

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76040

AT AUCKLAND

Before: M L Robins (Member)

Counsel for the Appellant: R N Smail

Appearing for the Department of Labour: No appearance

Dates of Hearing: 2 & 3 July 2007

Date of Decision: 21 February 2008

DECISION

This is an abridged version of the decision. In this appeal, certain particulars appear in truncated form or have been removed in total pursuant to s129T of the Immigration Act 1987. Those parts which have been truncated appear in square brackets. Those parts removed altogether are identified by "*deleted*" and also appear in square brackets.

[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, a citizen of the Democratic Socialist Republic of Sri Lanka.

INTRODUCTION

[2] The appellant arrived in New Zealand in September 2006. He applied for refugee status in October 2006. His application was declined by the RSB in March

2007. It is from that decision that the appellant appeals.

[3] The appellant is a [*deleted*] Muslim. He hails from A, a large township in B, one of the eastern districts. The appellant's [*deleted*] wife and [*deleted*] children remain in A.

[4] The appellant's case is that because of his political and business profile, he has been (and will continue to be) targeted by the LTTE, the (ex-LTTE) Karuna faction, the police and his political rivals. He also says that as a Muslim residing in an area - parts of which are either controlled by or contested by the LTTE - he faces an additional risk of serious harm.

THE APPELLANT'S CASE

[5] This is a summary of the case the appellant presented to the Authority. It is followed by the Authority's assessment of the credibility of the account.

[6] It was in 1990 that the appellant [*deleted*] first became involved in politics. The issue that prompted his involvement was whether the five northern districts should merge with the three eastern districts. The appellant vehemently opposed the LTTE's mission to administer a Tamil homeland made up of the eight districts of the north and east. There was a long history of distrust between the LTTE and the Muslim community living in the eastern districts and numerous documented examples of the LTTE forcing Muslims out of their homes, harassing them and attacking their mosques. The appellant believed that if the north and east were merged, the Muslims would be crushed under Tamil rule.

[7] In 1990, the northern and eastern provinces were, in accordance with a 1987 agreement between the Sri Lankan and Indian governments, temporarily merged. There was to be a referendum held in the eastern province to decide the permanence of the merger. As part of the agreement, the LTTE agreed to surrender weapons and release hostages. In the three years following the 1987 agreement, the appellant witnessed how the LTTE sabotaged provincial council elections, kidnapped and murdered political opponents (mainly Muslims), failed to surrender weapons and, for example, forced Muslims out of the northern towns of Jaffna and Mannar.

[8] These factors motivated the appellant, in 1990, to join the Sri Lankan

Muslim Congress (SLMC). His membership over the next four years up to 1994 involved only his attendance at monthly or bi-monthly SLMC meetings.

[9] By 1994, the appellant was married and was working on his family farm.

[10] General elections were to be held on 16 August 1994. [deleted] The appellant enthusiastically joined [some senior political figures] in campaigning for the SLMC in and around A. During the campaign, the LTTE, angry that the appellant was campaigning for a party opposed to the merger of the north and east, began to harass him. They made several threats to kill him, but the harassment and threats did not dissuade him from advocating the SLMC position.

[11] The People's Alliance party (PA) won the election but needed the collaboration of a minority party to form a government. The PA sought and won the support of the SLMC. [The appellant] transferred his allegiance to the deposed United National Party (UNP). [deleted]

[12] The appellant began to forge relationships in the local UNP branch. One day in [deleted] 1994, he was at the UNP branch office when an aggressive group of PA and SLMC supporters arrived. A heated argument ensued before the group departed. At 10pm that night, six SLMC and PA supporters burst into the appellant's home. They beat the appellant with sticks until he collapsed. They warned him that if he continued to participate in politics, they would kill him. The appellant did not report this incident to the police because he had recognised one of the attackers as a police officer (in civilian clothing) and, in any event, the local Sri Lankan police were against the UNP. Instead, the appellant decided to quit politics.

