Neutral Citation Number: [2008] EWHC 3157 (QB)

Case No: CO/665/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2008

Before :

LORD CARLILE OF BERRIEW QC
Sitting as a Deputy Judge of the High Court

- -

Between :

THE QUEEN
ON THE APPLICATION OF

MR THARUMAKULASINGHAM VEERAWAGU **Claimant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -
- -

Jonathan Martin (instructed by **Indra Sebastian Solicitors**) for the **Claimant**
Deok Joo Rhee (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing date: 11 December 2008

- -

Judgment

Lord Carlile of Berriew QC :

Background

1. The issue in this case is whether the Secretary of State for the Home Department has acted unlawfully in finding that the Claimant's renewed claim for asylum is not a "fresh claim".

2. The Claimant is a 50 year old Sri Lankan national. He is a medical practitioner, qualified in both Russia (where he obtained his primary qualifications) and Sri Lanka.

He arrived in the United Kingdom on the 26th April 2000 and claimed asylum on the grounds that he feared persecution in Sri Lanka.

3. He is a Tamil from the North of the island. His original application for asylum was founded on fear of both the Tamil LTTE (claiming that the LTTE would consider him to be a traitor) and the Sri Lankan authorities (claiming that in the past they had arrested, detained and tortured him as an LTTE activist, and might well do so again).

4. His application for asylum was refused by the Secretary of State on 2 February 2004, and his appeal against that refusal was dismissed (on both asylum and human rights grounds) by an immigration judge in a Determination promulgated on the 19th April 2005.

5. It was accepted that he is a Tamil, and that his account of his past history was credible. That history includes a period of 19 days' detention, of which part was spent in hospital as a result of injuries caused by the officials who detained him. He was released on payment of a bribe.

6. However, in relation to his claimed fear of persecution by the Sri Lankan authorities, the Determination stated: *"[o]n the objective material and the cases as to bribery, … it is unlikely that there would be any other interest in him or that he would be targeted as an escapee"*.

7. In relation to his alleged fear of persecution by the LTTE, the judge held: *"[o]n his account he had helped the Tamils. He had supported them as early as 1985. It is not plausible that they would pursue him as a traitor"*.

8. Shortly after the Determination, the Claimant submitted further representations (by letter of the 8th August 2005). He complained of delay by the Secretary of State in considering his claim for asylum, and raised details of his activities in the UK. He asked for discretionary leave to remain and humanitarian protection. By a letter dated the 2nd October 2006, the Secretary of State, having considered those representations refused the request; and issued removal directions on the 24th January 2007.

9. In these circumstances the Claimant sought to challenge the Defendant Secretary of State's decision of the 2nd October 2006 (and the removal directions). The grounds of claim highlighted the heightened security situation in Sri Lanka, and referred to objective evidence in support of the increased risks consequent on that situation.

10. The Secretary of State responded by a letter dated the 27 February 2007.

11. The Claimant contended that the Defendant acted irrationally in refusing to accept the new representations as a fresh claim, and has sought Judicial review of that refusal.

12. Permission to apply for Judicial Review was refused, on the papers, by Wyn Williams J on the 4th May 2007. He commented: *"The summary grounds of opposition contain compelling reasons why this claim is bound to fail. I can detect no arguable unlawfulness in the decision of 24.01.07."*

13. On the 6th August 2007 the Asylum and Immigration Tribunal [AIT] promulgated its decision in **LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG** [2007]

UKIAT 00076. This subsists as a country guidance determination of the AIT. The Tribunal elaborated on the risk factors relevant to the assessment of risk of persecution at the hands of the Sri Lanka authorities, consideration of which might be relevant for the purposes of returns to Sri Lanka.

14. On the 12th October 2007, after an oral hearing, Munby J granted permission to apply for Judicial Review, and gave leave for amended grounds of claim to be filed together with supporting evidence.

15. It was in light of the decision in **LP** that the permission was granted by Munby J. The learned Judge indicated that, but for the decision in **LP**, he would have refused permission in this case. This change of circumstances in Sri Lanka is the effective new material relied upon, rather than any changes personal to the Claimant.

16. The amended grounds were dated the 24th October 2007.

17. On the 11th December 2007 the Secretary of State wrote to the Claimant in response to the amended claim form, and in the light of **LP**. She maintained her refusal.

