

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

**REFUGEE APPEAL NO 76340**

**AT AUCKLAND**

<b><u>Before:</u></b>	A N Molloy (Member)
<b><u>Counsel for the Appellant:</u></b>	J Hindman
<b><u>Appearing for the Department of Labour:</u></b>	No Appearance
<b><u>Date of Hearing:</u></b>	7 July 2009
<b><u>Date of Decision:</u></b>	8 October 2009

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**DECISION**

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**INTRODUCTION**

[1] The appellant is a national of Sri Lanka. He claims that he will be seriously harmed if returned to Sri Lanka because he is suspected of assisting members of the Liberation Tigers of Tamil Eelam (LTTE).

[2] He appeals against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining his application for refugee status. The appeal turns in part upon the appellant's credibility, which is assessed following the summary of his claim which appears below, and in part upon whether his claim is well-founded.

**THE APPELLANT'S CASE**

[3] The appellant was born near Jaffna, in the north of Sri Lanka in the early 1970s. He is now married and has two children. His wife and children remain in Sri Lanka.

[4] The personal history recounted by the appellant is one of adversity and displacement common to many Tamil people from the north of Sri Lanka. For

three decades, the lives of the appellant and his family have been disrupted by civil war. They were victims of various forms of violence, threatened or actual, in 1977, 1983 and again in 1990 when the appellant made his way to India. He remained there for two or three months, returning to Sri Lanka in early 1991. The appellant completed his schooling while living with an uncle in Colombo.

[5] A year or two later, the appellant returned to Jaffna to work with a non-governmental organisation. He returned to Colombo for work reasons in 1996, and then left Sri Lanka to work overseas.

[6] In 2002, the cessation of hostilities between the Sri Lankan government and the LTTE was recorded in a formal ceasefire agreement. Given that development, the appellant returned to Sri Lanka that year to take up a position with a large multi-national company. He was responsible for the supply of medical products to doctors and pharmacists throughout the northern region. He later took up a similar position with a separate but affiliated company.

[7] Towards the end of 2006, one of the appellant's friends disappeared and another was killed by members of the Eelam People's Democratic Party (EPDP) (described by the United States Department of State as a "pro-government paramilitary" organisation). The appellant used his connections to persuade the local coroner to release the body of his deceased friend to the family, who were experiencing some difficulties with the police.

[8] By this time the appellant, who had recently married, believed that the hiatus in the civil conflict was coming to an end. He decided that it would be safer for him and his new spouse to move south, so he secured a transfer to the Colombo office of his employer.

[9] The appellant's wife had a relation, AB, who was a property developer. At the end of 2007 AB began receiving demands for money from the EPDP. At first he acceded to these demands but after refusing to pay any further sums AB was kidnapped in February 2008. His wife was seriously assaulted during the incident.

[10] The appellant flew to Jaffna with his brother-in-law, CD, to try to identify who was responsible for the kidnapping and to try to secure AB's safe release. They approached the Sri Lankan Army and the EPDP. Both organisations denied any knowledge of AB's whereabouts but while the appellant was at the EPDP office, he was recognised by one of its members. The man drew a firearm and

accused the appellant of supplying items to the LTTE. While this was true, the appellant had done so lawfully during the ceasefire through the company that employed him. The encounter scared the appellant and he returned to Colombo with CD the following day.

[11] The appellant's current predicament arose in August 2008 when he was contacted by a member of the LTTE named PQ, with whom he had lawfully conducted business during the 2002-2006 ceasefire. PQ said that he needed medical supplies to save the life of an injured LTTE member. The appellant was initially noncommittal. However when PQ rang back the following day the appellant agreed to obtain and deliver a small quantity of the drugs requested. He procured these from the company's supply base and drove to a town north of Colombo where he handed the medication over at a pre-arranged contact point.

[12] A few days later, one of the appellant's Sinhalese colleagues confronted him and accused him of supplying drugs to the LTTE. This led to a heated argument that was defused by other workmates. Later that evening, four members of the Sri Lankan police arrived at the appellant's home with the intention of taking the appellant to the local police station for questioning. Because the appellant's wife became upset, the officers agreed that he could attend the police station the following morning. The appellant duly attended, but took the precaution of asking a lawyer to accompany him in case he needed assistance. However he was asked only rudimentary questions about his identity and his place of work and was released after little more than an hour. The appellant was not questioned about the LTTE or about supplying drugs to them.

