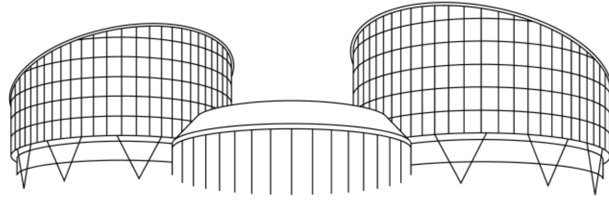

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

Application no. 16458/12
N. and Others
against the United Kingdom
lodged on 15 March 2012

STATEMENT OF FACTS

A. The circumstances of the case

1. Introduction

1. The present applicant has been lodged by three people who are of Sri Lankan origin and Tamil ethnicity. The first applicant, Ms N., is a Sri Lankan national who was born in 1961 and now lives in Sri Lanka. The second is her brother, J. He was born in 1967 in Sri Lanka but is now a British national, having lived in the United Kingdom since 1990. The third applicant, Ms A., is the first applicant's mother. She was born in 1935 is a Sri Lankan national who has lived in the United Kingdom with the second applicant since 2006.

They are represented by Mr A. Weiss, a lawyer practising in London with the AIRE Centre.

2. The application concerns the first applicant's removal by the United Kingdom authorities to Sri Lanka on a charter flight on 28 September 2011, after her asylum claim had been considered and dismissed by the United Kingdom authorities.

3. Her asylum claim, the domestic proceedings in the United Kingdom and the events which she alleges took place upon her arrival in Sri Lanka, may be summarised as follows.

2. The applicant's account of her detention and ill-treatment in Sri Lanka

4. In 2008, the first applicant, her husband and two of her three teenage sons fled from the armed conflict in northern Sri Lanka and settled in Colombo. The first applicant's eldest son had previously disappeared while the family was living in northern Sri Lanka; the first applicant believes the

Liberation Tigers of Tamil Eelam (“the LTTE”) may have forcibly conscripted him.

5. The first applicant’s husband was a justice of the peace and had the power to sign passport applications as part of his official role. After the family fled to Colombo, he also operated a small grocery shop there for a brief period.

6. On 26 November 2008, the first applicant obtained a United Kingdom visitor’s visa to visit the second applicant, his wife and their newborn child. Her sister and her sister’s teenage daughter obtained visitors’ visas on approximately the same date and for the same purpose.

7. On 4 February 2009, Sri Lanka’s Independence Day, the presence of police and other government agents in Colombo increased and the first applicant was stopped at a checkpoint. Government agents examined her identity card, which listed her place of birth as Karampon, a town in a predominantly Tamil area of northern Sri Lanka. The agents asked why the first applicant had come to Colombo and then asked whether she had come to plant a bomb. The first applicant explained that she lived in Colombo and denied any intention of committing an act of violence. The agents then placed her in detention for several days.

8. During this detention, the first applicant maintains that government officers subjected her to sustained physical and sexual violence, kicking her and striking her with rifle butts on the abdomen, chest and face, resulting in the loss of several teeth in her upper jaw. Three of the officers forcibly removed her clothing, sexually assaulted her and raped her. During the rape, the officers made comments accusing her of being an LTTE member. The first applicant fainted during the rape and woke up on the floor partially undressed.

9. Owing to the efforts of a lawyer retained by her husband, the first applicant was released from detention on condition that she report to the authorities on a weekly basis. Shortly after, when the first applicant informed her husband that she had been raped, he disappeared.

10. On 27 March 2009, while the first applicant’s two younger children were at school, three Criminal Investigation Department officers came to the family home and informed the first applicant that they were looking for her husband. When the first applicant told them that her husband was not present, the three CID officers proceeded to search the house. When the CID officers failed to find the first applicant’s husband in the family residence, they became violent, striking the first applicant and forcibly removing her to a white van. The officers then drove the first applicant to a camp in an unknown, government-controlled area of Sri Lanka.

11. The first applicant maintains that she was detained and interrogated in a room at the camp for approximately three days. During the interrogations, CID officers disclosed that they believed that the first applicant’s husband had supported the LTTE by signing the LTTE members’ passport applications. While interrogating the first applicant, CID officers placed a polythene bag filled with petrol over her face and demanded that she tell them where her husband was. The officers showed the first applicant several signatures and asked her to identify them as her husband’s. The first applicant told the officers that the signatures did not match her husband’s. The officers placed a book on her head and then

struck her with a pole; they also repeatedly submerged her head in a barrel of water, making her believe she would drown. As during her first detention, the first applicant was also subjected to sexual violence, with four officers taking turns to rape her. The four officers forcibly penetrated the first applicant for approximately five minutes each.

12. The first applicant lost consciousness during or after the rape. She subsequently became ill and developed diarrhoea. Her captors transferred her to a hospital in a remote forest area, where she was kept alone on a floor. A guard was stationed on the hospital grounds. At the hospital, the first applicant was treated by a doctor and a Tamil nurse. After the first applicant disclosed some of her mistreatment to the nurse, the nurse offered to help her escape; the first applicant used her gold earrings to pay the nurse to help her. The nurse lent the first applicant a nurse's uniform and led her through the rear of the hospital at 2 a.m. The first applicant was met by the nurse's husband, who owned an auto-rickshaw taxi and drove the first applicant to the home of one of her husband's friends in Wattala, a town near Colombo, with a population of 29,000. The first applicant remained hiding in her husband's friend's house for a week. Shortly after the first applicant's escape, she learned through a friend that there was no one living at her house and that her husband and, now, her younger children were missing. The first applicant has not seen or been able to locate her husband or any of her children since the time of the events described above.

13. Using the proceeds from the sale of her belongings, she paid an agent to smuggle her illegally out of Sri Lanka along with her sister (who would also later submit an asylum claim) and her sister's teenage daughter, and passed through Kuwait before arriving at Heathrow airport on 6 April 2009.

3. The first applicant's asylum claim

14. In the United Kingdom, the first applicant did not disclose to her brother or to the solicitor whose services he had secured that she had been raped. The first applicant maintains that she did not do so because the solicitor, although a fellow Tamil speaker, was male. Through the solicitor, she claimed asylum on 27 April 2009. The application stated that the first applicant had a well-founded fear of persecution because she was an ethnic Tamil from northern Sri Lanka; she had been detained and tortured by Sri Lankan authorities; as a result of her detention, the Sri Lankan authorities had a record of her as a suspected LTTE sympathiser; she was "confused and psychologically scarred"; she would be returning from London, which Sri Lankan authorities regarded as a centre of LTTE activity and fundraising; and she had escaped from Sri Lankan government custody.

15. On 27 April 2009, the first applicant attended an asylum screening interview. The interview was conducted with the aid of a male, Tamil speaking interpreter. The interviewer did not ask the first applicant if she had experienced sexual violence during her detentions in Sri Lanka. The first applicant maintains that, when asked about her health, she disclosed sequelae of her ill-treatment including 'headaches and pains' and further stated that she had left hospital "without notification" but that no further inquiries where made by the interviewer.

