

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76466

AT AUCKLAND

Before: B A Dingle (Member)

Counsel for the Appellant: C Curtis

Appearing for the Department of Labour: No Appearance

Date of Hearing: 22 March 2010

Date of Decision: 11 June 2010

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Sri Lanka of the Tamil race, a single man aged in his early 30s.

[2] This is the third time the appellant has claimed refugee status in New Zealand. His first and second claims were declined by both the Refugee Status Branch (RSB) and, on appeal, by the Authority (differently constituted); see *Refugee Appeal No 75723* (13 December 2006) and *Refugee Appeal No 76228* (8 December 2008).

[3] The grounds of the appellant's third claim are threefold. He says that he is at risk of being targeted by the Sri Lankan police and military authorities because they suspect him of an Liberation Tigers of Tamil Eelam (LTTE) connection. He also says that he is at risk from the Sri Lankan authorities because he participated in a pro-Tamil protest in Auckland in 2009 and individuals in the Sinhalese community in New Zealand will have informed the authorities that he is pro-LTTE. He claims to be at additional risk because he does not have a current Sri Lankan

passport or National Identity Card (NIC) and so will encounter difficulties on arrival in Sri Lanka or, subsequently, at police checkpoints.

- [4] The issues to be determined in this case are:
- (a) whether the Authority has jurisdiction to hear this third appeal;
 - (b) whether or not the third claim (or part thereof) to refugee status is credible; and, if so
 - (c) whether or not the facts as found establish a real chance of the appellant suffering serious harm on return to Sri Lanka.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[5] This is the third occasion on which the appellant has appealed to this Authority, and therefore the Authority must first determine whether it has jurisdiction to hear the appeal.

[6] Neither a refugee status officer nor the Authority has unlimited jurisdiction to receive and determine a further refugee claim after a first claim has been finally determined. Section 129J(1) of the Immigration Act 1987 (“the Act”) is headed “Limitation on subsequent claims for refugee status” and sets out the circumstances in which a refugee status officer may receive and determine a second or subsequent claim for refugee status:

A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, **circumstances in the claimant’s home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.**

[Emphasis added]

[7] Where the refugee status officer declines the subsequent claim, or finds that there is no jurisdiction to consider the claim on the basis that the statutory criteria are not met, the claimant has a right of appeal to the Authority. Section 129O(1) of the Act provides that:

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

[8] The Authority therefore intends to consider the appellant’s previous claims,

together with his third claim as presented at the third appeal hearing, with a view to determining whether it has jurisdiction to consider the third appeal. If so, it will then determine whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

COMPARING THE APPELLANT'S FIRST, SECOND AND THIRD CLAIMS FOR REFUGEE STATUS

The first claim

[9] In summary, the grounds for the appellant's first claim were that he was at risk of being persecuted by the LTTE because of his friendship with another young student (XX) who was involved with a rival Tamil organisation, the Tamil Eelam Liberation Organisation (TELO). The appellant claimed that XX was attacked by LTTE cadres at their shared accommodation in early 2002 at which time the appellant was identified by the LTTE as being associated with him. Soon after, XX departed Sri Lanka only to return in late 2003. Within days of returning to his home village XX was killed.

[10] In early 2004, in a related attack, several men came to the appellant's home searching for him. Because he was not there, the men abducted his brother who was never returned. As a result the appellant departed Sri Lanka and returned to Malaysia (where he studied in 2002/2003) and from there decided to travel to New Zealand. His father and sister relocated to Colombo and remained in hiding.

[11] The appellant arrived in New Zealand in late 2004 and filed his first confirmation of claim with the RSB on 21 January 2005. He was interviewed at the RSB on 23 March and 15 April 2005 and a decision declining his application was delivered on 30 August 2005. The RSB found that the appellant's claim was not credible. The appellant appealed to this Authority and his appeal was heard by the Authority (differently constituted) on 15 December 2005.

