

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 74848

AT AUCKLAND

<u>Before:</u>	V J Shaw (Member)
<u>Counsel for the Appellant:</u>	R McLeod
<u>Appearing for the NZIS:</u>	No Appearance
<u>Date of Hearing:</u>	12 & 13 May 2004
<u>Date of Decision:</u>	20 July 2004

DECISION

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

INTRODUCTION

[2] The appellant arrived in New Zealand on 24 April 2002. She filed her application for the grant of refugee status on 1 May 2002. On 5 August 2002, she was interviewed by the refugee status officer and was advised that her application had been declined in a decision dated 5 August 2003.

THE APPELLANT'S CASE

[3] The appellant, a single Tamil woman aged 35 years, is from a village outside Jaffna. Her parents, like most of the villagers, are farmers. Presently the appellant is uncertain of her parents' exact whereabouts. She has had no response to correspondence and more recently has learned from a cousin that her

parents' house is currently vacant. The appellant's younger brother, her only sibling, resides in Australia where he has been granted refugee status.

[4] From the mid-1980s, the family's life was disrupted by the civil conflict between the Liberation Tigers of Tamil Eelam (LTTE) and other Tamil militant groups and the Sri Lankan armed forces (SLA). Because the family's home was situated on the main road between Jaffna and Palaly where the SLA and Indian Peacekeeping Forces (IPKF) were based, they were particularly vulnerable. The LTTE regularly set up ambushes along the road, sometimes using local houses or farms as cover. The SLA, in turn, heavily patrolled the area, including by helicopter. Casualties from amongst the local civilian population included the appellant's grandmother who died from injuries received in one such skirmish and the family's house was also damaged. Like other young Tamils, the appellant and her brother experienced regular harassment from both the LTTE and the SLA.

[5] Two particular incidents that stand out from the 1980s were described by the appellant. The earlier occurred during 1985 when she was a 16 year-old college student. Three soldiers came to the house as part of a wider search of the area. The appellant's parents and younger brother were locked in a room. One of the soldiers then proceeded to rape the appellant. Before doing so, he rubbed a powder onto her breasts and genitals, causing an intense burning sensation. The pain and shock caused the appellant to faint. Subsequently, she ceased having her periods. Her mother took her to a traditional herbal doctor who, until very recently, was the only person, apart from her parents, to whom she had revealed what had happened, so keenly did she feel the stigma. Her father did not dare complain to the authorities for fear of retribution against the family.

[6] During 1988, the appellant was detained by the SLA for the first time. She was held for three days in an army camp before the village head man was able to arrange her release. During this time, she was kicked and beaten with rifle butts and accused of being with the LTTE.

[7] After completing her secondary education in 1988, the appellant remained at home until about 1993. The IPKF departed during this period and the level of conflict in the area made it safer to remain at home. Primarily she helped her father on the farm, though as the SLA tended to suspect any young Tamils without

obvious employment as working for the LTTE, she also arranged to give children private lessons at home.

[8] In 1993, the appellant commenced a three-year accounting course at a technical college. The LTTE, which controlled Jaffna during this period, regularly sought recruits and helpers from amongst the students. Although she resisted all attempts at recruitment, the LTTE nevertheless ordered her and other students to assist with looking after injured soldiers, digging bunkers, preparing meals and the like. Over a six month period during 1994, the appellant was forced to work on a farm operated by the LTTE.

[9] Twice during heavy fighting in 1995, the appellant and her family were ordered by the LTTE to flee their home. On the second occasion during October 1995, they were forced to remain in a refugee camp until they SLA regained control of Jaffna in April 1996. The family home again suffered damage during the shelling.

[10] The appellant was arrested on a second occasion during 1998, this time with her brother. The LTTE had mounted an ambush on an SLA vehicle from a site near their farm. The appellant, her brother and father had been in the fields at the time. A search of the farm revealed various items, including guns and clothes in a bag presumably left by the LTTE when they made their escape. The appellant and her brother were taken to an army camp where they were detained for one week. Over this period, the appellant was repeatedly accused of assisting the LTTE, as well as being beaten with a sand-filled plastic pipe, kicked and having her head smashed against the wall. Her brother suffered similar ill-treatment.

