



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

Application no. 38108/07
by Rajaratnam SIVANATHAN
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on
3 February 2009 as a Chamber composed of:

Lech Garlicki, *President*,

Nicolas Bratza,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 31 August 2007,

Having regard to the interim measure indicated to the respondent
Government under Rule 39 of the Rules of Court,

Having regard to the decision to grant priority to the above application
under Rule 41 of the Rules of Court,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Rajaratnam Sivanathan, is a Sri Lankan national who was born in 1975. The United Kingdom Government (“the Government”) were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant, a Tamil, arrived in the United Kingdom on 4 December 2000 and claimed asylum on that date. His application was refused by the Secretary of State on 12 March 2001 and his subsequent appeal was dismissed on 1 October 2001. On 15 January 2002 his application was resubmitted and subsequently refused on 14 June 2002. An appeal against that decision was dismissed on 21 January 2005 and permission to appeal to the Immigration Appeal Tribunal refused on 30 March 2005.

On 5 June 2006 the applicant was apprehended and subsequently convicted on 8 August 2006 at Lewes Crown Court for using a false instrument and was sentenced to 12 months’ imprisonment. He was recommended for deportation. On 5 December 2006 the applicant was served with a decision to make a deportation order and his subsequent appeal was dismissed on 14 June 2007.

On 21 August 2007, the Secretary of State issued the applicant with removal directions to Sri Lanka. The applicant was to be put on a flight leaving Heathrow Airport at 14:25 hrs (UK time) on 6 September 2007. On 31 August 2007 the applicant lodged an application with this Court and sought an interim measure under Rule 39 of the Rules of Court to prevent his removal to Sri Lanka. On 5 August 2007, the President of the Chamber to which the case had been allocated decided to apply Rule 39 and indicated to the Government of the United Kingdom that the applicant should not be expelled until further notice. The Government were accordingly informed of this decision the same day.

By way of a letter dated 21 April 2008, the Agent of the Government informed the Court that:

“the Applicant returned to Sri Lanka on 6 September 2007 at his own request, having been informed that the removal directions had been cancelled as a result of the Rule 39 indication.

Our records show that, having been alerted to the possibility that a Rule 39 indication might be made in this case earlier in the day, a fax confirming that Rule 39 had been applied in respect of the applicant was received in the FCO [the Foreign and Commonwealth Office] on the evening of 5 September 2007. This fax was forwarded

to OSCU [the Operational Support and Certification Unit of the then Border and Immigration Agency] the following morning and OSCU informed the local enforcement office that same morning that the removal directions should be cancelled. The removal directions were duly cancelled.

...

The Applicant had been due to depart on a flight scheduled for 1425 on 6 September 2007. News of the cancellation of the removal directions reached the relevant officials after the applicant had been taken from the detention centre to the airport. (It is normal practice to arrange transport from the detention centre to the airport well in advance of the flight departure time.). The applicant was informed that his removal had been cancelled. However, he said that he still wished to return to Sri Lanka and wanted to proceed with arrangements as planned. The applicant signed a document to this effect before boarding the flight to Sri Lanka.

In the circumstances, the applicant made a voluntary departure from the United Kingdom and was not forcibly removed by the Government. He was properly informed of the Rule 39 indication but chose to leave of his own accord. The Government have no power to prevent an individual leaving the country in these circumstances unless they have committed a criminal offence or it is a condition of their bail.’

By letter of 5 May 2008, the Section Registrar requested that the Government submit a copy of the document signed by the applicant. On 19 May 2008, the Agent of the Government replied as follows:

“Unfortunately the Government are not in a position to provide a copy of the document signed by the applicant and referred to in the third paragraph of my letter.

The document in question was signed by Mr Sivanathan on 6 September 2007 at Heathrow Airport, where he had been taken in anticipation of his scheduled removal that day. Mr Sivanathan was informed at the airport that a Rule 39 indication had just been issued by the Court in respect of his application and that his enforced removal had been cancelled accordingly. Mr Sivanathan stated that he nonetheless wished to return to Sri Lanka and signed the document to that effect.

A copy of this document would have been kept on the file held at Heathrow Airport. However, this file was destroyed two months after Mr Sivanathan left the country.

...

A copy of the document should also have been kept on Mr Sivanathan’s main UK Border Agency file, which is kept indefinitely. However, in this case due to an administrative oversight, a copy was never lodged on that file.

On the day of the removal a contemporaneous note was made on the UK Border Agency’s main database indicating that Mr Sivanathan had been told about the Rule 39 indication and its consequences but stated that he wanted to return to Sri Lanka and signed a “disclaimer” to that effect. Computer records also indicate that a “disclaimer form” was electronically raised in relation to Mr Sivanathan. I attach a copy of the relevant database entries as well as an uncompleted blank version of the form. The Government are confident, therefore, that Mr Sivanathan’s departure was entirely voluntary and that he gave written informed consent to that effect, even if an unfortunate administrative oversight means that the original document recording that consent can no longer be produced.

The Court will wish to be aware that, since this case was drawn to our attention, new procedures have been put in place and all relevant staff have been informed that copies of all written consents to voluntary removal must now be immediately faxed to the Operational Support and Certification Unit (OSCU), the team within the UK Border Agency that deals with all Rule 39 indications. This should ensure that original documentary evidence of the applicant's consent will be available in any future cases of this kind.

The Government apologise to the Court that they are not in a position to provide a copy of the original document signed by the applicant in this case for the reasons set out above. However the Government assure the Court that Mr Sivanathan did sign a document expressing his wish to leave the United Kingdom and return to Sri Lanka and that his consent was both voluntary and informed.'

COMPLAINTS

The applicant complained that his deportation to Sri Lanka would breach Articles 2 and 3 of the Convention.

THE LAW

Article 37 § 1 of the Convention provides:

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

- (a) the applicant does not intend to pursue his application; or
- (b) the matter has been resolved; or
- (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires”

The Court notes that the Government are unable to provide a copy of the document signed by the applicant but accepts that such a document was signed. It further accepts that the applicant's return to Sri Lanka was entirely voluntary and that he gave written informed consent to that effect. The Court also recognises that new procedures have been implemented by the Government which ensure that in all future cases of voluntary departure the appropriate documentation will be available. Finally, the Court observes that the applicant has not communicated with the Court since his removal and, prior to his removal, he did not provide any address in Sri Lanka or in the United Kingdom at which he could be contacted.

It therefore considers that, in these circumstances, the applicant may be regarded as no longer wishing to pursue his application, within the meaning of Article 37 § 1 (a) of the Convention. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case. Accordingly, it is appropriate to discontinue the application of Article 29 § 3, lift the interim measure indicated under Rule 39 of the Rules of Court and strike the case out of the list.

For these reasons, the Court unanimously

Decides to strike the application out of its list of cases.

Lawrence Early
Registrar

Lech Garlicki
President