

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76408**

**AT AUCKLAND**

**Before:** A R Mackey (Chairman)

**Counsel for the Appellant:** L Vivera

**Appearing for the Department of Labour:** No Appearance

**Date of Hearing:** 3 November 2009

**Date of Decision:** 17 November 2009

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**DECISION**

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[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 Sri Lankan national of Tamil ethnicity.

**INTRODUCTION**

[2] The appellant is in his late 30s. He is a married man with one child. He arrived in New Zealand on a valid student visa in February 2009. He lodged his confirmation of claim to refugee status in New Zealand with the RSB in March 2009. Through apparent misunderstanding on his part, he withdrew from an academic course that he had commenced at a New Zealand university. He was interviewed by a refugee status officer in May 2009. A decision to decline his recognition was made by the RSB in August 2009. He then appealed to this Authority in September 2009. He predicts he has a real chance of being persecuted if returned to Sri Lanka for reasons of the profile held by him and his family members with the Sri Lankan police and paramilitary.

## **NEW EVIDENCE AND STATEMENTS SINCE THE RSB DECISION**

[3] The appellant advises, in a statement dated 23 October 2009, that he has received information from his wife that she was arrested in Sri Lanka in July 2009. He provided a statement from his wife together with originals and English translations of a "Custody Request of a Suspect to the Court" from the Sri Lankan police and a further report from the Sri Lankan police referring to the earlier report and stating that the police no longer required his wife as a suspect and therefore that she could be released. Notice of the discharge by the magistrate was also attached.

[4] Additional documents in support of the appellant's wife's statement were also submitted and a number of additional country information reports from the United Kingdom Home Office, UNHCR and the website "TamilNet" for the months of June to October 2009. This documentary evidence is canvassed at [57] to [70].

## **THE APPELLANT'S CASE**

[5] What follows is a summary of the evidence given by the appellant before and at the hearing. He adopted the statement he made to the RSB, dated 26 March 2009, and a further statement dated 23 October 2009.

[6] The appellant was born as the fifth child of a Tamil family in the village of Z, Batticaloa District, Eastern Province, Sri Lanka. In 1985, fighting broke out between the Sri Lankan Army (SLA) and the Liberation Tigers of Tamil Eelam (LTTE) when the government of Sri Lanka declared part of Puthur as a high security zone so that the SLA could expand an air force base located near the village. The family was given 24 hours' notice to leave the home and surrounding farm which had been built up by the appellant's father and forebears over many years.

[7] The appellant's family was relocated to Y village in Batticaloa with the assistance of a non-governmental organisation (NGO). They were allocated a small piece of land to live on. A few days later, due to the pain and distress of the forced evacuation, the appellant's father died from a heart attack.

[8] The appellant is the only one in his family who has gone on to higher education. After completing his General Certificate of Education (GCE) exams in the early 1990s he was able, in 1995, to study at the UVW University, receiving his

bachelor's degree in December 1999. From 2003 to 2006 he studied and obtained a master's degree at the university in X.

[9] The appellant has four older siblings; two sisters and two brothers. His elder sister lives next door to his widowed mother in Y where she runs a vocation training school for women affected by the civil war. Her husband was arrested in 1990 and then disappeared. At about the same time, the appellant's second elder brother was arrested by the authorities and never seen again. It was some years later that the family was able to obtain death certificates for the husband and brother.

[10] The appellant's other brother is married and has three children. They live nearby in Y. He does not have a permanent job but maintains his family through small business activities and selling vegetables. His other sister is married and also lives in Y about 500 metres from the family home. Both the appellant's surviving brother and his brother-in-law did have problems with the Sri Lankan authorities in the 1990s, however, since they have married and pursued a very low profile existence, they have not had further problems.

[11] As stated, the appellant's mother still lives in the family home.

[12] The appellant's brother and brother-in-law disappeared after all the people in Y village were rounded-up in a cordon and search operation in 1990. At that time, the most fit and sturdy young men in the village were selected by the Sri Lankan authorities and then taken away in buses. His brother and brother-in-law were never seen again. Eventually, after many years of complaints and enquiries, at a time when there was a change in administration in the Sri Lankan government in the mid-1990s, the family was able to obtain the death certificates in respect of both of these men. The appellant had also been involved in this round-up but had not been selected. He considered that this was because of his youth and his smallness of stature at the time. The appellant and his family lived in "refugee" camps, firstly inside the UVW University grounds then later, after they tried briefly to return to their home in Y, at a church school. After staying in the two refugee camps, the family was finally able to return to their home, which they found was substantially damaged. However, they were able to get assistance from another NGO to make the property habitable.

