	No Appearance
Date of Hearing:	13 August 2003, 1 September 2003 & 14 October 2003
Date of Decision:	6 November 2003

DECISION

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[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, a national of Sri Lanka.

PROCEDURAL ISSUES

Leave to appeal out of time

[2] The appellant arrived in New Zealand on 16 January 1998. His application for refugee status was lodged on 29 January 1998 by his then agent, Sam Fernando, together with an authority signed by the appellant authorising Mr Fernando to act on his behalf. All correspondence between the RSB and the appellant was through Mr Fernando.

[3] The appellant was interviewed by a refugee status officer on 24 October 2001 and sent a copy of the interview report together with a request for further information on 23 April 2002. On 6 May 2002, he replied directly to questions raised by the refugee status officer in his interview report. In that letter, the

appellant provided a residential address but at no time notified the RSB that he had withdrawn his instructions from Mr Fernando or that the address to which communications should be sent should be amended.

[4] On 11 September 2002, the RSB notified the appellant through his representative, Mr Fernando, that his application for refugee status had been declined. It enclosed a copy of the decision together with notification of the appellant's appeal rights. Mr Fernando immediately returned the decision to the RSB claiming that he no longer had instructions to represent the appellant.

[5] The RSB took no further steps to communicate the decision until the appellant contacted its offices on 22 November 2002. At that time the appellant advised the RSB that he had had no contact with his agent and sought information regarding the status of his application. He was advised that it had been declined and a copy of the decision was forwarded to him. He lodged a notice of appeal the same day as receiving this advice, 22 November 2002.

[6] Section 129O(3)(b) of the Immigration Act 1987 provides that an appeal must be lodged within 10 working days after receipt of notification of the decision (13 September 2002), or within such further time as the Authority allows. Whether the appellant's appeal was lodged within time depends on whether notification of the decision to Mr Fernando was effective notification to the appellant of the decision declining him refugee status.

[7] Section 129G(4) of the Immigration Act 1987 provides:

> A claimant must provide an officer with a current address in New Zealand to which communications relating to the claim may be sent *and* a current residential address, and must notify the officer in timely manner of a change in either of those addresses. The officer may rely on the latest address so provided for the purpose of communications under this Part [of the Act]. (emphasis added)

[8] Regulations 3(b) and (c) of the Immigration (Refugee Processing) Regulations 1999 provide that, on lodging a claim to refugee status, an applicant must also provide "a current address to which communications relating to the case may be sent, including a facsimile number if appropriate" and "a current residential address for the claimant".

[9] Clearly two addresses are contemplated by the relevant legislation, an address to which communications may be sent and a residential address.

[10] Regulation 10(3) provides:

> The determination, the reasons for it, the right of appeal, and matters relating to the exercise of appeal rights must be notified to the *last address* or facsimile number *supplied by the claimant*…(emphasis added)

[11] Whilst this provision does not specify which "last address" (the address for communications or the residential address) when the relevant provisions are read as a whole it is implicit that Regulation 10(3) is referring to the last address for communications.

[12] The appellant told the Authority that he and Mr Fernando had an angry exchange at one point and 'lost contact'. Several months later the appellant contacted the RSB directly. Mr Fernando had earlier advised the RSB that the appellant had withdrawn his instructions.

[13] In any event, the address provided for communications remained that of Mr Fernando. The appellant did not advise the RSB of any change in his address for communications, nor that he had withdrawn his instructions from Mr Fernando. His letter of 6 May 2002 did not allude to his dispute with his counsel. It did include his residential address. While he could have provided that to the RSB as his address for communications once he effectively withdrew his instructions from Mr Fernando, he did not do so.

[14] Absent any suggestion to the RSB that the appellant's address for communications had changed, the Authority is satisfied that the RSB properly notified the appellant of the decision declining his application for refugee status by advising his representative on the record, Mr Sam Fernando. Section 129(G)(4) of the Act clearly places the responsibility on an applicant to notify the RSB of any change in his/her address for communications. The appellant did not do this until November.

[15] Accordingly, the Authority is satisfied that the decision was notified to the appellant on 13 September 2002 (the date it was received by Mr Fernando) and that the appellant had 10 working days from that date in which to lodge an appeal. By lodging his appeal more than two months later on 22 November 2002, the appellant was clearly out of time and requires, in the circumstances, the leave of the Authority to appeal.

[16] The Authority's jurisdiction to extend the time limit for lodging an appeal is stipulated in Section 129O(4) of the Act. It must be satisfied that "special circumstances" exist. The Authority will consider *inter alia* the length of the delay,

the reasons for the delay and the merits of the substantive appeal (see *Refugee Appeal Nos. 46/91* (19 August 1991) and *59/91* (19 May 1992) which, while dealing with the Authority's jurisdiction prior to the enactment of Section 129O(4) set out the relative principles). An affidavit must be filed setting out *inter alia* the reasons as to why the time limit was not complied with and identifying the special circumstances. (See also the Authority's Practice Note 2/99 at para 26.3.)

[17] Notwithstanding his failure to notify the RSB of the change in his address for communications, the appellant did continue to pursue his application. It was he who contacted RSB in November and, on being advised a decision had been made, he acted promptly in lodging his notice of appeal.

[18] He claims an ongoing politically-motivated vendetta puts him at risk of harm on return to Sri Lanka. *Prima facie* such a claim cannot be said to be without any merit.

[19] In the circumstances leave is granted to the appellant to appeal out of time.

[20] However, there is a further procedural hurdle for the appellant to overcome.

Previous decision of the Authority

[21] In his Notice of Appeal the appellant provided only one address to the Authority. Regulation 14(3) of the Immigration (Refugee Processing) Regulations 1999 provides:

> "A notice of appeal must contain a current address in New Zealand to which communications relating to the appeal may be sent.…The notice must also include the appellant's current residential address."

[22] In this case the appellant provided only his residential address, noting that his postal address was the "same". Clearly the appellant intended communications to be sent to his residential address. Where only one address is provided, the Authority must be entitled to assume that it is the address to which an appellant wishes communications to be sent.

[23] The Authority wrote to the appellant on 3 March 2003 at that address advising him that his appeal had been set down for hearing on Thursday 17 April 2003. The letter was returned to the Authority stating that the appellant no longer resided at that address. A subsequent letter was sent but it too was returned. The

Authority's Secretariat attempted to telephone the appellant on the number he had provided on the Notice of Appeal. It was advised the appellant had changed his telephone number but the new number was "confidential".

[24] Not surprisingly when the matter came before the Authority on 17 April 2003, the appellant did not appear.

[25] Section 129P(6) of the Immigration Act 1987 permits the Authority to determine an appeal if the appellant fails to appear without a reasonable excuse. However, in the absence of the appellant the Authority concluded that it could make no findings of fact and the appeal was dismissed as a result of the appellant's non-appearance (*Refugee Appeal No. 74440/02* (14 May 2003)).

