

**REMOVAL REVIEW AUTHORITY  
NEW ZEALAND**

**AT WELLINGTON**

**REMOVAL APPEAL NO: 46487**

**Before:**

A M Clayton (Member)

**Representative for the Appellant:**

Simon Laurent

**Date of Decision:**

18 July 2006

---

**DECISION**

---

**INTRODUCTION**

[1] The appellant is a [male] citizen of Sri Lanka who became unlawfully in New Zealand on 11 April 2006.

[2] On 18 April 2006 he appealed to this Authority against the requirement to leave New Zealand, pursuant to section 47 of the Immigration Act 1987 ("the Act").

[3] The main issue on appeal is whether the appellant has exceptional humanitarian circumstances given that he is married with children in New Zealand, and that he and his wife fled Sri Lanka for different, and credible, reasons.

**BACKGROUND**

[4] The appellant arrived in New Zealand [in] 1999 and applied for refugee status three weeks [after his arrival].

[5] His refugee status application was declined by the Refugee Status Branch (RSB) in September 2002 and his appeal to the Refugee Status Appeals Authority (RSAA) was dismissed in February 2006.

[6] Because his refugee status claim process had ended, the New Zealand Immigration Service (NZIS) revoked his last temporary permit as from 11 April 2006.

### **THE APPELLANT'S CASE**

[7] On his appeal form the appellant declares he is married with [a] stepdaughter, a New Zealand resident, and [a] son, a New Zealand citizen. He declares his mother and [siblings] to be living in Sri Lanka. He also declares he is working in New Zealand.

[8] The appellant is represented by counsel on appeal. His counsel's summation of his appeal grounds is as follows:

- (a) The length of time spent by the appellant in New Zealand.
- (b) The time taken to process his refugee claim and appeal.
- (c) His family relationships with his wife, a New Zealand citizen; his wife's daughter whom he treats as his own; his and his wife's son, born in New Zealand; and another child due [shortly].
- (d) His wife's background, which resulted in her own successful application for residence under the Humanitarian category in [...], and which requires the ongoing support of the appellant as her husband.

[9] Following receipt of the appeal and within the statutory 42-day period, the appellant's counsel filed more detailed submissions.

[10] First, counsel noted that the nature of the appellant's refugee status claim was political and that the RSAA decision in respect of it was embargoed, reflecting the political sensitivity of the case. The appellant spent, in total, more than six and a half years of his life in a state of uncertainty about his refugee status.

[11] Second, it is submitted that the appellant started his relationship with a Sri Lankan-born New Zealand citizen in late 2000, shortly after his arrival in New Zealand. They started living together as a couple in June 2001 and married [in] 2002. Their life together is documented by numerous bank and other financial,

tenancy and insurance documentation addressed jointly to the appellant and his wife.

[12] Lodged in support of the claim that his wife is reliant on the appellant remaining in New Zealand is a psychiatrist's report dated in 2000 in respect of the wife, which describes her former abusive marriage in Sri Lanka and her flight to New Zealand where her only close relatives, her brother and father, both reside permanently.

[13] It is submitted that the appellant and his wife are expecting their second child in [...] and a midwife's letter is supplied in that respect. It is submitted that they have displayed a genuine commitment to their relationship of almost six years. The appellant arrived in New Zealand [six years ago] and it is understandable that he was motivated to build a family here.

[14] It is submitted that it would be unjust and unduly harsh to remove the appellant because of the subsequent break-up of the appellant's family unit. Alternatively, if the children were to accompany him to Sri Lanka, the impact of having to leave the support of their family members in New Zealand and settle in a culturally different society, would be adverse to their development.

[15] Third, submissions were made in respect of the appellant's refugee status claim and his RSB and RSAA decisions have been copied to the Authority. The RSAA's decision is embargoed and shall be commented on to the extent necessary in the Assessment part of this decision.

[16] Documents lodged in support of the appeal and not already mentioned above are:

- (a) Copy Notice of Revocation dated 11 April 2006.
- (b) Statement dated 2 April 2006 from the appellant's wife in which she writes:

"He has been a loving and caring husband and a father. It is not conceivable for me to live a day without him near me. Only because of the love, attachment and everything else we have for each other. Therefore I am appealing to you not to separate my dear husband from myself and his children. ..."

- (c) Marriage certificate showing that the appellant and his wife married [in] 2002, indicating that the appellant had not previously been married and that his wife's previous marriage was dissolved in [...]. The certificate shows

that both were born in Sri Lanka and that they shared the same New Zealand address.

- (d) Birth certificate for the appellant's son showing his wife and the appellant as the natural parents.
- (e) Handwritten letter dated 2 April 2006 from the appellant's stepdaughter stating how the appellant pays for everything for her and her family, how he does not treat her differently or as an outsider, and how she is included as a member of the family in all communication with her stepfather's family in Sri Lanka.
- (f) Copy of the appellant's statement of claim in support of his refugee claim.
- (g) Copy of a letter bearing a date in 2002 confirming that the appellant's wife had been granted residence and another in 2006, from the Department of Internal Affairs, confirming her citizenship.

