CO/1007/2009

Neutral Citation Number: [2009] EWHC 2001 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 16 July 2009

B e f o r e:

MRS JUSTICE DOBBS DBE

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The Queen on the application of

S S
Claimant
and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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Ms S Jegarajah (instructed by K Ravi Solicitors, Middlesex HA5 5DY)
appeared on behalf of the Claimant

Miss Lisa Busch (instructed by the Treasury Solicitor)
appeared on behalf of the Defendant

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J U D G M E N T

Thursday 16 July 2009

MRS JUSTICE DOBBS:

Introduction

1. This is an application for judicial review, permission having been granted on 12 March 2009 by a Deputy High Court Judge.

2. The claimant seeks to challenge the decision of the defendant dated 21 January 2009 declining to treat representations made on his behalf as a fresh claim. The original claim was in relation to the defendant's failure to respond to representations made by the claimant dated 12 January 2009. In fact, there was a response to those representations, dated 21 January 2009, and thus the claim has been amended to challenge the decision in the defendant's letter.

3. The amended grounds now rely on new evidence in a Country of Origin Information Report on Sri Lanka, dated 26 June 2009, which, it is submitted, undermines key credibility and objective findings made by the Immigration Judge. The Immigration Judge found that if the claimant was really of interest to the authorities, he would not have been able to leave without problem.

The Background

4. The claimant is a citizen of Sri Lanka. He arrived in the United Kingdom on 30 September 2006 with a multiple entry clearance visa as the spouse of a person entitled to remain, valid from 26 September 2006 to 26 July 2008. Seven months later, on 9 May 2007, he claimed asylum on the basis of his activities as a member of the LTTE and the interest which allegedly the authorities had in him if he were to be returned to Sri Lanka. The defendant refused this claim on 30 July 2007.

5. The claimant appealed against that decision. His appeal was dismissed on a determination promulgated on 17 September 2007.

6. In the determination, the Immigration Judge accepted a number of the claimant's contentions. He was prepared to accept that the claimant had been a member of the LTTE until 2002; that he had lost his leg because of an incident involving a land mine in December 1988; that he had not been involved in fighting for the LTTE since 1988; and that his brother died in prison in January 2001. He categorically rejected the claimant's evidence concerning experiences after 2001. Thus the Immigration Judge did not accept that the claimant had ever been detained by the authorities or that he had escaped from custody: see paragraph 21 of the determination. He gave a number of reasons for reaching his conclusion, including the fact that, on the claimant's own account, he had passed through a number of checkpoints on various occasions without attracting any interest on the part of the authorities. He said as follows:

> "27. After the appellant escaped from custody on payment of a bribe, he went to Colombo with the agent. Again, he passed through a number of checkpoints on the journey. He had no difficulties with the authorities. This was a man who claims that the authorities, whilst he was in prison, knew all about him and all about his past LTTE membership. If that was the case,I do

> not believe that the appellant would have been able to pass through the checkpoints with such ease. The appellant claimed in his interview that he was able to pass through the checkpoints because the army knew the agent well. Even if they knew the agent well, it does not mean that they would be allowing a known LTTE suspect to move freely to Colombo and potentially to be involved in terrorist activities. I did not believe any of that either.
>
> 28. The appellant claims in his statement that his name was recorded the wrong way round in his passport and that was how he was able to pass through immigration at the airport without any difficulties. However, the appellant, at question 170 of his interview, was asked 'Why did he get you a genuine passport in your real name?' The appellant's answer was, 'The agent did it, I don't know why'. I do not believe that the passport was the wrong way round and I believe that the appellant's passport had his photograph and his correct name on it. If the appellant had been wanted in any shape or form by the authorities, I believe that he would have been stopped at the airport."

7. On 24 October 2007, Senior Immigration Judge Moulden made no order on the claimant's application for reconsideration. On 19 December 2007, Silber J ordered that the application for reconsideration be dismissed.

8. In the meantime, on 7 November 2007, the claimant was diagnosed as suffering from TB of the spine, as a result of which he was admitted to hospital on various occasions.

9. On 27 February 2008, 2 and 6 June 2008, 4 July 2008 and 17 October 2008, the claimant submitted further representations to the defendant, all of which she rejected in a decision letter dated 13 November 2008. None of those earlier decisions has been challenged.