16. On 29 November 2010 the first applicant's asylum interview took place. She was again assisted by a male, Tamil-speaking interpreter. During the interview, the first applicant indicated that her husband and three children had disappeared. She further explained, as she had during her asylum screening interview that her husband was a justice of the peace who signed passports and that she has been arrested and detained after CID officers had come to the family home to look for him. She clarified that the CID believed her husband had signed the passport applications of 'LTTE boys'. In response to further questions, the first applicant described her torture at the hands of the CID officers, stating that the officers had 'ill treated [her] very badly' after taking her to a camp in a white van. She also gave the details of that ill-treatment (as summarised at paragraph 10 above) but did not mention the rape or sexual assault. The interviewer recorded that the first applicant "appear[ed] distressed" when discussing her March 2009 detention and ill-treatment but did not ask if she had experienced sexual violence whilst being held in detention.

4. The Secretary of State's decision

17. The Secretary of State refused the first applicant asylum on 20 January 2011.

18. The first applicant's credibility was found to have been damaged by the fact that she had not claimed asylum immediately on arrival at Heathrow but four months after. (The first applicant states that this was a mistake on the part of the Secretary of State: she claimed asylum four weeks after her arrival and this delay had been because her mother had fallen ill.)

19. In respect of her alleged arrest in February 2009, the Secretary of State found that, having lived in Columbo for a number of years, the applicant would already have registered with the authorities there. The fact that she claimed to have been detained because her ID card stated that she was from Karampon was not considered consistent with the purpose and use of compulsory registration in Columbo, casting doubt on her claim. Her account was also vague: she could not say who the people who had come with her husband to collect her were, or how her husband had secured her release. Despite having to report on a weekly basis, she did not know who she reported to or how many times she reported.

20. In respect of her alleged arrest in March 2009, her claim to have been of interest to the CID was inconsistent with her account of having been left at the hospital without a CID presence. Although the applicant had stated that she had no contact with her husband or children since her escape, it was considered unlikely that she would have fled Sri Lanka without attempting to warn them of the CID's interest in her husband.

21. As regards her departure from Sri Lanka, the Secretary of State noted that she had all the necessary documents and means to leave legally and would not have required the assistance of an agent. Moreover she had been vague as to how her sister had arranged her departure, despite travelling with her.

22. The Secretary of State considered the risk to the applicant on return to Sri Lanka in the light of these credibility findings and concluded that the Sri Lankan authorities would have no interest in her. The only risk factors applicable to her were Tamil ethnicity, return from London and having

made an asylum claim abroad. This did not create, either separately or cumulatively, a real risk of ill-treatment on return. The applicant appealed against that decision to the First-tier Tribunal (Immigration and Asylum Chamber).

5. The Tribunal's determination

23. The first applicant's appeal was heard with that of her sister, who had also been refused asylum. The hearing took place before a male Immigration Judge and with the assistance of a male interpreter. The first applicant did not disclose that she had been raped, but did submit medical evidence that she had been treated by the National Health Service for depression, social phobia disorder and anxiety. Her brother also gave evidence as to her symptoms, which included persistent fear, memory loss, insomnia and a tendency to wander around their home in the dark in the early hours of the morning. The first applicant also submitted documentation attributing her delay in claiming asylum to the hospitalisation of her mother, the third applicant, and gave evidence that she had not claimed asylum at the airport because the agent had advised her to contact a solicitor before doing so.

24. Both appeals were dismissed by the Tribunal on 17 March 2011. In respect of the first applicant, the Immigration Judge upheld the Secretary of State's finding that the applicant would have had to register with the police in Columbo. He also found that, if they had not registered, the applicant and her family would have been stopped at checkpoints long before February 2009. He also observed that the Sri Lankan authorities had issued the first applicant with a passport in November 2008, even though they knew she was from Karampon. As regards the first applicant's release from her first period of detention, the Immigration Judge noted that her husband could not have known where the first applicant was being detained, when she herself did not know. The Immigration Judge also dismissed the first applicant's explanation that she did not know where she reported afterwards because her husband has taken her there.

25. For the second period of detention, the Immigration Judge found that the first applicant's account made no sense: if the CID were after her husband they would have waited for him or gone to look for him, not taken her instead. It was not credible that, during her ill-treatment, she could have retained her gold earrings for later bribing the nurse, or that afterwards the CID would have taken her to a hospital where she was the only patient on the whole floor. The Immigration Judge also observed that the circumstances of her escape were:

> "so ludicrously lacking in credibility that it would struggle to be acceptable even as the plot of a 'Carry-on' film".

26. As regards the first applicant's seeking refuge in Wattala, the Immigration Judge observed that she and her driver "would have woken up the entire village" by knocking on doors to find out where her friend lived, but had also implausibly claimed she could not go back to her own home because no one was there. The Immigration Judge observed that the first applicant had apparently forgotten that her husband and children would have come home by this point. The applicant's explanation that her friend

had told her that they were living elsewhere was an embellishment designed to plug a gap in her evidence. The Immigration Judge also rejected the account of the first applicant and her sister of how they had made contact by mobile telephone, after the sister's daughter was said to have retrieved the mobile telephone from her home. The Immigration Judge observed that the first applicant did not know when her sister received the telephone and so could not have known when to call. He added: "I hope that the daughter retrieved the charger as well but perhaps [the sister's] friend already had one!?"

27. The Immigration Judge also rejected the first applicant's account of selling her home and travelling with the aid of an agent as a total fabrication.

28. The Immigration Judge further rejected the first applicant's sister's account of her detention and ill-treatment as remarkably similar to that of the first applicant, in that she too claimed to have been detained twice and to have escaped on the second occasion, after having been taken to a hospital for treatment.

29. The Immigration Judge found that the sisters had obviously put their heads together and that their escape from Sri Lanka was nothing more than a coordinated pleasure trip with a sinister intention, namely to deceive the UK authorities by cooking up a story once they had arrived at their brother's house. The Immigration Judge had no doubt that they had been in contact with their respective husbands and that the first applicant had been in contact with her sons. The explanation for their delay in claiming asylum (their mother's ill-health) was also rejected. The Immigration Judge added:

> "The appellants claim to suffer from the effects of torture but I find that this is all part of the smokescreen. They have persisted in maintaining a false story and their conduct in seeking anonymity [in the course of proceedings before the Tribunal, a request that had been granted] is but another aspect of the smokescreen which they have thrown up. They have taken advantage of the [National Health Service] and the local school system. Their brother has abused the society which gave him refuge. I have no hesitation in finding that their conduct adversely affects what remains of their credibility."

30. The appeal based on Article 8 of the Convention was also dismissed, as removal was found to be appropriate and proportionate.

