

AT AUCKLAND

Appellant:	AI (Sri Lanka)
Before:	S A Aitchison (Member)
Counsel for the appellant:	C Curtis
Counsel for the respondent:	No Appearance
Date of hearing:	11 July 2011
Date of decision:	15 September 2011

DECISION

INTRODUCTION

[1] This is an appeal under section 194(1)(c) of the Immigration Act 2009 (“the Act”) against a decision of a refugee and protection officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining to grant either refugee status or protection to the appellant, a citizen of Sri Lanka.

[2] Pursuant to section 198 of the Act, the Tribunal must determine whether to recognise the appellant as:

- (a) a refugee under the Refugee Convention (section 129); and/or
- (b) as a protected person under the Convention Against Torture (section 130); and/or
- (c) as a protected person under the International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[3] The appellant fears the police, security forces, army, and paramilitary groups in Sri Lanka. He believes the Sri Lankan authorities will subject him to serious harm or kill him because they suspect him of supporting the Liberation Tigers of Tamil Eelam (LTTE) from abroad. He also fears he will be kidnapped by the authorities and paramilitary groups for extortion upon return to Sri Lanka. The primary issue in this appeal is whether the appellant's claim is credible.

[4] Given that the same account is relied upon in respect of all three limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[5] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

Living in Jaffna

[6] The appellant is a Tamil who was born in Jaffna, Sri Lanka. He completed his primary and secondary education in Jaffna. He has six siblings, two brothers and four sisters. They now live, variously, in Colombo, the United Kingdom and Canada.

[7] In April 1987, the appellant's family home in Jaffna was damaged by a bomb explosion caused by the Sri Lankan Air Force (SLAF). In September that year, the appellant's eldest brother was taken by the Eelam National Democratic Liberation Front (ENDLF). His father managed to secure his release a week later after presenting medical records and claiming that he was not fit for combat training.

[8] As a student, the appellant supported the LTTE in Jaffna by helping to dig bunkers in public places. He did this on approximately 10 to 15 occasions, along with other students, in 1986. After graduating from secondary school in 1989, the appellant was captured by members of the ENDLF and Eelam People's Revolutionary Liberation Front (EPRLF). He was held for four to five hours before convincing them to release him so that he could further his education.

[9] In February or March 1990, the appellant's eldest brother left Sri Lanka and successfully applied for refugee status in Canada.

[10] The family home in Jaffna was hit by artillery fire in September 1990 by the Sri Lankan Army, and destroyed.

Living in Madras, India

[11] The appellant left Sri Lanka in October 1990 and travelled to Madras in India. He resided there on a student visa and completed his tertiary studies.

[12] The appellant's family left Jaffna in 1996 and relocated to Colombo. The appellant's father was employed in Colombo as a teacher for some four to five years before he retired.

[13] The appellant returned to Sri Lanka for a holiday in January 1997. Upon arrival in Sri Lanka, he was questioned by immigration officials for approximately 20 to 25 minutes at the airport. The appellant returned to India a week later.

[14] In July 1998, having completed his studies, and anticipating the expiry of his student visa, the appellant registered with UNHCR in Madras. He presented UNHCR with a letter outlining why he could not, as a consequence of civil war, return to Sri Lanka, and UNHCR assured him that they would speak to immigration officials and ensure that he could remain in India. The appellant also registered at the police station in the area he lived.

Living in Colombo

[15] The appellant returned to Sri Lanka in April 2001 after his father secured employment for him with a company in Colombo. Upon arrival in Sri Lanka he was questioned for approximately 20 to 25 minutes by immigration officials at the airport. He was asked what he had been doing in India and whether he had any connections to the LTTE.

[16] While living in Colombo, the appellant was stopped at checkpoints and asked questions. He believes he was stopped because he carried a National Identity Card from Jaffna. He was questioned as to whether he knew certain persons. When stopped he would show his employment identity card and then be released to attend work.

[17] In October 2001, the appellant travelled to Singapore for a sister's wedding. He stayed there one month. Upon return, he was questioned by immigration officials about why he travelled to Singapore and about his profession.

[18] The appellant decided to come to New Zealand in September 2007 after attending an employment exposition in Colombo. Later that same year, he applied to study in New Zealand and, upon acceptance into a graduate diploma programme, arrived in New Zealand in April 2008.

