

Neutral Citation Number: [2009] EWHC 1888 (Admin)

Case No. CO/653/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Wednesday 10 June 2009

B e f o r e :

MR C M G OCKELTON
(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN ON THE APPLICATION OF SHANMUGARAJAH

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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190 Fleet Street London EC4A 2AG
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(Official Shorthand Writers to the Court)

Mr A Mustakim appeared on behalf of the Claimant
Mr P Patel appeared on behalf of the Defendant

J U D G M E N T

1. DEPUTY JUDGE: This is an application for judicial review following a grant of permission by Mitting J as long ago as 28 November 2007.
2. As amended today, the claim challenges decisions of the 25 and 26 January 2007 and 28 April 2009 refusing to treat new assertions by the claimant as a fresh asylum claim. Nothing has been said to me today with any specificity about the letters of 25 and 26 January 2007. There is no doubt that I am concerned in substance with the latest decision, that is to say the decision of 28 April 2009.
3. The claimant is a national of Sri Lanka, a young Tamil man now aged 29. He came to the United Kingdom in January 2000. He claimed asylum. It was refused. He appealed to an adjudicator. The adjudicator heard oral evidence from him and had documentary evidence available to him. The claimant said that from a date in 1997 until a date in 1998 he had been a member of the student wing of the Liberation Tigers of Tamil Eelam (LTTE). He described his activities as helping the LTTE. He claimed to have been detained four times. He claimed to have been ill treated. He claimed that he continued to be at risk if he were returned to Sri Lanka.
4. The adjudicator made findings of fact and assessments of credibility. Mr Mustakim, who appears for the claimant before me today, very properly, does not challenge the adjudicator's findings of fact and assessments of credibility.
5. The claimant claimed before the adjudicator to have been detained the first time in Trincomalee in March 1998. He was ill treated during his detention which lasted 20 days. The reason for his ill treatment was his own links with the LTTE. He was released without charge after a bribe was paid. The adjudicator accepted that that detention had happened as the claimant said.
6. The second detention that the claimant claimed was in July 1998. It lasted ten days. He was ill treated during it. Before the adjudicator there was a difference between the two accounts given by the claimant of what happened during that detention. The adjudicator preferred the first account. That account was that during the detention the claimant had been asked to identify a senior LTTE member but that he could not do so. He did not refuse to do so, but he simply could not do so because he did not have the knowledge that would be needed to do that. When he said that he could not provide the identification required he was beaten again. After ten days of detention he was released without charge, and there was imposed upon him by the Sri Lankan Army a condition that he sign on weekly.
7. The third detention claimed by the claimant before the adjudicator was one in August 1999 for seven days on account of links with the LTTE through his family. That was in distinction from the previous detentions which are said to have arisen from his own activities with the LTTE. The two particular links to which the claimant referred before the adjudicator were the involvement of his brother with the LTTE and the death of his sister Jotivana in 1996 while serving as a LTTE member. It seems to me that the adjudicator made no clear finding as to whether the detention in August 1999 had taken place. But whether it did or not, the adjudicator clearly found that there was no continuing interest as a result of those links. He drew that conclusion from the fact that

the claimant was released after seven days with no charge or any other activity against him.

8. After signing on as required after his second detention for about 15 months, the claimant left the North-East of Sri Lanka - left Trincomalee - and went to Colombo. He apparently had no permission from the authorities to do that. It was a consequence of his move that he stopped signing on. After his arrival in Colombo he resided in a lodge and was detained in one of the usual round-ups of residents in Tamil lodges in Colombo. He was detained for a relatively short period - three days, he said. According to him the authorities who detained him knew of his family connections, and he was spoken to in a threatening way but there was no ill treatment. After his three days' detention he was released when an arrangement was made by the owner of the lodge speaking to a senior official.
9. The adjudicator - writing his determination on 29 April 2002 - found that the claimant was of no interest to the authorities and that he would have been of no interest to the authorities even before the cease-fire which was at the date of the adjudicator's determination still in force.
10. That particular conclusion, that the claimant was of no interest to the authorities, and would have been of no interest even before the cease-fire, was specifically held to be correct when the claimant appealed unsuccessfully to the Immigration Appeal Tribunal.
11. The new submissions were made in 2006, I think, on the basis of the break-down of the cease-fire. Certainly it is accepted that the claimant's position now has to be considered on the basis of present conditions. The most recent submissions, made not before the issue of the present proceedings, nor even before the renewed application to this court following refusal of permission on the papers by Collins J, nor even promptly after grant of permission by Mitting J, but only in the middle of April 2009, are documents deriving from claims to asylum made successfully in France by the claimant's brother, that is to say one of the two brothers who now has asylum in France. I am told that a sister also has asylum in the Netherlands.
12. Mr Mustakim submits that the new material confirms the fact that the claimant's family members suffer as LTTE members: because it is a central part of his claim today that the claimant is at risk as a family member of known LTTE fighters. Mr Mustakim submits that the material confirms that and, confirms also, as he submits, that the authorities are still interested or have been recently interested in the family. But although the claim made by the brother in France is obviously evidence of an interest in him - the brother - it is far from clear that the brother's claim should be treated, without more, as supporting the claimant's claim. In one very surprising departure from the claimant's story, the sister Jotivana is said by the brother to have died not fighting for the LTTE in 1996 but of illness in 1995. The brother refers only to a different sister as being an active LTTE fighter and still alive in 2005.
13. Be that as it may, Mr Mustakim says that the present situation in Sri Lanka, the documents relating to the brother's claim, the risk factors identified by the tribunal in LP (CG) [2007] UKIAT 00076 as applied by the tribunal in AN and SS (CG) [2008]