[13] The appellant decided to return to his studies after completing his basic education. He did this so hopefully, in the long term, he could maintain his mother and sister. In 1991 however, whilst he was in a class at the "XYZ Institute" where

he was studying, the SLA and paramilitary came to the institute and rounded-up the students. After looking at the appellant's student identification, he was told to go to the investigations section in the Counter Subversive Unit (CSU). He was then taken to a dungeon room where his clothes were removed, his hands tied behind his back and a sack was put over his head. He was left for two hours until a man came and then, after removing his own clothing, attempted to sexually assault the appellant. The appellant became extremely angry and shouted, he was then hit and abused until he fainted. He awoke to find he was handcuffed and his legs were tied up.

[14] That evening some 10 to 15 soldiers came and woke him up and asked about his involvement with the "Tigers", training that he may have had and the names of a number of "Tigers" they obviously had an interest in. The appellant told them he was not involved and about the loss of his father, brother and brother-in-law. This led to him being beaten further and then hung up by his thumbs and hit with twisted wire until he fainted from the pain.

[15] The following day, a number of men came to the room he had been left in and dragged him away, scolding him because he could not walk. He was then subjected to a form of water torture during which time he thought he would die. He was subjected to torture and severe maltreatment over the first two or three days of his detention. He was held in total for 23 days; during the remaining days he was often burnt with hot rods or cigarettes on his body. The scarring from this is still evident. He demonstrated examples on his body to the Authority.

[16] He was eventually able to be released from detention after his family heard about the round-up and complained to the International Committee of the Red Cross (ICRC) and human rights organisations. Through the intervention of a well-known member of parliament in the district, who spoke to the superintendent of police, the appellant was released. At that time he was threatened that if he ever said anything about the torture that had taken place, the authorities or paramilitants would murder him. Thereafter he had to report on a weekly basis, and at the time of any other problems or incidents. That requirement to report continued through to approximately 1995 when he was able to show that he had passed his university entrance examinations.

[17] The appellant then went on to study at the UVW University, funded by a scholarship administered by the university.

[18] The next incident occurred in 1999 when the appellant was in his final year at university. One morning while preparing to enter classes, a round-up took place. This was carried out by a mix of police, army and paramilitary personnel. Again, after being placed in a queue for identity purposes, the appellant's identification was checked. Despite protestations, he was put into a van along with two other students and taken to the CSU in the prison building in Batticaloa. After the appellant asked for his family to be informed of his detention, the police became angry and locked him away in a cell. That night, four or five policemen came and tied him up. He was stripped and blindfolded and asked about his contacts with the LTTE and some specific "Tigers". After explaining that he was a student and the past difficulties of his family, he was again beaten with rods and twisted wire and had clothing stuffed into his mouth. Again he fainted.

[19] The appellant was held in detention for several days and, during that time, the ICRC came to make inspections. He was instructed by the authorities that he was not to mention any torture or maltreatment or he would be killed. Accordingly he told the ICRC that he had not been tortured.

[20] The appellant's landlord told the university that he had not returned home and thereupon his family and a number of students from the university set up organised protests to obtain his release. Staff from the university came to see him during the 18 days he was detained. He was not taken to court during this time. Eventually the protest from the students and the university authorities led to his being released. He was so traumatised by the maltreatment he had received that he could not resume his classes for about a month and then confined his activities solely to going to and from his classes and his accommodation.

[21] The appellant provided the Authority with a copy of a letter, in English, from the acting registrar of UVW University, Sri Lanka, dated 23 July 1999, addressed to the Government Agent in Batticaloa. This letter requests the release of the appellant, a final year student in the faculty of agriculture, and states that the student "now detained in the CSU unit next to the prisons in Batticaloa and has been visited by the Vice Chancellor, Dean Agriculture and Dean Commerce and Management". Also in support of this incident, he directed the Authority to an article from "TamilNet" [www.tamilnet.com/art](http://www.tamilnet.com/art) (accessed 20 March 2009). This article states that the students at UVW University boycotted lectures and demonstrated in the roads from 7am (on 15 July 1999) in protest against the arrest of two fellow students. All traffic on the Batticaloa road had been disrupted. The appellant and another student are named and a student representative is quoted

as stating that they will continue the protests until the two are released. It also notes that the vice chancellor was having discussions with student leaders.

[22] A letter from the ICRC, dated 27 August 1999, also certifies that the appellant had been arrested, detained and visited by the ICRC both at the CSU, Batticaloa on 24 and 28 July 1999 and that he was released on 30 July 1999. (The same letter also notes that the appellant had been arrested in October 1991 when he had been released on 12 November 1991.)