[26] A copy of the decision was forwarded to the appellant on 14 May 2003. It was not returned to the Authority. The following month, on 5 June 2003, the appellant notified the Authority of his change of address. There was some ensuing correspondence with the appellant and a representative instructed briefly by him before 7 July 2003 when that representative advised the Authority that the appellant had been arrested and detained, his permit having expired. On 16 July 2003 counsel now on the record was instructed to pursue the appeal.

[27] Pursuant to the Authority's well-established jurisprudence, where it has previously dismissed an appeal without a hearing on the basis of non-appearance, the Authority will consider an application for a new hearing of the appeal. The application must be accompanied by an affidavit setting out the reasons for the non-appearance. The Authority, in determining whether to grant the application, will consider both the reasons for non-appearance and the substantive merits of the case. (See further *Refugee Appeal No. 680/92* (27 February 1995).)

[28] In his affidavit of 1 August 2003 the appellant claimed he was suffering depression at the time and failed to advise the Authority of his change of address.

[29] He tendered evidence that, between 24 February and 22 March, he was absent from work and being treated for depression. The medical practitioner, Dr Seldakumar, general practitioner, records that this absence was due to depression and that the appellant "wasn't able to attend to his immigration matters during this period". At the hearing before the Authority, the appellant claimed that he had changed his address between lodging the notice of appeal and the Authority's notification of his hearing date. He claims he was depressed, unwell and not

functioning properly at the time. As a consequence he took no steps regarding his appeal until his mental health improved.

[30] Having heard the appellant's evidence as to the reasons for his non-appearance, the Authority accepts he has suffered periods of mental ill-health that impacted on his ability to participate in the appeal process in April 2003. In these circumstances his application for a full hearing of his appeal is granted.

THE APPELLANT'S CASE

[31] What follows is the account presented by the appellant to the Authority. The assessment of his credibility follows later in the decision.

[32] The appellant is one of two children born to his parents. He completed his secondary schooling in Sri Lanka and obtained his commercial pilots' licence. However, before he had completed his flying hours he was persuaded to run the family businesses instead. Both his mother and father had family businesses – his mother's family in an oil mill in D and his father's family in an irrigation works company that operated north of Colombo. The appellant soon held a reasonably significant management role in the oil mill in D for which he received a salary. He had less involvement in the irrigation business and was not paid for his work there. Instead, a share of the profits from that business was paid to his mother after his father's death in the early 1980s.

[33] The appellant married and he and his wife had one child. However, they have divorced since his arrival in New Zealand and his ex-wife and child now live in Belgium with his ex-wife's new husband.

[34] The appellant has one sister who resides in Sri Lanka. His father died in 1983 and his mother in April of this year, both from natural causes.

[35] From 1990 the appellant has been actively involved in the United National Party (UNP). His mother's family have a relatively long history of UNP activity. Her father was a Justice Minister in the 1950's and her brother, Dr Ranjith Atapattu, a Cabinet Minister at different times from 1977 to 1988 holding the health and social affairs portfolios. By 1988, Dr Atapattu had been subjected to a number of threats from his political opponents which culminated in one against the life of his son that he regarded as serious. As a consequence the family left Sri Lanka

for the United States in 1988. Dr Atapattu returned in 1999. He entered Parliament again in the December 2001 general election as a list candidate for the UNP. He has no ministerial portfolio but is active in an advisory capacity to the current government and wields considerable influence.

[36] The departure of her brother in 1988 left the appellant's mother as the only family member to carry on the family's UNP involvement and accordingly she decided to stand as a UNP delegate in the B area in the 1994 general election. Her brother had represented the B district since 1977 and the family as a whole was highly regarded in the area. The appellant's mother felt a sense of duty to continue the family's political activities.

[37] The appellant assisted his mother in campaigning. He organised meetings and rallies for her to attend, and obtained donations to finance the campaign. He also acted as her bodyguard and was issued with a gun licence for this purpose.

[38] Assisting his mother was not the appellant's first involvement with the UNP. He had attended meetings with her for some years and became an official member in 1991. He chaired the Youth League in B from February 1992 until December 1997 before leaving Sri Lanka in early 1998. The Youth League had approximately 730 members during this time. The role of the League was to provide social support for members, assist with job training and, at the same time, encourage them to vote. Given the violence that has plagued Sri Lankan elections for many years, persuading people to even cast a vote was a priority for the UNP.

[39] The appellant represented the Youth League at the central committee meetings of the UNP and attended these regularly up to and including August 1997.

[40] The Youth League also organised events, including a celebration for the appellant's mother when she was nominated to stand in the 1994 election; a 1993 sporting event at which all opposition leaders were invited to address the public; and a protest in September 1997 to draw public attention to the murder of two senior UNP officials.

[41] The UNP lost the 1994 general election and the appellant's mother did not win her seat. Instead the seat was won by Mahanda Rajapaksa (the current leader of the opposition PA party in Sri Lanka). Over the past several years, Mahanda Rajapaksa and the appellant's uncle had alternated in their

representation of the electorate. Accordingly, the appellant's family knew Rajapaksa's family and had developed some degree of social contact with him over the years.

[42] Over the next three years the appellant's life was relatively uneventful although he was subjected to a degree of harassment – for example, stones were thrown at his home in B, he presumes by PA supporters. The appellant's family had two homes, one in Colombo and the other in B. The appellant would spend his time between the two places but all of his campaigning and UNP work was done in and around B.

[43] The appellant's mother did not stand again in either national or provincial elections. Her health was not good and, in any event, she hoped that the appellant would step into her role.

[44] In 1997, plans were made for the 1999 general election and from that time the appellant and his family experienced an increasing number of threats from political opponents, including anonymous calls insisting that the appellant refrain from his Youth League activities. Despite this, he continued his work which included attending meetings with two more senior members of the UNP, Lalith Weerasinghe and Kalyanadasea Gunaratna.

[45] Lalith Weerasinghe was an elected member of the provincial council of the UNP, and a friend of the appellant's family for many years. In July 1997, he was shot dead late one night as he walked home from a funeral. No one was arrested for the crime but the appellant adheres to the locally expressed view that the killer was likely to have been an individual named Chandi, a PA supporter and also a member of the provincial council. Chandi and Weerasinghe had had long-standing disagreements over the years and the murder was thought to be politically motivated.

[46] Exactly a month later, Kalyanadasea Gunaratna was shot dead in broad daylight at a marketplace. He was the UNP leader of the B. Pradeshiya Sabha (urban council). Eye witnesses identified the assailants as hooded men on motorcycles who were alleged to have said, after firing the fatal shots, "two down, one left". Again, the local understanding was that Chandi had been responsible for this murder.

[47] Because the appellant had worked closely with the two dead men in raising funds and the UNP profile in the region, he was convinced then, and remains convinced, that the reference to “one left” is a direct reference to him and that he was in line to be the next target.