10. On 12 January 2009, the claimant submitted further representations based on a letter from the British High Commission in Sri Lanka dated 28 August 2008, which is cited in the then current country report on Sri Lanka. It indicated that the security situation at Colombo Airport was such that it was possible for persons departing Sri Lanka to proceed from landside to airside without security checks. Also cited was a passage from a letter dated 1 October 2008 from the British High Commission, referring to the fact that immigration officers at the airport lacked the power to prevent persons from embarking on a flight. The claimant submitted that these extracts serve to undermine the Immigration Judge's findings that the claimant was not of interest, because he passed through the checkpoint and the airport with no problems. In the main, the extracts from the letter were directed at the issue of the ability of persons to travel through the airport without check. The other point that is raised on the letter of 1 October 2008, is, that the office of the State Intelligence Service is situated in the Immigration Arrivals Hall, and that officers from that service usually patrols the arrivals area during each arrival flight. If they notice a person being apprehended, they approach immigration and take details to ascertain

if the person may be of interest to them. The office contains computer terminals. The letter goes on to say, that if the apprehended person is considered suitable to be passed to the CID, they are then walked across, and the CID officer makes a note of the arrival of the person in a log book. The extract letter also says that it was believed that CID had allowed these persons to proceed and no action has been taken against them, although the CID have advised the High Commission that, depending on the type of case, they could refer such cases to other police departments like the Anti-Human Smuggling Investigation Bureau or the Terrorist Investigation Department. The representations of 12 January also urged the Secretary of State to note that their client was an LTTE member from 1985 to 2002, that he has a prosthetic limb, that he has shrapnel scarring, that his mental health has now deteriorated, and therefore the account that he is likely to give of himself will appear suspicious and evasive to the CID in Sri Lanka.

11. The defendant rejected the representations in a letter dated 21 January 2009, in which the following was written:

> "....
>
> 14. You have stated one of the main reasons that the Immigration Judge did not accept your client would be of continuing interest to the authorities was '.... despite being an LTTE member, he was able to pass through checkpoints and the airport without any difficulties'.
>
> 15. In your letter of 12 January 2009, you have quoted various extracts from the BHC letters of 28 August 2008 and 1 October 2008. The quotes explain how a person who knows the layout of Colombo Airport can by-pass immigration controls and walk from landside to airside with virtually no checks and how the State Intelligence Service (SIS) can intervene in certain case specific situations.
>
> 16. However, in relation to the ease in which your client was able to leave Sri Lanka using his own passport, it is noted that the BHC letter of 28 August 2008 also stated:
>
> > 'At the check-in desks, passengers have to produce their passports to airline staff and go through check-in procedures. Having checked-in, passengers then proceed to another security gate, where they produce their passport and boarding card in order to enter the Department of Immigration & Emigration area. All passengers must complete a departure card and then queue at an immigration officer's desk. Passengers must present their passport, departure card and boarding pass to the immigration officer. The immigration officer will swipe the passport onto

> the IED Border Control System database .... Having passed through the immigration control, passengers proceed to the main departure lounge. There are further security checks conducted when passengers arrive at the boarding gate .... There is then a further boarding card check conducted by airline staff prior to entering the holding lounge. On many flights with European destinations and some with onward connections to Europe-N.America, Airline Liaison Officers from several overseas missions and/or trained airline document checkers make further checks on passenger's passports to check their admissibility in their destination countries.'

17. Furthermore, as stated at paragraph 25 of our letter dated 13 November 2008, the Immigration Judge did not accept that your client had been detained and ill-treated in Sri Lanka and to reiterate the findings of the Immigration Judge, it was stated at paragraph 36 of the appeal determination that 'I do not believe that the appellant was detained, escaped, detained on a second occasion and then escaped on payment of a bribe. I accept, of course, that the appellant may well have been a member of the LTTE, but I am satisfied that he left the LTTE and did not play an active military role since 1988'. The Immigration Judge further stated at paragraph 38, 'For the reasons which I have indicated, I do not believe that the appellant was detained and maltreated in Sri Lanka. I don't believe that he required to leave the country and I consider that his failure to claim asylum for a period of seven months detracts considerably from his credibility'.

....