[13] The interest shown in the appellant did not end there. Later that month, two men came to the appellant's house while he was at work. The men both spoke to the appellant's wife in Tamil. They asked where the appellant was. She said that she did not know. The appellant believes that the men were probably police officers as one of them had a gun.

[14] In early September, the appellant was again asked to provide medication for the LTTE. The appellant does not know who made the telephone call on that occasion, but he does not believe it was a genuine member of the LTTE. He believes it may have been either someone playing a joke or someone trying to find out whether he was supplying drugs to the LTTE. Either way, the call frightened the appellant and he decided that he had to leave Sri Lanka for his own safety. He applied for a visitor's visa for New Zealand shortly afterwards. (The appellant had

visited New Zealand at his company's expense earlier in 2008, as part of the company's employee incentive scheme).

[15] One evening soon after, the appellant and his wife heard a knock at the door. On investigating the appellant saw four men whom he did not recognise. The appellant was frightened and thought that he might be in danger of being abducted. He did not answer the door and the men left after about 20 minutes. The appellant still does not know who the men were but believes that they may have been police officers.

[16] The appellant and his family left their home that evening. They began to move around and eventually relocated to other rental accommodation. The appellant believes that the police continued to keep watch on him after this as one of his friends was questioned about the appellant after the appellant borrowed his motor vehicle.

[17] The appellant eventually received a visa allowing him to enter New Zealand. He resigned from his job and paid an agent to ensure that he would have no difficulty leaving Sri Lanka. The appellant departed from Colombo airport without difficulty. He arrived in New Zealand in late 2008 and applied for refugee status shortly afterwards. After interviewing the appellant in February 2009, a refugee status officer published a decision declining the appellant's application for refugee status in April 2009. It is from that decision that the appellant appeals.

[18] The appellant's wife and family remain in Colombo, where the wife is living with her own family.

#### Material received

[19] The Authority received a memorandum of submissions and an additional statement signed by the appellant under cover of a letter from counsel, dated 2 July 2009. An additional memorandum was provided by counsel at the hearing on 7 July 2009, together with copies of newspaper articles and the envelope in which various items had been forwarded from Sri Lanka. Counsel also wrote to the Authority on 11 August and 1 October 2009.

#### **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**

### Credibility

[22] Before turning to address the issues identified, it is necessary to determine whether the appellant is a credible witness.

[23] For reasons set out below, the Authority finds that the appellant's claim is not credible with respect to the key events that he says led to his departure from Sri Lanka in November 2008. In particular, the Authority rejects the appellant's claim that he agreed to supply drugs to a member of the LTTE in August 2008, or that he has been pursued by state and non-state agents ever since. These findings are relevant to the Authority's forward-looking assessment of the risk to the appellant if he is to return to Sri Lanka. This is expanded upon later in this decision.

### Context of the appellant's claim

[24] In order to properly understand why the Authority has arrived at those conclusions about the appellant's credibility, it is necessary to place his claim in its proper context. In that respect, it is relevant that the appellant is a Tamil from the north of Sri Lanka. He was forced to relocate within the north more than once as a child and is aware from personal experience of the toll inflicted upon his people by

the civil war. He has twice based himself in Colombo to avoid the worst effects of the hostilities: as long ago as 1990 and more recently after the ceasefire came to an end in 2006. However, even in Colombo the appellant was frequently reminded of the consequences of being a young Tamil male. Individuals within his demographic who are suspected of being connected with the LTTE have typically been targeted by the Sri Lankan army and police. They face potential detention, interrogation and mistreatment. It is precisely because of this that he now claims to be at risk.

[25] After he returned to Colombo in 2006, the appellant was repeatedly stopped at checkpoints. While afforded some level of comfort through being employed by a multi-national company, the appellant was nevertheless only too aware of the potential ramifications of being subjected to scrutiny and suspicion.

[26] It is in this context that the Authority considers the credibility of the claim pivotal to the appellant's account, namely that he agreed to provide medical supplies to a member of a banned organisation, the LTTE, in August 2008.

[27] When asked why he did so, the appellant prevaricated before describing it as a humanitarian gesture. He also tried to pass his actions off as trivial when, in reality, the appellant would have exposed his company to potentially severe consequences by contravening a government directive. Moreover, he would have jeopardised his job and livelihood. Of even more significance, however, is the fact that the appellant knew very well what kind of personal risk he might have assumed if the Sri Lankan authorities learned that he had helped the LTTE.