[13] In the middle of 1995, the appellant ceased working on the family farm and started a business [deleted]. Ultimately, this business employed six workers and provided the appellant and his wife with a good income.

[14] From [deleted] 1994 until February 2004, the appellant kept a low political profile. He ran his business and, with his wife, raised their [deleted] children.

[15] As his business grew, the LTTE began to take a financial interest in him. In [deleted February] 1996 they demanded money from him. He gave them LKR (Sri Lankan rupees) 20,000. From this point on, the LTTE, by means of threats and violence, forced the appellant to "donate" between LKR100,000 to LKR150,000 per year.

[16] In the decade up to 2004, there had been several political developments. A general election in 2000 was won by the PA in alliance with other parties, including the SLMC. The PA and SLMC then split because the PA withdrew the SLMC's leader's ministerial portfolio. As a result, Parliament was dissolved in February 2001. The SLMC agreed to support the UNP in the election set for December 2001. The UNP won that election and, with the support of the SLMC, formed a government. In 2002, a peace accord was signed between the Sri Lankan government and the LTTE. A period of relative peace followed, demonstrated most noticeably from the appellant's point of view by the removal of checkpoints.

[17] A general election was set for early April 2004. [The appellant learned] that the UNP and SLMC had agreed that, in B District, UNP candidates would not stand in opposition to SLMC candidates and that the UNP would support the SLMC campaign in B. [The appellant enthusiastically agreed] to get involved in the campaign. *[deleted]*

[18] By this stage, the appellant's financial position had improved. He had purchased some land in 2000 on which to grow trees. He had brought a partner into his business, changed its name and expanded his range of products.

[19] Election campaigning started in early February 2004. The appellant, with five or six others, put up posters, distributed pamphlets and visited the homes of sympathetic Muslims. An important plank of their campaign was to assure Muslim voters that the UNP intended to secure a place for Muslim representation in talks about the peace accord and the merger of the north and east. The appellant and his colleagues avoided canvassing in Tamil areas for fear of being attacked.

[20] [In] February 2004, the appellant's group of UNP campaigners were meeting in a house. A group of men burst in, demanding to know whether they were holding a political meeting. It was obvious to the appellant from the attackers' words and actions that they were PA supporters. The appellant and his colleagues were beaten with rods and sticks but all managed to escape from the house. [Later, the] appellant and some of his colleagues [returned] to the local police station [to lodge a complaint], but the police refused to record the complaint and instead told them to withdraw the UNP/SLMC nomination, warned them not to hold meetings or to work against the PA and then chased them out of the police station.

[21] [The UNP supporters then formed] independent groups of candidates.

Altogether, 21 independent groups were formed. The appellant was one of 10 candidates in [one of these groups]. The rationale behind this strategy was that, as independent candidates, the police would find it more difficult to deny them protection during the campaign or deny them access to polling stations. The appellant continued to campaign on behalf of the UNP but ostensibly as an independent candidate.

[22] [In] March 2004, some LTTE men arrived at the appellant's house. They warned the appellant that if he continued to campaign against the merger he would be killed. The appellant was one of two candidates in [his] group [*deleted*] who received such a visit from the LTTE. The appellant and this other candidate had the highest profiles in their group. They took whatever precautions they could but both were determined not be frightened off.

[23] [One week later], the appellant's wife was at home when local police officers arrived seeking the appellant. She told them the appellant was at a meeting. They said they had warned him not to be involved in the election and threatened that if he did not stop, they would kill him. They smashed a window and left. The appellant was unnerved by this but was determined to keep on campaigning.

[24] Two days later, the appellant received a telephone call from a man (presumed by the appellant to be a PA supporter) who said that if the appellant did not withdraw from the election, his life would be in danger. The appellant retaliated by asserting his right to be active in politics and then he hung up. The appellant decided to lay an official complaint to the police. Emphasising his status as an independent candidate in the election, he persuaded the police to record the details of the telephone threat.