20. It is noted that according to the medical report dated 3 September 2007 which was prepared by Dr S E Josse on your behalf and formed part of your client's appeal, it was not possible to confirm which scars were associated with contact with a mine and furthermore it was pointed out at paragraph 6 of the report that '.... there would be many other traumatic non-military causes for loss of limb such as following a road traffic accident, a fall from a height or problems following bony fractures'. At paragraph 7 it was stated that 'Two different types of ordnance injuries have been described and a number of scars and nodules have been found consistent with penetration of soft tissue by pieces of ordnance. I do not think it is possible to give an opinion as to which was caused by one type of ordnance and

which by the mine'."

In paragraph 21, the defendant reiterated the point which he had made in the decision letter of 13 November 2008 to the effect that the decision in LP established that the presence of scars would be of significance, only if there were other factors that would bring the individual to the attention of the authorities, such as being wanted or having an outstanding warrant or a lack of identity. It referred the claimant's representatives to the finding of the Immigration Judge at paragraph 33 of his determination. Finally, the issue of the claimant's mental health was dealt with in paragraph 22.

12. Removal directions were issued on 29 January 2009 for the claimant's removal on 3 February 2009.

The Submissions

13. In the written submissions, counsel for the claimant advances the following. The critical point in this case, when looking at the objective evidence, is that there is no power in law for those departing to be stopped by immigration or security officers, and thus being able to leave without being apprehended is not a valid indication of lack of state interest, as found by the Immigration Judge. Thus, it is submitted, this is why the evidence gives rise to a fresh claim in the context of the Immigration Judge's reasons for dismissing the claim. It is submitted that the defendant has disagreed with inferences to be drawn from the evidence, but has not determined whether a prospective Immigration Judge on appeal may find that there are reasonable prospects of success on appeal. The following points are highlighted. The claimant has a pronounced limp which is bound to attract attention on return. Because the office of the State Intelligence Agency is in the Immigration Arrivals Hall and officers from SIS usually patrol the arrivals area during the arrivals from a flight, if they notice a person being apprehended they will take details to see if the person is of interest to them and check on their computers. It is submitted that the claimant will be bound to be asked how he lost his leg and will say that he lost it in activating a mine during battle. He will either voluntarily or under duress make admissions as to the full extent of his involvement; he will be bound to admit that he has been a member of the LTTE for 17 years and then he would be subject to long-term detention and torture; and that he is a refugee. The last point is now withdrawn as being an error.

14. In light of the fact that the court had read all the papers, in oral submissions, counsel for the claimant, whilst relying on her written submissions, has concentrated on the following matters:

> (1) The approach to be taken by the court is that set out in ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6, in paragraphs 21 and 23 as follows:
>
> > "21. Notwithstanding that he might have failed to persuade your Lordships that the Secretary of State had made a material error in procedure, it remained open to Mr Satvinder Juss, who appeared for ZT, to seek to establish that the decision reached by the Secretary of State could not be sustained. In this context there

> was some debate as to the approach that should be adopted by the court when reviewing the Secretary of State's decision. Must the court substitute its own view of whether the claim is clearly unfounded, or has no realistic prospect of success, for that of the Secretary of State or is the approach the now familiar one of judicial review that involves the anxious scrutiny that is required where human rights are in issue? ZT is seeking judicial review and thus I would accept that, as a matter of principle the latter is the correct approach. I consider, however, that in a case such as this, either approach involves the same mental process.
>
> ....
>
> 23. Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."

The test is also as set out in R(L) v Secretary of State for the Home Department [2003] EWCA Civ 25 at paragraph 57 (which is quoted in paragraph 22 of ZT), as follows:

> "57. How, if at all, does the test in section 115(6) differ in practice from this? It requires the Home Secretary to certify all claims from the listed states 'unless satisfied that the claim is not clearly unfounded'. It is useful to start with the ordinary process, such as section 115(1) calls for. Here the decision-maker will (i) consider the factual substance and detail of the claim, (ii) consider how it stands with the known background data, (iii) consider whether in the round it is capable of belief, (iv) if not, consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not."

(2) The court should look at the case prospectively, as the Immigration Judge would look at the facts at the date of the hearing. The prospective assessment should be based on the current situation. It is impossible to assess prospective success without looking at the up-to-date position. To do otherwise would not be to give anxious scrutiny to the case.

(3) The finding in paragraph 28 of the determination has been met head on by the new material.

