

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76428

AT AUCKLAND

<u>Before:</u>	A N Molloy (Member)
<u>Counsel for the Appellant:</u>	C Curtis
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	14 December 2009
<u>Date of Decision:</u>	10 June 2010

DECISION

INTRODUCTION

[1] This appeal follows the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), to decline the grant of refugee status to the appellant, a national of Sri Lanka. The appellant is a Muslim male in his early 30s. He is of Tamil ethnicity. The appellant claims that the Sri Lankan police will seriously harm him because they believe that he is connected with the Liberation Tigers of Tamil Eelam (LTTE).

[2] This is the second time the appellant has applied for refugee status. A different panel of the Authority (the first Authority panel) declined the appellant's first appeal in *Refugee Appeal No 75428* (15 February 2006).

[3] Because this is his second appeal, the Authority is required to determine whether it has jurisdiction to consider the merits of his second appeal. The Authority will first set out its reasons for concluding that it has jurisdiction to do so. It will then turn to consider the substantive appeal, which turns upon the appellant's credibility. This is assessed following the summary of his account which also appears below.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[4] Neither a refugee status officer nor the Authority has unlimited jurisdiction to receive and determine a further refugee claim after a previous claim has been finally determined. Section 129J (1) of the Immigration Act 1987 (the Act) sets out the circumstances in which a refugee status officer may receive and determine a second or subsequent claim:

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.

[5] Section 129O(1) of the Act provides a right of appeal from a decision made by a refugee status officer under s129J(1):

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.

[6] The Authority considered its statutory jurisdiction to hear and determine second and subsequent refugee claims in *Refugee Appeal No 75139* (18 November 2004). The Authority held that under ss129J(1) and 129O(1), jurisdiction is determined by comparing the previous claim for refugee status with the subsequent claim. This involves a comparison of the claims as asserted by the refugee claimant. In the absence of significantly different grounds in the respective claims, the Authority has no jurisdiction to consider the merits of the subsequent claim.

[7] The Authority therefore intends to compare the appellant's previous claim with his second claim, with a view to determining whether it has jurisdiction to hear the second appeal. If so, it will then determine whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

THE APPELLANT'S FIRST REFUGEE CLAIM

[8] The appellant was born and raised in X, in the west of Sri Lanka. He lived and worked there until he left Sri Lanka in mid-2002. His first claim revolved around his membership of the United National Party (UNP). He claimed he was at

risk from members of the Janatha Vimukthi Peramuna party (People's Liberation Front) (JVP) because of his political activities while he attended university some years earlier.

[9] However, the appellant's primary concern revolved around the murder of an opponent of the UNP by UNP members in late 2001. The appellant found this action to be so repugnant that he left the UNP and offered to assist the father of the murdered man in any investigation.

[10] Shortly before the general election that took place in Sri Lanka in March 2002, the police came to the appellant's home to look for him in connection with the murder. After being pursued and fired upon by the police, the appellant went into hiding. He left Sri Lanka illegally in June 2002 and then spent about 18 months in Malaysia.

[11] The appellant made his way to New Zealand in early 2004. He applied for refugee status for the first time shortly after arriving. The appellant claimed that the Sri Lankan authorities were looking for him in connection with the murder to which reference has been made. He asserted that if he were to return to Sri Lanka he would immediately come to the attention of the Sri Lankan police because he had no valid travel document, and that he would be mistreated on the intervention of his political enemies.

[12] After interviewing the appellant in July and August that year, a refugee status officer of the RSB issued a decision in October 2004, declining his first application. He then appealed for the first time.

THE DECISION OF THE FIRST AUTHORITY PANEL

[13] The first Authority panel found that the appellant was a Tamil from the west of Sri Lanka. It accepted that he had engaged in some level of political participation in Sri Lanka. However, it found that he had never experienced any difficulties as a result of his political activities and that the core of his claim was untrue. In particular, it rejected the appellant's claim to have been implicated in the murder of a political opponent of the UNP, or to have been pursued by the police in the course of an investigation into that matter.

[14] The first Authority panel also rejected the appellant's claim that he had departed Sri Lanka illegally and his claim that he would have to return to Sri Lanka

without valid travel documents. It found that there was no credible evidence that the appellant was at risk of being persecuted in Sri Lanka.