[12] The first Authority panel accepted that the appellant had a friend called XX and that XX had been killed. However, the Authority rejected the rest of the appellant's account including his claim to be of interest to the LTTE because of his association with XX, the abduction of his brother and that his mother and sister were in hiding as a result. The Authority found, on the basis of enquiries made in Sri Lanka pursuant to a request to the DOL, pursuant to s129P(4), , that the documentary evidence produced to corroborate his claim that his brother had been

abducted by the LTTE was fabricated; see *Refugee Appeal No 75723* (13 December 2006) at [49]-[57] for the Authority's reasoning.

[13] The appeal was dismissed on 13 December 2006 on the basis that it was not credible.

[14] After the appellant's appeal was declined by the first Authority panel, the DOL commenced the process of removing him from New Zealand. The appellant appealed to the Removal Review Authority (RRA) to overturn the decision to do so in December 2006. The RRA declined the appeal in a decision delivered in November 2007.

The second claim

[15] The appellant lodged his second confirmation of claim form with the RSB on 5 March 2008. He was interviewed by the RSB on 9 June 2006 and a decision declining his subsequent claim was issued by the RSB on 16 May 2008. The appellant appealed to the Authority for the second time.

[16] The basis of the appellant's second claim was that circumstances in Sri Lanka had changed since the final determination of his first claim on 13 December 2006, in that there has been a formal resumption of hostilities between the various factions in the Sri Lankan civil war. These hostilities had arisen since his first appeal was finally determined. He also relied upon a further incident which occurred in January 2008, when unidentified men attacked his parents after they had returned to the home village in the west of Sri Lanka. As a result, the parents sold the home and moved back to Colombo. The new owner of the house reported that the police returned to the house from time to time because they suspected the appellant and his family may have LTTE connections. The new owner was also visited by unidentified men looking for the appellant and his family.

[17] The appellant claimed that on return to Sri Lanka he would be readily identified at the airport because he did not have a current passport – his previous passport having expired in December 2006. He said that if he did pass through the airport he would be stopped and detained at a checkpoint because of his profile as a young Tamil male with no NIC. He claimed that if detained he would inevitably be mistreated by the police.

[18] The second panel of the Authority (differently constituted) rejected the credibility of the appellant's second claim, finding that his claim was implausible

and that his testimony was inconsistent in significant respects. The Authority also declined to give any weight to additional documents provided by the appellant to corroborate his second account. On the basis of those findings, the Authority went on to assess the appellant's predicament on return to Sri Lanka and concluded that he did not have a well-founded fear of being persecuted on return. A decision declining his second appeal was issued in *Refugee Appeal No 76228* (8 December 2008).

The third (current) claim

[19] The third claim is outlined in more detail below. For the purposes of the jurisdiction question, it can be summarised as follows.

[20] The appellant claims that increased tensions between Sri Lankan authorities and the Tamil population since the defeat of the LTTE in May 2009 mean that young Tamil men are at increased risk of serious harm by the authorities. Furthermore, the appellant claims to have been identified by various Sinhalese individuals in New Zealand as having pro-Tamil views and being an LTTE supporter. He says that these people may have informed the Sri Lankan authorities of his pro-Tamil stance and that will put him at risk on return. These claims are all based on events which have arisen since the final determination of his second claim to refugee status on 8 December 2008. He also claims that his long absence from Sri Lanka, combined with the lack of a current passport and NIC will exacerbate his risk of being seriously harmed.

THE JURISDICTIONAL THRESHOLD

[21] Bearing in mind that jurisdiction is assessed by measuring claim against claim (not against the facts as found – credibility is addressed later), the Authority finds that the jurisdictional threshold set out in s129O of the Immigration Act 1987 is met. In essence, the appellant's claimed participation in pro-Tamil protests in Auckland in April 2009 and his claimed altercations with Sinhalese Sri Lankans in Hamilton who, he says, will have informed on him to authorities in Sri Lanka discloses significantly different grounds for his claim than those advanced in his first and second claims. Those grounds are clearly said to have arisen since the determination of the second claim.

[22] Given this finding, it is now necessary to summarise the appellant's third claim, assess its credibility and determine whether or not he has a well-founded

fear of being persecuted should he now return to Sri Lanka.