[25] [Later in] March 2004, the appellant received another visit from an LTTE member who warned him to cease campaigning against the merger of the north and east.

[26] The election was held in early April 2004. The PA won. Two days later, somebody threw stones at the appellant's house, smashing a window.

[27] The next night, the appellant received a telephone call from the same person who had called previously. The caller said that the only reason the appellant had not been killed was because the UNP had lost the election and

therefore the UNP posed no threat. [The] appellant laid a complaint with the police about the second call. The police recorded the complaint in writing.

[28] The appellant was exhausted and anxious after the election. [*deleted*] He and his family went to Colombo where they stayed with relations[for] a month [*deleted*]. During their absence, "Colonel" Karuna had split from the LTTE and had persuaded thousands of LTTE fighters in the eastern region to join what is commonly now referred to as the Karuna 'faction' or the Karuna 'group'.

[29] The appellant returned to his business. He continued to submit to the LTTE's demands for 'donations'. Although the post-election period was relatively quiet, the appellant could not shake off a strong sense of insecurity and danger.

[30] During 2004, the LTTE began moving into the east to engage the Karuna faction. By 2005, the violence between the LTTE and Karuna faction was widespread in B district.

[31] In October 2005, [*deleted*] the appellant [agreed] to participate in the UNP campaign for the presidential election to be held on 17 November 2005.

[32] [*deleted*]He and his UNP colleagues went from door to door (avoiding known PA supporters) advocating a vote for Ramil Wickramasinghe. They assured potential Muslim voters that Mr Wickramasinghe was keen to ensure a special place for Muslims in the peace talks and participation of Muslims in the administration of the east.

[33] [Shortly] before the election, the atmosphere in A was tense. Late in the afternoon, the appellant was at home with his family when police officers arrived at the door. They handcuffed him and took him to A police station. They accused him of dividing the PA supporters and campaigning against the merger. They beat him severely.

[34] The appellant's family became concerned so his uncle and cousin went to the police station to find out what was happening. The police officers told them the appellant was likely to be imprisoned. The uncle and cousin managed to negotiate the appellant's release by payment of a LKR50,000 bribe. The appellant's injuries were severe enough to require him to seek medical treatment. [*deleted*]

[35] Days later, a trusted friend of the appellant warned him that the LTTE was keeping the appellant under observation and had threatened that if he continued to

campaign against the merger, they would kill him. Over the next few months, the appellant continued to give in to the LTTE's regular demands for money but otherwise all was quiet.

[36] In late April 2006, the appellant started campaigning for the UNP/SLMC candidate in the local municipal election which was to be held on 20 May 2006. The appellant and his colleagues organised meetings, put up election posters and visited the homes of local Muslim residents. In response, the PA supporters began a campaign of violence and intimidation against them.

[37] At approximately 10pm on 16 May, six PA supporters burst into the appellant's house. He recognised one of them as a local police officer. They attacked the appellant and, when his wife and son came to his aid, the PA supporters grabbed the appellant's wife by the hair and threw her and the son against a wall. Their parting shot was a warning to the appellant not to work against the PA or he would be killed.

[38] The appellant was more deeply affected by the assault on his wife and son than he had been over the harassment and assaults he himself had personally suffered. [He was advised] to play no further part in the election and [to] attempt to leave Sri Lanka if possible. The appellant had recently made an application for a visa to visit New Zealand, purportedly to investigate a business opportunity.

[39] The SLMC won the great majority of seats on the municipal council. The PA and other opposition supporters were extremely angry. On 25 May, the appellant was working in his business when a man walked in, claiming to be from the Karuna group. He pointed a gun at the appellant and warned him not to give any money to the LTTE. The Karuna group (having previously been part of the LTTE) would have been aware that the appellant had been giving money to the LTTE over the years.