(4) The new material shows, that since 2008 there has been whole-scale war; it is clear from the recent events, since the defeat of the LTTE, that checks have intensified; and there is clear evidence that Tamil civilians are screened for LTTE connections.

(5) The court must consider whether the claimant would be at risk now. It is reasonably likely from a new objective element that he will be of interest to the authorities in the light of his injuries and the truthful answers he will give.

(6) It is open for an Immigration Judge now to come to a different decision on the facts as known.

The Defendant's Submissions

15. In written submissions, the defendant makes the following points in support of the claim that she did not act irrationally in rejecting the claimant's further representations. First, it is said that the material from the British High Commission does not engage with the findings which the Immigration Judge made in reaching his decision to dismiss the claimant's claim, and thus does not undermine the Immigration Judge's finding. The reliance of the claimant on the observation in the letter from the British High Commission that security at Colombo Airport is sufficiently lax to allow a person familiar with the lay-out of the airport to pass from landside to airside without a security check, does not assist the claimant, because he never suggested that this was his means of entering the airport. To the contrary, he gave evidence that his identity was not discovered because his names were in reverse order on his passport. The Immigration Judge took the view that the claimant had been able to pass through security at the airport, not because of an inaccurate passport but because he was of no interest to the authorities. Thus reliance on this aspect is misplaced.

16. Secondly, it is said that the claimant's evidence was not only that he had managed to pass successfully through airport security, but that he had also been able to pass through a number of roadside checks without notice on several different occasions (see paragraph 27 of the determination). The new material does not touch on that point, and therefore it cannot undermine the Immigration Judge's conclusion.

17. Thirdly, the Immigration Judge took account of the fact that the claimant had been a member of the LTTE, and of the issue of scarring. These matters were considered by him; they were endorsed by the Senior Immigration Judge; and they were also considered by the single judge in the High Court when declining to order reconsideration. In the absence of any further evidence, the findings in question are to be treated as sound.

18. Fourthly, no evidence has been provided as to the deteriorating mental health of the claimant. The objective evidence shows that a large proportion of the Sri Lankan population suffer from mental health problems. That factor alone cannot be treated as exposing the claimant to the risk of ill-treatment at the hands of the authorities.

19. Finally, it is submitted that the claimant's own story of being able, on several occasions, to pass through checkpoints without problem demonstrates that he would not be at risk.

20. In oral submissions today, Miss Busch, on behalf of the defendant, relies on her written submissions, but she also argues, that the claimant has taken the wrong approach in this case by coming to court with the up-to-date country information, which was not available at the time of the decision and which has not been put before the Secretary of State by way of representations. This court is a court of review, not a court of appeal. The claimant's contention would mean, that all that would need to happen in any case, is for a country situation to change, and that this would precipitate a further hearing before an Immigration Judge. The proper process, which is in place under paragraph 353 of the Immigration Rules, should not be circumvented. Any decision the court makes, must be in relation to the decision under challenge, and on the basis of the information on which the decision was based.

21. In response, counsel for the claimant submits that the court should take into account the up-to-date information, and that there is authority that post-decision events can properly be taken into account. The court asked counsel why, if reliance was placed on post-decision events, that was not raised in the amended grounds or the skeleton argument and why no authorities were produced. Counsel asked for time to obtain the authorities. The court indicated that counsel had the option to make an application for an adjournment, with the significant risk that a wasted costs order might be made, or to carry on. Counsel chose the latter course.

22. It is submitted by counsel that this case is one of the exceptions to the general rule: that if the case went before an Immigration Judge, he or she would be considering the situation at the time of the hearing, and thus this court should take into account the up-to-date position. The Secretary of State has a continuing duty to assess risk and thus, even if the claimant had not made representations about the up-to-date position, the Secretary of State should have taken it into account.

The Law

23. The relevant law and approach is conveniently set out in paragraphs 17 to 19 of the defendant's Detailed Grounds of Defence as follows:

> "17. In WM(DRC) v Secretary of State for the Home Department and Secretary of State for the Home Department v AR (Afghanistan) [2006] EWCA Civ 1495 the Court of Appeal considered the task of the Defendant when considering further submissions and the task of the Court when reviewing a decision of the Defendant that further submissions do not amount to a fresh claim.