6. The appeals against the Tribunal's determination

31. The first applicant and her sister sought permission to appeal against the Tribunal's determination *inter alia* on grounds of bias and the fact that the Immigration Judge had failed properly to consider the applicants' case under Article 8 of the Convention. The application was dismissed by a different Immigration Judge of the First-tier Tribunal who stated:

> "The [initial] Immigration Judge spent some time dealing with the appellants' cases and for a number of perfectly clear reasons disbelieved the entirety of their accounts. It is clear that he expresses himself in very forceful terms; however, for each matter he disbelieves he gives clear reasons [which] do not display bias, but which simply explain why he has reached the conclusion, and whilst many might not have expressed themselves so forcefully the expressions themselves do not display an arguable error of law.

> While it is true that there is no clear evaluation in relation to Article 8, in looking at the appellants' and [their] witness's statements there is nothing in them to suggest any real family life or private life for either appellant save for presence with other adult family members. As a result there appears to me to be no realistic prospect of success on appeal in relation to article 8..."

32. The first applicant and her sister renewed their application to the Upper Tribunal, which dismissed it on 6 July 2011 for the same reasons as given by the First-tier Tribunal. The Senior Immigration Judge added that, although the initial Immigration Judge's opinions had been robustly expressed, there was no evidence of bias.

7. The first applicant's mental health and her placement in immigration detention

33. In August 2011, the first applicant's NHS counselling psychologist informed the second applicant and the first applicant's general practitioner that the first applicant was 'having suicidal thoughts of throwing herself in front of a train or traffic'. The counselling psychologist further recorded the first applicant's statement that she (the first applicant) had attempted suicide two weeks earlier by stepping out in front of a passing car. On 6 September 2011, the general practitioner confirmed that the first applicant suffered from depressive illness, that her antidepressant medication was not working, and that her prognosis was poor.

34. On 14 September 2011, the United Kingdom Border Agency (UKBA) issued directions for the first applicant's removal to Sri Lanka by charter flight at 3 p.m. on 28 September 2011. She was taken into immigration detention on the same date. On 15 September 2011, medical personnel at the immigration removal centre recorded that the first applicant had told them that she had been tortured by the Sri Lanka army and, as part of that torture, had been raped. On 26 September 2011, a psychiatrist who interviewed the first applicant while she was in detention recorded that officials at the immigration removal centre had placed the first applicant on suicide watch.

8. The first applicant's fresh asylum claim

35. On 15 September 2011 the first applicant submitted a fresh claim for asylum to the Secretary of State. She relied on her declining mental health, and that fact that her rape had not previously been considered by the Secretary of State, or the First-tier and Upper Tribunals. Those acting on her behalf submitted that the reason for the first applicant's failure previously to disclose the rape was that she may have been too traumatised to give full disclosure to her brother, her male lawyer and the male interpreter at the asylum interviews, and that trauma could cause individuals to block out painful events. Relying also on Article 3 of the Convention, the first applicant submitted that return to the place where torture and ill-treatment had taken place could cause further mental deterioration.

36. On 23 September 2011, the Secretary of State informed the first applicant that the fresh representations she had made did not amount to a fresh asylum claim. The Secretary of State reiterated that it had not been accepted that the first applicant had ever been detained by the Sri Lankan authorities and recalled that the First-tier Tribunal had not believed her

account, even to the smallest degree. For that reason, the Secretary of State did not accept the first applicant's explanation for her failure to disclose the rape sooner. The Secretary of State added that, even if the first applicant were credible, it was not clear what the rape would add to her claim to be at risk on return to Sri Lanka. As regards the first applicant's mental health, the Secretary of State noted that the first applicant had not told her GP about her torture, and had attributed her depression and suicidal ideation to an undisclosed family situation and her placement in immigration detention. It was considered that she had not been honest with the United Kingdom authorities and was seeking to claim that she had been raped as a means of remaining in the United Kingdom, perhaps to obtain medical treatment or to resolve whatever problems she had with her family. The Secretary of State maintained her position that removal would also be a proportionate interference with the first applicant's rights under Article 8.

37. The following day, the first applicant was interviewed by an independent male psychiatrist with the assistance of a female interpreter. In that interview, she gave further details of her rape by three men in uniform during her first period of detention in February 2009 and her beating and gang rape by four Sri Lankan officers during her second period of detention in March 2009. The first applicant also expressed a desire to commit suicide if returned to Sri Lanka, as this would be preferable to being tortured and killed by soldiers. The psychiatrist concluded that the first applicant was suffering from depression and chronic post-traumatic stress disorder and had been acutely unwell at the time of the interview.

38. On 27 September 2011, on the basis of the psychiatrist's report, and other fresh evidence (including a letter from a Sri Lankan lawyer stating that the she had been detained in February 2009, and had appeared before the Columbo Magistrates' Court, represented by him), the first applicant made further, urgent representations to the Secretary of State.

39. Those representations were rejected by the Secretary of State at 11.41 a.m. on 28 September 2011. The Secretary of State noted that the first applicant had previously made no mention of having been produced before Colombo Magistrates' Court. There were also inconsistencies between the lawyer's account and that of the first applicant himself: he had said she was released on bail, she had said she was released with a reporting requirement; and she did not know where to report, whereas he said it was to a particular police station. As regards the first applicant's worsening mental health, the Secretary of State noted that this had been caused by her detention and thus would improve after removal. There was no clear evidence that the first applicant would commit suicide, and she had been assessed as fit to travel. Despite the applicant's representations to the contrary, the Sri Lankan health system also provided adequate treatment.

9. The first applicant's judicial review claim and her removal from the United Kingdom

40. Upon receiving the Secretary of State's decision the first applicant commenced judicial review proceedings in the High Court. The application for judicial review alleged that the Secretary of State's failure to treat the first applicant's post-appeal evidence concerning her rapes, psychiatric illnesses and suicide risk as a fresh claim violated domestic law as well as

Articles 3 and 8 of the Convention. She maintains that the papers were lodged at some time prior to 2 p.m. on 28 September 2011.

41. The first applicant further maintains that the application was received by a High Court judge sometime prior to 2 p.m. The judge later recorded in his decision of 30 September 2011 (see paragraph 47 below) that he had attempted to consider each of the applications submitted by failed asylum applicants on the charter flight's main manifest prior to the flight's departure, but that he had not had time to consider the first applicant's case "by 15:28 when I was told that the doors were about to close".

42. No order was made to suspend the first applicant's removal and she was placed on the charter flight at or around 3 p.m. Many of the 49 other Sri Lankans on board had also applied to the High Court for permission for judicial review on the basis that they faced a real risk of torture upon arriving in Sri Lanka, and some of these individuals were removed from the plane prior to departure as the High Court ordered that they were not to be removed pending those proceedings.