[23] After completing his bachelor's degree, the appellant had difficulty in obtaining employment and so went back to work at the post office where he formerly had a clerical job. He had a break from his study for a period of four years. During this period, the ceasefire between the Sri Lankan government and the LTTE came into operation. This ceasefire allowed the appellant to resume his studies. He did so at the suggestion of his former university supervisor. He then was able to pass an examination/aptitude test and, using a combination of savings and some assistance from his mother's widow's pension, was able to study for a master's degree. During all of this time, he avoided any involvement in political activities and never attempted to be involved either in the LTTE itself or the "Karuna Faction", which split off from the LTTE in the Eastern Province. At no time was he asked to join either organisation.

[24] The appellant married in 2005. His wife (AA) was originally from Jaffna but had been studying at the university in X where she had obtained a master's degree before the appellant. His wife's family continued to live in Jaffna.

[25] One of the appellant's wife's brothers, who had been in the LTTE, died at the time of the "Elephant Pass Attack". This was a long while before the couple married in Vavuniya.

[26] Shortly after the couple married in 2005, his wife was successful in winning a Japanese "Monbusho" scholarship to study at RST University, Japan for a doctorate. The appellant was unable to join her for several months as he was completing his master's degree. He was then able to obtain a visa to travel to Japan to join her. It was decided that she should continue with her studies and that he would undertake a part-time job and eventually, after the birth of their daughter, to undertake the child-care.

[27] Although his wife obtained a part-time research job after completing her doctorate, this was not enough to support the family in Japan. The appellant

wanted to study for a doctorate himself. After completing searches on the Internet, he found that an appropriate graduate course was available in New Zealand. He therefore decided to apply to complete a preliminary course, over a three-month period prior to going on to doctoral studies. He was confident that he could obtain an appropriate doctoral scholarship in New Zealand, at domestic fee rates, once he had completed the initial course.

[28] It was the intention of the appellant and his wife that she and their child would join him in New Zealand. He intended to obtain his student visa and come directly to New Zealand. While he was doing his preliminary course, his wife and child were to return to Sri Lanka. His intention of travelling directly to New Zealand, however, was not possible when the couple realised that their daughter was included in the appellant's passport. Thus it was necessary for him to travel to Sri Lanka with his wife and daughter before coming on to New Zealand.

[29] Arrangements were then made with an uncle of his wife, who lived in Wellawatte (near Colombo), for the family to be met at the airport and stay with that relative for a period of less than one week. The appellant would then travel to New Zealand, in late February 2009, so that he could commence his one semester preliminary course.

[30] After arrival in Wellawatte from Japan on 9 February, arrangements were made by the uncle and his father-in-law to purchase tickets for the appellant to travel to New Zealand via Singapore and Hong Kong. The wife's uncle had informed them by telephone, in advance of their travel to Colombo, that paramilitary groups and the police were becoming well known for kidnapping Tamil people who had recently returned from overseas in order to extort money from them. They had been advised therefore that they should not go outside the house and to be very careful in their movements while they were in Colombo.

[31] The uncle lived in a separate house in a built-up area. On the evening of 15 February, a police search of every house in the district took place. The appellant was inside the uncle's house with his wife and child when the police came to check the home and ask for identity. On checking the appellant's identification, they noted that he was from Batticaloa and became angry and accused him of being a "Tiger" who had come to Colombo to plant bombs. They were about to take him off to the police station and were only deterred from doing this by the crying and protestations from his wife, her aunt and the children in the house. They then checked the uncle's identification and found that he was a well-known permanent

resident who also had a letter from the Ministry of Defence authenticating his presence in Colombo. Unfortunately, the appellant and his wife's names were not on the letter provided by the Ministry of Defence. When the police asked why the uncle had not registered the appellant, his wife and daughter, he replied that they had just come from Batticaloa for a visit. After intense argument, they left once it was agreed that it was still necessary to check the appellant's identity and that he could be brought to the Wellawatte police station at 3pm the next day by the uncle to carry this out.

[32] After the police left, the appellant became extremely scared. He knew that they had all his details and, by checking, may be able to find out details of his previous arrests. They would then return to the uncle's home and take him away where he feared torture and maltreatment again.

[33] In the district where the uncle lived, there were many Tamils and it appeared to the appellant that this was probably the reason why a search operation was carried out.

[34] Early the next morning, the appellant, his wife and daughter were able to move to the home of his wife's cousin, who fortunately lived nearby in Colombo. Arrangements were made for the appellant to depart Sri Lanka from the airport that evening, just after midnight. The family remained in the cousin's home during the day until the appellant took a bus to the airport. There were no checks made on the bus during the trip to the airport. The following day, his wife and child took a night bus to the family home in Y. The appellant had no problems in getting on the flight after his passport was checked.

[35] The appellant stated that he had been careful not to tell the police in Wellawatte that he had recently returned from overseas and was about to travel to New Zealand and that they had not carried out a search of his luggage to locate his passport.

[36] When it was put to the appellant that it appeared perhaps a surprising coincidence that his uncle's house should be searched in the very short time that they were there, he agreed that it was coincidental but it was his "bad luck and it was very unfortunate".

