

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76193

AT AUCKLAND

Before: M A Roche (Member)

Counsel for the Appellant: E Griffin

Appearing for the Department of Labour: No Appearance

Date of Hearing: 30 April 2008

Date of Decision: 22 May 2008

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant who is a national of Sri Lanka of Tamil ethnicity.

INTRODUCTION

[2] The appellant arrived in New Zealand on 26 August 2007 and applied for refugee status on 15 October 2007. She was interviewed by a refugee status officer on 3 December 2007. A decision declining her application was delivered on 28 February 2008 leading to her appeal to this Authority.

[3] The appellant claims that should she return to her home in Jaffna, Sri Lanka, she will be persecuted by the Sri Lankan army (SLA) because of her Tamil ethnicity and because she is a single woman. The essential issue to be determined in this decision is whether her fears are well-founded.

THE APPELLANT'S CASE

[4] What follows is a summary of the evidence given by the appellant at the hearing. It is assessed later in this decision.

[5] The appellant is a widow aged in her early 60s. She has four adult children, three daughters and a son. However, she has lost contact with her daughters. She is currently residing with her son and his wife who are both New Zealand residents.

[6] The appellant is from a small fishing village near Jaffna town on the Jaffna peninsula. During her marriage, she was a housewife and her husband was a fisherman.

[7] In February 2000, the appellant's husband died of natural causes. She was at that time living in her home with her son and two of her daughters and their spouses.

[8] In May 2000, the SLA ordered the occupants of the appellant's village to evacuate their village because of hostilities that were about to take place between them and the Liberation Tigers of Tamil Eelam (LTTE) in the area. The residents of the village all went to Manipai, about three and a half kilometres away, where they resided in a refugee camp set up in a school.

[9] In September 2000, the appellant left the camp and travelled to Negombo with her son, his wife, and his wife's parents and disabled brother. In Negombo, the group lived in rented accommodation and were supported by the appellant's son who found employment as a technician.

[10] At the time the appellant left for Negombo, her three adult daughters and their families were sharing a vacant house in Manipai. After she moved to Negombo, the appellant kept in contact with her daughters by sending and receiving letters passed on by people travelling between Negombo and Jaffna. She also had occasional telephone calls with them.

[11] The appellant's daughters found life in Manipai difficult because there was no employment and it was therefore extremely difficult for them to provide for their families. Her daughters told her that they intended to relocate to the Vanni region. However, after being told this, the appellant lost contact with her daughters and,

despite enquiries she has made, she has been unable to re-establish contact with them apart from a single telephone call she received in 2004.

[12] In October 2002, the appellant's son and his wife left for New Zealand where they gained permanent residence. The appellant returned to her village in Jaffna with her daughter-in-law's parents and their son. Upon her return, she found that her home was damaged and dirty. She decided not to live in it in that state and instead went to stay with her daughter-in-law's parents who lived nearby. However, she found this living arrangement difficult because the home she was staying in was crowded. Accordingly, she spent most of her time in her own home and only went to her daughter-in-law's parents' home to sleep.

[13] After a while, she changed this arrangement and began to sleep at the convent near her home in her village, but still spent most of her time during the day at her own home. While the appellant was living in Jaffna between October 2002 and August 2007, her home was searched from time to time by the SLA who were looking for LTTE members and weapons. On several occasions they asked her about her children's whereabouts. She told them that her son was in New Zealand and that her daughters' whereabouts were unknown to her. The SLA indicated that they disbelieved her claims not to know her daughters' whereabouts but took no further action against her. Occasionally, all the village residents were ordered from their homes by the SLA and systematic searches of their houses were carried out. This was because the village was coastal and it was suspected that LTTE weapons could be smuggled in by sea.

[14] In 2004, while at her home in Jaffna, the appellant received a telephone call from one of her daughters who informed her that she had given birth to a son. When the appellant asked her where she was living, she refused to say. The appellant has had no subsequent contact from her, or from her other daughters.