Arrest of appellant's brother

[19] On 8 August 2009, one of the appellant's brother's, AA, was captured by a group of approximately five to six men in Wellawatte, Colombo, and detained. He was questioned and beaten. He was handed over to the Wellawatte police station the following day.

[20] The appellant's father and brother-in-law visited the police station in the morning and were told that AA was not there; however, in the afternoon when they visited they were told that he was held at the station. AA was transferred to the Welikada Magazine prison that same evening. When family members met with AA in prison he asked them to arrange for a lawyer to assist him, which they did.

[21] The appellant learnt that his brother was missing the evening after his capture, when his eldest sister called him. He finally learnt his brother's whereabouts after calling his family some three to four days later. AA was accused of committing terrorist activities and remained in prison for three weeks, and appeared before the Magistrates' Court during this time. He was mistreated while in detention and was released on bail at the end of August 2009.

[22] On approximately 2 or 3 September 2009, two to three days after AA's release, the appellant's eldest sister called the appellant and told him that whilst AA was detained the police had asked him questions about the appellant. She also advised that the police had asked questions about their brother BB who was living in Canada, but did not seem interested in him. She told the appellant that the police had also alleged that the appellant and AA were LTTE supporters and that the appellant was financially supporting the LTTE from abroad. She told him to be careful and to stay in New Zealand. The appellant did not ask for any more information as the family might experience difficulties if the telephone was tapped.

[23] At the time, the appellant was not worried about himself as he had a permit to be in New Zealand for another year, and expected to find employment and apply for residence. He considered that he was safe and would not need to return to Sri Lanka.

[24] The appellant spoke to AA approximately a week after his release from detention, at the end of August/beginning of September 2009. AA told him that there had been problems, but that he had come home. He did not say any more. The appellant next spoke to him at approximately the end of September/beginning of October 2009. AA told the appellant he had been arrested at the instigation of an informer, or "tip-off". He also said that the police had asked about the appellant's whereabouts and accused both AA and the appellant of being LTTE supporters, and the appellant of travelling abroad to provide financial support to the LTTE. AA did not say any more as it was not safe to speak on the telephone.

[25] When AA had finished speaking to the appellant on this occasion, one of the appellant's younger sisters, who was living in the family home in Colombo, spoke to the appellant and told him, too, that the police had been asking AA questions about him, but that they should not discuss this further on the telephone.

[26] The criminal proceedings against AA were dismissed in January or February 2010. In April or May 2010, AA travelled to India on holiday. Prior to his travel, his lawyer informed the police of his intention to travel. He did this because, soon after his release, he was told by the police that he would need to report any departure from the country. The appellant believes AA may have reported several times to the police since his release. He does not know any more details about his brother's requirements to the police or whether there continue to be any. He did not ask about this.

[27] Prior to his capture, AA had been employed both in Jaffna and Colombo. He was employed in Jaffna from 2000 until 2003. While teaching in Jaffna, he lived in the family home that had been partially rebuilt. In 2003, he returned to live with his family in Colombo. Up until 2006, he continued to travel to Jaffna every four months to collect rent from friends who occupied the family home. At one point, in late 2006, as a consequence of the conflict, he was prevented from returning to Colombo from Jaffna. From June 2008, he was employed, part-time, by the British Council in Colombo. He worked there for several months every six-month period. He was not working at the time he was captured.

[28] The appellant arrived in New Zealand on 23 April 2008. He lodged a claim to refugee status on 21 July 2010 and was interviewed by the RSB on 24 August 2010. On 22 November 2010, the RSB invited the appellant to make submissions on whether he should be recognised as a protected person under the new Immigration Act 2009. The RSB received written submissions from the appellant on this issue on 13 December 2010. The RSB declined the appellant's refuge and protected person claim on 7 April 2011. The appellant appealed this decision to the Tribunal on 20 April 2011.

[29] The appellant claims to fear the police, security forces, army and paramilitary groups upon return to Sri Lanka. He fears that the police will arrest him because they suspect him of supporting the LTTE. He fears paramilitary groups, as they kidnap persons returning from overseas and extort money from them. The police and security forces support this practice. The army and soldiers also kidnap people in white vans and kill them.

