

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76377

AT AUCKLAND

BEFORE: M A Roche (Member)

Counsel for the Appellant: D Ryken

Appearing for the Department of Labour: K England & T Thomson

Dates of Hearing: 28 & 29 September 2009

Date of Decision: 27 April 2010

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), cancelling the refugee status of the appellant, a Sri Lankan woman, pursuant to s129L(1)(b) of the Immigration Act 1987 (the Act).

INTRODUCTION

[2] The appellant arrived in New Zealand on 23 August 2001 and sought refugee status. She gave an account of having arrived directly from Sri Lanka and claimed to have been detained and mistreated by the authorities there in 2000 because of her suspected involvement with the Liberation Tigers of Tamil Eelam (LTTE). She concealed her presence in Switzerland between 1996 and 2001. During this time, she had married and had made two unsuccessful refugee claims.

[3] Being unaware of the deception, the RSB recognised her as a refugee in a decision dated 7 January 2002. She subsequently obtained permanent residence and in March 2006, was granted New Zealand citizenship.

[4] On 18 December 2008, the appellant was convicted on three immigration-

related fraud charges. These included a charge that on 27 August 2001, she used a document, a claim for refugee status, for the purpose of obtaining refugee status in New Zealand dishonestly. The appellant had pleaded guilty to the three charges and was sentenced to 13 months' imprisonment.

[5] On 10 March 2009, the Refugee Status Branch issued a notice of intended determination of loss of refugee status to the appellant on the grounds that at the time she claimed to be experiencing problems at the hands of the Sri Lankan authorities, she was in fact living in Switzerland. Her refugee status in New Zealand was cancelled by a decision dated 18 June 2009, leading to the present appeal.

[6] At the commencement of the hearing, counsel for the appellant raised the issue of the appellant's nationality and, in particular, whether she was still a Sri Lankan national. It was submitted that having acquired New Zealand citizenship in March 2006, she forfeited her Sri Lankan citizenship pursuant to the Citizenship Act for Sri Lanka 1948 which provides that persons who voluntarily become citizens of other countries cease to be citizens of Sri Lanka.

THE 'CANCELLATION' JURISDICTION

A TWO STAGE TEST

[7] Section 129L(1)(b) of the Act provides that the functions of refugee status officers include:

"...determining whether a decision to recognise a person as a refugee was properly made, in any case where it appears that the recognition given by a refugee status officer (but not by the Authority) may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information and determining to cease to recognise the person as a refugee in such a case if appropriate."

[8] Thus, a refugee status officer has a duty to determine whether to cease to recognise a person as a refugee if the original grant of refugee status by the RSB may have been procured by fraud.

[9] Where a refugee status officer ceases to recognise a person's refugee status, that person may appeal to the Authority. Section 129O(2) of the Act provides:

"A person who is dissatisfied with a decision of a refugee status officer on any of the matters referred to in section 129L(1)(a) to (e) and (2) in relation to that person

may appeal to the Refugee Status Appeals Authority against the officer's decision."

[10] There are two stages to the enquiry. First, it must be determined whether the refugee status of the person "may have been" procured by fraud, forgery, false or misleading representation, or concealment of relevant information. If so, it must then be determined whether it is appropriate to "cease to recognise" the person as a refugee. This determination will depend on whether the person who is the subject of the appeal currently meets the criteria for refugee status set out in the Refugee Convention: *Refugee Appeal No 75392* (7 December 2005) [10]-[12]; see also *Refugee Appeal No 75574* [2009] NZAR 355.

THE APPELLANT'S CASE

[11] The appellant accepts that she provided incorrect information to the RSB during the course of her refugee claim and, in particular, that she concealed her presence in Switzerland and the two refugee claims she made there. She says, however, that she did leave Sri Lanka after being arrested and mistreated by the Sri Lankan Army (although this occurred in 1996 and not in 2000 as she had claimed to the RSB), that she had had some involvement with the LTTE and that, as a Jaffna Tamil with some previous involvement with the LTTE, she is likely to be identified as a potential or actual LTTE member or supporter. Because of these factors, she would be at risk of being persecuted if returned to Sri Lanka and the Authority therefore ought not to cease to recognise her as a refugee.

EVIDENCE IN SUPPORT OF THE APPEAL

[12] What follows is the evidence given by the appellant and her witnesses at the hearing on 28 and 29 September 2009. An assessment of this evidence follows later.

THE APPELLANT'S EVIDENCE

[13] The appellant is a divorced woman, aged in her late 30s. She is Tamil and grew up in a village in Jaffna. Several of her siblings were disabled. During the late 1980s, when she was around 18, she and a school friend volunteered to assist the LTTE. The appellant subsequently spent four months working as a spy for the LTTE. Her role was to observe and report army movements. After about four months, the appellant's parents made a payment to the LTTE so that they would release the appellant and allow her to return to her family.