18. On the 10th June 2008 the AIT promulgated its determination in **AN & SS (Tamils – Colombo –risk?) Sri Lanka CG** [2008] UKAIT 00063. This too is a country guidance case. On the 27th July 2008 the European Court of Human Rights gave its judgment in the Tamil/Sri Lanka related case of **NA v United Kingdom** [Application no. 25904/07].

19. On the 20th November 2008 the Secretary of State wrote again to the Claimant, refusing to change her decision. She purported to have considered all the grounds and material up to date – facts, and case law.

20. The risk of persecution at the hands of the LTTE was not pursued in the hearing before me. Nor was an assertion of the relevance of the Claimant having visible scars. Whilst in some cases those might well be material considerations, I need not deal with them in this Judgment.

The role of the Secretary of State

21. The question that the Secretary of State has to ask herself is founded upon **The Immigration Rules [HC 395]. Rule 353** provides:

> *"When a human rights or asylum claim has been refused 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 which 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."*

22. A "fresh claim" gives rise to a free-standing right of further application to an adjudicator.

23. The Court of Appeal in **WM (DRC) and AR v SSHD [2006] EWCA Civ 1495** described the test to be used in assessing the Defendant's decision on further submissions (Buxton LJ at paragraph 7):

> "*The rule only imposes a **somewhat modest test** that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the **anxious scrutiny** of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in Bugdaycay v SSHD [1987] AC 514 at p 531F".* [the emphasis is mine]

24. The decision as to whether or not there a "fresh claim" is capable of being impugned only on *Wednesbury* grounds, albeit in asylum cases after *"anxious scrutiny"* (see ***Cakaby v SSHD*** [1999] Imm AR 176; ***WM v SSHD*** [cited above] at paras 10, 13-19). Collins J has described the realistic prospect of success test as *"a low one"* (**Rahimi** [2005] EWHC 2823 (Admin)). Buxton LJ, in the Court of Appeal in **WM**, commented:

> *"16. [...] First, for a court to say that it can adopt its own view because it is in as good a position, as well qualified, as the original decision-maker is the language of appeal, and not of review. Although courts, for instance this court in Razgar at its para 3, have stressed that the approach under consideration does not and should not lead to a merits review, it is very difficult to see how that is not the reality of a process in which the court directly imposes its own view of the right answer. If Parliament had intended that that should be the approach it would have provided for an appeal. Mr Patel, for the Secretary of State, was justified in saying that this was not merely a pedantic but more importantly a constitutional issue, that the decision-making power should rest in the Secretary of State, however stringent a review the court might thereafter apply to it.*

> *17. Second, at least one strand in the jurisprudence under discussion is of the view adopted in R(L) that the question of whether a claim is clearly unfounded can only have one answer: which is therefore going to be the same answer whether it is given by the Secretary of State or by the court. But that is not the case, and is not suggested to be the case, with the process of assessment that is involved in determining whether a claim has a realistic prospect of success.*
>
> *18. Third, it is with deference too simple to assume, as did this court in Razgar and Tzolukaya, that the approach in those cases will necessarily lead to the same answer as a review informed by the need for anxious scrutiny. In view of the demands of the latter there may not be many cases where a different result is achieved, but in borderline cases, particularly where there is doubt about the underlying facts, it would be entirely possible for a court to think that the case was arguable (the formulation used in Razgar), but accept nonetheless that that it was open to the Secretary of State, having asked himself the right question and applied anxious scrutiny to that question to think otherwise; or at least the Secretary of State would not be irrational if he then thought otherwise."*

25. The nature of the "*somewhat modest*" test was considered further by Collins J in **R (on the application of Lutete and others) v SSHD [2007] EWHC 2331 (Admin)**. At paragraph 13 of the Judgment he said:

> *"The law on fresh claims has recently been reconsidered by the Court of Appeal and Buxton LJ in the case of WM [2006] EWCA Civ 1495 has made it clear that the threshold is as he put it "relatively modest". In fact the test would appear to be whether the Secretary of State can reasonably take the view that the evidence which is produced will not be accepted. I emphasise "will not be accepted", because if it might reasonably be accepted then it would be wrong for the Secretary of State to decide for herself that the evidence which she has before her which supports her view is to be preferred. It is not for her to make that decision, particularly where the matter is already before a tribunal. If in reality the fresh material, whether or not it was capable of being produced at an earlier stage, is such as might reasonably result in a different view being taken, then it must be regarded as a fresh claim and there should in due course, if the claim is rejected, be a right of appeal given. That is a situation in an ordinary case. As I say, here, the situation is a little different in as much as the determinative decision will be that of the AIT in due course."*