[11] After being re-arrested, the appellant's brother left Sri Lanka in 1999. His travel to Australia was arranged through a contact found by a cousin and was paid for by his father. The appellant was under the impression that no-one in the family knew what had happened to her brother, although in his evidence in support, the brother advised that his father had intentionally not confided in the appellant about the circumstances of his departure so as to minimise the risk of exposure. The brother was uncertain if his father had learned that he was in Australia as he had not been able to establish direct contact with his family in the years following his arrival in that country.

[12] During November 1999 – when the LTTE celebrate Heroes' Day in honour of their dead martyrs – the appellant was again arrested. LTTE posters had appeared in the village including on the wall outside the appellant's home. Soldiers came to the house demanding to know who was responsible. They beat the appellant, accusing her of complicity with the LTTE. She was taken to an army camp and there detained in a dark room for around a month. She was subject to ill-treatment every two to three days including being kicked, beaten with sand-filled pipes, having her face pushed into a polythene bag full of water and bright lights shone in her eyes. On one occasion, she was taken outside, hung upside down and beaten. Her nose bled and she lost consciousness. A scar on her left chin is the result of a gash received when pushed to the floor. She was released after her parents sought the assistance of the village headman.

[13] A further arrest occurred during 2000. It was Black July, the time when the LTTE celebrate the killing, in 1983, of their members in Wellikaby prison. Early in the morning, soldiers arrived in the village and ordered people to congregate in the library compound. There, a masked person identified alleged LTTE members from individuals amongst the villagers. The appellant was one of three persons so identified.

[14] She was taken to an army camp and there accused of having worked at the LTTE farm. Her explanation that she had done so only under duress was disbelieved. She was detained in a room for up to two weeks. She suffered similar ill-treatment as during her detention in November 1999, though this time, when hung upside down from a structure in the outside compound, a fire was lit under her so that she suffered from smoke inhalation. During this detention, she was also raped by a soldier. She described a similar experience to that of 1985 in that a powder was rubbed on her breasts and genitals causing a burning sensation. When she started to scream, the rapist burned the appellant with a cigarette on her upper thigh and under her left breast.

[15] In order to secure her release, her parents and the village headman sought the assistance of an official from the Elam People's Democratic Party (EPDP) and paid a Rs15,000 bribe. Thereafter, the appellant spent two weeks in Jaffna General Hospital. Her body ached all over and she suffered from severe headaches. She was too ashamed to reveal that she had been raped.

[16] Some months later, after she was fully recovered, the appellant's father arranged for her to go to work at the home of a member of the EPDP which also served as an EPDP centre. The EPDP was strongly opposed to the LTTE and worked with the SLA. The father hoped that by creating an apparent association with the party, this would deflect SLA suspicions of the appellant.

[17] The appellant would go to the EPDP's member's home five days a week. She largely performed housework, shopping and such duties for which she received no payment. During the course of her work, she would sometimes notice the SLA bringing suspected LTTE members to the compound where their names and details would be recorded in a file, after which the suspects would then be taken away.

[18] As she regarded her association with the EPDP as purely pragmatic, she did not join the party or concern herself in its political activities. However, during the 2001 presidential election campaign, she was instructed by S, the EPDP member to whom she reported, to distribute EPDP election material in the local area. She reluctantly complied. She and her parents did not vote in the election for fear of retaliation by the LTTE.