[48] In the face of police inaction over the death of the two local UNP officials, the appellant and others decided to organise a demonstration in an effort to force the police to investigate, and as a show of strength against the PA party which was widely believed to have condoned the murders. The demonstration was to take place in September 1997 and was advertised throughout the region. Senior UNP officials were invited to attend the rally.

[49] The rally took place on 15 September 1997. Shortly thereafter, Chandi approached the police claiming that he was innocent and wanted to clear his name. He was released on bail but never brought to trial. The appellant believes that Chandi was required by Mahanda Rajapaksa to demonstrate a willingness to subject himself to police investigation to exonerate the PA party from any involvement in these two deaths. The fact that Chandi was never brought to trial is, according to the appellant, evidence of the political influence wielded by the PA party over the police.

[50] The appellant did not attend the demonstration in September as he had left the region a short while prior to that, fearing for his life because of the following incident.

[51] On 25 August 1997, the appellant was travelling with colleagues in a vehicle advertising the upcoming demonstration. At a junction in the hills, the vehicle was unexpectedly fired upon. The appellant believes that two or three shots were fired. In retaliation, he slowed the vehicle down, grabbed his automatic weapon and fired 17 shots in the direction of the gunfire, with his weapon jamming at the 18th shot.

[52] No one in the appellant’s car was injured and the appellant was unaware at the time if he had injured anyone in retaliation. However, he drove to the police station, arriving an approximately an hour after being shot at. He reported to the police that he had been fired upon but did not tell the police that he had fired back. He withheld this information because he believed that the police were corrupt and feared that he would be set-up by them for a crime he did not commit if he had admitted to firing shots.

[53] The police came to the appellant's home later that day and made some cursory enquiries of him about the shooting. They did not return until three months later, specifically on 27 November 1997. The appellant was not there at the time but was advised of this visit by his mother. No action was taken by the police in respect of the shots fired at the appellant's vehicle.

[54] The shots fired at his vehicle reinforced the appellant's view that he was indeed next on Chandi's "list". He remained in B for the next four days staying at a friend's home before leaving on the night of 29 August, when he drove to Colombo. On 30 August, his motorcycle, birdcage and dog were set on fire at his home in B. His servants reported this incident to the police and the appellant believes Chandi was charged with an offence. The appellant regards this incident as a further attempt by Chandi and his associates to intimidate him and other UNP supporters.

[55] After spending a very short time in Colombo, the appellant travelled north to A with his wife and child. They stayed together for three or four days before the appellant moved to H where his father's family business was situated. He remained there until he left Sri Lanka in early January 1998, some four months later. However, his wife and child returned to Colombo from H.

[56] A few days after he had been in H he was told by his mother that, in firing back after his vehicle was shot at, the appellant had critically injured two men, one of whom was Chandi's brother who was paralysed as a result. The other was an army deserter who was known to be part of Chandi's gang. The appellant believed that injuring the brother of Chandi increased the risk of his own death at the hands of Chandi and his gang.

[57] The appellant experienced no problems from Chandi or any PA members while he was in H. His wife and mother received more anonymous telephone calls demanding that the appellant cease all political activities. His mother received two or three such calls which then stopped. The appellant's wife received calls "on and off" but the appellant was unable to say when they stopped.

[58] Over the next several months the appellant took steps to leave Sri Lanka. Despite having travelled several times to Singapore – a visa-free destination – the appellant did not immediately leave Sri Lanka for Singapore. Instead, he wished to explore options and eventually applied for a visa to come to New Zealand. When this was granted, he left Colombo mid-January 1998 and arrived in New

Zealand shortly thereafter. Nine days later he lodged an application for refugee status.

[59] The appellant remained in regular contact with his mother until her death in April this year. They spoke almost every week. He and his wife eventually divorced. She has since remarried and is now living with his daughter and her new husband in Belgium. Neither the appellant's mother nor his wife has experienced any significant ramifications as a result of the appellant's activities since he left Sri Lanka.

[60] The appellant fears that if he returns he will be killed by the Chandi family. Until the hearing of this appeal, the appellant understood Chandi to be alive. He was not aware of at least one newspaper report (obtained by the Authority and disclosed to the appellant) that Chandi had been killed, allegedly in a politically-motivated murder. Even if Chandi is dead, the appellant still believes that his gang will continue to regard him as a political opponent and will seek revenge for the injury the appellant inflicted on Chandi's brother Karunapla. He also believes that the families of Gunaratna and Weerasinghe will exact some sort of revenge against him because he fled the country shortly after their deaths and did not do enough to support them.

[61] The appellant accepts that the UNP recently won both the national and provincial elections. He believes, however, that the UNP will only protect him if he enters parliament. The appellant is "fed up" with politics and has no desire to involve himself if he returns. As a consequence, he believes that the UNP will not offer him protection and that Chandi's family members and political associates will kill him. He does not believe the police force can protect him given its size relative to the Sri Lankan population.

[62] The appellant produced some documentary evidence in support of his claim to which the Authority has had regard and which is discussed later in the assessment of the appellant's case.

[63] During the course of the hearing on 14 October 2003, in his written submissions, the appellant's counsel argues that the member hearing this appeal is biased against his client. He submits that "it may have been appropriate for the member to have disqualified herself from any further participation in the appeal". Despite its hesitant tone, I have treated this submission as an application to disqualify myself from determining this appeal. The allegation of bias was raised

at the same time as a request for a further six-week adjournment. Both applications were refused for the reasons which are now set out in full.

Bias Allegations

[64] At the start of the hearing on 14 October, counsel sought a further six week adjournment to the proceedings to enable him to obtain documentation to further advance his submission that the Authority was biased against his client. Specifically, counsel sought a further six weeks to obtain a copy of the hearing tape of the first day of the hearing (13 August 2003) and to pursue an application before the Ombudsman seeking the release of evidence adduced in an unrelated refugee appeal.

[65] In his final written submissions, counsel pursues the claim that I was biased against the appellant. Although counsel did not make an application explicitly seeking that I disqualify myself from the determination of this appeal, his submissions have been dealt with as if such an application were made.

[66] Counsel's submissions centre around two matters – one being a question asked by me of the appellant, and the other involving my role in an unrelated appeal.

The question

[67] In the course of giving evidence, the appellant told the Authority that his family had a social relationship with Mahinda Rajapaksa, the current leader of the opposition People's Alliance party in Sri Lanka and the Prime Minister of Sri Lanka for much of the 1990s, including 1997 when the appellant claimed that he was forced to flee his home as he was being pursued by the Chandi gang. The appellant told the Authority that Mahinda Rajapaksa and his uncle were at school together, that the families had represented the H region of Sri Lanka for many years politically, and that the families attended many social functions together. On the NZIS file (at p. 162) is a letter purportedly signed by Mahinda Rajapaksa dated 29 April 2002 which describes the parties which make up the People's Alliance. The appellant told the Authority that his mother had obtained that letter herself from Mahinda Rajapaksa.