26. In the light of the authorities, for the purposes of this Judgment I have asked myself:

i) Was there a fresh claim, in the sense that it was significantly different from material previously considered by the Secretary of State?

ii) In deciding the answer to that question, and on the totality of the material, did she apply the relatively modest test of asking herself whether the material created a realistic prospect of an adjudicator, considering the matter afresh, finding that there is a real risk of the Claimant being persecuted on return to Sri Lanka?

iii) In answering (i) and (ii), did the Secretary of State apply to the sum of the submissions the anxious scrutiny required in this exercise of her executive power?

27. If the Secretary of State failed to abide by the process described by the questions set out in paragraph 26 above, it is likely that her decision would be held to be irrational, and therefore the Claimant would succeed in his application for Judicial Review.

The danger to the Claimant in Sri Lanka

28. In paragraphs 13 and 18 of this Judgment I have referred to the recent country guidance cases on the situation in Sri Lanka, and to the European Court of Human Rights decision in **NA**. The current position there can be summarised briefly. The long-running action by the LTTE against the Sri Lanka government has involved terrorism on a large scale, including suicide bombings. This has led to an extremely tense security situation in the island, and at times well-documented abuse of power by the authorities in the face of such terrorism. A cease-fire was brokered through the good offices of the government of Norway as mediator, via that country's extraordinary diplomatic presence and efforts in Sri Lanka. Unfortunately, that cease-fire has broken down, and recently there has been increased activity by the LTTE, and consequently by the government against the LTTE. That is the setting in which any Sri Lanka case is to be considered today.

29. Within the current dangerous setting, it is inevitable that the authorities in Sri Lanka, whether in relation to arrivals at airports and seaports or in street situations, will be paying enhanced attention to Tamils from the North (the present Claimant being one such): this increases the risk of unlawful or arbitrary detention, and of persecution. I have taken this into account.

30. These factors were considered as recently as the 3rd December 2008 by Wyn Williams J in **R (on the application of Senathirajah Lenin) v Secretary of State for the Home Department** [2008] EWHC 2968. This Court is indebted to Wyn Williams J for his analysis of the Sri Lanka situation, and of the recent case law. The facts have points of similarity to the present case. I adopt his approach, and have been assisted particularly by his Judgment from paragraphs 21 to 33. His comments included:

> "21. In paragraph 161 of its determination the Tribunal records:-
>
> '[Counsel for the Appellant] identified the 12 principal risk factors for a person returned as a failed asylum seeker from the UK to Sri Lanka who fears persecution or serious ill-treatment

from the Sri Lankan authorities. We list these twelve factors and later use them as a helpful manner of setting out our country guidance findings. The risk factors identified are:-

(i)Tamil ethnicity.

(ii)Previous record as a suspected or actual LTTE member or supporter.

(iii)Previous criminal record and/or outstanding arrest warrant.

(iv)Bail jumping and/or escaping from custody.

(v)Having signed a confession or similar document.

(vi)Having been asked by the security forces to become an informer.

(vii)The presence of scarring.

(viii)Returned from London or other centre of LTTE activity or fund-raising.

(ix)Illegal departure from Sri Lanka.

(x)Lack of ID card or other documentation.

(xi)Having made an asylum claim abroad.

(xii)Having relatives in the LTTE.'

Between paragraphs 206 and 222 the Tribunal sets out its view as to the significance to be attached to these factors. Between paragraphs 231 and 240 it sets out a summary of conclusions. I quote selectively from these paragraphs:-

'236. Other issues which require careful evaluation involve the previous attention paid to the appellant by the Sri Lankan authorities. Questions of whether the appellant has been previously detained and for how long will be significant, as will the reasons for the detention. A short detention following a round up may be of little significance; a longer detention as a result of a targeted operation will be much more significant. The question of release and how that came about may be important. It should be recognised that the procurement of bribes is a common occurrence in Sri Lanka and that the release following payment of a bribe is not necessarily evidence of any continuing interest. Care should be taken to distinguish between release following the payment of a bribe and release following the grant of bail. Care should be taken in the use of language here. Release on payment of a bribe, and release on bail with a surety could be confused. Both

forms of release follow discussions about, and possibly payment of, money. The evidence is that police in Sri Lanka do, in appropriate circumstances, grant bail. … If the tribunal is satisfied the appellant has jumped bail … it is necessary to assess the reasons for which bail was granted in the first place.