43. The first applicant maintains that, at or around 8 p.m. on 28 September 2011, while her application for judicial review was pending and approximately four and a half hours after United Kingdom authorities had informed the High Court judge that the doors were about to close, the charter flight departed. The first applicant had been carried onto the plane by two men and became profoundly distressed during the flight, experiencing chest pains.

10. Events at Columbo airport

44. The first applicant alleges that, after arriving at Columbo airport, she was detained and interrogated by authorities. One of her interrogators struck her on the forehead; later, another noticed that her head was swelling where she had been struck and asked her mockingly whether the United Kingdom authorities had tortured her and, if so, what she had done to prompt them to do so.

45. When the first applicant was released from this initial detention and was preparing to leave the airport, an unknown individual told her to come with him. She was then abducted, blindfolded and removed to an unknown location. Her clothing was forcibly removed; when one of her captors saw that she was wearing a rosary, he said "this is not going to protect you." Her captors asked whether she was "still" linked with the LTTE and had taken part in LTTE activities whilst living in the UK. They accused her family of funding the LTTE. The men showed her copies of her asylum papers (she believes they must have been put in her bag by United Kingdom officials when they were packing her bags for her at the immigration removal centre) and asked her questions about them. They proceeded to beat her with fists, poles and batons, kicked her and stabbed her with a broken ballpoint pen and did further "unspeakable bad things" to her. Eventually they forced her to sign statements written in Sinhalese.

46. The first applicant's interrogators ultimately released her from their custody. After seeking treatment at a hospital, she became frightened, went into hiding and was unable to contact her family in the United Kingdom for more than three months.

11. The High Court's determination of the judicial review claim

47. On 30 September 2011, the High Court refused the first applicant's application for permission to proceed with a claim for judicial review. The High Court judge stated:

> "The claimant [the first applicant] was due to be removed to Sri Lanka at 15.00 on 28 September. The directions for her removal had been served on her on 14 September. However, it was not until 28 September that her claim for judicial review proceedings challenging the directions for her removal was lodged. Her application for a stay on her removal directions came before me on 28 September as the 'immediates' judge. The claimant was one of 20 or so failed asylum-seekers due to removed on the same flight who were asking for a stay on their removal. Although some of the applications could be considered by other judges when they became available, it was plain by about 14.00 that I would not be able to consider all the remaining applications by 15.00.
>
> In those circumstances, I was informed by [UKBA's Operational Support and Certification Unit] which of the remaining applicants were on the main manifest, and which were on a reserve list – and therefore liable to be included on the main manifest only if someone on the main manifest was removed from the flight. Although my priority was to deal with the applications of those on the main manifest, I had not reached the claimant's case by 15.28 when I was told that the doors were about to close. I was informed yesterday that the claimant had been on the flight.
>
> The claimant's case is that the rejection by UKBA of the further representations made on her behalf on 15 and 27 September and the decisions not to treat those fresh representations as amounting to a fresh claim were legally flawed. A critical part of UKBA's reasoning was that her claim to have been raped was disbelieved by the immigration judge on her appeal against the refusal of her claim for asylum. I know, of course, about the concerns expressed in some quarters that our courts and tribunals too readily reject allegations of rape made by asylum-seekers. But whether the claimant had in truth been raped – and when she had first complained of rape, which would have been highly relevant to whether she had been raped - was of the greatest importance in considering whether her mental state was such as to amount to a visible argument that her removal to Sri Lanka would infringe her Art. 8 rights. If I had considered the claimant's case on 28 September, my difficulty would have been that the claimant's solicitors had not included in the bundle of documents the decision of the immigration judge. If would not have been possible for me to conclude that it was arguable that the rejection of the claimant's solicitors' representations, and the refusal to treat those representations as fresh claims, was legally flawed without reading that decision.
>
> Since the claimant has now been removed to Sri Lanka, no purpose would be served by reconsidering the matter once the court has been provided with the decision of the immigration judge or by permitting her claim to proceed."

48. The first applicant's representatives made a renewed application for permission to seek judicial review on 4 October 2011; this was refused on 18 January 2012. The judge considered the initial determination of the Tribunal and observed:

> "It is clear that, having heard evidence from both the claimant and her sister...the judge concluded, in emphatic terms, that neither sister was credible in any relation to the claims for asylum. In short, he concluded that both the claimant and her sister had told a pack of lies.
>
> ...

> [Counsel for the claimant's submissions] overlook the fundamental question of credibility and the context in which this new evidence was raised very much at the eleventh hour. The immigration judge's determination was, as I have indicated, a savage series of findings in terms of the credibility of the claimant's account. On the face of it, in circumstances where this claimant had given evidence dealing with her alleged treatment in custody in Sri Lanka in 2009 and the brutal treatment meted out to her, all of which evidence was considered by the immigration judge, it seems to me that the Secretary of State was well entitled to conclude that there was no realistic prospect of success in circumstances where completely new allegations were now being advanced some two days before removal directions were set and in circumstances where none of that evidence, including the medical evidence ... provided a sensible or satisfactory explanation for the failure to mention these important allegations at the time of the original appeal.
>
> In those circumstances, I take the view that it is impossible to characterise the Secretary of State's decision in relation to this application as unlawful and accordingly, I dismiss this renewed application for judicial review."

12. The first applicant's current condition

49. The first applicant has submitted a letter from a doctor at the National Hospital of Sri Lanka in Colombo which states that on 6 October 2011, she "presented with multiple physical injuries and psychological trauma." She had "sustained head, arm and leg injuries, scratches around [her] neck and bruises on her face caused by torture and other ill-treatment". The first applicant also maintains that, since emerging from detention, she has twice attempted to commit suicide, as documented by doctors in Sri Lanka. She is currently staying with an acquaintance. Her husband and sons remain missing.

13. The present application

50. The present application was lodged on 15 March 2012, that is, after the first applicant's removal to Sri Lanka. No request for interim measures under Rule 39 of the Rules of Court was made prior to her removal.

B. Relevant domestic law and practice

1. Asylum and human rights claims

51. Section 82(1) of the Nationality, Immigration and Asylum Act 2002, provides a right of appeal against an immigration decision made by the Secretary of State for the Home Department, *inter alia,* on the grounds that the decision is incompatible with the Convention.

52. Since 15 February 2010, appeals in asylum, immigration and nationality matters have been heard by the First-tier Tribunal (Immigration and Asylum Chamber). Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides a right of appeal to the Upper Tribunal, with the permission of the First-tier Tribunal or the Upper Tribunal, on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

53. Section 2 of the Human Rights Act 1998 provides that, in determining any question that arises in connection with a Convention right, courts and tribunals must take into account any case-law from this Court so

far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

2. Fresh asylum and human rights claims

54. Section 1(4) and 3(2) of the Immigration Act 1971 provide for the making of Immigration Rules by the Secretary of State. Paragraph 353 of the Immigration Rules provides as follows:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

55. As regards the scrutiny of fresh asylum claims and the power of the courts to review such scrutiny, the Court of Appeal in *WM (DRC) v. Secretary of State for the Home Department* [2006] EWCA Civ 1495 (paragraphs 10-11) has held:

> "Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return ... The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

Thus, an applicant making fresh representations must establish that they have a realistic prospect of success to establish a "fresh claim" which, even if then refused by the Home Office, will nonetheless generate a fresh right of appeal to be considered on the merits.