THE APPELLANT'S CASE

[23] What follows is a summary of the appellant's evidence. The credibility of this evidence is assessed later in the decision.

[24] Following the decline of his appeal to the Removal Review Authority on 27 November 2007, the appellant moved to Hamilton and went into hiding from Immigration New Zealand (INZ). He rented a room in a house from HH, an Indian of Tamil ethnicity. The appellant's friend, BB, also rented a room in the house.

[25] Throughout 2008 and early 2009, a young Sinhalese woman from Sri Lanka (CC) often visited HH's house. On several occasions she and the appellant argued about Sri Lankan politics and the civil war (then in train). During several discussions CC became angry with the appellant because he expressed some support for the Tamil cause. Two months before the appeal hearing, the appellant heard that CC had returned to Sri Lanka for a holiday and he believes she may have informed the authorities there of his views and that he is a LTTE supporter.

[26] In approximately November 2008, the appellant established a grocery retail business in a Hamilton suburb where he employed BB as a shop assistant. His customers included Sri Lankan Sinhalese people. The appellant and BB talked with the Sri Lankans about their homeland and maintained good relations with them.

[27] On 22 April 2009, the appellant and BB travelled to Auckland to buy stock for the shop. While there, they were spontaneously invited by a friend to attend a protest in central Auckland in support of the Tamils in Sri Lanka. The protesters assembled in Aotea Square and the appellant and four friends stood on the footpath as part of the crowd. There were no speakers or chants and the appellant and his friends talked among themselves about personal matters. The protest crowd then began moving east down Queen Street and after accompanying them for approximately 100 meters the appellant and BB left the protest and returned to their car. In total, they attended the protest for approximately 45 minutes during which time they observed two Sinhalese men, who they knew were from Hamilton, taking photographs and video footage of the protest. The appellant believes his image was clearly captured in the footage. The appellant and BB also purchased t-shirts at the protest which read "Sri Lankan

Tamils Blood in Sri Lanka” (“the protest t-shirts”).

[28] In late April 2009, a few days after the protest, BB and the appellant both wore the protest t-shirts while serving customers in the shop. A Sinhalese customer (EE) saw the t-shirts and became very angry. The customer verbally abused them, accused them of being LTTE supporters and threatened, “We will kill you at the airport.” The appellant interpreted the threat to mean that if he returned to Sri Lanka the authorities would be forewarned about him and would therefore arrest, detain and mistreat him as soon as he arrived. The appellant knew EE was Sinhalese from his language but does not know any other details about him or whether he has any links to authorities in Sri Lanka.

[29] Two days after the t-shirt incident, two Sinhalese men entered the shop and asked the appellant why he was supporting the LTTE. The appellant ignored them and nothing more was said. The appellant had seen the two men in the shop previously but does not know anything more about them.

[30] In mid-May, the appellant spoke with his uncle, FF, who continues to live in the Kurunegala district. The appellant maintains a close relationship with FF and they speak on the telephone periodically. FF reported that his neighbours had been looking at him strangely, as if he was an LTTE member.

[31] On 11 June, the appellant was arrested by INZ in his shop and served with a removal order under Section 54 of the Immigration Act 1987. BB was also arrested and served with a removal order and both men were detained at the Hamilton Police Station.

[32] The appellant was given a humanitarian interview by an INZ officer at the Hamilton Police Station on 12 June 2010 at the completion of which the INZ officer concluded that the removal process should proceed.

[33] The appellant was transferred to Waikeria Prison pending removal. While there he was visited by an INZ officer and asked to complete an application for a Sri Lankan passport but he refused to do so.

[34] Between his arrest on 11 June and 18 June 2009 the appellant, through friends, contacted and instructed a lawyer in Hamilton, Shaam Bhardwaj of Bridge Law. Mr Bhardwaj assisted the appellant to complete his Confirmation of Claim form for this, his third application, in a consultation while the appellant was still in Waikeria Prison. In the body of the claim form, the appellant gave an Authority to Act in relation to his refugee claim and all other immigration matters to Ms Carol

Curtis, she having been contacted by Mr Bhardwaj.