#### Implausible claim that his employer never discovered his actions

[28] The appellant claims that, within a day or two, his Sinhalese colleague found out he had supplied medicine to the LTTE. The colleague was so incensed by the appellant's actions that he confronted the appellant at work and then immediately informed the police about the appellant's activities. That is why the police came to his home that evening and why he was required to attend the police station for questioning the following day.

[29] If this were true, it is inevitable that the appellant's employer would have learned that the appellant had supplied its medicines to the LTTE in contravention of a government directive.

[30] Obviously this did not happen. If the company had any reason to believe that one of its employees was involved in such activities, it would have at least conducted an investigation into the matter, and may even have brought disciplinary action against the appellant. Yet the employer did not confront the appellant about his actions and there is no suggestion the company had any inkling that the appellant had supplied medicine to the LTTE.

[31] Even if the Sinhalese colleague had for some inexplicable reason decided not to inform the company, it is inevitable that the employer's attention would have been drawn to this fact by the Sri Lankan police. Their interest in the transaction would have extended beyond the involvement of the appellant himself because of the potential that the company itself could have been implicated in the matter.

[32] On the contrary, the appellant continued to work for the company until his departure for New Zealand in late 2008. When he left, it was of his own accord and he was clearly on good terms with the company when he did so. His immediate superior in the company advised him with respect to the timing of his resignation in order that he take advantage of all of the leave to which he was entitled.

Implausible claim that police believe he is an LTTE collaborator

[33] The civil conflict in Sri Lanka has been a long and brutal war. The Sri Lankan army and state authorities have targeted Tamil activists in the LTTE without giving any quarter. If the Sri Lankan authorities suspected that the appellant had collaborated with the LTTE, it is implausible that he could have continued to work and live in Colombo with impunity until he left Sri Lanka at the end of 2008. The appellant's evidence, with respect to the police response to information that he supplied the LTTE, is not credible.

[34] The appellant claims that the police responded immediately to his colleague's allegation that he is connected to the LTTE. He claims that they came to his home that evening, yet readily agreed not to take him for questioning. He claims that the police were content to allow him, a suspected LTTE collaborator, to speak to them the following morning on his own terms. They were prepared to take the risk that he would abscond and they were prepared to allow him to talk at a time convenient to him, accompanied by legal counsel, without the benefit of surprise.

[35] The appellant also claims that when the police did question him the following morning, they made no reference to the appellant's supposed interaction with the LTTE. He was merely asked mundane questions about his address and workplace.

[36] He also claims that the police failed to apprehend him at any time during the next three or more months. When asked why the authorities did not subsequently arrest him, if indeed they believed him to be an LTTE collaborator, the appellant suggested that it was difficult for the authorities to locate him. He said that he was hardly ever in his office and that he spent much of his time on the road.

[37] That explanation is rejected. The police could have taken the obvious route of contacting the appellant through the company for which he worked throughout the period in question. If he did not attend his office on any given day, he was working in places about which his office was aware. Yet it is clear that the police made no attempt to do so, and reference has already been made to the fact that the appellant's employer clearly had no inkling that the appellant was suspected of any wrongdoing.



[38] There is no evidence that any attempt was made to apprehend the appellant through his workplace and, in any event, if they had experienced difficulties, the police could have located him through his wife. She continued to attend the same workplace (a government department) at which she had been employed for several years.

[39] The police could easily have located and apprehended the appellant at any time, if they had wished to do so. The fact that they did not do so provides a strong indication that they had no interest in the appellant. That in turn undermines the appellant's core claim to be at risk in Sri Lanka.

[40] The point is perhaps best illustrated by referring to items of country information provided by counsel on the morning of the hearing. These comprise articles from Sri Lankan newspapers, forwarded to the appellant by his wife. According to translations provided on behalf of the appellant, they refer to the arrest of a man connected with a pharmacy near Colombo, on suspicion of providing medical supplies to the LTTE. The article, from a newspaper published on 17 June 2009, stated that the man had been arrested by the police who were acting on information received about the man's activities. The report states further that charges are likely to be filed against the man. The content of these reports are in sharp juxtaposition to the appellant's claims.

#### Remaining claims also lack credibility

[41] The Authority also rejects the appellant's claims that various other persons began to evince an interest in him; the Tamil men who spoke to the appellant's wife, the men who arrived one evening in a red van and the mysterious person who made the second telephone call asking him for medical supplies.