[40] The following day, an LTTE man visited the appellant. He knew about the Karuna visit the day before and he warned the appellant not to associate with the Karuna group.

[41] In early June 2006, the LTTE again demanded money. The appellant gave them LKR30,000.

[42] [In mid-June] 2006, despite the fact that his application for a New Zealand visa had not yet been granted, the appellant travelled to Colombo to make

arrangements for his departure. He arranged the transfer of part of his business to his business partner (leaving the balance to provide an income for his wife). He investigated the availability and cost of airline tickets. He returned to A *[deleted]* intending to wait there until his visa was granted.

[43] He felt very insecure in A. He was extremely anxious at the prospect of being confronted by either the LTTE or the Karuna faction, who each now suspected him of supporting the other. There was no love lost between the appellant and the LTTE and he feared that the Karuna allegation might prompt the LTTE to make good their repeated threats to harm him. He also feared retribution from angry opposition party supporters. So, despite the fact that no visa had been issued, he farewelled his family and, [in late] June 2006, he returned to Colombo *[deleted]*.

[44] The next day, the appellant telephoned his wife from Colombo. She told him that earlier that day, police officers – clearly already aware he had left the district - came to the family home demanding that he return and surrender himself. They warned that if he failed to do so, they would kidnap the wife and children. The appellant believed that these were empty threats, motivated only by the police officers' desire to extort ransom money. The appellant was comforted by the fact that his wife's parents lived in the same house and a number of their relatives lived close by. The next day, the appellant again telephoned his wife. She told him the police had returned and made the same threats. To the appellant's relief, there were no further visits from the police while he waited in Colombo.

[45] In early August 2007, the appellant received his New Zealand visa. He booked airline flights and finished his departure arrangements. In September he left Bandaranaike International Airport in Colombo *[deleted]* and he arrived in New Zealand the following day.

[46] The appellant then wrote to his family and requested various documents to support his application for refugee status. As soon as those documents arrived, he made his application.

[47] Since the appellant's departure from Sri Lanka, his wife has received visits from unidentified men (presumed to be LTTE) in October and December 2006 and in January and April 2007. They smashed furniture and demanded money. In April, the appellant's wife closed the business because that appeared to be a motive for the harassment. In May, the appellant's uncle told him that the police in

A were claiming that the appellant was an LTTE spy.

[48] The appellant is frightened that if he is forced to return to Sri Lanka, he will face ongoing problems from the LTTE, the Karuna faction, the police and opposition party supporters.

THE ISSUES

[49] 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."

[50] 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

CREDIBILITY

[51] Before turning to the first issue, it is necessary to determine the credibility of the evidence presented to the Authority.

[52] The appellant was a straightforward and candid witness. He spoke passionately and knowledgeably about his political beliefs. He convincingly professed his profound regret, in hindsight, that his political activities had caused him and his family so much anguish. He produced evidence that corroborated many of his claims. For example, he produced documentary evidence [of his connections with senior political figures], that the appellant was an active member of the UNP from 1995, and that he stood as an Independent Candidate in B in the General Election on 2 April 2004. He produced documents supporting some of his

dealings with the police such as a photograph of him in handcuffs sitting in what appears to be a police station cell, and copies of official complaints recorded by the police. He also produced a receipt from the LTTE confirming a payment by him in 2002 of 25,000 Rupees. The documents supporting the visa application confirmed the appellant's evidence about his business dealings and the extent of his real and personal property. His evidence was internally consistent and also consistent with country information.

[53] The Authority accordingly accepts the appellant's evidence in its entirety and now turns to the first issue posed.

OBJECTIVELY, ON THE FACTS AS FOUND, IS THERE A REAL CHANCE OF THE APPELLANT BEING PERSECUTED IF RETURNED TO THE COUNTRY OF NATIONALITY?

[54] Persecution has been described as the sustained or systemic violation of basic or core human rights, such as to be demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996).