18. In relation to the task of the Defendant, and in particular the second limb of the paragraph 353 test (ie whether the content of the submissions, taken together with the previously considered material, creates a realistic prospect of success, notwithstanding its rejection) at paragraph 7 Buxton LJ found that the threshold was 'somewhat modest'. The question for the Defendant is whether there is a realistic prospect of success in an application before an Immigration Judge, but not more than that. In AK (Afghanistan) v SSHD [2007] EWCA Civ 535 the Court of Appeal affirmed that the question which the Defendant must ask herself is 'whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim, on considering the new material together with the material previously considered'. Buxton LJ, in WM(DRC), said that in answering that question the Defendant must be informed by anxious scrutiny of the material. In other words, she must give proper weight to the issues and consider the evidence in the round.

19. In relation to the task of the Court, Buxton LJ confirmed that the decision remains that of the Defendant and the determination of the Defendant is only capable of being impugned on Wednesbury grounds (irrationality). Buxton LJ, at paragraph 11, said that when reviewing a decision of the Defendant the Court will ask two questions. First, has the Defendant asked herself the correct question? As stated, the question is, in an asylum case, whether there is a realistic prospect of an Immigration Judge, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return. Second, in addressing that question has the Defendant satisfied the requirement of anxious scrutiny? Buxton LJ concluded that 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 Defendant's decision."

The Findings of the Immigration Judge

24. Paragraphs 27 and 28 of the determination have already been set out. It is also to be noted that in paragraph 29 of the determination, the Immigration Judge found that the claimant claimed asylum seven months after having arrived in the country and this was inconsistent in the light of the claimant's explanations, which were rejected, of his having a genuine claim. In other words, by inference, it is inconsistent with the authorities having any interest in the claimant. It follows that it was not only the claimant's ability to pass through the various road checks and through the airport that formed the basis for the Immigration Judge's conclusions (see also paragraph 30).

25. As noted by the defendant, the Immigration Judge took into account the fact that the claimant is a Tamil, the fact of his injuries, and the expert report of Dr Smith about the country's situation, including the issues of scarring and disability. He also took into account a letter from a general practitioner which suggested some mental health problems which were linked to the claimant's treatment in Sri Lanka. These findings are set out in paragraphs 31 to 37.

The Fresh Evidence

26. The Country of Origin Information Report dated 26 June 2009 has been produced before the court. It was not available to the Secretary of State at the time of the decision in January 2009. It is well known that significant events have occurred in that country in the ensuing months. Many more passages than are cited in the letter of 12 January have been underlined and drawn to the court's attention. These were not relied on in the letter of 12 January 2009. I have, however, read the whole of the report. The passages relied on in summary relate to the following issues: the history of the conflict in Sri Lanka in recent months and the illegal detention of displaced Tamils; the herding of civilians into internment camps; the preparation by the government to bring charges against various professionals who had assisted the LTTE; the broad powers of the authorities under the emergency regulations; the risk to those Tamils who are in areas where the LTTE remained active; abductions of those who were suspected to be LTTE members or sympathisers, especially in the north of the country; the ease with which it is possible to obtain forged documents; the passages already alluded to in the letter dated 28 August 2008 from the British High Commission; and a letter from the British High Commission dated 22 January 2009 (after the decision of the Secretary of State). As already noted, reliance was placed on limited passages of the British High Commission's letter of 28 August. The letter of 28 August deals with exit and entry procedures. It also deals with the treatment of returning failed asylum seekers. Paragraph 33.10 (which was not relied on by the claimant, but which the Secretary of State had available) makes clear in the letter of 28 August 2008, that the computers at the airport are not linked to any national database and that any checks on detainees are conducted over the telephone. The computers contain records and photographs of people who have been returned to Sri Lanka, records of suspects who have been arrested and charged with offences, and the court reference numbers. It seems (according to what the Commissioner was told) that the staff had not received adequate training in the use of computers. There were no electronic fingerprint database or facility to read fingerprints at the airport. The letter also made clear that the travel documents that would be issued by the Sri Lankan High Commission in London for a returning failed asylum seeker is an acceptable identity record for the purposes of presentation at checkpoints to the police (paragraphs 33.12 and 33.13).

27. For the sake of completeness, the letter of 26 January 2009 deals with observations of returned asylum seekers. Returnees were questioned by State Intelligence Services and CID for about fifteen to twenty minutes. Photographs were taken of them. No fingerprints were taken and no computer records were checked or updated. Following the interviews, which were conducted in public, they were taken back to the immigration hall and handed their emergency travel documents, which were endorsed with an arrival stamp. The atmosphere was said to be relaxed throughout. Each department kept to its own procedures; there was no collusion with any other department.