[14] A few years later, around 1992 or 1993, the LTTE approached the appellant and asked her to assist them in collecting clothes, food and money from households in her village and two or three neighbouring villages. Although the appellant did not wish to assist the LTTE, she complied with their demands. People were afraid of the LTTE and were reluctant to refuse their requests. Most of the members of the appellant's village were forced to assist the LTTE at some stage or another.

[15] For six or seven months, the appellant carried out collecting duties for the LTTE. Together with three or four others, they would call in at houses and explain that the LTTE required donations. The appellant assisted the LTTE in this manner on an almost daily basis during this time. Eventually, she explained to the LTTE that her family required her at home to provide care for her disabled siblings. The LTTE then allowed her to stop participating in the collections. The appellant had no further contact with the LTTE after that.

[16] In early 1996, the appellant was arrested by the Sri Lankan army (SLA) who were conducting a house to house search in her village. Most of the villagers had fled but the appellant and her family had remained because of the difficulty they had transporting her disabled siblings. The appellant was taken from her home to a nearby army camp. There, she was accused of being an LTTE member, which she denied. She was kept at the camp overnight. The next day, she was transported by helicopter to Colombo. She was held for one night at an air base in Colombo. The next day, she was transferred to a building known as "The Fourth Floor" where she remained for three weeks. After this, she was transferred to a Colombo prison where she remained for a month. While being held, she was questioned about the LTTE and mistreated.

[17] Through a visiting Red Cross official, the appellant was able to make contact with her father's friend, AA, who resided in Colombo. He organised her release from prison. He was required to pay a large bribe.

[18] After the appellant was released from prison, she stayed with AA at his home in Colombo. After approximately one month, she became ill and went to see a doctor, travelling by bus. On her way back from the doctor, the bus was stopped and searched by the police. The appellant did not have her national identity card on her and was taken by the police to a police station. She was held at the police station for two days. AA learned of her whereabouts from the Red Cross or from the police and came to the police station with a guardianship document he had received from when she was released from prison. This document confirmed that

the appellant was under his guardianship. He paid a small bribe and the appellant was released.

[19] The appellant returned again to stay at AA's home. She wished to return to her family in Jaffna but was unable to establish contact with them. Instead, she decided to leave the country. AA organised for a passport to be issued to her. Using the services of an agent, an Italian visa was obtained for the passport. On or about 20 June 1996, the appellant departed Sri Lanka with the agent and flew to Rome. Her travel and the agent's services were paid for by her cousin in Switzerland.

[20] Once in Rome, the appellant travelled by car to Switzerland. A few days after her arrival, she claimed refugee status, using a false name and false date of birth. The claim did not mention her work for the LTTE as a spy and a collector of donations. She had been advised by members of the Tamil community in Switzerland that if she did so, her claim could be unsuccessful.

[21] In August 1996, the Swiss authorities declined her claim. An appeal against this decision was dismissed on 11 October 1996. After her appeal was dismissed, the appellant went into hiding in Switzerland for some time, but later rejoined her cousin. In March 1999, she made a second application for refugee status, this time using her correct name and date of birth. In her second claim, she falsely represented that she had returned to Sri Lanka after the appeal against the first Swiss decision was dismissed and had been mistreated there. Also in March 1999, the appellant married a Swiss national.

[22] On 14 April 1999, the Swiss authorities declined the appellant's second claim to refugee status. In May 1999, the appellant left her husband because the marriage had broken down and returned to live with her cousin. In the same month, she appealed against the second decline decision. In June 1999, this appeal was dismissed.

[23] The appellant remained in Switzerland until August 2001, when she departed, using a false German passport, and travelled to New Zealand. On her arrival, she claimed that she had travelled directly from Sri Lanka and that she had departed from there illegally using a false Indian passport. She provided her correct name but used the false date of birth that she had provided to the Swiss authorities in her first refugee claim there. She submitted a false account of her problems in Sri Lanka that correlated with her claim to have recently left that country.

[24] Following an interview, the appellant was granted refugee status in New Zealand by the RSB on 7 January 2002.

[25] On 14 March 2006, the appellant was granted New Zealand citizenship.

[26] In November 2006, the RSB received information from the Swiss authorities concerning the appellant's residence in Switzerland between June 1996 and August 2001 and the two refugee claims she had made there under two different identities. She was subsequently charged with three counts of fraud, to which she pleaded guilty. On 18 December 2008, she was sentenced to a term of 13 months' imprisonment at the Auckland District Court. While in prison, she was interviewed by a refugee status officer in relation to the cancellation of her refugee status. This status was cancelled in a decision dated 18 June 2009.