[68] In light of the familial relationship between the appellant's family and the man heading the People's Alliance, the Authority asked the appellant whether his mother had contacted Rajapaksa at any time to seek his help in persuading the Chandi gang from pursuing the appellant. It was the appellant's evidence that she had not. As to why his mother had not sought such assistance, the appellant responded "self pride".

[69] Given the importance that this exchange has assumed in counsel's submissions, what follows is the record of the questions and answers taken from the recording of the proceedings. It does not entirely equate with counsel's record (as detailed in his written submissions) but I am satisfied it is accurate.

[70] Having responded that his mother had not sought Mahinda Rajapaksa's assistance because of "self pride" the Authority asked:

Authority: Is her pride more important than your life?

Appellant: Yes…

Authority: So you are too proud to ask your mother to go to Mr Rajapaksa and [seek help]?

Appellant: Yes.

Authority: But you're not too proud to ask me for refugee status?

Appellant: No.

Counsel: Let's not get personal.

Authority: There's nothing personal, Mr Amery…I'm told there is a close family connection between the appellant's family and the leader of the opposition but pride would prevent you [being the appellant] from asking your mother…[and] her pride would preclude her from asking Mr Rajapaksa.

[71] The hearing then moved to discuss the evidence.

[72] It is this last question from the Authority that forms the first ground of the claim by counsel that I am biased in my determination of this appeal.

The evidence in the Ahmed Zaoui appeal

[73] The second ground upon which the claim of bias is advanced is more difficult to articulate. In brief, I was a member of the three-member panel of the Authority which heard and determined an appeal by an Algerian national, Ahmed Zaoui (see *Refugee Appeal No. 74540/03* (1 August 2003)). The Authority granted Mr Zaoui's appeal, finding him to meet the definition of a refugee. In the course of its determination, expressed in a 223 page decision, the Authority considered criminal convictions entered against Mr Zaoui in Belgium by the 14th Chamber of the Court of Appeal of Brussels, and criminal convictions entered against Mr Zaoui *in absentia* by the 16th Criminal Chamber of the High Court in Paris, France.

[74] Mr Amery now asserts in this appeal – being the appeal of a Sri Lankan national with no known or claimed connection to Mr Zaoui – that, if he can obtain a copy of the French and Belgian court decisions, he will prove that Mr Zaoui is a terrorist and should not, therefore, have been granted refugee status. He goes further and argues that the Authority was clearly biased in Mr Zaoui's favour in granting him refugee status in the face of these criminal convictions.

[75] He argues that bias can work both for and against an individual and it is his submission that, having demonstrated bias in Mr Zaoui's case, I am likely to be biased against his client.

[76] That is a summary of the arguments as best I can discern. Mr Amery did not articulate his argument clearly, nor is it further articulated in his submissions. He continues, however, to raise the need to obtain a copy of the decision of the French and Belgian courts and, as noted, sought a further adjournment for that purpose.

Decision on adjournment application

[77] The application for a six-week adjournment was raised at the start of the resumed hearing on 14 October. The Authority refused the adjournment and records its reasons now.

[78] As to the request that the matter be adjourned so that Mr Amery could obtain the hearing tapes, it must be noted that the question I put to his client (to

which counsel take exception) was in the hearing on 13 August 2003. Counsel had had two months by 14 October 2003 to obtain a copy of the hearing tape. Mr Amery argued aggressively before me that he had not been granted legal aid until the afternoon of 13 October 2003, and therefore, with no money, could not pursue his request for a tape of the hearing (at a cost of $30.00).

[79] I reject this as a suitable ground for an adjournment. Matters of payment between counsel and his client and/or the Legal Services Agency are not regarded by the Authority as suitable grounds for delaying the hearing of an appeal (see the Authority's Practice Note at paragraphs [28.1] and [28.2]). If counsel is not prepared to act diligently, professionally and at all times in his or her client's best interests, irrespective of whether the Legal Services Agency has processed the claim to legal aid, then counsel should not accept instructions until legal aid is granted. Having accepted instructions (which Mr Amery did and confirmed to the Authority on 12 July 2003) it is incumbent on counsel to act at all times in his client's best interests. In this case this would have meant requesting the tape shortly after the hearing on 13 August and not two months later.

[80] In any event, counsel was given a further seven days from 14 August 2003 in which to make any final submissions. As it transpires, he was able to produce the money needed and obtain and listen to a copy of the tape. He has dealt with it in his submissions. No prejudice to his client flows from the Authority's refusal to grant a further adjournment.

[81] As for the decisions relating to Mr Zaoui, counsel's final submission notes that he is pursuing his request with the Ombudsman. The Authority is aware that the appellant initially approached the Ombudsman seeking the release of these two documents under the Official Information Act, the New Zealand Immigration Service having previously declined his application. The Ombudsman suggested that counsel apply to the Authority for a summons directing the production of these decisions. Mr Amery made an application to the Authority. However, he did not specify against whom the summons should be issued, nor why the transcripts were relevant to his client. Importantly, he did not address the issues of confidentiality which attach to evidence adduced during the course of the refugee appeal process.

[82] Further, despite giving Mr Amery every opportunity to explain his rationale, the Authority is quite unable to discern the relevance of these transcripts to the appeal before it. Mr Amery's client has not been convicted of any criminal

offences, nor is he the subject of any criminal proceedings in Sri Lanka or any other country – at least as far as the Authority is aware. There is no suggestion by any person that he is a terrorist or involved in acts which might exclude him from the protection of the Refugee Convention. He is in custody in New Zealand solely because his permit expired and he had no lawful status in this country. There are no discernible similarities between the two cases.

[83] In the circumstances, therefore, the Authority dismissed the appellant's request that a summons be issued ordering the production of the court decisions relating to Ahmed Zaoui. For the reasons articulated above, the Authority also dismissed counsel's request for a further adjournment of these proceedings.

Decision of application to disqualify member from determining this appeal

[84] It is against this background that I must examine my own conduct and determine whether my conduct has created even a perception of bias such that I should disqualify myself from determining this appeal. The test for judicial bias was articulated by the Court of Appeal in *Auckland Casio Limited v Casino Control Authority* [1995] 1NZLR 142. In that case the Court considered the tests espoused by the Australian and English courts and concluded that, so far as apparent bias was concerned, there is little if any practical difference between the "real danger or real likelihood" test and the "reasonable apprehension of suspicion" test. The Court went on to hold that the "real danger" test, namely whether in all the circumstances of the case there was a real danger or a real likelihood, in the sense of a real possibility, of bias, was satisfactory.