[19] As a result of the peace process initiated by the new United National Party government (UNP), the LTTE was able to re-establish a presence in Jaffna. Feeling vulnerable, many EPDP members, including S and his party colleagues, made the decision to leave the area. One morning in April 2002, the appellant arrived at S' home only to find it deserted. When she returned home, her parents informed her that they had received a visit from the LTTE. Aware of the appellant's association with the EPDP, the LTTE had searched the house and located two bags and a file which S, a short while before, had asked the appellant to temporarily store. The larger of the bags – a paper cement bag – contained EPDP pamphlets. The appellant is uncertain of the contents of the smaller bag. S had brought both bags, along with the file in which the appellant had seen suspected LTTE members' names being recorded, to her home in a vehicle. She had agreed to their being stored in the house on the understanding that they would soon be removed.

[20] It was obvious to the appellant's parents, from comments made by their LTTE visitors, that the LTTE knew of the appellant's work with the EPDP -

including her distributing their election material - and the finding of the bags and file left by S only intensified their suspicions of her activities. They warned her parents that they would return the following day and that the appellant should be present.

[21] The appellant's parents were terrified that the LTTE could return to the house at any time and might kidnap and/or kill the appellant. They therefore warned that she had to leave immediately. Her father advised her that he had already spoken with her cousin who had previously assisted in the arrangements for her brother to leave Sri Lanka. The appellant, accompanied by her father, first went to a house in a nearby village where her father had arranged for her to stay. The following day, she went to her cousin's home from where, a day later, she and her cousin departed by plane for Colombo. Her father was required to pay Rs600,000 to secure her departure from Sri Lanka and travel to New Zealand.

[22] In Colombo, her cousin took her to the home of a contact. Some 10 or so days later, accompanied by a helper named M, she departed Colombo, travelling on a false Sri Lankan passport. It was her understanding that M was taking her to Canada.

[23] On 24 April 2002, the appellant and M arrived in Auckland. M took the appellant to a house for the night. The next day, the appellant realised that M had disappeared. She became distressed and, thinking that M might be at the airport, she managed, largely by sign language, to persuade the occupants of the house, who were not Sri Lankan, to take her to Auckland airport. Once at the airport, her tearful, distressed state attracted the attention of airport officials who eventually referred her to the Auckland Refugee Council.

[24] The appellant has written to her parents on one occasion but has received no reply. Prior to leaving Sri Lanka, they had warned her not to try to contact them in case it led to problems. Within the previous six months, she had managed to speak on the telephone with a cousin who informed her that he had been to her parents' home but that it had appeared deserted and his enquiries had been unable to establish the reasons for their departure or their whereabouts.

[25] The appellant fears returning to Sri Lanka. Not only is she afraid of further ill-treatment at the hands of the SLA, but she also fears being harmed by the LTTE

who wrongly believe that she is working with the EPDP, a key political opponent of the LTTE. She does not believe she would be safe from either the SLA or the LTTE merely by relocating to some other area of Sri Lanka, such as Colombo. The latter, she maintains, have spies everywhere amongst the Tamil community.

[26] The Authority has received a number of medical reports in addition to the two reports on the NZIS file. These establish that the appellant has been suffering from significant mental illness compounded by her social isolation.

[27] A report, dated 6 May 2004, from consultant psychiatrist Sanu Pal, who has been overseeing the appellant's care through the St Luke's Community Health Service since September 2002, states that she has adjustment disorder with depression and psychotic symptoms relating to past trauma. Dr Pal also records some symptoms of post traumatic stress disorder, such as nightmares, blunted affect and intrusive memories of past trauma. It seems that towards the end of last year, the appellant ceased attending the medical centre and her condition deteriorated. Dr Pal notes that a visit from her brother and further medication have relieved the worst of her symptoms.

[28] Two reports, both dated 20 April 2004, have also been received from Dr T Wansborough. One describes the appellant's history of severe symptoms of stress disorder and depression. The other alerts the Authority to the fact that the appellant had disclosed to Dr Wansborough the nature of the injuries she had suffered in the past, in consequence of which Dr Wansborough was referring her for a gynaecological examination. Dr Wansborough also identified a burn mark on the appellant's left upper thigh and right upper abdomen, both consistent with cigarette burns, said by the appellant to have been inflicted in July 2000. Also noted was a linear jagged scar under the appellant's chin, about two and a half centimetres long and, in Dr Wansborough's opinion, consistent with being pushed to the floor in 1999. Also described is an old "shell" scar on the appellant's left shin which is at least 15 years old.