THE APPELLANT'S SECOND CLAIM FOR REFUGEE STATUS

[15] The appellant claims that circumstances in Sri Lanka have changed since the final determination of his first claim in February 2006. He relies upon the fluctuating status of the peace process and refers to the fact that, during the interim period, there was a formal resumption of hostilities between the Sri Lankan government and the LTTE. He also asserts that the end of the war has not seen the end of such hostilities.

[16] The appellant also claims that the Sri Lankan police now believe that he has been involved in political activities while in New Zealand and that he is seen to be linked to the LTTE following events in 2009.

FINDING WITH REGARD TO JURISDICTION

[17] Comparing the appellants first and second claims for refugee status, the Authority finds that since the determination of his first appeal, circumstances in Sri Lanka have changed to such an extent that the appellant's second claim is based on significantly different grounds.

[18] Accordingly, the Authority finds that it has jurisdiction to determine the merits of the appellant's second appeal. What follows is a summary of the appellant's second claim, and an assessment of the appellant's credibility.

THE APPELLANT'S SECOND CLAIM

[19] In order to place the appellant's second claim in context, it is necessary to set out various events that have occurred since the final determination of his first appeal.

[20] Shortly after the first Authority panel published its decision declining the appellant's first appeal, Immigration New Zealand (INZ) revoked the appellant's temporary permit to be in New Zealand.

[21] The appellant then lodged an appeal against that revocation to the Removal Review Authority (RRA) in May 2006. The RRA published its decision partially granting that appeal in February 2007. The RRA took into account the fact that the appellant had married a New Zealand citizen in 2005. It directed that the appellant be issued with a temporary work permit for one year, and directed further that the appellant should apply for residence on the basis of his marriage as soon as possible within that period.

Travel to India

[22] Shortly after the RRA's decision was published, the appellant's parents encouraged him to marry a Muslim woman of their choosing. Despite the fact that he was still married to a New Zealand citizen, the appellant travelled to India in August 2007, where he married a Sri Lankan woman in a *nikah* ceremony. The appellant was able to travel to India because he had obtained a valid Sri Lankan passport which had been issued to him in July 2005. The appellant's Sri Lankan wife returned to Sri Lanka, where she remains today.

[23] The appellant separated from his New Zealand wife at the beginning of 2008.

Travel to Sri Lanka

[24] The appellant was informed in early 2008 that his father had become seriously ill. He wanted to return to see his father in person, but was still concerned about the risk to his safety because of past events. He had also heard that the police had continued to look for him in 2006 and 2007.

[25] Accordingly, one of the appellant's uncles arranged the payment of significant bribes to ensure that the appellant could return to Sri Lanka covertly. He entered Colombo by air in May 2008, and was greeted by a prearranged contact who assisted him through the usual immigration channels. He was then covertly transported out of Colombo to the village where his Sri Lankan wife's father lived. This is about two hours' drive from Colombo. The appellant remained in hiding there throughout, while members of his family were brought to see him in secret. The appellant returned to New Zealand in June 2008. He was again helped to leave Sri Lanka covertly by contacts who had been paid by his uncle.

[26] The appellant's Sri Lankan wife gave birth to the appellant's child in January

2009.

Attendance at pro-Tamil gathering in Auckland

[27] Further problems arose for the appellant after he travelled to Auckland for his employer in early April 2009. While there, he accompanied some friends to a protest that had been organised in the central city. It aimed to draw attention to the manner in which the Sri Lankan government had conducted its campaign to end the conflict with the LTTE.

[28] The appellant had never been involved in any political activities while in New Zealand and nor was he involved in the organisation of this particular event. He simply attended the event at the invitation of friends. The one step the appellant took was to buy a t-shirt that bore a slogan that was sympathetic to the plight of Tamils in Sri Lanka. He was wearing that t-shirt at his work place in Hamilton at the end of April 2009, when he was confronted by a Sinhalese man who took exception to the slogan. After remonstrating with the appellant, the man told him that he would be killed if he returned to Sri Lanka.

Taken into custody

[29] The appellant was located by INZ in early June 2009. By then, the permit issued following the RRA decision had expired and the relationship upon which the appellant had based his application for residence had come to an end. He was taken into custody as he was no longer lawfully in New Zealand. Up to that time, the appellant was living in a flat owned by an Indian man who is friendly with Sinhalese people. The appellant believes that they will be aware he was detained by INZ. He also believes that they will have had access to his files relating to his first refugee claim. He believes that they will have alerted the Sri Lankan authorities that he was likely to be returning to Sri Lanka.