[30] While news reports convey that a number of low-level supporters of the LTTE, detained by security forces in Sri Lanka, have recently been released, their release is a consequence of international pressure on the government. As the Sri Lankan government anticipates allegations of war crimes from the United Nations, they are making these token gestures as part of an "acting drama". There are still several hundred thousand refugees in the country who have not been resettled. Emergency regulations are still in place in the country.

[31] On 7 July 2011, counsel wrote to the Tribunal enclosing a copy of a British Broadcasting Corporation, Channel 4 documentary, entitled *Sri Lanka's Killing Fields*.

[32] The appellant stated at the hearing before the Tribunal on 11 July 2011 that this documentary was presented to illustrate the acts of violence committed by the Sri Lankan army against Tamil civilians during the closing phase of the conflict.

[33] Counsel filed submissions with the Tribunal on 25 July 2011, including a response to several questions raised by the Tribunal in correspondence on 14 July 2011. Further submissions were received from counsel on 23 August 2011 concerning the abovementioned documentary.

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[34] The appellant's evidence of his brother's arrest, detention and release, delivered in his statement, before the Refugee Status Branch, and Tribunal, was consistent and clear. This evidence is corroborated by evidence of police submissions made to the Magistrates' Court in Colombo. Areas of the appellant's evidence concerning police interest in him, however, were vague, mobile, and characterised by inconsistencies and contradictions.

When the appellant was informed about allegations against him

[35] When the appellant was asked by the RSB when he first learned from his brother, AA, that the police had made allegations about him personally, he stated that he had heard this on the second or third time they spoke after his release from detention. When pressed to be more specific, he responded that he had heard this news in approximately, August, September or October 2009. He added that he "was not paying much attention to this kind of information at that time". Before the Tribunal, he stated that AA informed him of this news on the second or third time after his release from detention, then later in evidence stated that he had heard this on the second occasion. When asked, specifically, when he learned this information he estimated it to be at the end of September, or in October 2009. When asked by the Tribunal why he could not be more specific about the time he spoke to AA and learned this critical information concerning his life and security, he stated that he was not concentrating on the date and thought that he was secure in New Zealand at the time. When reminded that he had presented precise dates concerning his other evidence, he simply repeated his evidence.

Who first informed the appellant of allegations made against him

[36] To the Tribunal, the appellant claimed that AA had first informed him of the police allegations about him being an LTTE supporter, then later stated that he had first heard this news from his sister. When asked to explain this discrepancy, he simply compounded the irreconcilable claims by stating that his eldest sister had first informed him of this news, however, his younger sister had also relayed this news after he had spoken to his brother on a shared telephone call.

[37] The Tribunal, further, asked the appellant to comment upon the discrepancy in his evidence before the RSB that AA first told him of the police allegations about him as follows:

Q. Did [your] brother tell you this or your sister?

A. Earlier my brother mentioned [then] my sister mentioned.

[38] The appellant responded that he had been tense at the RSB interview and that his evidence to the Tribunal was the correct evidence. The Tribunal does not accept this explanation as satisfactory and finds that the appellant's evidence before the RSB was unequivocal.

News of "tip-off"

[39] To the Tribunal, the appellant stated that the police had received a "tip-off" that he and AA were LTTE supporters. When asked how he knew there had been a "tip-off" he stated that this was recorded in the police submission to the Magistrates' Court on 9 August 2009. When asked whether AA told him there had been a "tip-off" he responded, no. Later, however, he stated that AA had told him that there had been an informer and this was why he was arrested. When asked to respond to this inconsistency, he stated that he learnt there was a "tip-off" when reading the police submission, then he added that he thought that *later* AA also mentioned this matter when they spoke the second time after his release from detention. When the Tribunal drew the appellant's attention to the fact that he had claimed to have received the police submission subsequent to hearing the news of a "tip-off" from AA, not before, he changed his evidence, claiming that the police submission confirmed what he had already been told.

Questions about the appellant

[40] Initially, the appellant told the Tribunal that AA did not tell him what questions the police had asked him about him. When asked by the Tribunal whether the police had asked AA where the appellant was, he responded that he did not ask his brother about this, and that the police, in any event, knew where he was. Later, however, he stated that the police asked AA about his whereabouts. When asked to respond to this inconsistency the appellant stated that the questions he was being asked were confusing.