[55] For the reasons set out below, the Authority is satisfied that, on the facts as found, there is a real chance of this appellant being persecuted if he returns to Sri Lanka.

Country information and submissions

[56] Counsel filed helpful submissions and country information on 25 May 2007, 26 June 2007, 16 July 2007 and 21 January 2008. The Authority has considered all of this material.

[57] The country information indicates that the human rights situation in Sri Lanka deteriorated dramatically in 2004 and 2005, after a brief period of relative calm following the 2002 ceasefire agreement. In regard to the eastern provinces, the calm was broken in April 2004 when the LTTE's eastern commander, "Colonel" Karuna, split from the LTTE. Following the split, LTTE troops moved in from the north to engage the Karuna faction in battle. In regard to the Muslim population in the east, Muslim leaders allege that their communities face a variety of threats and abuses, primarily from the LTTE. They allege that police and local government officials fail to provide their communities protection or support and that they have become increasingly vulnerable as the peace process has deteriorated. Muslim businessmen are particularly vulnerable to extortion by the LTTE: Amnesty

International *Sri Lanka – A climate of fear in the East* (3 February 2006).

[58] In October 2006, an Australian based NGO called the Hotham Mission produced a comprehensive report; *Hotham Mission Field Trip to Sri Lanka; Security, protection and humanitarian concerns and implications for Sri Lankan Asylum seekers in Australia* (October 2006) [http://203.56.94.10/asp/Sri Lanka Report.pdf](http://203.56.94.10/asp/Sri%20Lanka%20Report.pdf), which confirmed the total breakdown of the ceasefire. It reported widespread fighting in the north and the east between the Sri Lankan army and the LTTE, and in the east between the LTTE and the Karuna faction. In relation to the east, the report stated (paragraph 4.2):

“Unlike much of the north, which is primarily Tamil, the Eastern districts in many places are an equal mix of Tamil, Sinhalese and Muslim. The LTTE control a number of areas in the Trincomalee, Ampara and Batticaloa districts, with the Karuna faction also operating in the area. The major concerns for these areas relate to the ongoing conflict over what the Government of Sri Lanka describes as cleared and uncleared areas, the high level of ethnic tension and violence, and the growing incidents of abduction, extrajudicial killings and other targeting human rights abuses.” (sic)

[59] In relation to Muslims, the report recorded the Mission’s “serious concerns for the Muslim community in the East, innocently caught up in the conflict...”. It said Muslims are vulnerable because they are regarded with suspicion by other sectors of the community. In some areas they are perceived as pro-Tamil and pro-LTTE, whereas in other areas they are perceived as pro-government or even suspected of being government informers.

[60] In December 2006, the UNHCR assessed the position of Sri Lankan asylum seekers. It found that:

“Muslims are particularly vulnerable to human rights abuses from parties to the conflict. For example, certain Muslims are targeted by the LTTE, such as those suspected of being government informers and those who are perceived as opposed to the LTTE. Furthermore, Muslims residing near LTTE-controlled areas, or areas contested by the LTTE, in Eastern Sri Lanka are at risk of forced displacement, threats and killings due, in particular, to being caught in the cross-fire during armed hostilities.”

[61] The UNHCR concluded that Muslims, if subjected to targeted violations of human rights by the LTTE, the authorities, or paramilitary groups, should be recognised as refugees, particularly those with the above profile. The UNHCR also concluded that, in relation to individuals who flee targeted violence and human rights abuses by the LTTE, there is no realistic internal flight alternative given the reach of the LTTE and the inability of the authorities to provide assured protection. UNHCR *UNHCR Position on the international protection needs of*

asylum seekers from Sri Lanka (December 2006) (<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=459alfcb2>).