[30] The appellant was interviewed by an immigration officer to determine whether there were any reasons of an exceptional humanitarian nature why he should not be removed from New Zealand. The immigration officer determined that no such grounds existed. The appellant lodged his second claim for refugee status on 15 June 2009. He was in custody at the time.

[31] For some reason, the appellant was wrongly removed from New Zealand, in breach of the obligation of *non-refoulement*, which is fundamental to the Refugee

Convention. The error was identified while the appellant was in Malaysia and he was repatriated to New Zealand, before he could travel on to Sri Lanka, on 19 June 2009.

[32] The appellant spoke to members of his family in Sri Lanka by telephone on 24 June 2009. They informed him that the police had come to his father's home to look for the appellant on 18 June. The police claimed to have been informed that the appellant had arrived from New Zealand using a false name. The police questioned the appellant's family members about the appellant and revealed that they believe he had links with the LTTE in New Zealand.

[33] The appellant claims that news of his (wrongful but temporary) removal from New Zealand in mid-June 2009 must have come to the attention of the Sinhalese man with whom he had argued in Hamilton. He claims that man, or some other member of his Sinhalese community, must have alerted the Sri Lankan authorities of the appellant's impending return to Sri Lanka.

[34] The appellant claims that he would immediately be identified as a Tamil male with a link to the LTTE if he were to return to Sri Lanka now.

[35] The appellant claims that his Sri Lankan wife is being harassed by the police, who are looking for information about him. She has been forced to relocate to Colombo as a result. The appellant believes that if he were to return to Sri Lanka now, the Sri Lankan authorities will identify him and detain him on suspicion of being linked with the LTTE. If that happens, the appellant believes that he will be seriously mistreated by the Sri Lankan authorities.

Material received

[36] Counsel wrote to the Authority on 19 November 2009, enclosing a statement prepared by the appellant following a recent telephone conversation with his wife.

[37] A further letter was forwarded on 4 December 2009, enclosing opening written submissions, together with a further copy of the statement first forwarded on 19 November.

[38] During the course of the second appeal hearing, the appellant produced the t-shirt he claims he purchased at the gathering in Auckland in April 2009. The Authority provided counsel with a copy of a report from the United Kingdom Home

Office Report of Information-gathering visit to Colombo, Sri Lanka 23-29 August 2009 (August 2009) (the Home Office Information gathering report).

[39] Counsel then forwarded her closing submissions in writing under cover of a letter to the Authority, dated 16 December 2009.

THE ISSUES

[40] 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.

[41] 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

[42] In order to address the issues identified it is necessary to determine whether the appellant is a credible witness. For reasons set out below, the Authority finds that he is not and his core claim is rejected.

Reliance upon previous credibility findings

[43] 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.

[44] The first Authority panel rejected the appellant's core claim for refugee status in *Refugee Appeal No 75428* (15 February 2006). It rejected the appellant's claim to have been involved in the murder of the political figure in Sri Lanka, and rejected his claim that he was being sought by the police for that (or any other) reason. It found his evidence to be contradictory, inconsistent with country information, vague and implausible (see [43] – [52]). It also found that significant elements of the appellant's claims were simply fabricated. For example, it found that the appellant had fabricated an account in which he falsely claimed to have been personally involved in actual events in order to obtain refugee status.

[45] Having considered all of the evidence available in respect of the appellant's second appeal, the Authority is satisfied that it is appropriate to rely upon the robust and comprehensive findings of credibility and fact made by the first Authority panel, when considering the second appeal.

The appellant's Sri Lankan passport

[46] Before dealing specifically with the appellant's second claim, it is relevant to identify from the outset one aspect of the appellant's first claim which is clearly undermined by subsequent events. The appellant claimed, for the purposes of his first refugee appeal, that he had left Sri Lanka illegally and that he would have to return to Sri Lanka without a valid passport. The first Authority panel rejected that claim and found that "there is no reason to believe that [the appellant] did depart [Sri Lanka] illegally" ([73]).

[47] Whether or not that is the case, it is now apparent that when he returned to Sri Lanka in 2008, the appellant used his own genuine Sri Lankan passport which, on the face of it, was issued in July 2005.

[48] When asked to reconcile this with the claims he had made for the purposes of his first appeal, the appellant stated that he first applied for the passport around the end of 2002, long before he left Sri Lanka. He said that it was not issued until two or three years later, in 2005, while he was in New Zealand.