[27] Since being released from prison, the appellant has been living with two male cousins. She is in contact with her family in Sri Lanka. Currently, her parents live together with two of her sisters and their families in very crowded conditions in Jaffna. Eleven of them are staying in a house in which only one room is habitable.

EVIDENCE OF BB

[28] BB is a Tamil man aged in his late 20s. He is the appellant's maternal cousin. Their mothers are sisters. He came to New Zealand in May 2000 and claimed refugee status. He was granted refugee status in October 2000 and is now a New Zealand citizen.

[29] BB is from a village in Jaffna. His family lived a few miles away from the appellant's family and the families had frequent contact. In 1995, his family home was destroyed and his family was displaced. They relocated to Z. In early 1996, the appellant's mother visited his family home in Z and told his family that the appellant had been arrested. He did not see the appellant again until she arrived in New Zealand in 2001.

[30] BB stated that it was normal for people in their area to assist the LTTE. No-one who was requested to provide the LTTE with assistance dared refuse because of the reprisals that would be taken against them.

EVIDENCE OF CC

[31] CC is a Sri Lankan national, aged in his early 30s. He is the older brother

of BB and the maternal cousin of the appellant. He currently lives in Auckland with them. He was granted refugee status in June 2009.

[32] In early to mid-1996, CC and his older sister became separated from the remainder of their family and lost contact with them. He had no news of them or of the appellant until he left Sri Lanka and travelled to Switzerland in late 1997. In Switzerland, he learned for the first time about the appellant's arrest and transportation to Colombo by the army in 1996. He recalls her telling him in Switzerland that she was arrested because she was suspected of being in the LTTE because she went to their camps and packed food parcels for them. He cannot recall her ever telling him that she went from house to house collecting clothes, food and money for the LTTE.

DOCUMENTS SUPPLIED IN SUPPORT OF THE APPEAL

[33] Counsel filed the following documents:

- i. opening submissions (22 September 2009);
- ii. witness statements from the appellant and her witnesses and an unsigned witness statement by her cousin in Switzerland;
- iii. closing submissions, dated 20 November 2009;
- iv. a copy of an LTTE pass with translation;
- v. UK Home Office Operational Guidance Note Sri Lanka, August 2009;
- vi. a copy of a letter to the appellant, dated 9 February 2009 from the Department of Internal Affairs, notifying the appellant that the Department may request the Minister of Internal Affairs to make an order depriving the appellant of New Zealand citizenship;
- vii. the appellant's application for New Zealand citizenship;
- viii. UNHCR RefWorld copy of the Citizenship Act for Sri Lanka, dated 15 November 1948; and
- x. Department of Immigration and Emigration of Sri Lanka "Acquisition of Dual Citizenship" form.

[34] In addition, counsel for the appellant filed further items of country

information.

DOCUMENTS FILED IN OPPOSITION TO THE APPEAL

[35] The DOL cancellation file was provided to the Authority. This file consisted of two volumes of tabulated documents relating to the appellant's refugee claim, her two Swiss refugee claims and the criminal proceedings. Of particular significance was an affidavit by the appellant, dated 10 September 2008, filed in the Auckland District Court prior to her sentencing on the immigration fraud charges. In this affidavit, she set out a detailed account of her experiences in Sri Lanka and Switzerland prior to coming to New Zealand, the matters that led her to conceal her time in Switzerland when she applied for refugee status in New Zealand, and an account of two visits made by her to Sri Lanka after she was granted refugee status in New Zealand.

[36] The DOL filed written closing submissions dated 27 November 2009.

CREDIBILITY

[37] For reasons which follow in this decision, it is not strictly necessary to make findings about the evidence presented at the hearing. However, the Authority records that of the evidence presented, it is accepted only that the appellant is a single Tamil woman from Jaffna whose family remain there. Apart from these bare details, the Authority had very real and substantial concerns about the credibility of the evidence given by the appellant and her witnesses at the hearing. In brief, the appellant's evidence about her LTTE collecting duties was mobile to the point of being bizarre. She claimed variously that she collected clothing and food a few times only, that she collected the items on a daily basis for six or seven months, that she collected two or three times a week and never every day, that she stopped her collecting duties gradually, that she stopped them completely after telling the LTTE she was not available, and that she was not allowed to stop after telling the LTTE she was not available. The Authority gained the impression she was making up and forgetting the evidence as she proceeded.