[37] Very shortly after arriving in New Zealand on 18 February 2009, the appellant spoke to his wife by telephone. She reported that she had been in touch with her uncle in Wellawatte who told her that on 16 February the police had



revisited his home. He told them that the appellant had gone back to Batticaloa. However, they threatened then beat the uncle for not taking the appellant to the police station as undertaken.

[38] When the appellant contacted his wife again approximately a week later, she told him that on 23 February, at approximately midnight, a group of armed men in plain clothes had come to the family home in Y. They were looking for the appellant. She advised them that he had gone overseas. She was told to go to the police station the following day. At that time she told the police that the appellant had gone to New Zealand. They were angry because the appellant had failed to report to the police in Wellawatte before he left. They told his wife that he must report to the authorities as soon as he returned.

[39] The appellant continued to call his wife once or twice a week until she told him not to continue with his calls as she was receiving threatening telephone calls asking about the appellant and when he was returning. After that she called him every three weeks approximately. Because of the continuing interest in him in Sri Lanka, and his fears based on past treatment by the Sri Lankan authorities, he decided he should apply for refugee status. He contacted a lawyer he located on the Internet. He then made his application for recognition to the RSB. He had gained the impression that he had to stop his studies at that time. However, he was able to secure accommodation near the university.

[40] He became aware of it when his refugee status application was declined on 28 August 2009. Being desperate to speak to his wife, he rang her and informed her of the decline. It was at this time that she informed him that she herself had been arrested and detained in prison in X for a period of three days in July 2009. She had been bailed after three days and finally, after an appearance on 27 August 2009 at the court in W, she was discharged without conviction. His wife had not informed him of the arrest prior to that time because she did not want to worry him but stated that she would try to get documentation relating to the arrest and send it to him.

[41] She states that she and her child were living with her mother-in-law in Y after the appellant went to New Zealand. Local paramilitary groups attached to the Y police were aware of the appellant's previous arrest details and that he was wanted for not reporting to the Wellawatte police. During search operations, police and paramilitary members harassed and insulted her and kept asking about her husband's return to Sri Lanka.

[42] The appellant's wife had been in contact with BB, her former employer, who had promised her he would re-employ her on a joint project related to waste water management. Accordingly, with her child, she had gone to X on 19 July 2009 and stayed with a friend, CC, whom she had known for several years. On 20 July in a house search operation by the local police she was asked for her identification. This revealed her birth place was Jaffna and that she was living in Batticaloa. She was then asked to accompany them to the police station. She told them that she had come there to work at X University and gave them a copy of her passport and doctorate certificate from the Japanese university. However, they ordered her to come to the police station, even after pleading with them and seeing the child in a distressed situation. She was kept for a long time at the station without any enquiry and an inability to feed the baby. The police stated they suspected she had some connection with the "Tiger" terrorists and wanted to detain her for further enquiries. After protesting her innocence that she had no connections with terrorist groups it was then ordered that CC be brought to the station. After she came the appellant's wife was ordered to give the baby to her. This extremely distressed her and she begged for release. However, no mercy was shown and she was kept in detention.

[43] CC informed BB about the detention. He came to the police station and argued with the police explaining that the appellant's wife had come to take up a job at his invitation. He was told that the appellant's wife was still a suspected LTTE supporter and that they had to wait for clearances from Jaffna and Batticaloa.

[44] On the second day of her arrest, the police got to know about the details of her husband and she was asked about her husband's previous arrests and detention. She explained that she did not know much about these arrests as they took place before her marriage. She was then asked why her husband went overseas without reporting to the Wellawatte police. She explained that it was due to fear that he did not report to the police. However, they refused to believe her and continued to interrogate and intimidate her. She was eventually forced to sign a document in the Sinhala language, which she could not understand or read. Fortunately, due to the efforts of BB, she was released from detention on surety bail. The professor had arranged a lawyer for her. She was very concerned about her husband at that time and did not want him to get worried or panicked. Therefore, she did not inform him thinking that she would tell him about it after she had been completely discharged by the court. When she was telephoned to be informed of the decline of the refugee application she told him about the incident.

Because of her fears she gave up the idea of working at X University and returned to Batticaloa to live with her mother-in-law. Finally, she reports that the level of arrests and detentions has increased and that there is harassment from local paramilitary members. The local police have already warned her to instruct her husband to report to the police immediately on his return. She strongly believes that her husband's (and her own) life is under threat in Sri Lanka.

[45] Between mid-July and late August, the appellant's wife had rung him on one occasion but did not tell him about her arrest. It was put to him that this appeared illogical as if she had also been arrested it surely would have added weight to his own claim in New Zealand. The appellant's reply was that he had told his wife this but by that time it was too late.