[49] During his second appeal hearing, the appellant said that his father forwarded the passport to him shortly after it was issued. This is relevant because the decision of the first Authority panel was not published until nearly seven months after the passport was issued. During the intervening period, the appellant

had provided additional information and documents to the first Authority panel on at least four occasions without ever disclosing that he had been issued with a genuine Sri Lankan passport.

The appellant's second appeal

[50] The appellant has consistently proved to be an entirely unreliable witness. He has, over a protracted period of time since he arrived in New Zealand in 2004, put forward a series of untruths in order to advance false refugee claims. He attempted to insert himself, falsely, into actual events for the purposes of his first refugee claim. He relied upon false documents and has lied about the meaning or existence of genuine documents, depending upon which inference he believes most suits his ends at the time.

[51] The appellant's first application for refugee status was rejected. The first Authority panel found that his core account was untrue and that the appellant was not of interest to the Sri Lankan authorities.

[52] The appellant then married a New Zealand citizen. He relied upon his marriage as a basis for remaining in New Zealand for a further period while applying for residence. He then travelled to India in order to marry a Sri Lankan woman in a religious ceremony while still married to the New Zealand citizen. In 2008, the appellant used a genuine Sri Lankan passport (which he had previously denied obtaining) to return to Sri Lanka, where he claims to be at risk of being persecuted.

[53] He then returned to New Zealand. After INZ took further steps to remove him from New Zealand, the appellant lodged a further claim for refugee status.

[54] It is in this context that the Authority finds that the appellant has again fabricated an account in order to bolster a claim for refugee status. His second claim comprises a self-serving and evolving account, the core elements of which the Authority finds to be untrue.

Delayed reference to crucial elements of claim

[55] By the time of the second appeal hearing, the appellant's claim was based primarily upon his belief that he is at risk because the Sri Lankan authorities believe he has a link with the LTTE. However, that did not form the basis of his

second claim at the time it was formulated on 15 June 2009, because he only found out about this when he spoke with members of his family after he was repatriated to New Zealand later that month.

[56] The appellant explained that, at the time he lodged his second claim, he was concerned with the change in country conditions since the end of the internal conflict, and the fact that the Sri Lankan police had continued to search for him in 2006-07.

[57] In the absence of any additional credible explanation, the Authority rejects the appellant's claim of ongoing police interest in him in 2006-07. It is no more than a continuation of the fabricated claim he advanced for the purposes of his first refugee claim. The first Authority panel rejected the appellant's claim to be of interest to the police and the Authority has adopted that finding under s129P(9) of the Act.

[58] It follows that the Authority also rejects his claim that his return to Sri Lanka in 2008 was only made possible by the payment of bribes. There is no credible evidence that the appellant was of any interest to the Sri Lankan authorities at that time, and his claim that he had to return in clandestine fashion is also rejected.

[59] The Authority has not overlooked the existence of statements submitted by the appellant's uncle and niece which purport to corroborate that aspect of the appellant's account. However, the Authority has been unable to question the makers of those statements in person or to determine their credibility. The Authority tends to view such documents as essentially neutral, with their authenticity following findings as to the claimant's credibility generally. The content of those statements does not outweigh the concerns outlined by the Authority, and they are given no weight.

[60] In making those findings, the Authority also takes into account additional concerns arising out of the appellant's second claim.

[61] The first matter of relevance is that the appellant failed to refer to the supposed police visits to his family home in 2006/07 when interviewed by the immigration officer who conducted his humanitarian interview in mid-June 2009, or in his claim form outlining his second application for refugee status.

[62] At the time of the interview in question, and at the time he completed his second application for refugee status, the appellant was in custody awaiting return

to Sri Lanka. The purpose of the humanitarian interview and, subsequently, of completing the second application for refugee status, was to outline the reasons he could not safely be returned to Sri Lanka. His impending return must have been at the forefront of his mind. Therefore, if the police had truly continued to express an interest in the appellant's whereabouts in 2006 and 2007 (giving rise to the need for detailed and expensive arrangements to allow his clandestine return in 2008), it is extraordinary that the appellant should fail to refer to events so pivotal to his claimed predicament.

[63] These are not the only omissions of note. The appellant also failed to refer to his altercation with the Sinhalese man in April 2009 during his humanitarian interview, in his second refugee claim form or in his 11 page statement dated 14 July 2009. Nor did he refer to his attendance at the protest in Auckland where he purchased the shirt that instigated the confrontation.