[85] In *Lave Faavae* v *Minister of Immigration and another* (CA 125/97) 23 July 1997, the Court of Appeal once against considered the issue of judicial bias. In this case, objection was taken to statements made by the Chairman of the Deportation Tribunal which were said to give rise to a presumption of bias. The test as applied by the Court of Appeal on this occasion was whether a reasonable person knowing all the material facts consisting of the various statements made by the Tribunal would consider them to constitute a reasonable danger of bias (applying *Auckland Casino Limited* v *Casino Control Authority* op.cit.).

[86] Even more recently, in *Riverside Casino Limited* v *Moxon* [2001] 2NZLR 78, the Court of Appeal considered an allegation of bias by a member of the Tribunal

and concluded that the process as a whole must be considered when determining the issue of bias.

[87] Together with these authorities, I remind myself that, in cases of refugee determination, only the highest standards of fairness will suffice (*Khalon* v *Attorney-General* [1996] 2NZLR 458).

[88] With these principles in mind, I take into account the following:

(i) The Authority is entitled to and indeed must test the credibility of a refugee appellant. This may include robust questioning. This appellant was well educated and articulate. The hearing was in English. The appellant was legally represented. He claimed a familial relationship with the head of the political party which, he claimed, endorsed the activities of the criminal gang which was trying to kill him and eventually succeeded, on his evidence, in hounding him out of his home country. It is not unreasonable for the Authority to ask the appellant what steps his family took given its familial relationship with Mr Rajapaksa. The appellant's claim that neither he nor his mother had sought any assistance because they were too proud was not a response that I found plausible. In effect, the appellant was claiming to be too proud to seek protection from his own fellow countrymen. An application for refugee status, on the other hand, is a claim for surrogate protection from a country that, *prima facie*, owes no duty of care to an individual. Hence, my question as to whether the appellant's pride extended to cover his request for assistance from such an unrelated country.

    In short, the question to which counsel takes objection was designed to do no more than test the plausibility of the appellant's earlier evidence.

(ii) Mr Amery argues in his written submissions that my bias was further demonstrated when I put to the appellant evidence given during the RSB interview which differed from that before me. He submits that, as the hearing before this Authority is *de novo*, what occurred before the RSB is irrelevant.

    I reject this claim. All appeals before the Authority proceed by way of hearing *de* novo, and all issues of law, fact and credibility are at large. The Authority makes a decision on the facts as they stand at the date of

determination of the appeal and is not confined to the facts as they stood at the time of the hearing before the refugee status office (see Authority's Practice Note 2/99 at paragraph [3.1]). The Authority is not therefore prevented from having regard to all relevant information, including previous statements made by the appellant. But while the Authority will consider all issues afresh without regard to the *findings* of the refugee status officer, it does not do so without regard to the *evidence* adduced at any time during the refugee determination process, including that provided by the appellant in his RSB interview.

(iii) Mr Amery claims that I adopted an unnecessarily harsh approach in questioning the appellant. However, the Authority is entitled to test credibility and may at times appropriately adopt a firm line. As an example he cites the following question:

> "Authority: You have not told the truth, have you? You simply shared the same name [as the UNP member Dr Atapattu] and adopted this story to claim refugee status."

In light of the country material before the Authority, and in the face of his total lack of knowledge regarding his uncle's recent political activities, it was open to the Authority to conclude that the appellant had fabricated his claim. This question was designed to give the appellant an opportunity to comment on this possible outcome. While there is no obligation on the Authority to warn an appellant that it may make adverse credibility findings against him (*Khalon* v *Attorney-General* op.cit.) I do not regard this question as any indication of bias. In any event, as will become apparent, I have extended the benefit of the doubt to the appellant in respect of his family circumstances.

(iv) The hearing of the evidence originally covered one day. In the course of my deliberations, I continued to undertake research into the country conditions in Sri Lanka and came upon country material that, *prima facie*, was adverse to the appellant's claim – being the return and re-election of his uncle in 1999, and details of his mother's obituary. In fairness to the appellant, the hearing was resumed and the evidence was put to him for comment. Counsel referred repeatedly in the hearing and in his submissions to this evidence as being raised "without notice" to the appellant. He infers that some prejudice arises here. However, the very purpose of resuming the

hearing was to give the appellant the opportunity to comment on this evidence. At his request, he was then given six weeks to obtain information from Sri Lanka to rebut it. I regard a six week adjournment as very generous. I would have expected counsel to be able to elicit the information from Sri Lanka in much less time, and to take steps to do so where his client is held in custody. However, the adverse evidence had the potential to significantly undermine the appellant's credibility and he sought a six week period to obtain information from Sri Lanka. Reminding myself that only the highest standards of fairness will apply in the refugee determination process, a period of six weeks adjournment was given.

(v) The appellant was given an opportunity to present his further evidence on 14 October, and as noted in this decision, I have extended to him a generous benefit of the doubt in respect of that evidence.

(vi) The whole appeal process has extended to this appellant considerable latitude. Leave has been granted to him to lodge his Notice of Appeal out of time. Although he failed to attend the first hearing offered, he has since been given the opportunity to present his case in full.

(vii) As noted, I can discern no direct or even indirect connection between this case and that of Ahmed Zaoui. No cogent grounds are advanced for this plank of counsel's submission. To suggest that I am biased because I was part of a three-member panel that granted refugee status to Mr Zaoui ignores the considerable number of decisions I have given over the past eight years where I have dismissed appeals.

Further, to suggest that, because counsel may take a different view of one part of the evidence before the Authority in any case, means that the Authority was biased is frankly a nonsense. Whatever motive Mr Amery may have in pursuing this claim, I can discern no relevance whatsoever to the appeal currently before me.

[89] In disposing of this application, I do not overlook the difficulties faced by a judicial officer who is effectively required to determine an allegation of bias against herself raised in the course of the hearing. I have already alluded to the High Court dicta that requires only the highest standards of fairness apply in refugee determination processes. However, I also consider that, whilst judicial officers

should err on the side of caution in such matters, they should not disqualify themselves without good cause.

[90] Looking as I must, and do, impartially and objectively at my conduct, I am satisfied that a reasonable person would not regard my questions of the appellant as evidence of bias. The primary complaint was directed at one question out of hundreds on a point that was not, in the final analysis, in any way determinative.

[91] I am also satisfied that the reasonable observer would not regard me as biased simply because I was a member of a three-person panel who granted refugee status to another refugee appellant from a different country, in entirely different circumstances and with no discernible connection to this appellant. Neither alone nor cumulatively do these grounds constitute any real danger of bias and the application (assuming it has been raised) that I disqualify myself is therefore dismissed.

[92] Having dealt with these preliminary applications, I turn now to consider the issues raised in the appeal.

ISSUES FOR DETERMINATION

[93] 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."

[94] 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

[95] Before determining these issues, the Authority must decide whether the appellant is a credible witness upon whom the Authority can rely.