[46] After the telephone call in late August, he contacted his lawyer and was advised that he should try and obtain from his wife, a statement as well as the documentation relating to the arrest. Accordingly, he and his wife took steps to do that. This led to the appellant submitting several additional documents to the Authority along with unofficial, and later official, translations of some of the documents that had been presented in Sinhala.

## **DOCUMENTARY EVIDENCE**

[47] The additional documents noted are:

- (a) "Custody Request of a Suspect to the Court" – Sri Lankan police dated July 2009. This document, which has a date stamp on it of September 2009, sets out that it is a station report made under the Code of Criminal Procedure Act, No 15 of 1979. It is a statement from a Sub Inspector of Police at the X Police Station who took the appellant's wife "as a suspected female" into custody after searching a house located at an address in X which belonged to C (a friend of the appellant's wife as explained below). The appellant's wife was found at the address and it was noted that she used to live in "Jaffna, Batticaloa and Trincomalee areas". The report goes on to state that according to information provided the police tried to contact her relatives and (as at July 2009) no useful information had been obtained about her. The investigations were still continuing and the officer urged keeping her in remand custody until July 2009. This action was then followed by a request for bail made by a lawyer representing the appellant's

wife. That application with a surety bail of Rs100,000 had been granted and signed off by a Magistrate at W in July 2009.

- (b) “Further Report Sri Lankan Police”. This report sets out a statement from the Sub Inspector of Police at X which states:

“Reference to the first B report filed by me on [date], suspect arrested by me, and I request from the Honourable Courts, we need not this suspect and release the suspect.” (*sic*)

- (c) This document records a note from the Magistrate at W stating in July 2009 that the investigation was not concluded and that the Sub Inspector of Police says that the investigation would be concluded by August 2009. On the same document dated August 2009 is a report of a hearing before the Magistrate at W. The suspect is noted as present. It is then stated that a further report was filed and the accused discharged. The records from the Magistrates’ Court appear to have been prepared in September 2009 and certified as such.

- (d) A copy of a letter from the appellant’s wife dated 28 October 2009, referred to below; and

- (e) A letter from DD, Senior Lecturer, University of X. This is dated July 2009 addressed: “To Whom It May Concern”. It states:

“I am pleased to inform that [appellant’s wife] has been working on a collaborative research project July 2009 onwards with EE and me.

She will be responsible for planning the research, conducting the research, data collection, data analysis and reporting.”

[48] In a letter from the appellant’s wife, she reports about her arrest and detention in July 2009.

[49] It was put to the appellant that again it appeared to be a surprising coincidence that the day after his wife arrived in X there should be a house to house search. The appellant replied that:

“We are unfortunate but I cannot say when it will happen. I have not made this up to assist my case.”

[50] He had no idea where the reference to Trincomalee in the release document came from. His wife had only lived in Jaffna and Batticaloa so it must be a mistake. The documents that had been obtained from the police in X had been secured by CC who had passed them on to his wife. He agreed that after his wife’s situation had been investigated completely by the police, they had found no

problems for her and therefore she had been discharged. However, he stressed that she had documentation in support of her situation which was not the case for him should he return to Sri Lanka and their hometown.

[51] The letter from DD confirmed that the appellant's wife had secured employment in the university and had just started her work there when she was detained.

[52] His last contact with her had been on 22 October when arrangements had been made to send the letter to him. This had to be done through a safe fax number which his wife arranged. He had not spoken to her since that time.

[53] He predicted that on return he would be arrested and taken before the police where he would be severely maltreated because of his failure to report in Wellawatte and the previous interest shown in him by the Sri Lankan authorities. He considered that even though the war with the LTTE was over, and his past detentions had taken place some 10 and 18 years ago, he was still at a high level of risk. This was evidenced by the arrest of his wife and the continuing interest in him even after his wife had been released and discharged herself. He considered that because he had been captured and detained in the past he would always be suspected as a terrorist. The situation was now worse for Tamils returning from overseas in his view and this was reflected in country information that he had provided.

[54] He explained that it was a trip of approximately 200 kilometres across the island of Sri Lanka for him to return to his hometown after arriving at the airport in Colombo. He considered there would be a number of checkpoints on the way which would put him at risk if he was stopped and problems were found with his identity. On each occasion details of his past arrests and detentions would come to light. In addition, his passport would show that he had been overseas but there would be no evidence of him completing study either in New Zealand or Japan. He stressed again that this was different from the situation of his wife who clearly had the documentation reflecting her doctorate from Japan.

[55] The appellant added that his situation was made worse by the disappearance of his brother and brother-in-law many years ago and the implication that they were involved with the LTTE.

[56] The appellant stated that he had not been involved with any Tamil or LTTE supporters or organisations while in Japan and had not conducted any fundraising on their behalf.