[64] What makes the omission of these events so extraordinary is the fact that the appellant now claims that the Sinhalese man threatened to have the appellant killed if he returned to Sri Lanka. Again, if true, it is almost inevitable that the appellant would have referred to this.

[65] Further, while the appellant refers, in his long statement, to the supposed police visit to his family home in late June 2009, he did not assert that the police now associate him with the LTTE.

[66] The appellant says that he did not know at the time he composed his statement that the Sri Lankan authorities must have been tipped off from New Zealand. He said he only found that out shortly before his interview with the refugee status officer in late July 2009. However, that explanation is inconsistent with the appellant's claim that he learned of this during a telephone conversation with his family in late June 2009, well before he prepared his statement.

[67] The appellant's explanation for this series of omissions was that he was confused, stressed or preoccupied at the time he made, or failed to make, the various disclosures. In the context of all of the evidence available, the Authority does not believe him.

[68] Nor does it accept that his public detention by INZ officers who arrested him at his work premises in mid-2009 will have led his Indian landlord to inform members of the Sinhalese community, or that the Sinhalese community will have

relayed information to the Sri Lankan authorities that he is a supporter of the LTTE. His claim to that effect is speculative, opportunistic and self-serving and, in light of his general credibility, it can be given no weight.

[69] The Authority also rejects the appellant's claim that his wife has been forced to relocate to Colombo after experiencing difficulties with the Sri Lankan police. In doing so, the Authority relies upon the fortuitous timing of this evidence (which came to light after the appellant's second claim was declined by the RSB), the lack of any credible corroboration and the appellant's general lack of credibility.

Summary of findings

[70] For all of these reasons, the Authority finds that the appellant is an entirely unreliable witness. He has continually lied in order to present his account in what he perceived to be the best light. The Authority cannot rely upon any aspect of the appellant's core account, and his second claim is rejected in its entirety. In particular, the Authority rejects the appellant's claims that he has been threatened by a Sinhalese man following an argument in a shop in Hamilton in 2009, that the Sri Lankan police began searching for him again in June 2009, that the Sri Lankan authorities have received information linking the appellant with the LTTE, and that his Sri Lankan wife has been forced to relocate to Colombo.

[71] The first Authority panel accepted that in the past the appellant had been involved in political affairs to some extent. However it also found that there was no evidence to suggest that his political activity placed him at any risk of being seriously harmed as at the date of publication of the first Authority panel's decision. The Authority finds this still to be the case. It is now some eight years since the appellant left Sri Lanka for the first time and he has had no involvement in Sri Lankan political matters since that time. The appellant was able to return to and depart from Sri Lanka in 2008 without any difficulty and there is no credible evidence that the appellant's past level of political involvement will place him at risk of being seriously harmed if he returns to Sri Lanka now.

The appellant's characteristics

[72] The Authority's task is of course to determine the appeal on the basis of the facts as found, rather than on the basis of assertions which are rejected. On that basis, the Authority accepts that the appellant is a Sri Lankan national of Tamil ethnicity. It finds further that he is a Muslim from X, and that his family still lives in

that area.

[73] The Authority finds that the appellant has a valid Sri Lankan passport which he used to enter and depart from Sri Lanka, without difficulty, in 2008. It finds further that the appellant does not have an adverse profile with the Sri Lankan authorities and that there is no reason why he would be linked to the LTTE if he were to return to Sri Lanka now.

[74] It is on that basis that the appellant's claim is to be determined.

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

[75] For the purposes of refugee determination, "being persecuted" has been described as the sustained or systemic violation of basic or core human rights, such as to be demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996) and *Refugee Appeal No 74665/03* [2005] NZAR 60; [2005] INLR 68 at [36] to [125]. Put another way, it has been expressed as comprising serious harm, plus the failure of state protection; *Refugee Appeal No 71427* (16 August 2000).

[76] The Authority has consistently adopted the decision in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), which held that a fear of being persecuted will be well-founded when there is a real, as opposed to a remote or speculative, chance of such persecution occurring. This entails an objective assessment as to whether there is a real or substantial basis for the harm which is anticipated. Mere speculation will not be sufficient.

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

Present conditions in Sri Lanka

[78] Sri Lanka has borne the brunt of an uncompromising civil conflict which continued at various levels of intensity from the early 1980s until Sri Lankan President Mahinda Rajapaksa declared victory in the conflict with the LTTE on 18 May 2009.