[15] In 2006, the appellant began making arrangements to join her son in New Zealand. She needed to apply for a Sri Lankan passport and to have medical checks carried out for her visa. In 2006, she made two trips to Colombo. On each occasion she flew between Jaffna and Colombo and stayed in Colombo for approximately one month. On these visits, she obtained a Sri Lankan passport and underwent the requisite medical checks for her New Zealand visa without difficulty.

[16] In March 2007, the appellant flew to Colombo for a third time in order to fill out visa forms her son had sent her. She stayed in a lodge in Colombo. In late May 2007, a bomb was detonated by the LTTE near the appellant's lodge. Because of this, the appellant left the lodge with a Tamil family who were also staying in Colombo. She went to Negombo with them and later, after their son had left for overseas (they had been in Colombo to see him off), returned to Jaffna by air with them on 21 July 2007.

[17] The appellant remained at her home in Jaffna for approximately one month before flying back to Colombo. In Colombo, she stayed for five days with a Tamil family she had met at a church and, on 25 August 2007, departed from Sri Lanka without difficulty.

[18] The appellant does not wish to return to her home in Jaffna because it is essentially in a war zone from which she can hear blasts and fighting between the SLA and the LTTE. She told the Authority that in Sri Lanka, she had had high blood pressure which was related to the stress of being near a war, but that in New Zealand, her blood pressure had become normal. Because her daughters are missing and her son lives in New Zealand, she would be on her own in Jaffna and would have no-one to support her. Her surviving siblings live in the Vanni area and she has no contact with them.

Documents received

[19] Counsel for the appellant filed written opening submissions, dated 27 April 2008, together with an unsigned, undated supplementary statement by the appellant. Following the hearing, the appellant filed a translation of her Sri Lankan identity card, the original of which was sighted by the Authority at the hearing. This identity card confirms that the appellant is from Jaffna as she claims.

THE ISSUES

[20] 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."

[21] 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

[22] Prior to determining the framed issues, it is necessary to make an assessment of the appellant's credibility.

[23] The Authority found the appellant to be a credible witness. Her evidence was consistent with her previous accounts and with country information. It is accepted that she is a Tamil widow from a coastal village in Jaffna and that she has lost contact with her three adult daughters.

[24] The appellant does not want to return alone to a volatile part of Sri Lanka, at a time when the war between the SLA and the LTTE is escalating. This is accepted. However, the question for the Authority is whether the treatment the appellant fears would amount to being persecuted.

[25] The treatment the appellant is likely to face should she return to Jaffna can be gauged from both country information concerning the current situation in Sri Lanka and the appellant's past experiences there. While the refugee enquiry is forward-looking, past experience provides an indication of what may be expected to occur in the future: *Refugee Appeal No 70366* (22 September 1997).

The situation in Sri Lanka

[26] In 2002, the Sri Lankan government and the LTTE signed a formal ceasefire agreement to end a 17-year armed conflict. From 2005, onwards the frequency and seriousness of its violations, and the fact that the conflict between the Sri Lankan Army (SLA) and the LTTE now involves large scale military operations, meant that the civil war in Sri Lanka had effectively resumed. The

ceasefire formally ended on 16 January 2008: UK Home Office *Country of Origin Report: Sri Lanka* (3 March 2008) para 4.10.

[27] A comprehensive review of the deteriorating human rights situation in Sri Lanka was made in a UNHCR position paper published in 2006. This paper did not call for the recognition of all Tamils from the north as refugees. Rather, it distinguished between persons facing the risk of being specifically targeted by state and non-state agents, and those who face only levels of generalised violence. It identified individuals suspected of having LTTE affiliations as being particularly at risk of human rights abuses by government forces and those who refused to support the LTTE, and who are perceived as supporters or sympathisers of the government, to be at risk of human rights violations from the LTTE: UNHCR *Position on the International Protection Needs of Asylum-Seekers from Sri Lanka* (December 2006).