[38] The appellant also gave evidence that contradicted the affidavit provided to the District Court about her experiences in Sri Lanka. For example, she gave evidence that after being transferred to Colombo she was interrogated and slept the night at the army base before being transferred to a building that was named "the fourth floor". In the affidavit she deposed that upon her arrival at the base she was immediately transferred by vehicle to her next place of detention. The

Authority would expect that has she really been transferred to Colombo by helicopter following her arrest by the SLA, she would have been able to consistently recall where she slept the first night.

[39] These and other inconsistencies in her evidence gave the Authority the impression that yet another false account of the appellant's experiences in Sri Lanka was being presented.

DETERMINATION OF WHETHER THE GRANT OF REFUGEE STATUS MAY HAVE BEEN PROCURED BY FRAUD AND THE LIKE

[40] The Authority must first determine whether the grant of refugee status to the appellant "may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information". On the facts there can only be one answer.

[41] The appellant claimed refugee status on arrival at Auckland airport on 23 August 2001. She claimed to have travelled directly from Sri Lanka on a false Indian passport. She provided a false date of birth (1 October 1976). The following day, she filed a confirmation of claim to refugee status and provided a letter from an official at the Red Cross in Sri Lanka that contained false information. In her confirmation of claim, written statement and interview in connection with her claim, she advised that:

- (a) In January 2000, she was arrested in Jaffna by the SLA on suspicion of belonging to the LTTE and then transferred to Colombo by helicopter and detained and interrogated for three weeks at the Central Investigation Department building in Pettah.
- (b) In early February 2000, she was transferred to Welikada Prison where she remained for several weeks before being released, pursuant to the influence of a friend of her father, AA.
- (c) Following her release, she stayed with AA in Colombo but, on 26 April 2000, she was arrested at an army checkpoint, accused of being connected to the LTTE and incarcerated at Welikada Prison for approximately two weeks before again being released following intervention by AA.
- (d) On 2 August 2001, she departed Colombo using a false Indian passport under the name Aryan Jaya, accompanied by an agent. She travelled to

Germany where she remained for three weeks before travelling from there to New Zealand via Korea.

[42] All of the above was untrue. The appellant had departed Sri Lanka on 20 June 1996 on her own passport, without difficulty. She travelled to Switzerland where she resided for the next five years. In that time she married and made two unsuccessful refugee applications.

[43] Making a finding concerning the appellant's fraud is straightforward. She has admitted that she lied to the RSB regarding her whereabouts in 2000 and that she was in Switzerland at the time when she claimed to be having difficulties at the hands of the authorities in Sri Lanka. She has pleaded guilty in the District Court to a charge of using her claim for refugee status, for the purpose of obtaining refugee status in New Zealand dishonestly.

[44] Her recognition as a refugee in February 2002 was procured by the provision of false or misleading information and the concealment of relevant information. The first stage of the enquiry is made out.

WHETHER THE APPELLANT SHOULD CEASE TO BE RECOGNISED AS A REFUGEE

[45] Having found that the appellant's grant of refugee status may have been (and in fact was) procured by fraud, forgery, false or misleading representation or concealment of relevant information, the Authority would ordinarily next consider whether she currently meets the criteria for refugee status which are set out in the inclusion clause of the Refugee Convention, Article 1A(2).

[46] Prior to determining this issue, the Authority intends to record a concession made by counsel and to address matters raised by counsel concerning Article 1C(3) of the Refugee Convention. Turning first to the concession, counsel acknowledged at the hearing that it is not appropriate in this appeal to determine whether the appellant might have been entitled to recognition as a refugee had she presented a truthful account on arrival in New Zealand. Rather he submitted the focus of the appeal should be on whether the appellant is currently entitled to the protection of the Refugee Convention.

[47] Counsel's concession is properly made. It is not appropriate to attempt to retrospectively establish a person's qualification for refugee status many years

after the date on which it was originally assessed. Rather than attempting to second-guess the conclusion an original decision-maker would have reached had he or she known the true facts, fraud having been established to the requisite standard, the appropriate enquiry is whether New Zealand nevertheless has a duty of *non-refoulement* in relation to the particular individual. This is determined by examining whether such a person is currently entitled to refugee status; see *Refugee Appeal No 75574* [2009] NZAR 355 [84] to [89].

[48] Turning now to Article 1C(3), both counsel have made submissions that the Authority should not take the appellant's New Zealand citizenship into account in these proceedings. Counsel for the DOL in closing submissions asserts that Article 1C(3) of the Refugee Convention (which provides that the Convention does not apply to a person who has acquired a new nationality and enjoys the protection of the country of their new nationality) cannot apply to the appellant because this appeal is related to cancellation rather than cessation proceedings.