3. UKBA's policy instruction on judicial review and injunctions

56. The above instruction provides that UKBA will normally defer removal where a judicial review application has been properly lodged with the High Court in accordance with the applicable Practice Direction. However, where it is considered appropriate because of the complexity, practicality and cost of a charter flight, a judicial review application may not defer removal unless an injunction is obtained from the High Court.

4. Country guidance determinations in respect of Tamils returning to Sri Lanka

57. The AIT's determination in *LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG* [2007] UKAIT 00076 was considered by this Court in *NA. v. the United Kingdom*, no. 25904/07, 17 July 2008. The headnote to the determination provided:

"(1) Tamils are not per se at risk of serious harm from the Sri Lankan authorities in Colombo. A number of factors may increase the risk, including but not limited to: a previous record as a suspected or actual LTTE member; a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the security forces to become an informer; the presence of scarring; return from London or other centre of LTTE fundraising; illegal departure from Sri Lanka; lack of an ID card or other documentation; having made an asylum claim abroad; having relatives in the LTTE. In every case, those factors and the weight to be ascribed to them, individually and cumulatively, must be considered in the light of the facts of each case but they are not intended to be a check list.

(2) If a person is actively wanted by the police and/or named on a Watched or Wanted list held at Colombo airport, they may be at risk of detention at the airport.

(3) Otherwise, the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment.

(4) Tamils in Colombo are at increased risk of being stopped at checkpoints, in a cordon and search operation, or of being the subject of a raid on a Lodge where they are staying. In general, the risk again is no more than harassment and should not cause any lasting difficulty, but Tamils who have recently returned to Sri Lanka and have not yet renewed their Sri Lankan identity documents will be subject to more investigation and the factors listed above may then come into play.

(5) Returning Tamils should be able to establish the fact of their recent return during the short period necessary for new identity documents to be procured.

(6) A person who cannot establish that he is at real risk of persecution in his home area is not a refugee; but his appeal may succeed under article 3 of the ECHR, or he may be entitled to humanitarian protection if he can establish he would be at risk in the part of the country to which he will be returned..."

58. *LP* was reconsidered by the AIT in the light of *NA*. in *TK (Tamils – LP updated) Sri Lanka CG* [2009] UKAIT 00049. The AIT's conclusions were summarised in the headnote to the determination which, where relevant provides:

"a) The risk categories identified in *LP (LTTE area – Tamils - Colombo – risk?) Sri Lanka CG* [2007] UKAIT 00076 and approved by the European Court of Human Rights (ECtHR) in *NA v UK*, App.no. 25904/07, remain valid.

b) Events since the military defeat of the LTTE in May 2009 have not aggravated the likely approach of the Sri Lankan authorities to returned failed asylum seekers who are Tamils; if anything the level of interest in them has decreased. The principal focus of the authorities continues to be, not Tamils from the north (or east) as such, but persons considered to be either LTTE members, fighters or operatives or persons who have played an active role in the international procurement network responsible for financing the LTTE and ensuring it was supplied with arms.

c) The records the Sri Lanka authorities keep on persons with some history of arrest and detention have become increasingly sophisticated; their greater accuracy is likely

to reduce substantially the risk that a person of no real interest to the authorities would be arrested or detained."

5. Case-law on Sri Lankan charter flights

59. UKBA have conducted five charter flights to Sri Lanka since June 2011 which have taken place on 16 June 2011, 28 September 2011, 15 December 2011, 28 February 2012 and 31 May 2012. Each flight has returned approximately fifty Sri Lankan nationals (including failed asylum seekers) to Columbo airport.

60. On 27 February 2012 the Upper Tribunal (Immigration and Asylum Chamber) heard an application for judicial review of the Secretary of State's decision to refuse to consider the fresh representations of a Sri Lankan Tamil as amounting to a fresh asylum claim and to set directions for his removal to Sri Lanka (*R (on the application of X) v Secretary of State for the Home Department*, unreported). The main issue in the application was whether there was an elevated risk of ill-treatment to Tamils returned on charter flights. Having reviewed the evidence before it, including reports by Amnesty International, Freedom from Torture and Human Rights Watch and a letter from a returnee, RS, who claimed to have been ill-treated, the Upper Tribunal concluded that there was not. It reasoned:

"Whilst the materials from the [United Nations Committee against Torture], Amnesty International, Human Rights Watch and others indicate that there are significant concerns currently about the use by the Sri Lankan authorities of torture and their ill treatment of those detained, especially those suspected of LTTE involvement, this is evidence that the Defendant [the Secretary of State] accepts and has taken into account in consideration of the Claimant's fresh claim. Although this evidence paints a worrying picture as to ongoing human rights abuses in Sri Lanka, it remains that the evidence before the Defendant also includes materials indicating that there has been a very considerable reduction in the numbers of internally displaced persons and that in relation to treatment of failed asylum seekers the view of the ECtHR expressed less than a year ago in E.G. v UK [no. 41178/08, 31 May 2011], was that in the post-conflict climate there was less of a basis for the Sri Lankan authorities viewing failed asylum seekers adversely. We remind ourselves that, like the country guidance given in TK (which the ECtHR endorsed), the Court's own assessment in E.G. was based on a mass of evidence including many detailed country reports and similar documentation.

[British High Commission] monitoring

45. We have noted evidence that UK charter flight returns of Sri Lankans involve a degree of monitoring. Some of the sources relied on by the Claimant dispute that simply taking a person's details and providing them with a phone number does amount in any sense to effective monitoring, especially as (it is said) such persons may well fear that to contact the BHC might incur the wrath of the Sri Lanka authorities. However, the BHC assistance would appear to amount to significantly more than that. The BHC letter of 18 March 2011 explains that it 'provides its contact details to returnees and they are encouraged to contact the Migration team if they encounter difficulties including any instances of harassments or assaults. This is not just limited to the entry procedures at the Airport, but also for post- arrival assistance.' The same letter also indicates that BHC staff has taken the opportunity to undertake some kind of survey of responses made to them by charter flight returnees. It states that: 'Further, 25% of the UK enforced returnees stated that the Border Control process for entry along with the Criminal Investigation Service (CID) procedure is cumbersome and lengthy. But there were no allegations of harassment.' And the letters produced by the Defendant relating to the UKBA charter flight returns of 28/29 September and 15/16 December 2011 demonstrate that not only does a BHC representative speak with returnees and explain to them the procedures and offer to assist them in contacting friends or relatives *prior* to the Sri Lankan authorities processing them, but that representative also accompanies them *after* they have passed through Sri Lankan immigration and security controls. The BHC representative also gives them a business card and advises them to contact the BHC if they have any questions or concerns. By this time the returnees have also been spoken to individually by representatives of the International Organisation for Migration (IOM) who take their contact details and then hand them a travel grant in Sri Lankan rupees equivalent to £50. We do not see why if any returnee had any concerns they would choose not to raise them out of fear of reprisals by Sri Lankan officials.