[42] If any or all of these people were connected to the police, as the appellant believes, the Authority returns to the point already made that there is no reason why the police could not and would not have been able to apprehend the appellant during the period of months which elapsed from the time he supplied the goods until the time he left Sri Lanka.

[43] Another possibility is that they were simply a disparate collection of individuals with no connection to each other. If that was so, then the timing of their interest would indicate that they too had learned that the appellant had provided medical supplies to the LTTE (the timing being too remarkable to be coincidental).

However, that simply underlines the implausibility of the proposition that everyone but the appellant's employer should be aware that he has, without authority, taken medical supplies from his employer and given them to a banned organisation.

#### Summary of credibility findings

[44] The appellant's evidence is that he was approached by the LTTE; that he readily agreed to provide medical supplies in contravention of a government directive; that a Sinhalese colleague managed to find out about this; that the police found out about it, questioned him without referring to it and then pursued him unsuccessfully for the next four months without being able to locate or apprehend him; and that his company remained oblivious to the fact that he had, allegedly, supplied its drugs to the LTTE.

[45] Considered in its proper context, the Authority is satisfied that the appellant's core claims are not truthful. In truth, the Authority finds that the appellant has fabricated his claim to have supplied medicine to the LTTE and he has similarly fabricated his account of the supposed consequences which he has faced to date and which he would face in the future.

[46] While the appellant claims that he paid a substantial figure to an agent to ensure his safe departure in late 2008, the Authority finds that there is no credible evidence supporting this assertion. It finds that it is simply an aspect of the appellant's account which he has fabricated as part of his attempt to justify his claim for refugee status.

#### The facts as found

[47] The Authority's task is, of course, to determine the appellant's claim for refugee status upon the facts found, not according to the assertions that have been rejected. In that regard, the fact that aspects of a witness's evidence are disbelieved does not mean that everything he has said is unreliable. In large part, this appellant's claim is plausible and is consistent with various documents which he has produced.

[48] The Authority therefore finds that he is a Tamil male from the north of Sri Lanka who has spent long periods of time in Colombo at various times and in particular, since the end of 2006. The Authority also finds that the appellant was employed by a multi-national company in Sri Lanka for some years before he

travelled to New Zealand towards the end of 2008, that he left Sri Lanka lawfully at that time, using his own genuine passport, and that his wife and family remain in Colombo where the wife's family are also based.

[49] It is upon this basis that the Authority turns to address the principal issues identified.

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

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

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

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

#### General outline of country conditions

[53] In May 2009, shortly after the determination of the appellant's application for refugee status in April 2009, Sri Lankan President Mahinda Rajapaksa declared victory in the conflict with the LTTE on 18 May 2009, bringing to an end the civil war which has been fought in Sri Lanka since the 1980s.

[54] While this is inevitably significant, it is unlikely that the ethnic tensions which fuelled the conflict for three decades or longer will simply dissipate overnight. As

the Authority observed in a recent decision referred to by counsel, Sri Lanka is in a state of transition: *Refugee Appeal No 76294* (30 June 2009) (at [76]). Counsel provided country information which questions whether the leader of the LTTE, Vellupillai Prabhakaran is truly dead. She also drew the Authority's attention to the magnitude of the humanitarian crisis facing the Sri Lankan government in trying to resettle up to 250,000 people in their home areas in the north of the country. Many of those people were displaced relatively recently as a consequence of the brutal campaign waged in the north against the LTTE.

[55] The Authority's analysis is accordingly conducted on the basis that, despite the formal end to hostilities, the Sri Lankan authorities will, for some time, retain a high level of vigilance as to the activities of members and potential supporters of the LTTE. In *Refugee Appeal No 76294* (30 June 2009), the Authority observed that, to that end, the government is maintaining tight security throughout the country and particularly in the north east and in Colombo (at [84]).

[56] There is some evidence that the Sri Lankan government continues to be highly suspicious of civilian Tamils. It is implicated in the brutal treatment of some believed to have been associated with the LTTE (at [86]). In that context, Human Rights Watch reports that the Sri Lankan government has detained more than 9,000 alleged LTTE fighters and other individuals suspected of having LTTE connections: *Sri Lanka: Avoid a Postwar Witch Hunt* (3 June 2009) (at [82]).