UKIAT 0063, and subject to the commentary by the European Court of Human Rights in NA v United Kingdom Application No 25904/07 and also in R (SS) (Sri Lanka) v Secretary of State for the Home Department [2009] EWHC 223 Admin, show a realistic prospect of success in the Tribunal if there were to be an appeal now.

14. Working through the factors identified in LP, the position is as follows. The claimant is a Tamil. He has been a LTTE member or supporter. He has no criminal record. There is no arrest warrant outstanding against him. His claim is that he failed to report. Having been ordered by the authorities to report regularly, he failed to report when he moved from Trincomalee to Colombo. He has not signed a confession. He has not refused a request to become an informer although he failed to provide information because he was unable to do so during his second detention. He has no scars. He is being returned from London.
15. In LP, at paragraph 218, the tribunal took the view that the risk arising from return from London as a known centre of LTTE activity or fund raising would need to be substantiated. As the tribunal put it at paragraph 218 -

"He would need to show the extent to which the Sri Lankan Embassy in the UK was aware of his activities and was thus likely to have passed the information on to Colombo when the applicant was being deported or removed."

As Mr Mustakim acknowledged today, there is no evidence that the claimant has engaged in any LTTE activity or fund-raising in this country.

16. The claimant apparently left Sri Lanka illegally. That is to say the evidence before the adjudicator was that he had available to him a passport in another person's name which was used by an agent, though there is, I think it is fair to say, no actual evidence that he left Sri Lanka illegally, because there is no evidence that he did not also have a passport in his own name. He has no identification card, but again the tribunal in LP took the view that that of itself was not sufficient without evidence supporting other factors. As the tribunal said at paragraph 220, an appellant would need to show why he would be at continuing risk and that he cannot reasonably be expected or able to acquire a new identity card. He has made an asylum claim abroad. He has or had relatives in the LTTE.
17. There are a number of factors amongst those identified in LP as factors contributing to an assessment which might, taken generally, found the belief that the claimant might be at risk. But the factors identified must, in my judgment, be put in context in two important ways.
18. The first relates to records. I have said that the claimant has been a LTTE member or supporter, has been identified as such in the past and claims to have failed to report. But so far as records of his past are concerned, this is not a case like NA where there was a clear individual record of the claimant's detention taken with a photograph and fingerprints on his last detention. Nor is it a case like SS where there was a confession and a long period of detention. It is, in my judgment, entirely realistic and, indeed,

correct to apply to the present claim the observations of the tribunal which, after considering a substantial amount of expert and other evidence on the question of records in AN and SS, stated this at paragraph 105 and following:

"105 We have been asked in particular to give our view on whether the second of the risk factors in LP applies to Miss AN, namely whether she has a 'previous record as a suspected or actual LTTE member of supporter'. Much energy was initially expended on the question whether the CID at the airport have computers or not, but as Professor Good observed, even if the CID do not, the Immigration Service certainly does, and when in-coming passengers are being checked, a 'Stop List' and a 'Watch List' on the computer will alert the immigration officer to anyone in whom the CID would have an interest. The tribunal in LP accepted that this is so, and found that the appellant in that case would be on the computer record because he had been formally brought before a court and had been granted bail before absconding. He therefore came within the fourth of the risk categories, namely 'bail jumping'. We note also that the head of the CID told a Home Office mission in 2002 that photographs of wanted persons were not available at the airport, but that their names were on the computer.

106 The background evidence clearly supports the existence of a centralised national database accessible by the security services. The National Intelligence Bureau is said to have records going back ten years or even longer, and to have had a central database since 2004. Although there is a lack of computer facilities in the north of the island, paper records are sent south and are transferred onto the computer database. The question for us then is not whether, as in the case of the LTTE, the database exists at all, but who would be on the database. In his oral evidence, Professor Good did not venture to surmise who was likely to be stopped at the airport, save those for whom an arrest warrant has been issued, although in his written report he expressed the view that the authorities have every incentive to maintain official records of suspects who have been arrested, even if they have subsequently been released without charge. Dr Smith was less cautious, asserting that the central database contains the names of all those who have even been detained and subsequently released as 'unacquitted suspects'.