[28] The UNHCR position paper reviewed the situation in Jaffna noting that, following the resumption of hostilities, the peninsula has been the scene of heavy fighting and curfews have been imposed throughout the district. The main road linking Jaffna to the remainder of Sri Lanka (the A9) was closed in 2006 (although Jaffna airport remains open). The closure of the A9 road, together with curfews, restrictions on movements and fishing restrictions, has been harsh on the civilian population of Jaffna. There are serious shortages of food and medical supplies and the prices of both have increased dramatically. There has also been a large number of civilian casualties and internally displaced people: *ibid* p8-9.

[29] More recent reports confirm that hostilities and civilian displacement have continued: See for example the following:

“In the continuing conflict between the Sri Lankan government and the [LTTE], both sides show little regard for the safety and wellbeing of civilians and violate international humanitarian law by indiscriminately firing on civilian areas and unnecessarily preventing the delivery of humanitarian aid. Since the breakdown of the ceasefire and the resumption of major military operations in mid-2006, hundreds of civilians have been killed and over 208,000 persons remain displaced as of October 31 [2007].” Human Rights Watch *World Report: Sri Lanka* (January 2008)

[30] In her submissions, counsel noted the escalating nature of the conflict between government forces and the LTTE in the north. She quoted the following passage from the recent United States Department of State *Country Reports on Human Rights Practices 2007: Sri Lanka*, (11 March 2008) (“the DOS report”):

“In August government security forces expelled LTTE troops from the east. Military confrontations also occurred regularly in the northern districts of Mannar,

Vavuniya, and Jaffna, [...] The government's respect for human rights continued to decline due in part to the escalation of the armed conflict. While ethnic Tamils comprised approximately 16 percent of the overall population, the overwhelming majority of victims of human rights violations, such as killings and disappearances, were young male Tamils. Credible reports cited unlawful killings by government agents, assassinations by unknown perpetrators, politically motivated killings and child soldier recruitment by paramilitary forces associated with the government, disappearances, arbitrary arrests and detention, poor prison conditions, denial of fair public trial, [...], infringement of freedom of movement, and discrimination against minorities.

The LTTE, which maintained control of large sections of the north, continued to attack civilians and engage in torture and arbitrary arrest and detention; denied fair, public trials; arbitrarily interfered with privacy; denied freedoms of speech, press, and assembly and association; and forced recruitment, including of children. The LTTE was also active in areas it did not control and during the year carried out at least one politically motivated killing in Trincomalee, a politically motivated suicide attack in Colombo, a suicide attack against a government army base near Batticaloa, a bombing of civilian shoppers in a suburb of Colombo, and bombings of civilian buses in the south.

...There were numerous reports that the army, police, and progovernment paramilitary groups participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity. The situation deteriorated particularly in the government-controlled Jaffna peninsula. By year's end extrajudicial killings occurred in Jaffna nearly on a daily basis and allegedly perpetrated by military intelligence units or associated paramilitaries." (sic)

Gender-based violence

[31] As counsel noted at [19] of her submissions, gender-based violence has long been a feature of the Sri Lankan civil war.

"Sri Lankan women have experienced rape, detainment, harassment at checkpoints and other violations of their personal security in the two decades of civil war. (UNIFEM, Gender Profile of the Conflict in Sri Lanka, updated 31 July 2006)."

[32] The International Crisis Group have pointed out that the resumption of hostilities has made women particularly vulnerable, especially in the north:

"Women are particularly disadvantaged by displacement and the return to war. [...] Single women heading households, widows, and women caring for the disabled have gender-related needs which are not adequately recognised or addressed by the government and non-governmental organisations (NGOs). The same is true for the health needs of women and adolescent girls.

The increases in arrests and detentions under emergency regulations have brought particular dangers for women. Safeguards to protect those in custody are widely ignored; women wardens or police are not often available, and forced sex with prison guards is a common complaint. Chronically inadequate facilities for women and girls in detention are under further stress." International Crisis Group Sri Lanka's Return to War: Limiting the Damage (20 February 2008) at 14.

[33] It was counsel's submission that the appellant's status as a single Tamil woman without male protection, from Jaffna, placed her at a real risk of gender-

based violence, given the current climate in Jaffna. The information relied on by counsel in this regard notes both that women have been vulnerable to gender-based violence throughout the conflict, and that anecdotal evidence noted in the DOS report suggests that the resumption of conflict has led to an increase in gender-based violence by security forces.