[29] The Authority also heard evidence from the appellant's brother who has been living in Australia since September 1999. He referred to his own arrests during 1998-1999, including a joint arrest with the appellant, which had led to his departure from Sri Lanka. The risk to him from the SLA had become particularly

acute once it was established that a friend, unbeknownst to him, had joined the LTTE.

[30] Throughout the years in Australia, the brother has had had no contact with his family. He has written letters but has never received a reply. He has, though, on occasion, sent messages through people travelling to his home region and assumes his parents would have been informed that he was in Australia. More recently, someone he knew from a neighbouring village had returned to Sri Lanka and endeavoured to visit his parents on his behalf. The friend had reported that he had been unable to locate the parents in the village and that he had been unwilling to make too many enquiries as to their whereabouts for fear of attracting adverse attention to himself.

[31] The brother had been unaware that his sister was living in New Zealand until around September 2003.

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On coming to Auckland to meet with his sister, he was shocked to find her so unwell. She had appeared to be in a paranoiac state, afraid that her food was being poisoned and without anyone to care properly for her. Since she has been having medication in an injectable form, the brother has observed an improvement in her condition.

[32] At the completion of the hearing, the Authority granted leave to counsel to submit a gynaecological report following an examination of the appellant which had been arranged for some weeks hence. This, along with a further report from Dr Wansborough, was duly received on 15 July 2004. It seems the appellant is suffering from stress incontinence which, in the opinion of Dr Wansborough, could be consistent with pelvic floor carnage. These reports have been considered, along with the other medical reports and counsel's written submissions.

THE ISSUES

[33] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

"... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[34] 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

[35] The Authority must first make a determination as to the appellant's credibility.

Credibility

[36] The Authority accepts the appellant's evidence. Her basic account has been consistent, particularly having regard for her mental state, and is entirely plausible when considered against the country material concerning the activities of the SLA and the LTTE in Jaffna over the last two decades. The fact that an arrest in November 1999 was overlooked until counsel was preparing the appeal does not detract from the appellant's credibility. The medical evidence is clear as to the appellant having been mentally ill for much of the time that she has been in this country while confusion can easily result from recounting - particularly through an interpreter - a number of similar events such as repeated arrests and torture.

[37] Equally, the appellant's belated disclosure that she had been raped by soldiers on two occasions cannot be held against her. Apparently, until she spoke to Dr Wansborough in April 2004, the appellant had disclosed the rapes to no-one apart from her mother and the elderly doctor her mother had taken her to because of menstrual problems. The appellant's modesty, expressed sense of shame and fears that she cannot now marry, are consistent with Sri Lankan cultural norms.

[38] Her account of a powder applied to her genitals and breasts, which caused a burning sensation, is also consistent with documented reports of the use made by the SLA of chilli during torture of suspected LTTE members¹. Relevantly, the appellant concealed the cigarette burns on her thigh and upper abdomen, no doubt because of the explicit sexual connotation. These singular scars, indicative of torture, provide objective evidence that the appellant, until recently, concealed the full extent of her past ill-treatment.

Well-founded fear

[39] Turning now to the framed issues, the Authority is satisfied that these should be answered in the affirmative.

[40] The appellant fled her home after the LTTE came looking for her. Their comments revealed they were aware of her association with the EPDP, while the finding of EPDP literature and other items in the house would have reinforced their suspicions. Although forcibly made to assist the LTTE during the 1993-1996 period, the appellant had not previously been subjected to physical harm at their hands. However, she and her parents took the prudent view that an encounter with the LTTE, after having been identified, however mistakenly, as an EPDP political opponent, was to be avoided. Their caution was perhaps influenced by the more recent ill-treatment the appellant had suffered at the hands of the SLA during 1999 and 2000 and the desire to avoid, at all costs, further torture of the appellant from any source. It is conceivable that, had the appellant been lucky, the LTTE might have confined its interest in her to an intimidatory warning and harassment. However, given that the events occurred in April 2002 when the February 2002 ceasefire agreement was in its infancy, and in light of the LTTE's

¹ UN Commission on Human Rights *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women* Report of the Special Rapporteur on violence against women 14 January 2003, paras 181, 184

reputation for brutality towards perceived opponents, her parents' decision to remove her to Colombo was reasonable.