[79] While the formal conflict may have ended, it is unlikely that the ethnic tension which fuelled that prolonged battle will simply dissipate. As the Authority

observed in a previous decision referred to by counsel, Sri Lanka is in a state of transition; see *Refugee Appeal No 76294* (30 June 2009) at [76]. This means that, while not every Tamil citizen is at risk of being persecuted in Sri Lanka, the predicament of any individual must still be assessed having regard to their particular circumstances.

Risk on arrival at airport

[80] Counsel submits that upon his return to Colombo, the appellant will be identified as a person of interest by the Sri Lankan authorities. She submits, in effect, that he will be detained, questioned and possibly arrested on suspicion of being connected with the LTTE, and that he is therefore at risk of being seriously harmed by the Sri Lankan authorities.

[81] The Authority has previously accepted that there is evidence that some Tamils arriving at the international airport in Colombo are subjected to increased scrutiny; see *Refugee Appeal No 76294* (30 June 2009) at [93].

[82] The particular characteristics which might attract attention are identified in a report prepared following a visit undertaken in order to gather information about circumstances faced by Tamils since the end of the civil conflict in May 2009: the United Kingdom Home Office *Report of Information Gathering visit to Colombo* (August 2009) (the Home Office report):

All enforced returns (of whatever ethnicity) were referred to the Criminal Investigations Department (CID) at the airport for nationality and criminal record checks, which could take more than 24 hours. ... Those with a criminal record or LTTE connections would face additional questioning and may be detained. In general, non-government and international sources agreed that Tamils from the north and east of the country were likely to receive greater scrutiny than others, and that the presence of the factors below would increase the risk that an individual could encounter difficulties with the authorities, including possible detention:

- outstanding arrest warrant
- criminal record
- connection with LTTE
- illegal departure from Sri Lanka
- involvement with media or NGOs
- lack of an ID card or other documentation. (p 5, emphasis added).

[83] Each of these points can be examined in the context of the appellant's individual circumstances.

[84] There is no evidence that the Sri Lankan authorities will be aware that the appellant is an “enforced” returnee or a deportee. There is no reason why the appellant would need to disclose his claims for refugee status and he can truthfully point to the fact that he obtained temporary residence permits on the basis of his marriage to a New Zealand citizen.

[85] However, even if it were to become apparent that the appellant has been removed from New Zealand, or that he had claimed asylum, there is nothing in the appellant’s background that would cause him undue difficulty. The Authority has found that he is not a person of interest to the Sri Lankan authorities. There is no credible evidence that he has a criminal record or that he is the subject of an outstanding arrest warrant and the Authority has also rejected the appellant’s claim that he will be perceived to be a supporter of the LTTE, whether by virtue of information received from New Zealand or for any other reason.

[86] Further, while the appellant is Tamil, he is not from the north or the east. In that regard, the Authority has not overlooked that there is one article which refers to X as though it is in “the north”. However the Authority is satisfied that typically reference to “the north” has come to mean the Vanni or the area around Jaffna. X is widely regarded as being in the west of Sri Lanka, not “the north” in the sense referred to in most country information, and Counsel concedes as much in her written submissions

The appellant did not depart unlawfully

[87] Counsel submits that it is “not in issue” that the appellant departed from Sri Lanka in 2002 unlawfully, using a false passport, and submits that “there is absolutely no record whatsoever of him originally leaving Sri Lanka to go to Malaysia in 2002”. However, contrary to counsel’s assertion, the Authority has adopted the finding of the first Authority panel that there is no credible evidence that the appellant departed Sri Lanka illegally. Even if he did, the appellant has a genuine Sri Lankan passport which enabled him to return to and depart from Sri Lanka, without difficulty, as recently as 2008. While the appellant claimed that he did so only because an uncle paid a large sum of money to facilitate his return, the Authority has rejected that claim. The appellant would therefore return to Sri Lanka now with a valid passport that demonstrates that he entered and departed from Sri Lanka lawfully in 2008.

[88] Even if his current passport was lost or replaced, the records held by the Sri

Lankan authorities will show precisely the same details with respect to his last entry and departure to Sri Lanka. There is no apparent reason why this would bring him to the adverse attention of the Sri Lankan authorities.

[89] The appellant has no association with the media or with non-government organisations and, while he may or may not have a current identity card, the appellant possesses a valid Sri Lankan passport by which his identity will be readily apparent.

[90] In summary, none of the specific risk factors identified in the Home Office report apply to this appellant.