## **COUNTRY INFORMATION**

[57] Because of the significant changes in Sri Lanka over the past six to nine months, including the defeat of the last LTTE forces by the Sri Lankan government forces in May/June of this year, the Authority has made every endeavour to obtain the most up to date country information so that this could be assessed against the appellant's predicament and profile on return at this time.

[58] In addition to a considerable amount of country material held on the file that was available to the RSB, the Authority has also had the benefit of considering the "Country of Origin Information Report (COIR) – Sri Lanka" from the UK Border Agency Home Office, dated 18 February 2009, the most recent COIR dated 13 October 2009, the "Operational Guidance Note (OGN) – Sri Lanka" from the UK Border Agency, issued in August 2009, the UNHCR "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka" (April 2009) and a number of Internet reports, predominantly from the "TamilNet" website: [www.tamilnet.com/art](http://www.tamilnet.com/art), which were provided by the appellant's counsel. These have all been taken into account. Some particularly relevant information follows.

## **UNHCR ELIGIBILITY GUIDELINES (APRIL 2009)**

[59] This report, which was prepared and published only a month or two before the fall of the LTTE, explains (at page 8) the situation in the East noting that the last eastern base of the LTTE was captured by the SLA in July 2007 thereby ending LTTE control of the region. Notwithstanding this, there was a heavy military and paramilitary presence in the territory and the SLA and counter-insurgency Special Task Force (STF) assert security, military and counter-terrorism imperatives for their operations in the region. The overall security situation in the east is stated as continuing to be "tense and serious violations of human rights by government and non-state actors are still regularly reported". It also reports in early-2009 the UNHCR expressing its concerns regarding the security situation and calling on the government to investigate reported human rights abuses and inadequate security of civilians in the region. UNHCR note regular instances of violence in the East, including in areas of return [of previously

displaced people from the region], have increased and the atmosphere of fear existed between the different ethnic and political groups in the East and between the returnee community and security forces. The majority of reported instances and human rights violations involved young Tamil males and the measures implemented by the SLA and the STF which have been associated with:

“...significant restrictions on freedom of movement and access to land and livelihood, arbitrary arrests, mistreatment in detention, sexual assaults, extrajudicial killing and disappearance of Tamils. Cordon and search operations are carried out regularly in the east and very frequently associated with arrests primarily of Tamils.”

[60] It notes, at pages 10 and 11, that the pro-government Tamil Makkal Viduthalai Pulikal party (TMVP), which broke away from the LTTE in 2004, now effectively controls Batticaloa and other parts of the East, is reported to engage in terror and crime involving abductions, robberies and repression of dissent. The TMVP forces are responsible for extrajudicial killings, deaths in custody and abductions, which are apparently being carried out with the knowledge and tacit agreement of the government actors and the local authorities.

[61] At page 20 of the report, under the heading “Impunity”, this report notes that the government of Sri Lanka has been widely criticised for failing to acknowledge the extent of the problem and for lacking commitment to effectively punish perpetrators of human rights violations, in particular that among members of the police, security and military forces. It reports:

“In a recent statement, a group of 10 UN independent experts expressed their “deep concern at the deteriorating human rights situation in Sri Lanka, particularly the decreasing space for critical voices and the fear of reprisals against victims and witnesses – together with a lack of effective investigations – has led to unabated impunity for human rights violations”.”

[62] The same report notes that while torture and other inhuman, cruel or degrading treatment is prohibited by law, there is extensive use of torture by police, security and armed forces in Sri Lanka and torture was widely practised in Sri Lanka and prone to become routine in the context of counter-terrorism operations.

[63] At page 21 of the same report, Tamils originating from the north and east of Sri Lanka are noted as groups at risk of targeted human rights violations by government actors and the TMVP, particularly those suspected of having past LTTE affiliation, including:

“... young Tamil males, in particular those not able to establish their affiliation to the TMVP, or one of the other pro-government Tamil groups ...

... Tamils who are not in possession of proper civil documentation, such as national identity cards...

... Tamils who were born in the north or the east who are outside of the region, in particular those who reside or seek to enter Colombo.”

[64] An addendum to the above report, dated July 2009, notes that in May 2009, government forces captured the last territories held by the LTTE. It states that notwithstanding the end of hostilities, the human rights situation in Sri Lanka remains of concern to the UNHCR and the UNHCR considers the observations and recommendations of the April 2009 Guidelines remain valid and should be taken into consideration when assessing eligibility of asylum seekers from Sri Lanka.

[65] This report, while it concentrates significantly on Tamils who return to the North, rather than the East, states that the UNHCR recommends that the involuntary return of Tamils to Sri Lanka not be undertaken during this transitional post-conflict period pending clear indications that the situation of displacement and confinement has significantly improved.