[41] Similarly, the decision that the appellant should leave Sri Lanka was also prudent. Her presence in Colombo or any other area outside the north east would have come quickly to the attention of the security forces through registration requirements, routine checks and the like. Her past record with the SLA, including recent multiple arrests, would have aroused suspicion, thereby exposing her to a real chance of further abuse.

[42] It is a fundamental principle of refugee law in New Zealand that the relevant date for the assessment of refugee status is the date of determination; *Refugee Appeal No 70366/96* (22 September 1997). Further, as the same decision makes clear, the enquiry into refugee status is concerned with the prospective assessment of the risk of persecution. Past persecution, though often relevant to the assessment of the future risk of harm, is not determinative. The question for the Authority is whether, in light of the peace process over the last two years, the real chance of serious harm from either the SLA or the LTTE has now receded to such an extent that it could be said that the appellant's fears of being persecuted by either party are no longer well-founded.

Fear of the LTTE

[43] Despite the LTTE's suspending its participation in further peace talks in April 2003 and the political crisis sparked by President Kumaratunga suspending Parliament, declaring a state of emergency and sacking three ministers on 4 November 2003, allegedly because of the risk to national security posed by the LTTE, the February 2002 ceasefire has continued to hold. The situation though remains highly volatile and the peace dividend disappointing².

[44] It is clear that the LTTE, since gaining legal recognition in September 2002, has utilised the peace process to consolidate its position in the north east of the

² Schweizerisch Flüchtlingshilfe *Situation in Sri Lanka*, 16 February 2004, pp1-3; "Analysis: Sri Lanka's Uncertain Future" *BBC News* (4 November 2003); "Sri Lankan Clampdown begins" *BBC News* (6 November 2003); "Tamil Tigers reject Sri Lanka's offer" *BBC News* (20 June 2003); Asia Centre for Human Rights *Constitutional Coup in Sri Lanka: Back to the bad old days*, 6 November 2003

country, in expectation of a further devolution of power along the lines set out in its 31 October 2003 proposal for an interim self-governing authority. According to the report *Situation in Sri Lanka*, the LTTE has established in the north east a police and judicial system, including opening a number of courts presided over by LTTE fighters with no formal legal training. It has also introduced a legal code and amended the customary law applicable to Tamils. The population is said to be under pressure to toe the line with freedom of expression almost non-existent and people afraid to voice their opinions. Institutions have been warned not to carry out any programme in the north east without LTTE approval. The LTTE imposes taxes in territories it controls in addition to government taxes. It has also set up restricted zones where civilians are disallowed; see paras 1.3, 3.3, 4.8, 4.11 and 4.12 of the report (*ibid* at footnote ²).

[45] Following elections to the National Assembly in April 2004, which saw the United People's Freedom Alliance replace the previous government of the United National Party³ there were complaints of voter intimidation and ballot rigging against the LTTE⁴. The LTTE backed the affiliated Tamil National Alliance, which took seven percent of the vote.

[46] The LTTE has also been accused of numerous violations of the ceasefire, including a campaign of intimidation and assassination against members of other Tamil political groups, including the EPDP⁵. Recruitment of child soldiers has also reportedly continued⁶.

[47] The Authority concludes from the available country information that, since April 2002 when the LTTE sought out the appellant because of her association with the EPDP, its presence in the Jaffna area has been considerably strengthened. Most importantly, the LTTE appears to be able to enforce its will against the local population with relative impunity. The fact that her parents appear to have abandoned their home may well reflect harassment they have encountered from the LTTE, perhaps linked to a perceived connection with the EPDP.