[49] To the contrary, the Authority is of the view that the appellant's New Zealand citizenship is central to the disposition of this appeal and that Article 1C(3) is of no relevance. Logically, cessation of refugee status can only occur after recognition and is not part of the inclusion assessment which involves the determination of whether a person fulfils the requirements of the inclusion clause (Article 1A(2)). The previous recognition of the appellant as a refugee was obtained by fraud. That being the case, the inquiry mandated by both the Convention and the Act is whether today, the inclusion criteria are met. If they are not, Article 1C(3), is not relevant.

[50] The Authority now returns to the question of whether the appellant meets the requirements of the inclusion clause of the Refugee Convention, Article 1A(2). This clause relevantly 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.”

In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.” (emphasis added)

[51] Usually, the Authority would at this point determine whether the appellant holds a well-founded fear of being persecuted on return to Sri Lanka. Such a determination would normally encompass an assessment of current conditions in Sri Lanka, the credibility of her latest account and an assessment of the risk a person with her profile would face on a return to Sri Lanka. Because of the issues raised by the appellant's current citizenship (dealt with below) it is not strictly necessary to make a full assessment of the appellant's credibility or her risk on return to Sri Lanka. Some brief credibility points have been made earlier in this decision. In any event, the appellant is not now a Sri Lankan national. She is a New Zealand national having acquired citizenship here in March 2006. This affects the determination of whether she currently meets the criteria for refugee status.

[52] In terms of the Article 1A(2) definition, the appellant is neither outside her country of nationality (New Zealand) nor does she have any well-founded fear of being persecuted in her country of nationality (New Zealand). Even if somehow her Sri Lankan nationality has been retained, the second paragraph of Article 1A(2) precludes her recognition as a refugee because she has the protection of New Zealand.

[53] Section 129K(1)(b) of the Act confirms that significance of New Zealand citizenship as a bar to recognition as a refugee. It provides:

"A refugee status officer may not consider a claim for refugee status by a person who is – a New Zealand citizen."

[54] Section 129K(2) provides:

"This section does not affect the power of an officer to determine the question of such a person's continued refugee status arising under section 129L."

[55] The effect of s129K is to ensure that New Zealand citizenship is not a shield to a fraud enquiry. The fact that a person is a New Zealand citizen does not inhibit or prevent a refugee status officer from making a determination under s 129L in respect of such matters as cessation, cancellation and exclusion. It necessarily follows that once initiated, an inquiry under this provision can have either a favourable or an unfavourable outcome. If favourable, the person's refugee status "continues". If unfavourable, refugee status comes to an end either because it has ceased (s 129L(1)(a)), or because the person is no longer recognised as refugee (s 129L(1)(b)) or because the person is excluded from the protection of the Convention (s129L(1)(c). The same logic applies in "application" cases which come before the Authority under s 129L(1)(f).

[56] Although the appellant currently holds New Zealand citizenship, the letter from the Department of Internal Affairs to the appellant of 9 February 2009 shows that her citizenship is currently under investigation and may, in the future, be the subject of an order depriving citizenship pursuant to section 17 of the Citizenship Act 1977. Counsel submits that should this occur, the appellant would have lost the quality of being a person who has acquired a new nationality and enjoys the protection of the country of that new nationality. He submits that because her citizenship may be at some risk, she is not a person, who, having acquired New Zealand citizenship, no longer requires the protection of the Refugee Convention. Rather, she is a person who 'at least on a contingent basis' may need its protection.

[57] The bare possibility that the appellant having possibly retained her Sri Lankan citizenship, may lose her New Zealand citizenship, and may then face expulsion to Sri Lanka is a matter which at this point is entirely speculative and not relevant to the present day determination of her current refugee status. It would be speculative for the Authority to attempt to determine now whether the appellant may at some indeterminate point in the future satisfy the inclusion provisions of article 1A(2) of the Refugee Convention.

[58] The Authority resolves that it is appropriate to deal with the appellant in the circumstances she finds herself, at the date of this decision. She is currently a New Zealand citizen and not a citizen of Sri Lanka. As such, she cannot be a person to whom Article 1A(2) applies. Having acquired her refugee status by fraud, and currently unable to satisfy the inclusion provisions of Article 1A(2) of the Refugee Convention, the appellant cannot be recognised as a refugee. It is therefore appropriate, in terms of section 129L(b) of the Act, to cease to recognise her as one.

CONCLUSION

[59] The following determinations are made:

- i. Refugee status may have been procured by fraud.
- ii. It is appropriate to cease to recognise the appellant as a refugee.

[60] The appeal is therefore dismissed.

"M A Roche"
M A Roche
Member