Affidavit evidence

[41] The appellant tendered an affidavit from AA in support of his claim. In this affidavit, AA recorded that he had been arrested on 8 August 2009 and had been detained and tortured. He was released on bail on 27 August 2009. He appeared before the Magistrates' Court and was remanded. He was then released from the charges against him on 11 February 2010. He added that he was questioned about the appellant during his detention.

[42] When the appellant was asked by the Tribunal why his brother had not included in the affidavit the fact that the police had made accusations about him (the appellant) supporting the LTTE and providing funding from abroad, the appellant stated that it would not be safe to include this detail. When the Tribunal pointed out that inclusion of this fact was no more likely to endanger anyone than the facts already contained therein, including the record of his brother's mistreatment, the appellant simply repeated his evidence.

Conclusion on credibility

[43] Based upon the combined effect of the above vague, inconsistent and contradictory evidence, the Tribunal does not accept the appellant's account that the police inquired about him or made allegations that he was an LTTE supporter and providing financial support to the LTTE. The Tribunal does, however, accept that his brother, AA, was arrested and mistreated by the authorities as a suspected LTTE member or supporter, and has since been released, with all charges being dropped.

[44] It is also accepted that the appellant is a Tamil, of Hindu faith, born in Jaffna, Sri Lanka. He has spent a significant period of time studying in India, and later lived and was employed in Colombo where his family have settled. He has since travelled to New Zealand and applied for refugee status. The appellant's claim falls to be assessed on this basis.

THE REFUGEE CONVENTION – 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* (17 September 1996), the principal issues are:

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

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

[47] The "being persecuted" element of the refugee definition is interpreted by the Tribunal as the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection; see J C Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at [38]. As such, the concept of persecution is a construct of two essential elements, namely, the risk of serious harm and a failure of state protection.

[48] The appellant's brother was detained and mistreated by the police in Sri Lanka as a suspected LTTE member or supporter. He was detained for approximately three weeks and brought before the Magistrates' Court to extend his periods of detention. Upon being released on bail, he continued to appear before the Magistrates' Court until his case was dismissed approximately six months later. He was not mistreated during this time. Since the case was dismissed, he has not experienced any further difficulties from the authorities. He was required to report to the police, and inform them if he intended to leave the country. He did so when he travelled to India in approximately April or May 2010. The police had no objection to him travelling.

[49] The question for the Tribunal is whether the profile of the appellant's brother, and his treatment by the authorities, would give rise to the appellant facing a real chance of being persecuted in Sri Lanka upon return. The Tribunal has not

accepted as credible the appellant's evidence that the authorities questioned his brother about him or made any accusation that he was an LTTE member or supporter. Further, the appellant's brother's profile is distinguishable from the appellant's in certain key respects. His brother continued to live in Jaffna after the appellant and his family left there. When living in Colombo, he travelled frequently to Jaffna to collect rent. At one point in time, in 2006, he remained in Jaffna for six months, as he was unable to return to Colombo on account of the conflict. It is well documented that the authorities view with suspicion those who, in particular, have lived in Jaffna during the later phases of the conflict in Sri Lanka. At the time the appellant's brother was arrested he was also not engaged in employment (being employed part-time for short periods of the year only), another risk factor that may cast suspicion of his having LTTE connections.

[50] In contrast, the appellant has never returned to Jaffna since leaving there in 1990. While living in India, he engaged in study and completed several qualifications. Upon return to Colombo, he was immediately placed in employment and continued in employment until coming to New Zealand. He has never been arrested or detained by the authorities.

[51] The Tribunal has regard to the potential risk profiles for Sri Lankans returning or deported to Sri Lanka expressed by the UNHCR in the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (5 July 2010) (these guidelines expressly supersede earlier guidelines issued in April 2009), and the United Kingdom Border Agency *Report of Information Gathering Visit to Colombo, Sri Lanka 23-29 August 2009* (Border Agency Report). The risk factors identified in the Border Agency Report include an outstanding arrest warrant, criminal record, connections with LTTE, illegal departure from Sri Lanka, and lack of an identity card or other documentation.

[52] The appellant has no criminal record, and there is no evidence of an arrest warrant in existence for him. He holds a national identity card. While he has been stopped on a number of occasions at checkpoints and questioned, he has soon been released, without harm. Upon return to Sri Lanka from living in India, and visiting Singapore, he has been questioned by immigration officials and soon released, again without harm. When travelling to New Zealand, he left the country legally.