46. It is also significant in our view that there is no evidence from any source before us of failed asylum seekers returned during 2011 having sought to contact one of the many human rights organisations in Sri Lanka in whom they might be expected to repose more confidence that their concerns would be kept confidential. The reports to the November UNCAT meeting are replete with references to various NGO bodies in Sri Lanka who have assembled dossiers of abuses by the Sri Lankan authorities.

47. Another important factor in our judgment is that in 2011 we know that over 100 Sri Lanka Tamils who are failed asylum seekers have been returned on charter flights. Yet there has not been a single allegation made in respect of their treatment since either to the BHC or UKBA. In respect of these charter flights there has been a considerable amount of legal assistance provided to them prior to their departure. We cannot think that when they left the UK their advisers in the UK would have neglected to advise them to contact lawyers here (or ensure relatives or friends did) if anything untoward was to happen to them. As regard enforced returns in 2011 outside the context of charter flights, once again we have not been shown any evidence of such allegations save in relation to the return last Tuesday of RS which we have already considered.

48. We are not aware of the ECtHR having made any Rule 39 indication in respect of persons on the 28 February 2011 charter flight.

49. Having regard to the details of the FFT, Amnesty International and HRW cases of concern, we are bound to say that the quality of the claims made about them, as presently presented, leaves much to be desired. We take into account that each of these bodies is a reputable organisation and that that each might wish to pursue perfectly legitimate policy concerns with the UK and other governments. But we can only deal with what is in front of us. Even bearing in mind that the test on an application of this kind is a modest one, what is in front of us does not pass muster. Whilst we do not question the motives of those who have sought to give them

publicity, they do not exhibit features which might create a realistic prospect of success in the context of an appeal before a hypothetical tribunal judge. They certainly pose a number of questions, as any set of allegations must inevitably do, but they raise even more unanswered questions about their own efficacy. In our judgment the new materials relied on in this case do not arguably add anything of substance to the Claimant's case. They do not show that the guidance given by the ECtHR in E.G. should be different or that the Defendant should have considered that they did."

C. Relevant European Union law

1. The Charter

61. Charter of Fundamental Rights of the European Union provides at Article 3(1):

> "Everyone has the right to respect for his or her physical and mental integrity."

Article 18 of the Charter provides:

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

Article 19(2) states:

> "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

Article 47, where relevant, provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."

Article 51(1) provides:

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

2. Council Directive 2004/83/EC

62. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted entered into force with respect to the United Kingdom on 10 October 2006.

63. The Directive mandates at Article 4(3):

> "The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
>
> ...

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country..."

Article 4(4) further provides that:

"The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

Article 20(3) and (4) provides that:

"3. When implementing this Chapter [on the content of international protection], Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

4. Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation."

3. Council Directive 2005/85/EC

64. Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status; its deadline for implementation passed, giving its provisions direct effect in the legal order of the United Kingdom and other EU Member States, on 1 December 2007.

65. Article 13(3) of the Directive provides in relevant part:

"Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner...."

Article 32 concerns subsequent applications for asylum, and states in relevant part:

"2. ... Member States may apply a specific procedure as referred to in paragraph 3, where a person makes a subsequent application for asylum:

...

(b) after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken.

3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.

> 4. If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II.
>
> ...
>
> 6. Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 3, 4 and 5 of this Article in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 39."

66. Article 39 provides for the right to an effective remedy where decisions taken regarding asylum applications are concerned, as well as the suspensive effect of such remedies. It reads in relevant part:

> "1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:
>
> (a) a decision taken on their application for asylum...
>
> (c) a decision not to examine or further examine the subsequent application pursuant to Articles 32 and 34...
>
> ..
>
> 3. Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:
>
> (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome..."

D. National and international guidelines on gender-related asylum claims

1. UKBA's policy instruction

67. Section 7 of UKBA's policy instruction on gender issues in asylum claims covers interviewing and assessment of credibility. Section 7.1 where relevant, provides:

> "Case owners should, prior to the interview, have familiarised themselves with country of origin information on the role, status, and treatment of women in the country from which a woman has fled. Establishing the material facts of a claim and the credibility or otherwise of past experiences and the various aspects of the reasons for seeking asylum or humanitarian protection is essential in assessing the merits of the claim. It is therefore important that an interview is conducted sensitively, thoroughly, and that relevant issues are clarified with the applicant.
>
> Each applicant will have been asked at screening to indicate a preference for a male or female interviewer, and it should normally be possible to comply with a request for a male or female interviewer or interpreter that is made in advance of an interview. Requests made on the day of an interview for a male or female interviewer or interpreter should be met as far as is operationally possible.
>
> ...

A reassuring environment will help to establish trust between the interviewer and the claimant, and should help the full disclosure of sensitive and personal information."

68. Section 7.2, where relevant, provides:

"While the substantive asylum interview represents the applicant's principal opportunity to provide full disclosure of all relevant factors, the disclosure of gender-based violence at a later stage in the determination process should not automatically count against her or his credibility. There may be a number of reasons why an applicant may be reluctant to disclose information, for example feelings of guilt, shame, and concerns about family honour, or fear of traffickers or having been conditioned or threatened by them.

Interviewers should be sensitive to the fact that gender and cultural norms may play an important role in influencing demeanour, for example, how a woman presents herself physically at interview e.g. whether she maintains eye contact, shifts her posture or hesitates when speaking. Demeanour alone is an unreliable guide to credibility.

Women who have been sexually assaulted and/or who have been victims of trafficking may suffer trauma. The symptoms of this include persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, shame, a pervasive loss of control and memory loss or distortion. Decision-makers should be aware of this and how such factors may affect how a woman responds during interview. ...

For victims of rape or sexual violence, it is not necessary to obtain precise details about the act itself. However, information should be obtained about the events leading up to and following the assault, the context in which it took place as well as the motivation of the perpetrator (if known). It should be noted that a victim may not always be aware of the reasons for the assault or the identity of the attackers.

Case owners may, if necessary, provide applicants with sufficient time to submit psychological or medical evidence where trauma may affect the applicant's ability to recollect events consistently or otherwise support the applicant's account, in particular where an applicant's account is doubted."

2. UNHCR's guidelines

69. UNHCR's "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" set forth a series of procedural best practices "in order to ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process" (paragraph 36). Paragraph 35 of the guidelines states:

"Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community."