[35] The appellant was released on conditions at the end of June 2009.

[36] While in custody the appellant feared for his personal safety. He also developed significant anxiety about his situation in New Zealand (the loss of his business and his uncertain immigration status) and his predicament should he have to return to Sri Lanka. In August 2009 he consulted Dr Toni Wansbrough, GP, who prescribed him medication to treat his reported anxiety and depression. The appellant continues to take some medication and at the third appeal hearing reported an improved mental state.

[37] Following his release from custody, the appellant learned that his shop premises in Hamilton had been entered and the goods removed. He has never discovered who was responsible for this but believes it was Sinhalese people, assisted by the shop landlord who is Indian. Initial attempts through a lawyer to sue the shop landlord in relation to the interference with his occupation of the shop were not pursued.

[38] During his time in custody, some of the appellant's possessions in his rented room were interfered with and some of his clothes and documents, including those relating to his refugee claims and immigration matters, are missing. The landlord denied knowing where these items were. The appellant believes they were given to the Sinhalese community. The appellant did not report the alleged theft to the police for fear of being arrested again.

[39] The appellant also found that his car, which had been moved from the shop to his rented address by an INZ officer on the day of his arrest, had been damaged. He believes the damage was caused by someone in the Sinhalese community who wanted to cause him harm. No-one has been identified as being responsible.

Documents

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

[41] Under cover of a letter of 15 March 2010, counsel filed opening written submissions and medical notes relating to medical treatment of the appellant between August and November 2009.

[42] During the hearing, the Authority was provided a copy of a receipt (dated 7 September 2009) for the repair of a car windscreen which the appellant says was damaged as a result of targeted vandalism.

[43] Also during the hearing the Authority provided counsel with the following report: United Kingdom Home Office, *Report of Information Gathering Visit to Colombo, Sri Lanka 23-29 August 2009 (August 2009)* which included information as to the characteristics and profile of those individuals who would likely attract adverse attention from the Sri Lankan authorities.

[44] Counsel's closing submissions were filed on 31 March 2010.

THE ISSUES

[45] 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.

[46] 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

General credibility concerns

Previous Authority panels' credibility findings relied upon

[47] Section 129P(9) of the Act prohibits any challenge to a finding of fact or credibility made by the Authority in relation to a previous claim and the Authority has a discretion as to whether or not it will rely upon findings made in relation to an earlier claim. It provides that:

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

[48] The first Authority panel rejected the appellant's claim for refugee status in *Refugee Appeal No 75723* (13 December 2006). It rejected the appellant's claim of ongoing interest in him by XX's killers. It also rejected the appellant's claim that his brother had been abducted and that the LTTE had an adverse interest in the appellant and his family. It found his evidence to be contradictory and implausible and that he had attempted to bolster his claim by submitting much fraudulent documentary evidence.

[49] Likewise, the second panel of the Authority in *Refugee Appeal No 76228* (8 December 2008) found that the appellant was not a credible witness because his testimony was implausible (at [56]-[60]) and inconsistent (at [62]-[58]) and he also provided further documents which could be afforded no weight. On that basis, the Authority rejected the appellant's claim that the LTTE or another Tamil group attacked his parents in 2008 and was looking for the appellant. His claim to be of interest to the Sri Lankan police was also rejected.

[50] Having considered the persuasive and comprehensive reasons given for the decisions in the first and second appeals and all of the evidence available in respect of the appellant's third appeal, the Authority is satisfied that it is appropriate to rely upon the findings of credibility and fact made by the first and second Authority panels, when considering the third appeal.

[51] This decision now proceeds to assess the credibility of the appellant's evidence in support of his current (third) refugee appeal.

Persistent deceit and manipulation of New Zealand's immigration system

[52] As noted above, the appellant has been found by two previous panels of the Authority to have fabricated an account and obtained false documents from Sri Lanka in an attempt to secure recognition as a refugee in New Zealand.