[57] There is also some evidence that Tamil arrivals at the international airport in Colombo are subjected to increased scrutiny. Some have been detained and questioned on suspicion of being LTTE operatives from overseas; *Refugee Appeal No 76294* (30 June 2009) (at [93]).

[58] Counsel referred to various risk factors which would attract the interest of the Sri Lankan authorities to the appellant upon his arrival at the airport in Colombo; the fact that he is a young male of Tamil ethnicity, his record as an actual or suspected LTTE member or supporter and the fact that he has made an asylum claim abroad.

[59] However, the Authority has rejected the appellant's claim to be a suspected or actual LTTE supporter, or to have any profile as such. In addition, there is no reason why the Sri Lankan authorities would suspect that he had sought asylum while he was in New Zealand. The Authority also notes that the appellant has left Sri Lanka and returned through Colombo airport on more than one occasion in the

past without attracting any undue attention (including his return from New Zealand in early 2008).

[60] It is impossible to state categorically that the appellant would not be questioned by the authorities upon his return to the airport. However the Authority finds that the chance that this might occur is speculative. In any event the Authority notes that the appellant has a longstanding connection with Colombo. He has worked and lived there for long periods of time. His wife, who works for a government department, still lives there with her extended family. The appellant also has important contacts in Colombo quite independent of his family through his former employer, a large multi-national corporate entity which clearly valued the appellant as an able and loyal employee.

[61] All of these factors provide the appellant with sound reasons to be returning to Colombo, and with a network upon which he can rely for support should he be questioned at the airport upon his return.

[62] The Authority accepts that once the appellant leaves the airport in Colombo he may be confronted with many of the same obstacles that he had to cope with as a Tamil male working in Colombo between 2006 and 2008.

[63] For example, in *Refugee Appeal No 76294* (30 June 2009), the Authority referred to the continued presence of military checkpoints in Colombo. It stated that the military has maintained its practice of conducting house searches and that young Tamil men are still vulnerable to arrest and detention. Those without a Colombo identity card and with only casual employment or temporary accommodation are at heightened risk of being detained (at [91]).

[64] The appellant's prospects of obtaining further employment were not canvassed during the hearing. However he is a well-qualified person with a long-established work record and considerable experience in his field. There is no reason to believe that he would be unable to obtain further employment in Colombo should he seek to remain there.

[65] The cumulative impact of these factors is such that the appellant clearly has strong reasons for being in Colombo so that even if he is stopped and questioned by the military at a check point or elsewhere, the appellant is able to call upon a strong network of family and acquaintances who can vouch for him and attest to his background.

[66] The Authority has not overlooked other incidents in the appellant's past which he claims may add to the risk he faces today. For example, the appellant claims that in 2006 he used his connections to persuade a coroner in the north of Sri Lanka to release the body of a deceased friend to the friend's family. He also claims that he was threatened by a member of the EPDP when he attended their office in the north to investigate the whereabouts of a missing relative.

[67] However, neither of these incidents (if they occurred) created any problem for the appellant prior to his departure from Sri Lanka at the end of 2008, and there is no reason why they would create any difficulty for him now.

[68] Similarly, while the appellant's brother-in-law apparently left Sri Lanka some years ago in order to escape the attention of the Karuna group, (a breakaway faction of the LTTE which latterly assisted the government against the LTTE), there is no evidence that the appellant or his wife have ever been the subject of adverse attention from that quarter. Any risk that he would be targeted now, after the end of the war, is entirely random and speculative.

[69] The Authority has not overlooked country information provided by counsel referring to military attacks on field hospitals in the north of Sri Lanka prior to the end of the combat, targeting doctors and medical staff. The Authority is satisfied that there is no analogy between the plight of medics described in the country information and a person such as the appellant who worked for a medical supplies company in Colombo. In addition, and at the risk of stating the obvious, the appellant is not a doctor or a medical officer and there is no reason why he would work in the north or at a hospital. In any event, the combat has come to an end.

[70] In all of the circumstances of this appeal, the Authority finds that the risk of the appellant being seriously harmed upon his return to Sri Lanka is no more than speculative and random. It does not meet the threshold of a real chance.

## **CONCLUSION**

[71] The first principal issue identified for determination is answered in the negative. That being the case, the second principal issue does not fall for consideration.

[72] For the above reasons, the Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"A N Molloy"

A N Molloy  
Member