The guidelines also provide that claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves, and they should be provided automatically for women claimants (paragraph 36(iii)). The Guidelines further provide that both open-ended and specific questions which may help to reveal gender issues relevant to a refugee claim should be incorporated into all asylum interviews, in part

because female claimants may fail to relate questions that are about torture to the types of harm which they fear (such as rape, sexual abuse, female genital mutilation, honour killings, forced marriage, etc.) (paragraph 36(vii)).

3. Parliamentary Assembly of the Council of Europe Resolution 1765

70. Paragraph 6 of the above resolution (on gender-related claims for asylum) provides:

> "In addition to the problem of gender issues not being properly taken into account in the assessment of asylum claims, the asylum procedure in member states often makes it difficult for women to tell their full story. A woman who faces a male interviewer or interpreter can be reluctant to speak freely and give a full account of the violence she has experienced, whether gender based or not. Moreover, the officials involved in the asylum procedure often lack adequate training on gender issues and therefore fail to ask the right questions or to analyse the evidence before them properly. This problem may be exacerbated by the use of country of origin information that ignores gender issues or has little gender relevance."

Paragraph 8 states:

> "[w]omen and girls seeking asylum in Council of Europe member states have the right to have their protection claims assessed by an asylum system that is sensitive, in all aspects of its policy and operation, to the particular forms of persecution and human rights abuses that women face because of their gender."

Paragraphs 9.3, 9.6 and 9.7 call on member States to ensure that women are automatically provided with assistance and interpretation by female counsellors and interpreters when formulating their asylum claims and filling out their applications; to guarantee that interviewers and interpreters dealing with female asylum seekers are always women; and to ensure that the asylum interview is carried out in a gender-sensitive way and, in particular, that questions relevant to gender-based violence and gender-related persecution are asked.

COMPLAINTS

A. Articles 2 and 3

71. The first applicant complains under Articles 2 and 3 of the Convention that she was forcibly returned to Sri Lanka, despite a real risk of ill-treatment contrary to those Articles.

72. She submits that she only relies on the events which took place following her removal to extent that they confirm what she alleges the United Kingdom authorities knew or ought to have known when she was removed.

73. Her submissions made be summarised as follows.

1. Ill-treatment on return

74. The first applicant submits that the United Kingdom authorities ought to have known that she would be ill-treated on return to Sri Lanka. In

respect of Article 3, she invites the Court to adopt the approach set out in Article 4(4) of Council Directive 2004/83/EC, namely that, if an applicant has already been subject to serious harm, this is a serious indication of a real risk of suffering serious harm on return.

75. She argues that the issue of detention and ill-treatment of failed asylum-seekers by the Sri Lankan authorities was not properly considered by the decision-makers in her case. She submits that she was particularly vulnerable as a lone, female Tamil returnee. There was a heightened risk in her case given that she had appeared in court as a suspected LTTE sympathiser, had escaped from custody, had left Sri Lanka illegally, had returned from London and had made an asylum claim in the United Kingdom.

2 Credibility

76. She acknowledges that her case in respect of ill-treatment on return hangs primarily on her credibility and that, as a general principle, national authorities are best placed to assess such issues (*R.C. v. Sweden*, no. 41827/07, § 52, 9 March 2010). However, in this case, she submits that the national authorities' assessment was so poor that it is appropriate for the Court to substitute its own credibility findings for those of the national authorities. With the exception of the delayed disclosure of the rapes, her basic story was consistent throughout and accorded with the background information on torture in Sri Lanka, particularly in the methods used by the Sri Lanka army. It was also supported by the independent psychiatrist's report and medical evidence from her GP and counselling psychologist to whom she had given a consistent account of the side-effects of her rape and torture.

77. In addition to this evidence, she also submits a witness statement from the Dr Juliet Cohen, a forensic physician and head of medical services at the non-governmental organisation Freedom from Torture. Dr Cohen describes the difficulties survivors of torture frequently encounter during interviews when asked to describe the abuse they experienced, including asylum interviews. These include cultural taboos, protective coping mechanisms such as denial and avoidance, the chemical effect of extreme emotional arousal on the ability to retain memories, the impact of psychological problems such as post-traumatic stress disorder and depression on the ability to recall events accurately and in detail and the effect of physical injuries such as blows to the head, asphyxiation and suffocation. Dr Cohen also highlights the failure of the first applicant's asylum interviewers to ask questions that would elicit details of her mistreatment, and discusses at length the potential cultural and clinical explanations for the purported inconsistencies that formed the basis of the adverse credibility findings in her case.

78. She submits that, given her overall consistency and the known impact of physical, psychological and sexual trauma on memory, she deserved the benefit of the doubt from the United Kingdom authorities rather than the sarcastic language employed by the Immigration Judge in the First-tier Tribunal's determination.

79. The first applicant also submits that domestic authorities neglected to follow UNHCR's guidelines and the recommendations contained in

Resolution 1765 by failing to provide her with female interpreters during her initial asylum screening interview and hearing on 3 March 2011, and by failing to ask her questions that would elicit a disclosure of sexual abuse or sexual violence.

3. Suicide

80. The first applicant complains that there was a separate violation of Article 3 as a result of her return while she was at real risk of suicide. She had repeatedly informed the United Kingdom authorities about her poor mental health and had submitted appropriate medical and other evidence to that effect. That evidence made clear that her suicidal ideation and suicide attempts were inextricably linked to her traumatic experiences in Sri Lanka and the United Kingdom authorities' decision to return her there. She had been receiving medical care and the support of her family in the United Kingdom, neither of which was available in Sri Lanka. She had also submitted evidence as to the inadequacy of mental health care in Sri Lanka, and elevated rates of suicide among women whose husbands had disappeared during the conflict, none of which was properly considered by the Secretary of State.

B. Article 6

81. The first applicant complains that failure, prior to her removal, to provide her with a hearing as to whether her fresh claim for asylum was in fact a fresh claim violated her right to a fair trial. She accepts that decisions as regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations (*S.S. v. the United Kingdom* (dec.), no. 12096/10, § 85, 24 January 2012). However, where a State conferred rights which could be enforced by means of a judicial remedy, these could, in principle be regarded as civil rights (*Oršuš and Others v. Croatia* [GC], no. 15766/03, § 105, ECHR 2010) and European Union law was domestic law for purposes of the Convention (*Aristimuño Mendizabal v. France*, no. 51431/99, § 79, 17 January 2006).

82. Article 32(4) of Council Directive 2005/85/EC confers a right to have a new application for asylum considered if, following a preliminary examination, there are new elements which significantly add to the likelihood of the applicant qualifying as a refugee. In such a case, there is a right to an effective remedy and a right to a fair and public hearing in accordance with Article 47 of the EU Charter.