[53] While the fact the appellant has told lies previously does not automatically mean that he is telling lies about the alleged events which form the basis of his third claim, his previous actions suggest a willingness to manipulate and undermine the integrity of New Zealand's immigration and refugee determination processes. His evidence must therefore attract a high level of scrutiny as to its credibility.

[54] Against that backcloth of persistent deceit, the Authority records the following concerns as to the credibility of the appellant's evidence.

Factual basis for current refugee claim not disclosed in humanitarian interview or Confirmation of Claim Form

[55] Asked by the Authority why he fears returning to Sri Lanka, the appellant gave the following reasons:

- (a) He participated in the April 2009 pro-Tamil protest and a Sinhalese man took photographs and video footage of him which could be used by Sri Lankan authorities to identify the appellant as a LTTE supporter;
- (b) He had a verbal altercation with a Sinhalese man in the shop relating to the pro-Tamil t-shirt, in which the man threatened that the appellant would be harmed on return to Sri Lanka;
- (c) On several occasions he had debated the Sri Lankan civil conflict with CC, a Sinhalese woman who has since returned to Sri Lanka and may have informed the authorities about him; and
- (d) Because he has no current National Identity Card or Sri Lankan passport, he will come to the attention of immigration authorities upon entry into Sri Lanka and because of his profile as a young Tamil man he will be detained, suspected of links with the LTTE and mistreated.

[56] Surprisingly, none of the first three grounds outlined in (a)-(c) above were referred to by the appellant in either his humanitarian interview in June 2009 or in his Confirmation of Claim form for this third claim.

[57] Asked why he did not mention these matters in his humanitarian interview, the appellant said that the INZ officer did not ask him any questions about it. His response is contradicted by the record of the humanitarian interview on file which records the multiple questions he was asked in relation to his possible return to Sri Lanka and his situation there, including the following:

- Question 16: Why have you not returned to your home country?
- Question 17: What effect will it have on you if you are returned to your home country?
- Question 21: Is there anything else you wish to tell me?

[58] Later in the interview the appellant was asked "What significant changes

have occurred since any decision was made by the Appeal Authority (or s35A decision)?" His response is recorded as being "opened a business". When reminded by the Authority that he was asked questions about his situation on return to Sri Lanka and given an opportunity to provide information about the protest and the altercation, the appellant said that the INZ officer told him that he (the officer) could not ask him about Sri Lanka or his situation there, impliedly asserting that that was why no mention was made of the protest photographs and the shop altercation. This assertion is plainly contradicted by the record of the interview which establishes that the appellant was asked open questions which invited the giving of such information and yet he gave answers to them which omitted to mention the events he now claims put him at risk of being persecuted.

[59] Asked to explain why these events were also omitted from his Confirmation of Claim form, the appellant stated the form was filled out while he was in prison and he did not have much time to explain his situation to the lawyer. That response does not satisfactorily explain the omission. The appellant's contention is that these two events were the primary reason for his third claim for refugee status and that, while in prison, he believed that his arrest by INZ was also related to those events. In other words, the protest and the altercation must have been at the forefront of his mind as being the cause of his predicament. His Confirmation of Claim form does record statements he made in response to questions about what he feared would happen on return to Sri Lanka, why it would happen, what happened to cause the fear, when he first feared it would happen and the events which have caused the claim for refugee status. Answers are recorded for each of those questions. None of the answers refers to any of the events which the appellant now says are the basis for his claim. It is beyond belief that a claimant motivated to make a claim on the basis of three specific events would fail to make any reference whatsoever to those events when asked to summarise the reasons for the claim in the application form. This is particularly so with an individual such as the appellant who is familiar with the refugee claim process.

Vague and uncorroborated assertions

[60] Many of the details of the appellant's present account are vague and uncorroborated by external or credible evidence. For example, the appellant is unable to provide the full name of CC despite the fact that he met her many times and she is known by one of his close friends in Auckland with whom he keeps in contact. When asked why he did not know her name or had not confirmed it with friends, the appellant could give no sensible answer.