[53] The fact that the appellant was held for four to five hours by the ENDLF and EPRLF in Jaffna soon after graduating from secondary school, then released, and that he assisted the LTTE to dig bunkers on 10 to 15 occasions as a student in 1986, more than 25 years ago, does not give rise to a real chance the authorities know of, or will learn of, such and suspect the appellant of having LTTE connections. While the appellant expressed to the Tribunal that he supports the LTTE, in ideology, there is no evidence that the appellant's beliefs, in the absence of his providing any tangible assistance or support, will come to the attention of the authorities.

[54] The fact that the appellant has travelled abroad to India, Singapore, and most recently to New Zealand, does not, in itself, give rise to a real chance the authorities will suspect him of providing financial support, or other means of support, to the LTTE. Counsel argues that the appellant is part of the new post civil war Tamil diaspora, and that, with the LTTE defeated, the Tamil diaspora has become the new enemy of the Sri Lankan government. The reality, however, is that the Sri Lankan authorities have always been concerned about the flow of funds and support to the LTTE from Tamils abroad and the "post-civil war" period has not changed that. There is no reason why the authorities should consider the appellant to be a supporter of the LTTE and his travel to other countries has been for legitimate reasons, which he can demonstrate. Similarly, Counsel's submission that the "recent controversy" surrounding the documentary "Sri Lanka's Killing Fields", recording, *inter alia*, the dead body of the former LTTE leader, Vellupillai Prabhakaran, amongst other executed LTTE soldiers, would make the appellant "especially vulnerable" and at "renewed risk", in the absence of any evidence that the appellant is of interest to the authorities as an LTTE supporter, is purely speculative. Further, the Tribunal does not accept counsel's submission that reports in Sri Lanka of Keith Locke's support of Tamils, along with the statement of the New Zealand's Prime Minister that "Tamil boat people would not be welcome here", in combination with the appellant's "sudden return", would identify the appellant as an "unwanted Tamil refugee claimant" and a person at risk of a real chance of being persecuted.

[55] The appellant has a brother who was suspected of being an LTTE member or supporter, but the matter against him was dismissed more than a year and a half ago and there is no evidence that he has experienced any further difficulties from the authorities since that time. The appellant does not know what current

conditions, if any, may have been imposed upon his brother by the police. He told the Tribunal that he has not asked about this. He knows only that his brother informed the police before he left Sri Lanka to visit India. The appellant's family members have also not experienced any difficulties from the authorities as a result of AA's circumstances. Further, there is no evidence that the authorities have any interest in the appellant. Given his profile and the circumstances outlined above, there is no real chance that the authorities will consider him to be an LTTE supporter or member.

[56] It is acknowledged that, in spite of the protracted conflict in Sri Lanka coming to an end in May 2009 (along with many LTTE leaders, including its chief), the Sri Lankan authorities continue to fear an LTTE resurgence and exercise broad powers of arrest and detention under the Prevention of Terrorism Act and Emergency Regulations against those persons suspected of LTTE links. Military checkpoints continue to be maintained throughout the country, and it is reported militarisation is particularly heavy in the north of Sri Lanka; Australian Department of Foreign Affairs and Trade *Sri Lanka: Treatment of Tamils: CIS Request No LKA10612* (21 September 2010). In the wake of the conflict, over 10,000 persons suspected of having ties to the LTTE were arrested and detained in high-security camps; see *Human Rights Watch World Report 2010: Sri Lanka*, p. 350.

[57] As detailed in *Refugee Appeal 76507* (5 August 2010), the security and human rights situation in Sri Lanka has been an evolving one since the cessation of hostilities. Several years on from the conflict those considered to have a low level involvement with the LTTE are slowly being released from the high security camps; see United Kingdom Border Agency *Operational Guidance Note: Sri Lanka* (16 March 2011). Fewer checkpoints are reported in Colombo, and the number of arrests and detentions are decreasing. The UNHCR Guidelines (p1) state that the security situation in Sri Lanka has significantly stabilized and states that:

In light of the improved human rights and security situation in Sri Lanka, there is no longer a need for group-based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country.