…

238. During the course of the determination we have considered a list of factors which may make a person's return to Sri Lanka a matter which would cause the United Kingdom to be in breach of the conventions. As in previous country guidance cases, the list is not a check-list nor is it intended to be exhaustive. The factors should be considered both individually and cumulatively... [The Tribunal then set out the risk factors as identified above]

239. When examining the risk factors it is of course necessary to consider the likelihood of an appellant being either apprehended at the airport or subsequently within Colombo. We have referred earlier to the wanted and watch lists held at the airport and concluded that those who are actively wanted by the police or who are on the watch list for a significant offence may be at risk of being detained at the airport. Otherwise the strong preponderance of the evidence is that the majority of the returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment.'

22. **AN&SS** contains important country guidance. The guidance which is important in this case is summarised in paragraph 122 of the determination.

'RISK IN COLOMBO FROM THE SECURITY FORCES The National Intelligence Bureau in Sri Lanka maintains a computerized database of persons who are thought to pose a threat, while immigration officers at Bandaranaike International Airport use a computer system which can flag up whether a newly-arrived passenger is on the "Wanted List" or "Stop List". The CID at the airport will be alerted when this happens. But there is no firm evidence to support the contention that everyone who has ever been detained by the police or army is likely to be on the database. Failed asylum seekers who arrive in Colombo without a National Identity Card should be able to get a new one on production of a birth certificate, which is usually easy to obtain. If an NIC cannot be issued, the UNHCR will issue a substitute which is generally acceptable. Those newly arrived in Colombo who do not yet have an ID card should, if questioned about their ID, be able to establish that they have recently come from abroad.'

> The summary conclusion … is based upon paragraph 107 of the determination. That reads:-
>
> *'We think that Dr Smith has allowed himself, as he did with the LTTE database, to slip from the idea that it would be useful to have certain information on a database to a prediction that the information must be on a database. We think it intrinsically unlikely that everyone who has ever been detained by the authorities in the course of the Sri Lankan conflict, or at least in the last 10-15 years, is now on a computer database which is checked by the Immigration Service when failed asylum seekers arrive at the airport, and is checked by the police or army when people are picked up at road-blocks or in cordon-and-search operations. The evidence suggests, on the contrary, that the database is far narrower than that. When Tamils are picked up in Colombo the authorities want to know why they have come and what they are doing, if they are not long-term residents of the city. There are no reports of people being detained and perhaps sent to Boossa camp at Galle because they were once held for questioning in Jaffna or Batticaloa years before. As for arrivals at Bandaranaike International Airport, the 'Watch List' and the 'Stop List' clearly contain the names of people who are 'seriously' wanted (to use a phrase of Mr Justice Collins) by the authorities. Equally clearly, the evidence does not indicate that they contain the names of everyone who has ever been questioned about possible knowledge of, or involvement in, the LTTE. "The majority of Sri Lankan asylum seekers coming to this country claim to have been detained at some time by the authorities, but there are no reports of any being detained at the airport on return because they were once held for questioning years ago and then released.' "*

31. In **Nishantbar Thangeswarajah and Others** [2007] EWHC 3288 (Admin), at paragraph 10 to 12 of his Judgment Collins J made the following observations about the 12 factors listed in **LP** and also set out above in the extract from **Lenin**:

> *"(1). …Tamil ethnicity by itself does not create a real risk of relevant ill treatment. Accordingly some of these so-called risk factors are in reality, as it seems to me, background…factors.*
>
> *(2). That "…if there is a factor which does give rise to a real risk that the individual will be suspected of involvement in the LTTE" background factors add to the significance of that risk.*
>
> *(3).(a) Tamil ethnicity;*
>
> *(b) illegal departure from Sri Lanka;*
>
> *(c) lack of ID card or other documentation;*