[61] The same vagueness was a feature of his evidence about the men who took photographs and video footage of him at the protest and the man with whom he had an altercation in the shop. In relation to all those people, the Authority asked the appellant to give details about them such as their names, their occupations, their home area in Sri Lanka or any other details. In each case the appellant asserts that he knows they live in Hamilton and are Sinhalese but that he knows nothing else about them. When asked if he had attempted to find out more about these people (given their relevance to his refugee appeal and his claimed predicament in Sri Lanka) he said he had not because he thought it would cause further difficulties. He did not elaborate on what those difficulties were.

[62] Other potentially corroborative evidence is also notable by its absence and by the lack of any concerted effort by the appellant to obtain it. An important feature of the appellant's claim is his assertion to have been verbally attacked and threatened in his shop. Despite this, the appellant has made little effort to obtain video footage of those events. Asked by the Authority if he had security footage of the altercation in the shop the appellant said that there were security cameras operating but that he had not obtained the footage. Initially, he suggested that he could obtain the footage after the hearing but when challenged about why he had not already done so (given the issue had earlier been raised with him at the RSB interview) he said that the security cameras (and footage) were not available. It is inherently unlikely that, had the incident genuinely occurred, the appellant would not have made more effort to obtain the footage to corroborate his claim. This is especially so because the matter was raised at the RSB interview and therefore the lack of footage (when it may still have been available) was brought directly to his notice. While counsel submits that the appellant made a general effort to recover all of the stock and other possessions from the shop once he was released from custody, the Authority finds the lack of effort to specifically locate the security footage which would provide compelling corroborative evidence of the appellant's account, is indicative that the event did not occur.

[63] As to his claim that personal possessions were stolen from his room in HH's house, the appellant did not report the matter to the police and so there is no official record of the theft. Asked why he failed to report the alleged theft, he said that he did not want to tell the police because he was fearful of being arrested again. There is no apparent reason why he should have feared a further arrest by the police. Having lodged a second claim for refugee status while in detention and having secured release from detention on the basis of that claim, the appellant must have known that he was not at risk of further arrest at that time. In the

context of the appellant's generally unreliable account, the Authority finds that the lack of any corroborative evidence of the theft militates against the evidence being given any weight.

Counsel's submissions as to the appellant's mental state

[64] As noted above, counsel provided the Authority with medical notes relating to medical consultation and treatment received by the appellant between August and November 2009. In her memorandum of counsel (15 March 2010) counsel asserts (at p6 [a]ii) that the appellants credibility should not be impugned because of vagueness or inconsistencies in recounting peripheral details because memory failures are experienced by many people who have experienced persecution. On p7 she submits that the appellant had mental health difficulties at the RSB hearing which made it difficult for him to concentrate and caused him great anxiety.

[65] While these submissions are respectfully acknowledged, the Authority finds that they do not outweigh the specific credibility concerns outlined above. While the medical notes indicate self-reported memory lapses and anxiety, there is no analysis of these issues with regard to the appellant's ability to give evidence or an updated assessment of his mental state after he had been on the prescribed medication (as he had been for some months at the time of the appeal hearing). There was no submission or medical evidence before the Authority to establish that his evidence at the appeal hearing could not be relied on.

[66] Issues as to the relevance of his mental state and medical treatment to his predicament on return to Sri Lanka are dealt with later in the decision.

Summary of findings on credibility

[67] For the reasons given above, the Authority rejects the appellant's third claim for refugee status, specifically that:

- a. he was photographed and videoed by antagonistic Sinhalese men from Hamilton while participating in a pro-Tamil protest in Auckland and that those images would have been used to inform authorities in Sri Lanka about his activities;
- b. he had several heated arguments with CC about the civil conflict in Sri Lanka and that she would have thus been motivated to inform the Sri Lankan authorities about his pro-Tamil stance when she returned there on

holiday;

- c. he was verbally abused and threatened by a Sinhalese man in his shop who will have subsequently informed on him to Sri Lankan authorities; and
- d. he was accused of being an LTTE supporter by further Sinhalese customers who will have informed on him to Sri Lankan authorities.