[58] While there may be heightened interest in Tamils originating from the north of Sri Lanka, there is no evidence of the appellant being at risk of serious harm at the hands of the authorities based on his ethnicity or place of birth alone. Upon return to Sri Lanka, he may be questioned by immigration officials as he has been in the past. It is also possible that he may be questioned by the Criminal

Investigation Department (CID) and State Intelligence Service (SIS), in particular should he be deported, and asked the grounds for his deportation and his background, a process reported by the Sri Lankan High Commission in London in the United Kingdom Border Agency *Country of Origin Report Sri Lanka* (11 November 2010). However, there is no evidence, given his profile and circumstances, that there is a real chance of his being persecuted; for a more detailed discussion of airport checks for returnees/deportees see *Refugee Appeal Nos 76502, 76503 and 76504* (29 June 2010), and *AG (Sri Lanka)* [2011] NZIPT 800092.

[59] Counsel submits news reports of persons returned to Sri Lanka having been persecuted for alleged LTTE involvement. In one article, "Germany-based 50 year old Tamil woman arrested at airport for taking part in 'AntiWar' Demonstration" *www.UKTamilNews.com* (23 May 2010), an LTTE profile was alleged by the authorities for a Tamil woman, who arrested her upon return. Otherwise, the profile of such persons is, generally, unreported in the news reports received. In parallel, the Tribunal is aware of a recent BBC News report that persons deported to Sri Lanka, including asylum-seekers, were questioned by the CID, and released the same day; see "Sri Lanka: Fears for Tamils deported from UK" *BBC News* (17 June 2011). On the basis of these reports it is difficult to draw inferences, and it is not possible to conclude that persons who are deported or returning to Sri Lanka, without any LTTE connections, are at risk of being persecuted. As stated by the Asylum and Immigration Tribunal *TK (Tamils – LP updated) Sri Lanka CG* [2009] UKAIT 0049, paras 98-108, having regard to various news articles of the arrest and mistreatment of returnees/deportees to Sri Lanka, it cannot be discounted that in those cases the arrested persons were of a certain profile, having committed or being suspected of having committed crimes abroad or having LTTE connections.

[60] The appellant also claims that he is at risk of being kidnapped by paramilitaries and authorities in Sri Lanka who seek to extort money from him. This assertion is not supported by any evidence. The claim that the appellant would suffer this fate is simply conjecture. Given that conjecture and surmise have no part to play in assessing whether a risk of harm is well-founded, any risk of harm to the appellant for this reason is no more than speculative and falls well short of amounting to a real chance.

[61] The Tribunal finds that there is no well-founded fear of the appellant being persecuted upon return to Sri Lanka.

Is there a Convention Reason for that Persecution?

[62] The first framed issue being answered in the negative, the second issue does not fall for consideration.

Conclusion on Claim to Refugee Status

[63] For the reasons mentioned above, the Tribunal finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[64] Section 130(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

Assessment of the Claim under the Convention Against Torture

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

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

[66] The appellant relies on the same evidence in support of his claim under the Convention Against Torture as he did to support his claim under the Refugee Convention.

Conclusion on Claim under Convention Against Torture

[67] The Tribunal is satisfied that the appellant has not established that there are substantial grounds for believing that he would be in danger of being subjected to torture if he now returns to Sri Lanka.

[68] The appellant is not entitled to be recognised as a protected person under section 130(1) of the Act.

THE ICCPR – THE ISSUES

[69] Section 131(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.”

Assessment of the Claim under the ICCPR

[70] Pursuant to section 131(6) of the Act, “cruel treatment” means cruel, inhuman or degrading treatment or punishment but, by virtue of section 131(5):

- (a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards; and
- (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.

[71] Again, the appellant relies on the same evidence in support of his claim under the ICCPR as he did to support his claim under the Refugee Convention.

[72] For the same reasons as led to the finding that the appellant does not face a real chance of serious harm if he returns to Sri Lanka, neither are there substantial grounds for believing that he would be in danger of arbitrary deprivation of life or cruel treatment there.

Conclusion on Claim under ICCPR

[73] The Tribunal reaches a similar conclusion as on the claim under the Refugee Convention. The facts as found do not establish substantial grounds for believing that the appellant would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

CONCLUSION

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

- (a) Is not a refugee within the meaning of the Refugee Convention;
- (b) Is not a protected person within the meaning of the Convention Against Torture;
- (c) Is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[75] The appeal is dismissed.

"S A Aitchison"
S A Aitchison
Member

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