> *(d) an asylum claim made abroad; are factors which neither "in themselves, or even cumulatively, would create a real risk".*
>
> *(4).(a) A previous record as a suspected or actual member or supporter "at a level which would mean the authorities" retain an interest is "likely to create a risk".*
>
> *(b) a previous criminal record and an outstanding arrest warrant are "highly material and clearly capable of …producing a real risk".*
>
> *(5). (a) Bail jumping and/or escaping from custody are "…on the face of it highly material.*
>
> *(b) Release on payment of a bribe without more would not indicate that there was an ongoing risk because it would be likely to be recorded as a release",*
>
> *(c) "…whether the nature of the release was such as to lead to a risk" will depend upon "the individual circumstances".*
>
> *(d) "A signed confession or similar document obviously would be an important consideration" (para.12)*
>
> *(6). "… having been asked by the security forces to become an informer can be of some importance …" (para.13).*
>
> *(7). Scarring was, generally speaking, to be "regarded as confirmatory rather than a free-standing risk element".*
>
> *(8). Having relatives in the LTTE is something "that one can well understand might produce suspicion."*

32. Finally (para.16) Collins J observed the test was:-

> *"…whether there are factors in an individual case, or one or more, which might indicate that the authorities would regard the individual as someone who may well had been involved in the LTTE in a significant fashion to warrant his detention or interrogation."*

33. In R(Sivanesan) v Secretary of State for the Home Department [2008] EWHC (Admin) 1146 Sir George Newman said:-

> *"41. The … central question is whether a real risk exists that the authorities would suspect the Claimant of having a sufficiently significant link to the LTTE which could cause him to be detained on his return to Sri Lanka.*
>
> *"42. The question must be answered after a thorough assessment has been made of the findings made by the judge in connection with the original claim. This is required because a*

> *fresh judge will take the original conclusion as a starting point. In the cases now pending, depending as they do on changed circumstances in Sri Lanka, the assessment should be directed at the conclusions which have been reached which establish the profile of the claimant. It is likely that the claimant (or his lawyers) will have advanced the profile by reference to a number of risk factors. Each case must be considered on its own facts. The factors in LP are not exhaustive but are ones commonly found that have been present in many cases. They may be reflected in any case in a different manner to that described in LP. The requirement that each case should be considered on its own facts means that the formulaic repetition of a conclusion in LP will not be sufficient if differences of detail are present. Where the factors capable of showing a connection of significance to the LTTE are relied upon, a careful assessment of the detail will be required. The judgment of Collins J provides clear guidance on the line between real risk factors and background factors. That said, a combination of factors could materially affect the conclusions. It must always be remembered that the requirement of anxious scrutiny means addressing the relevant representations which have been advanced. A failure to do so will not be saved by repetitive citation of principle from cases or sections of a Determination which are arguably in point without the reasons for referring to the sections being stated."*

34. In **NA** the European Court of Human Rights gave its approval to the approach of the AIT in **LP**. It noted that there had been deterioration in the security situation in Sri Lanka and that this determination had been accompanied by an increase in human rights violations on the part of the Sri Lankan Government. However, the deterioration and corresponding increase in human rights violations did not create a general risk to all Tamils returning to Sri Lanka. Accordingly, each case had to be considered on an individual basis. The European Court accepted the legitimacy of carrying out an individual assessment by reference to the list of risk factors identified in **LP** provided the risk factors were not taken to be a checklist or exhaustive and provided that the assessment of whether there was a real risk in any one case was undertaken on the basis of all relevant factors. In paragraph 131 of its judgment the Court decided that a likelihood existed of systematic torture and ill treatment by the Sri Lankan authorities of Tamils who would be of interest to them in their efforts to combat the LTTE. Accordingly it concluded in paragraph 133:-

> "*… in the context of Tamils being returned to Sri Lanka, the protection of Article 3 of the Convention enters into play when an applicant can establish that there are serious reasons to believe that he or she would be of sufficient interest to the authorities in their efforts to combat the LTTE as to warrant his or her detention and interrogation.*"

35. **NA** provides a very useful set of signposts for the judge having to deal with the very differing facts of each individual Sri Lankan Tamil case. It is only to avoid inordinate

length that I do not repeat the material parts of the Judgment fully here: it is an essential reference, which I have taken into account fully.

Applying the relevant law to this case

36. In the present case, as submitted before me, the Claimant relies on the following risk factors from the list identified in **LP**:

> *"(i) Tamil ethnicity.*
>
> *(ii) Previous record as a suspected or actual LTTE member or supporter, including detention for 19 days and release following payment of a bribe being injured by the authorities.*
>
> *(viii) Return from London or other centre of LTTE activity or fund raising.*
>
> *(x) Lack of ID card or other documentation.*
>
> *(xi) Having made an asylum claim abroad."*

37. Under **HC 395 Rule 353,** there is a two-stage test, as summarised in paragraph 26 above. In my judgment, whilst there was new material from the country guidance cases, and thereby a fresh claim, the Secretary of State was correct in asserting that there was no realistic prospect of a finding of persecution. This involves a fact-based assessment. I deal below with the issues supporting my conclusion.