28. The letter dated 1 October 2008, which was before the Secretary of State, dealt with scarring. It made it clear that there was no recent evidence to suggest that examinations for

scarring were routinely carried out, and that in any event the security forces only conducted them when there were other reasons to suspect an individual of having been involved in fighting or military training.

29. This information puts the passages relied on by the claimant into their proper perspective. It is to be noted that the findings are broadly supportive of the Immigration Judge's findings and the conclusions of the defendant. However, for reasons which I shall give shortly, the details of the letter of 22 January 2009 will not be taken into account, as it post-dates the decision of the Secretary of State which is under challenge.

The Decision

30. I adopt the approach set out in ZT. As is noted in that case, the same mental process is involved as that employed by the Secretary of State. The first issue to deal with, is whether or not all the material relied on, which was not available at the time to the Secretary of State, can now be taken into account.

31. The challenge is one to the decision letter of 21 January 2009. I have come to the conclusion that, in the absence of any authority to the contrary, this court is concerned with a review of that decision in the light of the material then in front of the Secretary of State. It is an unattractive argument to suggest that a decision should be characterised as irrational or unreasonable at the time it was taken, based on material which has only subsequently become available. A decision might later be shown to be wrong in the light of further information, but the test is clear. It is the decision letter based on what was in front of the Secretary of State that the issue of irrationality or unreasonableness has to be considered.

32. As indicated, I have read all the relevant documentation, including the previous submissions and responses by the Secretary of State. All issues raised by the claimant have been addressed by the defendant in the various communications. In my judgment, and applying the test as set out above, it is not arguable that the defendant has acted irrationally or unreasonably in a Wednesbury sense in finding in the letter of 21 January, some of which I have quoted, that the further submissions, taken together with the previously considered material, would not create a realistic prospect of the claimant succeeding before an Immigration Judge, bearing in mind the need for anxious scrutiny, namely the need to give proper weight to the issues and to consider the evidence in the round.

33. I have reached that conclusion for the reasons set out by the defendant, the additional reasons rehearsed during the discussion on the Immigration Judge's findings, and the fresh evidence. In summary, the Secretary of State set out the findings of the Immigration Judge, considered the fresh evidence and submissions, but also took into account other parts of the documents relied on, which put the claimant's submissions into some perspective. It was noted, rightly, with regard to the submission about the deteriorating mental health of the claimant, that no evidence of this deterioration has been provided. All that was available to the Secretary of State was the original letter from the general practitioner, which the Immigration Judge had already considered. The Secretary of State, however, went on to consider the position of mental health sufferers generally in Sri Lanka as a result. In my judgment, all matters are dealt with comprehensively and cogently.

34. It follows that this application for judicial review is refused.

MISS BUSCH: Thank you very much. May I ask for the claimant to pay the defendant's costs, to be assessed if not agreed?

MRS JUSTICE DOBBS: Yes, but who is going to pay them? Who are you asking for costs against?

MISS BUSCH: The claimant.

MRS JUSTICE DOBBS: Any observations?

MISS JEGARAJAH: Just that this is a publicly funded matter. It is all coming from the same pot. I cannot oppose the application.

MRS JUSTICE DOBBS: Miss Busch, does it make any difference -- just allowing you a response to that? What, if any, difference does that make?

MISS BUSCH: It does not really. I cannot recall the precise statute provision but, as I understand the position, if the claimant is publicly funded, if you make an order for costs it cannot be enforced without a further order of the court.

MRS JUSTICE DOBBS: If I am to make an order, I need to know exactly where we stand and that I make the correct order.

MISS BUSCH: There is a standard form of order.

MRS JUSTICE DOBBS: You have drawn it to my attention that the claimant is publicly funded, and therefore I want to make sure that the form of order is a proper one. In principle it is right that the winner should have their costs. I want to make sure I have the form of order right. I will make the order in these terms: the defendant is to have its costs in line with the order that is made against a publicly funded person.

MISS JEGARAJAH: My Lady, may I apply for a detailed costs assessment as well?

MRS JUSTICE DOBBS: Yes. Thank you both for your assistance.