Assessment of the appellant's risk of being persecuted

[34] The term "being persecuted" is defined in refugee law as the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection: *Refugee Appeal No 2039/93* (12 February 1996) and *Refugee Appeal No 74665/03* [2005] NZAR 60.

[35] The appellant's circumstances in Sri Lanka will be assessed in regard to her home village in Jaffna as it is to there she is likely to return should she go back to Sri Lanka, given her lack of family or enduring connections in any other part of Sri Lanka. Although the A9 road is closed, the airport is open and it is likely that the appellant would travel by air between Colombo and Jaffna as she has done in the past.

[36] The appellant resided in her village in Jaffna for several years before her departure for New Zealand. Although in her final year in Sri Lanka she spent significant periods of time in Colombo and Negombo, she spent several months in her village at a time of heightened hostilities between the SLA and the LTTE. She experienced no significant difficulties with either the LTTE or the SLA during this time, apart from being subjected to the same household searches by the SLA as other villagers.

[37] In 2006 and 2007, the appellant made a number of return trips between Jaffna and Colombo without difficulty. She had no problem obtaining her passport and identity card. She was able to depart Sri Lanka without difficulty.

[38] The inconvenience the appellant faced of having her home searched on a regular basis by the SLA and occasionally being questioned by them can, at best, be described as harassment. There is nothing to suggest that, should she return to her home in Jaffna, the treatment she would receive from the SLA would be any more malevolent.

[39] It should be acknowledged that in 2000 the appellant was evacuated to an IDP camp where she resided for several months before leaving for Negombo with her son and his in-laws. Given the intensified conflict in northern Sri Lanka, it is possible that in the future the appellant may once again, along with the other members of her village, be temporarily evacuated to an IDP camp.

[40] The insecurity and possibility of internal displacement in Sri Lanka does not in itself establish that the appellant has a well founded fear of being persecuted there for a Convention reason. As was noted in *Refugee Appeal No 75692 and 75693* (3 March 2006) at [101]:

“Those impacted by civil unrest and even generalised violence are not entitled to refugee status on that basis alone. The focus of the Refugee Convention is quite specific. First, it requires the refugee claimant to demonstrate that he or she faces a real chance of serious harm ie a well-founded fear of being persecuted and second, it requires that the anticipated serious harm is “for reason of” one of the five Convention grounds (ie race, religion, nationality, membership of a particular social group or political opinion). In the words of Professor Hathaway in *The Law of Refugee Status* at 93, refugee law is concerned only with protection from serious harm tied to a claimant’s civil or political status. Persons who fear harm as the result of a non-selective phenomenon are excluded. Returning to this point at op cit 88 he emphasises again the general proposition that victims of war and violence are not by virtue of that fact alone refugees.”

[41] It is accepted that gender-based violence has been a feature of the war. Incidences of gender-based violence perpetrated by the Sri Lankan security forces since the resumption of hostilities may well have increased. However, the evidence before the Authority, which consists of both country information reports and the appellant’s account of her own experiences in Sri Lanka, falls well short of establishing that she faces a real chance of being subjected to such violence.

[42] Apart from the appellant’s status as a single woman which, it is submitted, increases her vulnerability to gender-based violence, she lacks a profile with the SLA or the LTTE and has not established any risk factors which would cause her to be targeted by either side in the conflict. Given her lack of profile with either the LTTE or the SLA, she is unlikely to be arrested or detained and to find herself in custody. Her risk of being the victim of gender-based violence or other forms of serious harm at the hands of the SLA or LTTE is remote and speculative and would occur only, in terms of *Refugee Appeal No 71404* (29 October 1999) at [61], should she find herself in the wrong place at the wrong time.

[43] The appellant does not have a well-founded fear of persecution on return to Sri Lanka. The first issue framed for consideration is answered in the negative, making it unnecessary to consider the second issue.

CONCLUSION

[44] For the foregoing 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.

"M A Roche"

M A Roche
Member