[62] The government has claimed continuing success in winning territory from the LTTE in eastern coastal areas: ‘Fear in the capital of Sri Lanka’ 2008, *BBC News*, 4 February, <http://news.bbc.co.uk/>, and ‘Bombings mar Sri Lanka’s 60th Anniversary of Statehood’ 2008, *The New York Times*, 5 February (EPIC OneFile). The LTTE has claimed it is “not finished in the east” and that it had “gone into guerrilla mode”: ‘No end in sight to Sri Lanka conflict’ *BBC News* 21 February 2007. According to the BBC, “Sri Lanka is a country where the official statements of the military and the rebels often appear to have little bearing on reality”: ‘A grim future foretold for Sri Lanka’ 2008, *BBC News*, 8 January, <http://news.bbc.co.uk/>.

[63] On 16 January 2008, the Sri Lankan government pulled out of the 2002 ceasefire agreement, arguing that the rebels had used it to re-group and re-arm: ‘Many dead in Sri Lanka bus attack’ 2008, *BBC News*, 4 February, <http://news.bbc.co.uk/>. Although there does not appear to have been any major clashes in the east in the latter part of 2007, the escalation of violence throughout Sri Lanka since 1 January 2008 indicates the real possibility of a full-scale conflict. Between 2 January, when the government announced its intention to withdraw from the ceasefire agreement, and 4 February, 139 civilians died in bomb explosions on buses and in public places, 908 Tamil Tigers were reportedly killed in air raids and ground battles, and 36 government soldiers were killed in fighting in the north: ‘President vows to crush “terrorism” as violence increases’ 2008, *IRIN News*, 4 February, www.irinnews.org. It is relevant that the end of the ceasefire also automatically means the withdrawal of the Sri Lankan Monitoring Mission, staffed by Nordic nationals, whose role it has been to independently investigate and monitor the violence: ‘A grim future foretold for Sri Lanka’ 2008, *BBC News*, 8 January, <http://news.bbc.co.uk/>.

[64] The situation in the three eastern districts was described in January 2008 as “tense”, due to intensive cordon and search operations and the continued presence of armed non-state actors (Inter-Agency Standing Committee Sri Lanka, 2008, *Kilinochchi, Mullaitivu, Mannar, Vavuniya, Trincomalee, Batticaloa and Ampara districts Situation, Report # 110*, January [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/PANA-7BAFAX-full_report.pdf/\\$](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/PANA-7BAFAX-full_report.pdf/$)).

Assessment of the appellant’s claim in light of country information

[65] The appellant is a politically active Muslim from an area contested by the LTTE and the Karuna faction. The cumulative effect of this appellant's active membership of the UNP, his close relationship with senior political figures, his candidacy in the 2004 election, and his staunch opposition to the LTTE on the issue of merger, is that he has a profile. According to the country information, this profile will put him at real risk of serious harm from the LTTE, the Karuna faction and political rivals if he is returned to the eastern region of Sri Lanka. The perception that he is a 'wealthy' businessman and landowner will only serve to increase his profile. The wife's refusal to "donate" to the LTTE since her husband's departure may give the LTTE grounds to regard him with increased hostility should he return.

[66] The test is not whether an appellant *will* be persecuted, but whether there is a *real chance* of him being persecuted if he is returned to Sri Lanka; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA). The chance must be a real one, not remote or merely speculative.

[67] After assessing the evidence and the country information, in the round, and measuring it against the real chance test, the Authority is satisfied that there is a real chance of this appellant being persecuted by the LTTE, the Karuna group and, to a lesser extent, his political rivals. A person with his profile does not, according to the country information, have an internal protection alternative. He will not be able to access meaningful state protection, particularly taking into account his previous problems with the police. Therefore both of the required elements for establishing persecution in non-state actor cases have been established.

CONCLUSION

[68] In relation to the principal issue, the Authority finds that there is a real chance of the appellant being persecuted if he returns to Sri Lanka.

[69] In relation to the second issue, the reasons for the appellant being persecuted are on account of his imputed political opinion and, at a lesser but contributory level, his Muslim religion.

[58] 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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M L Robins
Member