[96] During the course of this appeal, the Authority has had significant concerns regarding the appellant's credibility. These concerns focus on two key areas – the appellant's true relationship with Dr Ranjith Atapattu, and whether he in fact retaliated when fired upon in August 1997 giving rise to a vendetta which he claims still places him at a real chance of harm should he return to Sri Lanka.

The appellant's family circumstances

[97] The appellant has always claimed to be the nephew of Dr Ranjith Atapattu – a UNP politician who held ministerial positions in the UNP governments from 1977 until 1989. The appellant told the Authority that in 1988 Dr Atapattu left Sri Lanka due to threats he and his family members had received from opposing political figures. The appellant initially told the Authority that Dr Atapattu had never returned to live in Sri Lanka and remains to this day in California, to the best of his knowledge. It was in fact the departure of Dr Atapattu from Sri Lanka that propelled the appellant's mother into politics, feeling compelled to carry on the family tradition of representation in the H region of Sri Lanka.

[98] Country material available to the Authority records Dr Atapattu being elected to parliament in the February 1989 general election. (See for example, "New cabinet formed in Sri Lanka" *Japan Economic Newswire* (18 February 1989) nexus.) The appellant gave evidence that Dr Atapattu left Sri Lanka in 1988. However, he also told the Authority that Dr Atapattu was a cabinet minister at the time of his departure and the Authority accepts that the appellant was likely to be mistaken over the year of Dr Atapattu's departure – it being sometime after his election in February 1989.

[99] The Authority heard the appellant's evidence over one day. However, in considering its decision it became aware of country information which clearly indicated that Dr Atapattu, far from still residing in California, in fact stood as a UNP candidate in H district in the December 2001 general elections. The information indicates that, while he lost the seat, he entered parliament as a list member of the UNP. (See for example, "Contestants who won seats" *LankaWeb*

[2001] [Internet] http://www.lankaweb.com/news/contestants/htm and *Democratic Socialist Republic of Sri Lanka – Legislative elections of 6 December 2001 [Internet]* http://www.psephos.adam-carr.net/srilanka/srilanka2001.txt.)

[100] The only information the Authority could locate on the appellant's mother was her obituary in the Sri Lankan Daily News published on 11 April 2003. This made no mention of Dr Ranjith Atapattu being her brother and only sibling. Instead it gives three other names for her siblings.

[101] In light of this evidence, the Authority reconvened the hearing to give the appellant an opportunity to comment on this information which raised the question of, firstly, whether Dr Atapattu was in fact his uncle, and secondly, whether he had ever left Sri Lanka – and, if he did, why the appellant was unaware of his return to politics.

[102] At the resumed hearing the appellant expressed surprise at the country material. He repeated his claim that Dr Atapattu was his uncle and could not explain his omission from his mother's obituary. He told the Authority he was unaware that Dr Atapattu had stood in the 2001 general elections and that he had not discussed politics with his mother in their regular telephone conversations. This is not withstanding that, until his mother's death in April 2003, the appellant had spoken with her nearly every week since his arrival in New Zealand in January 1998 and that he had contacted her on at least two occasions specifically to obtain documents in support of his refugee claim.

[103] The appellant sought a six week adjournment of the proceedings to enable him to obtain information from Sri Lanka to rebut the material put to him by the Authority. At the resumed hearing on 14 October 2003, he produced the following documentary evidence:

(a) A poster purporting to be of his mother, which claimed she was the only woman in the south of Sri Lanka to stand for the UNP, and that she was standing in the H district;

(b) A party propaganda card with a calendar on one side (1994-1995) and two photographs on the other – one purporting to be of the appellant's mother and the other one noted as being of Dr Ranjith Atapattu. The inscription confirmed the appellant's mother was "from the reputed Atapattu family"

and effectively carried Dr Ranjith Atapattu's personal endorsement in the election;

(c) A sworn statement from his sister confirming that their late mother had only one brother – Dr Ranjith Atapattu – and that those named as siblings in her obituary had been inserted erroneously;

(d) A letter from the customer service department of the Associated Newspaper of Ceylon Limited responding to a letter from the appellant's sister apologising for the publishing error in the obituary notice. (This letter does not specify what the error was nor is a copy of the appellant's sister's letter tendered in evidence.);

(e) A letter from the chairman of the UNP dated 3 October 2003. It records that the appellant:

> "…was a very active party member since 1990. He was appointed as the chairperson of the Youth League in [B] seat in February 1992 and held the position until December 1997. During his chairmanship he demonstrated exceptional leadership qualities. Also was involved in organising very prominent party events."

[104] The appellant also told the Authority that it was he who had contacted his sister directly in Sri Lanka from Mt Eden prison. During their short conversation, the appellant's sister told him that their uncle, Dr Ranjith Atapattu, had returned to Sri Lanka in mid-1999. The appellant gleaned from their discussions that his uncle had been persuaded to return by the UNP as the party wanted the advantage of his influence and reputation in the upcoming 2000 general election. The appellant claimed that his uncle has "a very big say" in the UNP, and wields considerable influence over a wide spectrum of politicians. While he has no ministerial portfolio in the current government, the appellant believes he is active in maintaining the stability of the party in which a number of factions operate.

[105] In respect of the appellant's family circumstances, the Authority still harbours some doubts about aspects of the appellant's evidence and the documents he has produced. However, the appellant is entitled to the benefit of those doubts and the Authority accepts therefore that he is the nephew of Dr Ranjith Atapattu, a current member of the UNP government. It accepts that his mother stood, unsuccessfully, as the UNP candidate in the H district, in the 1994 general elections.

[106] As to the appellant's own political role, the letter he has produced from the UNP chairman confirms his evidence to the Authority. As to his claimed activities, the appellant's evidence has been reasonably consistent since he lodged his application for refugee status. In the circumstances, the Authority accepts that the appellant was the chair of, and actively involved in, the B wing of the UNP Youth League from 1992 until December 1997. His activities included campaigning in the 1994 election on behalf of his mother, working with young people in the region, and organising rallies and other party-related activities.

The appellant's claimed reason for his flight from Sri Lanka

[107] The appellant fears that if returned to Sri Lanka the 'Chandi gang' will become aware of his return, hunt him down and kill him. He advances two motives for this: the first being in retaliation to the injury he has inflicted on Chandi's brother K; and the second because of the appellant's political profile within the UNP which made him the next target of the Chandi gang after the death of Gunaratna and Weerasinghe, and because of which he remains, nearly six years later, a target.

[108] For the reasons which follow, the Authority does not accept the appellant's evidence that he caused serious personal injury to Chandi's brother K, nor does it accept his claim that he has any sort of political profile which is likely to attract a violent response from the Chandi gang some six years after his departure from Sri Lanka.

Claimed injury to K

[109] The appellant told the Authority that, upon being fired upon while travelling on UNP business with colleagues, he retaliated with seventeen shots. Some days later his mother told him that those shots had caused serious injury to Chandi's brother, leaving him permanently disabled, and caused serious injury to another member of the Chandi gang.