³ "President wins Sri Lanka election" *BBC News* (4 April 2004)

⁴ "Election Petition: LTTE prevented Free and Fair Elections in Jaffna" *Asian Tribune* (29 April 2004)

⁵ Human Rights Watch *Sri Lanka: Political Killings During the Ceasefire* (7 August 2003); "Rebel Tamil Tigers are executed" *BBC News* (8 July 2004); *ibid* – footnote ², para 4.8

⁶ Human Rights Watch *Sri Lanka: Tamil Tigers again abduct child soldiers* (29 June 2004)

[48] While the appellant has no political profile or, for that matter, formal association with the EPDP, there must be every likelihood that, in the event of her returning to Jaffna or any other LTTE-controlled area in the north east, she would be subjected to scrutiny. Applying the benefit of the doubt, the Authority finds that there is a real chance that, besides being subjected to threats and intimidation from the LTTE, the appellant would also be subjected to assault and other forms of serious harm amounting to persecution.

Fear of the SLA

[49] The Authority concurs with the appellant that it would also not be safe for her to live in an area away from the north east, such as Colombo. Relevant factors that must be considered are the appellant's profile with the SLA and the current heightened tension between the LTTE and the SLA.

[50] The appellant departed Sri Lanka travelling on a false passport. At the very least, her lack of valid travel documents on return would bring her to immediate official attention and expose her background.

[51] The appellant has a history of being targeted by the SLA and has experienced relatively recent arrests. During her last arrest in 2000, she was actually identified as an LTTE member by an informer who presumably had knowledge of her once having worked on an LTTE farm. As on previous occasions, she suffered atrocious torture. Her brother also has a similar profile as a suspected member or supporter of the LTTE. This background makes it highly likely that the appellant will be regarded with suspicion by the security forces who, country material suggests, have continued, despite the ceasefire, to commit human rights violations with impunity⁷.

[52] Tensions between the LTTE and the SLA, which have been growing in recent months, came to a head following what has been described as the most serious threat to the ceasefire thus far, namely a suicide bombing on 7 July 2004, which killed the female bomber and four police officers⁸. The attack had all the hallmarks of the LTTE and it is thought that the intended victim was EPDP leader,

⁷ *Ibid* footnote ² at paras 4.3 - 4.7

⁸ "Deadly blast in Sri Lankan capital" *BBC News* (7 July 2004); "Analysis: Sri Lanka truce fears" *BBC News* (7 July 2004); "Tamil rebels deny causing blast" *BBC News* (8 July 2004)

Douglas Devanada, whose office the female bomber had earlier tried to enter. Following this and other violent incidents, such as the killing of Police Inspector Sunil Thabrew of the Terrorist Investigation Division on 23 June 2003 in Colombo, the police and security forces have carried out cordon and search operations, established checkpoints and resumed mass arrests of Tamils.⁹

[53] The July bomb blast has caused many to worry about the future of an already fragile peace process. The LTTE have recently accused the military of waging a covert war against them in the east of the country and warned that the country was drifting back to war¹⁰.

[54] In the present environment of recent political crisis and heightened security tensions, a Tamil woman of the appellant's background and profile with the SLA faces a real chance of serious harm during the course of any interrogation by the security forces.

[55] The Authority concludes that the appellant has a well-founded fear of being persecuted by both the LTTE and the SLA. Such persecution would be by reason of her political opinions.

CONCLUSION

[56] For the above reasons, the Authority finds that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

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V H Shaw
Member

⁹ Sri Lanka Monitor June 2003 *Mass arrests in the capital*
[http://breslproject.gn.apc.org.s/monitor/June 2003/mass.html](http://breslproject.gn.apc.org.s/monitor/June%202003/mass.html), footnote ², para 4.4

¹⁰ "Sri Lanka Tigers accuse army of undermining truce" *Reuters* (6 July 2004)