[68] Furthermore, in reliance on the previous panel's findings, the Authority rejects the claims that he has previously had any adverse profile with the Sri Lankan authorities or that he has ever been targeted by the LTTE or any other pro-Tamil group. Also rejected is his claim that his parents were targeted by the LTTE and that the police have an ongoing interest in him and his parents; see *Refugee Appeal No 76228* [52]-[77]. The appellant's claim that his father refused to report to the police station as requested and so is now unable to register his presence in Colombo is inextricably linked with his discredited claim to have been of interest to the police and the LTTE. It is also rejected. It is not established that his parents and sister have not registered their residence in Colombo with the police.

[69] On that basis, the Authority finds that the appellant is a Sri Lankan national of Tamil ethnicity, who is able to obtain a genuine Sri Lankan passport. He has no current or historical adverse profile with the Sri Lankan police or any other Sri Lankan authorities. His parents and sister currently live in Colombo and do not have an adverse profile with the Sri Lankan authorities.

Objectively on the facts as found, does the appellant have a well-founded fear of being persecuted on return to Sri Lanka?

[70] 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).

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

[72] The appropriate question to be considered is whether, considering the

totality of the evidence, individuals having each of the appellant's characteristics would face a real chance of serious harm for a Convention reason if sent to Sri Lanka; see *A v RSAA* (CIV 2004-4-4-6314, 19 October 2005, HC, Auckland, Winkelmann J) at [38].

[73] The Authority now turns to consider the country information against which the risk to the appellant is to be assessed.

Summary of country conditions

[74] While the country information about the situation facing some Tamil civilians in Sri Lanka, particularly those with known connections to the LTTE, indicates that they may be subject to arbitrary arrest, detention and mistreatment, such information does not establish that every Tamil citizen is at risk of serious harm to the real chance level. In other words, while there is a risk of serious harm for Tamil individuals with a particular profile in Sri Lanka, for others the risk does not rise to the level of a real chance.

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

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

[77] Continued security in Colombo includes checkpoints and a high police and

army presence: *Refugee Appeal No 76294* (30 June 2009) at [91]. Some of the country information indicates that the frequency of checkpoints in Colombo has reduced since mid-2009. See United Kingdom Foreign and Commonwealth Office, *Report of Information Gathering Visit to Colombo, Sri Lanka 23-29 August 2009* (22 October 2009) (“FCO October 2009 Report”). The country information indicates that those most likely to be of interest to authorities at the checkpoints are young Tamil males originating from the north and east of the country, particularly those with: a profile or history of LTTE links; scarring consistent with wounds sustained in hostilities; no identity card or other identity documentation; no Colombo address; an outstanding arrest warrant or criminal record; no employment or other verifiable reason (such as study) for being in Colombo and those without family or other networks in Colombo on which to rely for support; see the FCO October 2009 Report and UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (April 2009), particularly Section D: “Groups at Risk of Targeted Human Rights Violations”. The FCO October 2009 Report at page [6] reports that most sources consulted said that arrests at checkpoints are very rare.

[78] The FCO October 2009 Report indicates that some Tamil arrivals at the international airport in Colombo may be subject to careful scrutiny. A number of arrivals have been detained and questioned on the grounds that they are suspected of having LTTE links overseas; see *Refugee Appeal No 76294* (30 June 2009) at [93]. Again, the authorities are particularly vigilant with those who possess the characteristics outlined above in [73]. The report indicates that those who have been returned as failed asylum seekers are not at additional risk of serious harm on that basis. See in particular [1.14]-[1.18] at p9 *Foreign and Commonwealth Office Report*.

[79] The Authority has also consulted country information published in 2010 such as United States Department of State *Country Reports on Human Rights Practices for 2009: Sri Lanka* (11 March 2010) and the UK Home Office *Country Report: Sri Lanka* (18 February 2010), none of which displaces the above assessment of the country conditions.

[80] This decision now turns to consider the specific predicament of the appellant.

Assessment of the appellant’s predicament on return

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

Lanka to the real chance level. The reasons follow.

[82] The country information before the Authority does not establish that all Tamil Muslim men who return to Sri Lanka from abroad are at risk of being persecuted for a Convention reason.