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[66] This notes that the state of emergency, which gave the government of Sri Lanka extensive anti-terrorism powers and increased security measures, including checkpoints throughout the country, remains in force. (Indeed, a TamilNet report of 6 November 2009 reports that the government of Sri Lanka has extended the state of emergency for a further one month.)

[67] The COIR notes that arrests and detentions of people of Tamil ethnicity continue and sets out details of a number of incidents of arrests over recent months, several of them from the pro-LTTE website “TamilNet”. These detentions include some made at the Colombo Katunayake international airport in August 2009. In respect of the Eastern Province, including Batticaloa, at 3.12 - 3.14 of the COIR, a letter from the British High Commission in Colombo, dated 5 August 2009, is reported. While this notes that the security situation in Batticaloa has improved, it states that a major source of instability in the East in recent months has been the presence of armed para-military groups, including TMVP and a group of TMVP cadres loyal to the government minister, Muralitharan (aka Karuna). It also notes that the re-settlement of IDPs from the war and the tsunami into the Eastern Province continues. It sets out a summary in the following manner:

“In summary, the overall security situation in the Eastern Province is continuing to improve and had led to real improvements to the lives of ordinary people. People



appear pleased with progress over the past couple of years and have no appetite for a return to conflict. The tensions between Chandrakanthan and Muralitharan, and between the Provincial Council and the central Government leave potential for future instability, but they are not currently having a serious impact on the overall security situation.”

## **TAMILNET**

[68] While the reports from this pro-LTTE website need to be assessed with caution, some reports do have specific references to the risks faced by this appellant. These include a report of 8 June 2009, reporting that “two Tamil foreign returnees were arrested in Wellawatte and taken into custody”. A report of 1 August 2009 notes that “Tamil youth arrested at Katunayake airport”. This notes a 22 year-old Tamil youth was arrested by the National Intelligence Bureau on his arrival from South Africa. He is stated to be a resident from Jaffna who had previously resided in Wellawatte before going abroad. He was noted as being deported from South Africa to Sri Lanka. A report of 5 September 2009 notes that the Sri Lankan Terrorist Intelligence Division (TID) arrested a Tamil citizen at the international airport when he was about to leave the country. This civilian was identified by name as a resident from Batticaloa and he was subjected to interrogation to ascertain whether or not he was involved in LTTE activities in past. Another report of 21 September 2009 notes “Tamil engineer arrested in Katunayake”. This states that the Sri Lankan SIS arrested a Tamil engineer who arrived at the airport from Singapore. A report of 20 September 2009 notes a “Trinco” Tamil youth abducted in Batticaloa.

[69] A further report of 1 October 2009, “Five Tamil youths arrested in Colombo”, notes that the STF commandos took into custody five Tamil youths in a search operation conducted in Wellawatte, Mount Lavonia and Dehiwala, in the suburbs of Colombo city. They were reported as being detained at police stations and being subjected to interrogation.

[70] A report of 12 October notes the SLA and police took into custody three Tamil youths in Colombo during a search operation. Finally, in a report dated 19 October 2009, it states “29 Tamil youths arrested at Katunayake in two incidents”. The first incident referred to 11 Tamil youths who took a flight to Singapore but were refused admission. They were taken into custody on return. The second incident involved 18 Tamil students who were taken into custody at the international airport after taking a flight from London. The youths apparently had valid student visas issued by the UK embassy. This report notes:

“Since July this year, special teams of state intelligence unit and police have been deployed at Katunayake international airport to monitor the movement of Tamils who go abroad, according to sources in Combo.”

## **THE ISSUES**

[71] 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.”

[72] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

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

## **ASSESSMENT OF THE APPELLANT’S CASE**

### **CREDIBILITY**

[73] The appellant gave his evidence in an open and straightforward manner. The major concern of the Authority with his story was the apparent implausibility of the appellant and his family being involved in a search operation in Wellawatte during the period of less than one week that he returned to Sri Lanka, coupled with the apparent “convenience” of his wife again being involved in a search operation the day after she arrived in X. The possible implausibility of these two events happening so shortly after the family’s arrival in Colombo and then his wife’s arrival to resume work in X, was put to him, along with the possibility that this could well be seen as his having “manufactured” the basis for a refugee claim in New Zealand. In his response, the appellant did not attempt to be evasive or deceptive, or to exaggerate these two events. He simply stated that they were unlucky and unfortunate to be in the wrong place at the wrong time. Apart from one or two small, minor inconsistencies in the remainder of his story, his claim has been presented as a consistent, if expanding, claim.

[74] Noting the country information that states the Sri Lankan authorities continue to operate cordon and search operations and house to house searches in locations where Tamils are known to be resident, albeit at a possibly lower level than at the height of the civil war, the Authority is prepared to accept the appellant's evidence as credible in this regard. There is ample country evidence of search operations in areas such as Wellawatte and indeed in the appellant's home district of Batticaloa.