[110] For the following reasons the Authority rejects the appellant's evidence that he caused these injuries.

(i) The appellant has never previously given this evidence

[111] In lodging his refugee claim in January 1998, the appellant tendered a two page statement detailing his claim. In that he recorded "being shot at by some unknown armed people". He makes no mention of retaliating or later being advised that he had caused serious injury to a member of a gang already targeting him.

[112] In that statement the appellant recalls that he drove straight to the police station. He tendered a copy of a statement purportedly made on 25 August 1997 to the Beliatta police. In the police statement the appellant complains of being shot at and damage being caused to his vehicle by the shots. He says that no one was injured in his vehicle and that he "could not recognise anybody who shot at the vehicle". He makes no mention of retaliation.

[113] In a lengthy interview with the RSB, some three and a half years after lodging his application, the appellant was asked about this incident and reiterated the evidence given in the police statement.

[114] In responding to questions raised by the RSB in the written interview report, the appellant continued to advance his explanation that Chandi and his "supporters" would continue to target him because of his political affiliation. He makes no mention of the retaliation because of the injury to Chandi's brother. His claim to refugee status was declined.

[115] In counsel's submissions of 4 August to this Authority, this claim was repeated – specifically no mention was made of any change in the appellant's account.

[116] On the morning of the appeal hearing (13 August 2001), the appellant tendered an affidavit signed that morning in which he claimed he retaliated when fired upon and that he subsequently learnt from his mother that he had critically injured two members of the Chandi gang.

[117] As to why he would only raise this evidence at such a late stage, the appellant claimed that his previous lawyer had advised him not to declare he had weapons. The appellant told the Authority that the weapons were issued to him as part of his role as his mother's bodyguard. The appellant did not find the lawyer's advice to withhold evidence in any way unusual and claimed that in his country if he admitted to having a gun he would be treated as a criminal.

[118] The appellant also told the Authority that he ceased communicating with his previous lawyer before responding to questions arising from the RSB interview. That written response is detailed and articulate. It was prepared by the appellant himself. As to why he did not raise such crucial evidence at that time, having rid himself of his legal counsel, he proffered no explanation other than that it was “my fault”.

[119] The introduction of new material evidence for the first time only after an application has been declined will almost always raise the possibility that the new ‘evidence’ is fabricated. Further, the claim to fear for his safety because of injury caused to Chandi’s brother has become now the central plank to the appellant’s claim to refugee status. The appellant is a well-educated and articulate witness. He had no compunction in withdrawing his instructions from counsel as a result of a disagreement with him. His claim to be bound at any time thereafter by previous instructions from that counsel was not compelling.

(ii) Aspects of the claim are implausible

[120] The appellant has always maintained that, after the van was shot at, he travelled immediately to the Beliatta police and reported the incident. He has produced a copy of the statement to the police to that effect. When asked why he did not mention the retaliation in self-defence, he claimed that the police were corrupt and might have "placed a body there [at the scene of the shooting] and blamed me". When asked why then he bothered to report the incident at all, he claimed that he had to. Later, he said that he had reported the matter to the police because he expected protection from them – a claim difficult to reconcile with his earlier claim of police corruption.

[121] At the time the shots were fired at the vehicle, three other people were in the van with the appellant. All four travelled together to the police station, a journey of about one hour. Yet at no time did they discuss what they would tell the police. Specifically, the appellant did not suggest to his colleagues that they make no mention of his retaliation. As to why, he claimed he panicked, and that it never occurred to him his travelling companions might tell the police he fired back.

[122] The Authority finds it implausible that, had the appellant retaliated and genuinely feared he might be 'set-up' for an offence he did not commit, he would not, in the one hour journey, have sought the co-operation of his colleagues. Not to do so risked the immediate disclosure of his actions by one of them wittingly or unwittingly. Further, the Authority finds it implausible that, if the appellant genuinely feared that he might be set-up for a crime he did not commit, that he would bother to report the incident at all. No one in his van had been injured and there was only some minor damage caused to the vehicle. His explanation for reporting the incident and that he was expecting police protection contradicted his earlier account that the police were under the influence of the PA party.

(iii) No inquiry was made by the police of the appellant in their subsequent investigations

[123] The appellant's evidence was that the police visited his home on two occasions after the shooting incident – on the day it happened and three months later. If in fact his mother had heard through local 'gossip' that Chandi's brother and another had been injured at the very spot where the appellant had retaliated, it is inconceivable that the police would not be aware of that. Yet no inquiries were

made of the appellant, his family, or domestic staff at any time, not even during the second visit to his home in November 1997.

[124] If the Authority accepts the appellant's claim that the police were under the control of Chandi and the PA party at that time, it is highly unlikely that they would not make an inquiry of the appellant or his family once injury to Chandi's brother and the other gang member became common knowledge. This is even more so given that the appellant had specifically reported being in the area at that very time and being fired upon.

[125] For these reasons, the Authority does not accept this part of the appellant's account and therefore rejects his claim that the Chandi gang will pursue him if he returns to Sri Lanka to take its revenge for any injury to its members.

Appellant as a political target

[126] The appellant claims that, because of his prior political involvement and family connections, he remains at risk of harm from the Chandi gang should he return to Sri Lanka, despite an absence of almost six years.

[127] During the hearing the Authority made available to the appellant country information that refers to the death of Kakanamage Ranjith, alias Chandi Malli, who is noted as a Rajapaksa (People's Alliance) supporter. The country information is dated 15 June 2003 but gives no actual date of Chandi's death. (See "'Lankan Tiger' emerges" 2003 *Sunday Leader On-line (Sri Lanka)* 15 June (http://thesundayleader.lk/20030615/politics.htm).) Until the hearing, the appellant was unaware of Chandi's death but he does not dispute this record, nor does he adduce any evidence to the contrary. He maintains that, irrespective of the death of the leader of the gang, he remains its target. He could provide no evidence of the size of the gang, its territory, or its membership. Country information obtained by the Authority is sparse, although it includes comments from the appellant's uncle in the aftermath of the presidential election of December 1999, in which he is recorded as saying "…the problem in B will be worse at a general election. A chap called Chandi Malli is running amuck. After the election, he assaulted people who stopped impersonations"…. ("Aftermath of a presidential election" *Sunday Leader (Sri Lanka)* 1 January 2000.)

[128] Council submits that, by their nature gangs are secretive, therefore it is not likely that there will be any information on the extent of this gang, its infrastructure or membership.

[129] The appellant advances two reasons why he remains at risk of harm from the People's Alliance-sponsored Chandi gang. The Authority will deal with each of them in turn.