## **STATUTORY GROUND OF APPEAL**

[17] This appeal has been lodged pursuant to section 47 of the Act, the relevant provisions of which are:

### **“47. Appeal against requirement to leave New Zealand**

- (1) A person who is unlawfully in New Zealand may appeal to the Removal Review Authority against the requirement for that person to leave New Zealand.
- (2) The appeal must be brought within 42 days after the later of—
  - (a) The day on which the person became unlawfully within New Zealand; or
  - (b) The day on which the person received notification under section 31 of the confirmation of the decision to decline to issue a permit, in the case of a person who, while still lawfully in New Zealand, had lodged an application under section 31 for reconsideration of a decision to decline another temporary permit.
- (3) An appeal may be brought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.
- (4) For the purposes of subsection (3), the mere fact that a person's circumstances are such that the person would meet any applicable

Government residence policy requirements for the grant of a residence permit does not in itself constitute exceptional circumstances of a humanitarian nature.”

## **ASSESSMENT**

[18] The Authority has been provided with the NZIS file in relation to the appellant and has also considered the submissions and documents provided on appeal.

### **Refugee Status Claim**

[19] Copies of the appellant’s RSB and RSAA decisions have been supplied on appeal and submissions made with respect to the outcome of the RSAA decision in particular. The Authority does not intend to traverse that decision as indeed its publication is embargoed and it is clear from its content that release of the details that would make any sense of the appellant’s claim might also put him at risk. It is sufficient to say that his claim revolves around persons in Sri Lanka with high political profiles, and that both the RSB and the RSAA accepted his evidence in its entirety.

[20] The RSAA’s conclusion was that, in certain circumstances, the appellant would be at risk of being seriously harmed in Sri Lanka. However, because the appellant was found to be able to choose the extent of his political activities should he return to Sri Lanka, the risk to him fell below the level of a “real chance”, the level required to make a finding of a well-founded fear.

[21] The risk of danger to the appellant in Sri Lanka, to the nature and extent that it was recognised by the RSAA, is taken into account as an incremental background factor in the present appeal.

[22] As to the delay in the hearing of the refugee claim, appellant’s counsel submits that had the claim been dealt with in 1999, when the appellant first arrived in New Zealand, it may well have had a successful outcome given the volatile political conditions in Sri Lanka at that time.

[23] Such a submission can only ever be speculative. In any event, the appellant has been afforded a physical haven in New Zealand for the time it has taken to process his refugee status claim and appeal.

### **Family in New Zealand**

[24] The Authority does not overlook the understandable mental anguish suffered by the appellant given the uncertainty of his status in New Zealand for the last seven years. Nevertheless in that time, he has also married and started a young family in New Zealand.

[25] The Authority sees no reason to suspect the appellant's relationship with his wife is anything other than genuine and stable. They have been living together since mid-2001 and, as at the date of this decision (a birth certificate only just having come to hand), have two natural children of their own, and another whom the appellant treats as his own.

[26] The Authority turns to the psychiatric report, now some six years old, in respect of the appellant's wife. This describes in some detail the reasons for which she left Sri Lanka and joined the remainder of her family here. The reporting psychiatrist made a DSM-IV diagnosis of post-traumatic stress disorder. He recommended counselling and medication and concluded that returning to Sri Lanka, where her abusive husband remained, would cause her serious emotional harm.

[27] It is accepted that realistically it would be extremely difficult for the appellant's wife to accompany him to Sri Lanka in those circumstances. It is highly likely she would be confronted there by her former husband and members of his family. While she would have the support of the appellant and his family there she would be without her brother and father, and would have to deal with those aspects of her past about which the New Zealand psychiatrist was most concerned.

[28] Even if it were reasonable to expect his wife to accompany the appellant to Sri Lanka (and the Authority does not find that to be so), the best interests of the couple's [three] children remain to be considered.

[29] In this case, the appellant's [stepdaughter], who regards the appellant as a father (the Authority notes he began living with her mother [approximately five years ago]), and the appellant's own [son], are New Zealand resident and citizen respectively. The third child [is] also a New Zealand citizen, given his mother's status. All three children are undoubtedly affected by the outcome of this appeal.

[30] New Zealand has particular obligations under international law with respect to children affected by appeals of this kind. New Zealand's Court of Appeal in *Puli'uvea v Removal Review Authority* (1996) 14 FRNZ 322 noted that Article 3 of the *Convention on the Rights of the Child* (the Convention) requires that the best interests of such children are a primary, but not the paramount, consideration.

[31] The three children who are affected by this appeal are of an age that they need to be with their parents. That is not to say the Convention entitles children to have both their parents remain in New Zealand when one or both parents can be lawfully removed.

[32] In the particular circumstances of this case, a return to Sri Lanka for either the children's father or both their parents, would be potentially very harmful to the children. While the children's standard of living might not be so inadequate in Sri Lanka as to jeopardise their physical wellbeing, the extreme stress and possible danger to each of their parents (for different reasons) would put their mental, psychological and social wellbeing at unacceptable risk.

[33] In the particular circumstances of this case, a separation of the appellant from his family, should his wife and children remain in New Zealand, would also be unduly harsh.

[34] The appellant has no criminal convictions in New Zealand. Nor have further checks revealed any adverse issue which would make allowing the appellant to remain in New Zealand on a residence permit, contrary to the public interest.

## **CONCLUSION**

[35] For the foregoing reasons, the Authority finds there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be removed from New Zealand and that it would not in all the circumstances be contrary to the public interest to allow him to remain in New Zealand.

[36] The Authority directs, pursuant to section 52(2) of the Act that the NZIS grant the appellant a residence permit. He should present himself to the nearest branch of the NZIS in order for this to be arranged.

[37] The appeal is allowed in the foregoing terms.

.....  
A M Clayton  
Member  
Removal Review Authority