107 We think that Dr Smith has allowed himself, as he did with the LTTE database, to slip from the idea that it would be useful to have certain information on a database to a prediction that the information must be on a database. We think it intrinsically unlikely that everyone who has ever been detained by the authorities in the course of the Sri Lankan conflict, or at least in the least 10-15 years, is now on a computer database which is checked by the Immigration Service when failed asylum seekers arrive at the airport, and is checked by the police or army when people are picked up at road-blocks or in cordon-and-search operations. The evidence suggests, on the contrary, that the database is far narrower than

that. When Tamils are picked up in Colombo the authorities want to know why they have come and what they are doing, if they are not long-term residents of the city. There are no reports of people being detained and perhaps sent to Boossa camp at Galle because they were once held for questioning in Jaffna or Batticaloa years before. As for arrivals at Bandaranaike International Airport, the 'Watch List' and the 'Stop List' clearly contain the names of people who are 'seriously' wanted (to use a phrase of Mr Justice Collins) by the authorities. Equally clearly, the evidence does not indicate that they contain the names of everyone who has ever been questioned about possible knowledge of, or involvement in, the LTTE. The majority of Sri Lankan asylum seekers coming to this country claim to have been detained at some time by the authorities, but there are no reports of any being detained at the airport on return because they were once held for questioning years ago and then released."

19. Applying those observations to the facts of the present case, it seems unrealistic to suppose that the evidence available at any stage in this claim is evidence which ought to show that there is actively maintained or available to the authorities a record of the claimant's detention in Trincomalee in 1998 and 1999, or of the conditions under which he was released from his second period of detention, or of his failure to continue to sign on from 1999 to the present date.
20. During the course of his submissions Mr Mustakim relied on one sentence from the evidence of Professor Good recorded in the tribunal's determination in LP. That sentence occurs in paragraph 110 of LP and is as follows:

"Where a person is released on bail with strict reporting requirements that seems to suggest clear continuation of interest."

Mr Mustakim was unable to show me that that observation by Professor Good was accepted by the tribunal and it appears to me that it was not. The mere release with reporting conditions does not demonstrate that in 1998 there was a continued interest in the claimant. For the reasons I have given there is no reason to think that there would be a record of it now in any event.

21. It follows that although the risk categories in LP which I have identified, that is to say that he has been a LTTE member or supporter and that he claims to have failed to report, do exist in his case, there is no basis for supposing that there is a record of them and therefore, for the purposes of assessing risk, they have no relevance.
22. The second principle of context to which I referred is this. In any event, the claimant's own history shows that he would not be at risk on return. After he had been in the student wing of the LTTE supporting its activities, after he had been detained and ill treated, after he had stopped reporting, after his family connections were known, he was picked up and in the course of a short detention he was not ill-treated. He was apparently released without a bribe. There was no charge.

23. In the face of the evidence and the adjudicator's findings of what actually happened to the claimant, there is simply no basis at all for supposing that he is at risk now. As Mr Mustakim acknowledged, there is nothing to suggest that a person who was not of any interest in 1999 when the events - including his membership, his detention and the reporting conditions - were recent, and his family links to the LTTE were current, would be now of greater interest. General background evidence, on which Mr Mustakim placed a considerable amount of weight, cannot help except in relation to generalities. Here, there is specific information.
24. The information is that the claimant was not, when he left Sri Lanka, of interest to the authorities. There is no reason to suppose that he would now be.
25. For those reasons it appears to me that the claimant has entirely failed to show that the Secretary of State should have taken the view that an appeal to the Tribunal in the present circumstances and on the basis of the new material would have a realistic prospect of success. It clearly would not. This claim is therefore dismissed.
26. MR PATEL: Can I ask for a consequential order for costs, that the claimant pay the defendant's costs to be assessed by way of detailed assessment if not agreed?
27. DEPUTY JUDGE: Mr Mustakim, can you say anything to that?
28. MR MUSTAKIM: I just say that since permission was granted for this hearing the claimant has tried to do this case as a litigant in person. He has only recently - just a few days ago - instructed his representative. But since the permission was granted he thereafter was a litigant in person, and I would alert you to that for your consideration in this particular case. My understanding is that the solicitors are doing this case at the last minute on a pro bono basis.
29. DEPUTY JUDGE: Thank you. Despite the observations Mr Mustakim makes, those matters, if they are right, might make a difference to the amounts that the claimant needs to pay his own team but it makes no difference, in my view, to the amount that he is liable to pay the successful defendant. There will be an order for the claimant to pay the defendant's costs on detailed assessment if not agreed.
30. MR PATEL: I am obliged.
31. MR MUSTAKIM: There is an application to appeal to the Court of Appeal.
32. DEPUTY JUDGE: On what grounds?
33. MR MUSTAKIM: First of all, the LP factors, whether the threshold to be applied is, in fact, a very high threshold.
34. DEPUTY JUDGE: A very high threshold of what?
35. MR MUSTAKIM: In looking at the factors, looking at them individually and cumulatively, whether the threshold, when one looks at each of the factors and adds the factors together, is one which requires a substantial number of factors to be in favour of

the applicant or whether a certain number of factors would suffice. Then, just on the issue of records, whether the court should rely on SS where it is stated at paragraph 39 that the assessment to be undertaken is one which is a possibility of a real risk on record rather than one which is of high probability or certainty.

36. DEPUTY JUDGE: I refuse permission. It does not appear to me that either of those matters is of material consequence in view of the facts of this case.
37. MR MUSTAKIM: I am obliged.