[83] The profile of the appellant is that of a Tamil man who was born in the west of Sri Lanka and whose immediate family now live in Colombo. He has no adverse profile with Sri Lankan authorities (either personally or by way of family or other connections) and has never been suspected of LTTE links. His family are not suspected of LTTE links and have not been asked to report to police at any time in the past. The appellant is able to enter and depart Sri Lanka without difficulty (as he did without incident between 2002 and 2004).

[84] Relevant to these characteristics, the appellant contends (by way of his own evidence and counsel's submissions) that he is at risk in Sri Lanka for the following reasons:

- (a) He will be mistreated because of the defeat of the LTTE and because there is now general mistreatment of Tamils;
- (b) He will be at risk of arbitrary arrest and detention at the airport on return and his risk is exacerbated because he will appear nervous and anxious;
- (c) He cannot live with his family because their Colombo accommodation is small and they have not registered with the police;
- (d) He cannot live with other relatives, for example his uncle, FF; and
- (e) Without an identity card the appellant will not be able to access the medication he takes for anxiety.

[85] However, in spite of these assertions, the characteristics of the appellant do not expose him to a real chance of being persecuted for a Convention reason.

[86] As to the claimed risk of arrest, detention and mistreatment from the Sri Lankan authorities either at the airport or elsewhere in Sri Lanka, that is unfounded on the country information. The appellant does not have any known link to the LTTE and there is no reason to believe that he would suddenly be suspected of such a link and attract the adverse attention of police or security officials. His claim that he will appear nervous and agitated on arrival at the airport and thus attract more attention leading to serious harm is not accepted. Even if he

did appear nervous at the airport, in the absence of an adverse profile with the authorities there is no reason to conclude that his demeanour will lead to mistreatment by the authorities. It is a speculative and unsubstantiated claim. In any event, the appellant concedes that the anti-anxiety medication is working well for him and that his mental health has improved since he suffered severe anxiety as a result of his detention in New Zealand.

[87] His claim that he cannot live with his parents is not established. It will be recalled that the Authority rejects his claim that his parents cannot and have not registered their residence in Colombo. Moreover, it is not established before the Authority that the small size of the family's current residence would prevent the appellant from being able to stay there should he now return. Neither is it established that he could not live with his uncle, FF.

[88] His further claim that he will not be able to access his medication in Sri Lanka until he gets an NIC is not established by any objective evidence. Nor is it established that he would be unable to take a supply of medication with him from New Zealand or have it sent to him.

[89] His assertion that his lack of identity documentation will expose him to a real risk of being persecuted is also rejected. There is nothing to prevent the appellant getting a birth certificate from Sri Lanka via his parents or FF before he returns to Sri Lanka. Likewise, there is nothing to prevent him obtaining a new Sri Lankan passport from the Sri Lankan High Commission in Australia on which to return. He can obtain a copy of his previous passport which would likely facilitate obtaining a new one and he does not require a current NIC to make the application.

[90] While his claimed lack of an NIC may mean that he is questioned if stopped at a checkpoint, there is no basis on which to find that he would face serious harm as a result. This is especially so given his ability to produce other documentation (birth certificate or passport). Country information before the Authority does not establish that all Tamil males without a current NIC face a real chance of serious harm. The appellant has not established that he has other characteristics that would elevate his risk of serious harm at a checkpoint to the real chance level. Furthermore, there is no reason why the appellant cannot apply for a new NIC immediately on arrival in Sri Lanka. His own estimation is that it would take approximately one month to obtain one.

Conclusions on well-founded fear

[91] The Authority has considered whether a person having all of the characteristics of the appellant facing the particular circumstances he would face on return has a real chance of being persecuted in Sri Lanka. For the reasons given, the answer is “No”. The appellant does not face a real chance of being persecuted should he now return to Sri Lanka.

[92] The first principal issue identified for determination is answered in the negative. That being the case, the second principal issue does not fall for consideration.

CONCLUSION

[93] For the above reasons, the Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

“B A Dingle”
B A Dingle
Member