Potential difficulties in Colombo

[91] Counsel submits that the appellant will be forced to relocate to Colombo and made submissions with respect to the difficulties the appellant might encounter in Colombo. However, the Authority rejected the appellant's claim that he is being sought by the Sri Lankan authorities in X (or elsewhere), and that his Sri Lankan wife has been forced to relocate to Colombo. The Authority finds that in the circumstances the appellant is likely to return to his home in X and does not accept that the appellant will relocate to Colombo.

[92] Even if he were stopped at a checkpoint on his way out of Colombo or shortly after his arrival, the appellant has none of the risk factors identified as most likely to be of interest to the authorities, namely: a profile or history of LTTE links; scarring consistent with wounds sustained in hostilities; a lack of identity documents or documents identifying him as a person from the north: *Refugee Appeal No 76294* (30 June 2009) at [91], citing the UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (April 2009).

[93] Counsel also submitted generally that the appellant would be at risk of confessing to any allegations if he is tortured. However, the Authority finds that there is no real chance that he will be tortured.

Other risk factors

[94] Counsel submits that there is country information indicating that Muslims are at risk of being abducted. The extract relied upon appears at para 3.18 of the

Home Office Report and states that “Reports of cases of extortion faced by Muslims were also mentioned”. That broad and unsubstantiated statement is entirely unhelpful. The Authority notes further that it appears within the context of a section of the Home Office Report entitled “Abductions and disappearances since June 2009”, in which the substantive conclusion appears to be that the overall number of abductions has declined markedly since that time.

Lack of information

[95] The Authority has not overlooked counsel’s submission that there is much going on in Sri Lanka that simply does not make its way into the public domain. This is because of moves to harass and detain journalists who write articles critical of the Sri Lankan government. She submits that even the UNHCR, NGOs and embassies are not necessarily able to access or release all relevant information, and states that a more accurate impression of circumstances in Sri Lanka can be gained by considering information from less impartial sources such as *TamilNet*.

[96] The appellant produced several articles from such sources both to the RSB and to the Authority. These include some reports of Tamils who have gone missing or who are reported to have died in custody, and some reports of Sri Lankans, including Muslims, being abducted. The Authority does not intend to deal with each exhaustively. In general terms, they tend to relate to incidents in the north or east of Sri Lanka and in that respect lend support to the country information obtained through official sources and NGOs.

[97] Even taking into account information available from all such sources, the Authority finds that the risk faced by a person with the appellant’s characteristics is no more than random to the point of being remote. The risk does not rise to the level of a real chance and is entirely speculative.

Malaysia

[98] Counsel submits that if returned forcibly now the appellant would be held in detention in Malaysia, and would have to be sent from there to Sri Lanka at an undetermined time. She submits that the inability of INZ to provide an ongoing ticket to Sri Lanka would mean that the appellant is trapped in an airport in Malaysia.

[99] There is no evidence that the appellant would be held in detention in

Malaysia en route to Sri Lanka. It appears that he may have been briefly detained in Malaysia in 2009 after he had been wrongly removed from New Zealand. The INZ file contains an entry from a compliance officer to the effect that once this error was discovered the appellant was "... intercepted by NZ authorities in Kuala Lumpur and arrangements made for his return to NZ".

[100] However, there is no reliable evidence that the appellant would be detained in Kuala Lumpur if he were to be removed from New Zealand now, nor is there any reason why this would contribute to the risk faced by the appellant upon his return to Sri Lanka in any event.

SUMMARY

[101] The Authority has taken into account all of the appellant's characteristics and has considered all of his claims, both discreetly and cumulatively. Having done so, the Authority finds that there is no real chance that the appellant will be subjected to serious harm upon his return to Sri Lanka.

[102] The appellant has no adverse profile with the Sri Lankan authorities and will be able to return to his family in X, where he will most likely reside. Even if he is subjected to questioning at the border or at checkpoints in Colombo en route to his village, there is no reason why the appellant will be subjected to any more than the inconvenience of such questioning. That falls well short of the level of serious harm which is akin to "being persecuted".

CONCLUSION

[103] The Authority has jurisdiction to consider the appellant's second claim for refugee status.

[104] For the reasons given the Authority finds that objectively, on the facts as found, there is no real chance of the appellant being persecuted if returned to Sri Lanka. The first principal issue is answered in the negative and the second issue does not fall for consideration.

[105] 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.

"A N Molloy"
A N Molloy
Member