83. The first applicant submits that, once she disclosed her rape, her new application met the requirements of Article 32(4) and that she had a right to have her case examined by the High Court prior to her removal. She also submits that her Article 6 rights were undermined by UKBA informing the High Court judge that the charter flight's doors were about to close four and a half hours before it actually took off.

C. Article 8

84. All three applicants submit that the first applicant's removal to Sri Lanka violated their right to respect for their private and family life under Article 8. They submit that the removal was not in accordance with the law, as there had not been a proper consideration of the first applicant's fresh asylum claim in accordance with the procedures set out in Directive 2005/85. The refusal of the Secretary of State to consider the first applicant's representations as a fresh asylum claim deprived her of a right to appeal with automatic suspensive effect. The only recourse was an application for judicial review, which did not have automatic suspensive effect and, in any event, because the High Court had been told that the doors to the aeroplane were about to close four hours before it in fact took off, the application had not been considered in time. Moreover, the removal was not proportionate, having regard to the fact that the applicant had lived peaceably in the United Kingdom with her family for two and a half years and had no family left in Sri Lanka.

85. The first applicant further submits that her removal, in light of her poor mental health and the fact that she faced ill-treatment there, constituted a further unjustified interference with her private life.

D. Article 13 read in conjunction with Articles 2 and 3

86. The first applicant further submits that the rejection her fresh representations as not amounting to a fresh claim deprived her of an effective remedy under Article 13 of the Convention read in conjunction with Articles 2 and 3.

87. She submits that she does not challenge in general terms the rule of domestic law which allows the Secretary of State to refuse to recognise representations made by a failed asylum-seeker as a 'fresh claim' in accordance with the terms of Paragraph 353 of the Immigration Rules (see paragraph 54 above). In some circumstances, it will be entirely appropriate for the United Kingdom authorities to refuse to consider a subsequent asylum claim as a fresh claim. However, she submits that, where a failed asylum-seeker makes a new claim with information that has not yet been considered and which shows there are serious grounds for believing there is a real risk that her expulsion will expose her to treatment contrary to Article 3, Article 13 requires that a refusal of such a claim must be accompanied by a remedy with automatic suspensive effect.

88. The first applicant submits that her disclosure – albeit late – that she had been raped added significantly to the likelihood that she would qualify as a refugee and cast significant doubt on the adverse credibility findings of the Secretary of State and Tribunal. Because of the specific nature of this claim and the evidence adduced in support of it, Article 13 demanded rigorous scrutiny of her new claim. Moreover, the only remedy open to her following this failure of the Secretary of State – judicial review by the High Court – did not have automatic suspensive effect. Recourse to the High Court was also ineffective given the court's failure to consider her case before removal, and UKBA informing the High Court judge that the charter flight's doors were about to close four and a half hours before it actually

took off. The refusal to provide suspensive effect to her application for judicial review was all the more arbitrary given that, if she had been on a commercial flight and not charter flight, removal would have been deferred pending the outcome of the application (see UKBA's policy at paragraph 56 above).

E. Article 14 when taken with Articles 2, 3, 6 and 8

89. Finally, the first applicant submits that the failure of the domestic authorities to give proper consideration to her claim to have been raped was in violation of Article 14 when taken with Articles 2, 3, 6 and 8.

90. She submits that the Court has acknowledged the unique and severe harm suffered by individuals who have been raped whilst in custody (*Aydın v. Turkey*, 25 September 1997, §§ 83 and 86, *Reports of Judgments and Decisions* 1997-VI). This means that she was a person whose situation was significantly different from that of other asylum-seekers and that, accordingly, she should have been treated differently. The United Kingdom authorities were consequently obliged to treat her rape claim as a fresh asylum claim unless they had an objective and reasonable justification not to, and, in her submission, they did not.

91. She maintains that the authorities failed to take into account the specificities of her situation in determining whether her rights under Articles 2, 3 and 8 would be violated by her return to Sri Lanka.

92. She also maintains that this failure to take into account the specificities of her situation left her without access to court to consider whether her rights under European Union law had been respected, in violation of Article 14 when taken with Article 6.

QUESTIONS TO THE PARTIES

A. Article 3

1. Did the first applicant's removal to Sri Lanka violate Article 3 on account of a real-risk of ill-treatment at Columbo airport? Were the United Kingdom authorities entitled to conclude that, at the time of removal, there was no real risk of ill-treatment to the first applicant? In this connection, the parties are requested to comment on the relevance, if any, of:

(i) the fact that the proceedings before the Secretary of State and First-tier Tribunal were conducted with the assistance of male interpreters and, in the case of the Tribunal, before a male Immigration Judge;

(ii) the wording of the First-tier Tribunal's determination;

(iii) the fact that the first applicant was returned on a charter flight;

(iv) her claim of ill-treatment and sexual assault on arrival at Columbo airport; and

(v) her allegation that Sri Lankan officials had copies of her asylum papers because United Kingdom officials packed her bags for her at the immigration removal centre.

2. Did the first applicant's removal to Sri Lanka violate Article 3 on account of a real risk of suicide (see *Balogun v. the United Kingdom*, no. 60286/09, § 31, 10 April 2012)?

B. Article 13 read in conjunction with Article 3

3. Did the failure of the High Court to consider the first applicant's judicial review application before her removal amount to a violation of Article 13 read in conjunction with Article 3? The parties are requested to comment on:

(i) the time at which the judicial review application was lodged in the High Court;

(ii) the fact that the First-tier Tribunal's determination was not included in the bundle accompanying the application;

(iii) the practice of placing all urgent judicial review applications concerning charter flights before a single "immediates" judge of the High

Court and thereafter other judges as they become available (see the High Court's decision quoted at paragraph 47 of the statement of facts); and

(iv) the High Court judge's statement that he was told at 3.28 p.m. that the doors of the charter flight were about to close when taken with the first applicant's allegation that the flight did not in fact leave until 8 p.m.

C. Article 6

6. Is the right set out in Article 32(4) of Council Directive 2005/85 to have a new application for asylum considered in certain circumstances a "civil right" within the meaning of Article 6 of the Convention?

7. If so, was there a breach Article 6 in the present case?

D. Article 8

7. With regard to her submissions in respect of Directive 2005/85, was the first applicant's removal to Sri Lanka in accordance with the law?

8. If so, was the removal proportionate having regard (i) to her submissions as regards her private and family life in the United Kingdom; and (ii) her submissions as regards her poor mental health?

E. Article 14

9. Is a failed asylum-seeker who subsequently claims to have been raped a person whose situation is significantly different from other failed asylum-seekers for the purposes of Article 14?

10. If so, was there a failure to treat the first applicant differently and was that failure without an objective and reasonable justification?

11. In conclusion, was there a violation of Article 14 when taken with (i) Articles 2 and 3 of the Convention; (ii) Article 6 of the Convention; or (iii) Article 8 of the Convention?