(i) His membership of a political family of which he is "next in line" to take up a position with the UNP government party

[130] This claim was advanced by the appellant to the Authority before he became aware that his uncle had returned to Sri Lanka and was currently a Member of Parliament. Clearly, the appellant's position has changed. He is no longer the only member of his extended family who can take up political office to carry on the family name. His uncle is doing this now and has been doing it from at least 1999.

[131] In any event, the appellant told the Authority that he had no interest in politics anymore and would not be seeking a role in the UNP if he returned.

[132] There is no evidence before the Authority that persuades it that mere membership of this political family makes the appellant a target. His mother was never the victim of any serious attacks nor has his sister been. His uncle appears to be carrying out his political responsibilities without interference. The Authority accepts that future elections are likely to attract violent outbursts between supporters of the various political parties. It also accepts that there are criminal groups in Sri Lanka which carry out violent and illegal activities with impunity because political patronage they receive provides them with immunity from police prosecution. (See further the discussion in *Refugee Appeal No. 73323/01* 31 May 2002) [15]-[20] to which counsel referred the Authority.) However, the appellant will not be involving himself in politics if he returns to Sri Lanka and thus any risk of harm to him from such violence is both speculative and remote.

[133] In short, the Authority was satisfied that there is nothing about the appellant's family connections, nor his likely future activities, that will put him at risk of harm from the Chandi gang.

[134] His past high profile within the UNP

[135] The appellant claims that he was the next target of the Chandi gang after the deaths of Gunaratna and Weerasinghe. He reached this conclusion because of his close association with the two men, the shots fired at his vehicle while campaigning, and his role in organising the September 1997 rally designed to highlight the deaths and the subsequent police inaction.

[136] The Authority doubts the appellant was the next target of those who murdered Gunaratna and Weerasinghe. Unlike them, the appellant did not hold an elected office within the UNP. There is nothing in the letter he has produced from the UNP Chairman which suggests that the appellant was a target of such serious political violence. As the van in which he was travelling when the shots were fired at carried UNP slogans, the Authority cannot rule out the possibility that the shots fired were a random attack on the UNP rather than a specific attack against the appellant.

[137] The lack of any real effort by the Chandi gang to locate the appellant after the shots were fired at his van and he fled the B region is not consistent with someone "next in line" on a list of assassination targets. In this regard, the appellant's evidence was vague – he claimed some threats were made against him to his wife and mother but could not say how long the threats persisted. Further, given that the appellant is a member of a prominent family, it is relevant that no inquiries were made of him at his father's business once he sought refuge there. The Authority accepts that the business was somewhat itinerant in nature, but it is, at the very least, surprising that no inquiry was made.

[138] Further, the appellant's own conduct was not consistent with someone who was actively being pursued to the point where he was forced to flee his country. He gave evidence that he spoke to his mother almost every week from the time he arrived in New Zealand in January 1998 until her death in April 2003. Yet, he never inquired about the fate of other UNP colleagues in the B region. This is despite conceding to the Authority that two other men worked with him, Gunaratna and Weerasinghe, and that those two other men may also have been the target of the Chandi gang. However, he made no inquiry as to their well-being at any time since he left the region nor did he even ask his mother to make such an inquiry. He was unaware who had been elected to the B seat in the recent general elections and that his uncle had returned to Sri Lanka to take up an active political role. The Authority finds it quite extraordinary that the appellant's mother would not have relayed this information to her son had he been at risk of harm because

of his association with this political family or because of his own high political profile.

[139] The Authority is aware of a letter to the appellant from his mother (see pp. 61-62 of the NZIS file). In that letter the appellant's mother claims that he will be a "sitting duck" if he returns. Counsel made specific reference to this letter and advances it as evidence that there is a real chance that the appellant will come to harm if he returns to Sri Lanka.

[140] The letter was written in May 2001. No mention is made in this letter of the return of the appellant's uncle or why the appellant will be a "sitting duck" when his uncle was not experiencing any difficulties. The appellant's mother's claim that she herself was not a target because of her age (at the time she was about 46 years old according to the appellant) is simply not convincing.

[141] The appellant made no effort to leave Sri Lanka at the earliest opportunity. He had previously travelled to and from Singapore on a number of occasions – a visa-free destination. Yet, he chose to remain in Sri Lanka for four months after fleeing the B region in an effort, he claimed, to get a New Zealand visa. As to why he did not go to Singapore immediately (and from there obtain a New Zealand visa) the appellant claimed that he had to stay in Sri Lanka to make plans to move his family with him. Yet, he could offer no plausible explanation as to why he subsequently left Sri Lanka without his family.

[142] In all these circumstances, the Authority is not satisfied that the appellant was a political target of the Chandi gang at the time he left Sri Lanka. But even if he was, the Authority is satisfied that there is no real chance he remains a target nearly six years since his departure. His uncle has returned to political office without incident. Neither his mother nor sister were ever targeted by the gang. The UNP holds political power at both local and government level. Chandi is now dead. Importantly, the appellant has no interest in resuming any political role.

[143] In all these circumstances, the Authority is satisfied that there is no real chance that the appellant will be the target of political violence should he return to Sri Lanka.

[144] This leaves only the claim made by the appellant that the families of Gunaratna and Weerasinghe might harm him on his return. This surprising claim was raised for the first time during the appeal hearing. The appellant suggests

that, because he left Sri Lanka and did little to help the widows of Gunaratna and Weerasinghe, they will extract some sort of revenge against him if he returns. This is despite his efforts in organising the September 1997 rally which drew public attention to their deaths and the subsequent police inaction.

[145] The appellant has had no contact with the families of his former colleagues since he left the B region, nor has he asked his mother or any of his political colleagues to inquire of them. He has no evidence, direct or indirect, that either family harbours any grudge against him, let alone any intention to harm him. In the circumstances the Authority finds this claim to be spurious and it is rejected.

Summary

[146] Extending to the appellant the benefit of the doubt, the Authority is satisfied that he was a member of the UNP from 1990 and the Chairperson of the Youth League in the B region from 1992 until December 1997. It accepts that his mother stood in the 1994 general elections but was unsuccessful. It accepts that his uncle, a former cabinet minister in the 1980s, returned to Sri Lanka in 1999 and is currently a member of the UNP government. However, the Authority is satisfied that there is nothing about the appellant's past political involvement or his association with this political family that raises a real chance that he will be persecuted by the Chandi gang should he return to Sri Lanka. Further, the Authority accepts the appellant's evidence that he will take no part in political life on his return. In the Authority's view, this can only lessen the chance (which is at best remote or speculative) that the appellant will come to harm at the hands of a politically-motivated criminal gang. Issue one as posed is therefore answered in the negative, and Issue two does not arise for consideration.

CONCLUSION

[147] There is no real chance that the appellant will be persecuted for a Convention reason if he returns to Sri Lanka. He is not a refugee within the meaning of Article 1A(2) of the Refugee Convention 1951. Refugee status is declined and this appeal is dismissed.

....
E M Aitken
Chairperson