[75] The appellant's return to Sri Lanka for a short period of time in February this year was not part of his plan wherein he intended to come directly to New Zealand. It arose, the Authority accepts, solely because of the necessity of his having to return to Sri Lanka with his young child because the child was included in his own passport.

[76] The only remaining area of credibility concern was whether his wife had genuinely not informed him of her own detention in order not to trouble him in New Zealand or that this whole story had been contrived between them, including the provision of possibly fraudulent documentation in support, immediately the appellant discovered his claim for recognition in New Zealand had been declined. While the Authority is, of course, aware of the ease of ability to obtain fraudulent documents in countries such as Sri Lanka and that it continues to be prevalent, again this is a situation where the explanations given and the details provided in the letter from his wife are consistent with the totality of the rest of his story and country information.

[77] The Authority therefore accepts the appellant's account as credible.

### **WELL-FOUNDED FEAR OF BEING PERSECUTED**

[78] The Authority has, for many years, interpreted the term "being persecuted" in the refugee "inclusion clause" as the sustained or systemic violation of basic human rights, demonstrative of a failure of state protection. In other words, core norms of international human rights law are relied on to define the forms of serious harm which are within the scope of "being persecuted". This is often referred to as the human rights understanding of "being persecuted" and is fully explained in *Refugee Appeal No 74664/03* [2005] NZAR 60; [2005] INLR 68 at [36] to [125].

[79] This appellant would be returning to Sri Lanka to the international airport in Colombo on a valid Sri Lankan passport, which includes a student visa and permit for study in New Zealand. He has no record of any convictions being recorded

against him, despite having been detained and severely maltreated on two occasions in the past. The Authority is satisfied that the failure to report to the police in Wellawatte, as he promised in February, has not become a matter of criminal record likely to be held at the airport. The Authority is satisfied that any risk to him on arrival is minimal and remote.

[80] The appellant then has the requirement of making his way, probably by bus, across the island of Sri Lanka to his home town of Y. Country information shows that there is still a possibility of his being unfortunate enough to be stopped, searched and detained while on that journey. In the circumstances, whether that risk is a real or remote one is immaterial to the outcome of this decision due to the findings by the Authority that there is a real chance of him being detained and subjected to severe maltreatment on return to his home district.

[81] The appellant and his family have lived in the Y/Batticaloa district for many years. On the accepted evidence, if he returned to his home, there is a real risk that the Sri Lankan police, army or TMVP paramilitary would seek him out. His wife has been asked of his whereabouts. At that time, based on the country evidence and their knowledge of his past detentions, and his failure to report in Wellawatte, the Authority finds there is a real chance this would lead to his being detained for questioning. In a situation where the state of emergency still continues, it is now necessary to assess whether the treatment he would receive in such detention would involve serious maltreatment, to an extent that there is a real chance of him being persecuted.

[82] At this point, it is necessary to note that his detention and investigation cannot be directly compared to that of his wife in X. The Authority does not consider the discriminatory behaviour against her and the inappropriate treatment she suffered, particularly as a young mother with a child, rose to the level of a sustained or systemic violation of basic human rights. She was in a position where, *prima facie*, valid investigation into her background could be carried out. That was done, in an apparently inappropriate and over-zealous manner, but this did not amount to sustained or systemic physical or mental maltreatment. She was also in the position where she was able to obtain bail fairly readily and, by having sufficient documentation and evidence about her background and qualifications, she was able to have her case dismissed by the Magistrate in late August.

[83] The appellant, however, is not in such a position. He has no supporting documentation relating to his studies in Japan and/or New Zealand. He does have a history of previous fairly lengthy detentions where he was subjected to severe torture and maltreatment. Regardless of whether there was a finding of him being an LTTE supporter in the past, the fact that he has been detained and investigated in the past, albeit many years ago, and has recently returned from overseas after two reasonably extended periods out of the country, does, on the evidence, indicate a real chance of him being severely maltreated again while in detention and under investigation.

[84] In reaching this conclusion, the Authority notes the country evidence of continuing impunity to torture or maltreat people while in detention and investigation into past LTTE associations. While the situation may be gradually improving, there is no evidence that the propensity for impunity has fallen away to a level where it is a remote or fanciful risk for young Tamil males, with a profile such as this appellant, of suffering serious maltreatment. The level of maltreatment that he would suffer, even in an investigatory detention, given his predicament and background is, at this time, found to be at the level of persecution.

[85] For this reason, the first issue is therefore answered in the affirmative. The Authority finds that this appellant does have a well-founded fear of being persecuted on return to his home district. In respect of the second issue, that fear is for reasons of his ethnicity and/or imputed political beliefs.

## **CONCLUSION**

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

"A R Mackey"  
A R Mackey  
Chairman