38. In relation to factors (i), (viii), (x) and (xi) the Secretary of State submits that she paid full attention to the changed situation in Sri Lanka as described in the country guidance cases.

39. She referred the Court to the following in particular:

> *"(i) Tamil ethnicity will not of itself be sufficient to show a well founded fear of persecution"*. She points to **LP** paras 207-208, 234 and 240.
>
> …
>
> *(viii) return from London or other centre of LTTE activity or fund-raising is a highly case-specific factor. In particular, the individual would need to show the extent to which the Sri Lankan Embassy in the UK was aware of his activities in the UK and was thus likely to have passed on information to Colombo when he was being deported or removed:* **LP** para 218. As such, the mere fact of return from London would not be sufficient to show a well-founded fear of persecution;
>
> …

> *(x) as to lack of an ID card, "an appellant would need to show why he would be at continuing risk, and that he cannot reasonably be expected, or able, to acquire a new identity card":* **LP** para 220. In this respect, the Claimant has failed to show how or why he would not be able to acquire a new identity card on arrival;
>
> *(xi) in relation to having made an asylum claim abroad, it was acknowledged that it is a reasonable inference that application forms for replacement passports and travel documents may alert the Sri Lankan High Commission in London and that that information may be passed on. However, this factor alone would not place any returning failed asylum seeker at a real risk of persecution or serious harm on return: 'Again, it would make but a contributing factor that would need other, perhaps more compelling factors added to it before a real risk of persecution or serious harm could be established':* **LP** para 221.

40. The Secretary of State contends that the existence/nature of any past records will only be of relevance where he is detained and his records checked. In so far as detention may take place upon arrival in the airport at Colombo, the AIT in **LP** held (at para 239):

> "*When examining the risk factors it is of course necessary to also consider the likelihood of an appellant being either apprehended at the airport or subsequently within Colombo. We have referred earlier to the Wanted and Watched lists held at the airport and concluded that those who are actively wanted by the police or who are on a watch list for a significant offence may be at risk of being detained at the airport. Otherwise the strong preponderance of the evidence is that the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment.*"

41. In the present Claimant's case, the Secretary of State does not accept that he would be included on a wanted or watched list at the airport. She emphasises, correctly, that the facts vary from cases to case, and within the applicable legal framework each case is to be judged on its merits.

42. In this respect the Secretary of State has had regard to the low level nature of the Claimant's involvement with the LTTE (and the AIT's conclusions that he is unlikely to be of any real interest to the Sri Lankan authorities). Furthermore, she says that the Claimant has not identified any factors other than the general deterioration of the security situation in Sri Lanka to suggest that this critical finding of the AIT needs to be revisited.

43. The Secretary of State contends that none of the other risk factors on which the Claimant relies, either alone or in combination, show that the Claimant has a well-founded fear of persecution.

44. In relation to the past records of detention, the following passages of the AIT's determination in **LP** are relevant:

> *"Previous Record as a Suspected or Actual LTTE Member or Supporter*
>
> *Dr Smith, at paragraph 121 of his second report, identified this as a risk element noting that the appellant in this case had been detained on suspicion of being an LTTE member and then released on bail. Dr Gunaratna went further to state that (at paragraph 5.2) it was very likely the Sri Lankan Government would have a record of the appellant, firstly because he had been arrested and jumped bail, and secondly because Sri Lankan Government records would state he was a supporter of the LTTE.*
>
> *210. […]*
>
> *Previous Criminal Record and/or Arrest Warrant*
>
> *211. Both parties appear to agree that returning a young Tamil with an outstanding arrest warrant, validly found in the facts will be a significant factor. ….] However it does not mean, of itself, that the applicant has a well founded fear of persecution (or other serious harm) on return to Sri Lanka for that reason alone.*
>
> *Bail jumping and/or Escape from Custody*
>
> *212. The background information provided to us here indicated that those who had jumped bail would be at a real risk of being detained either at the airport or if they later came into contact with the Sri Lankan authorities. […]*
>
> *213. […] We agree with the logic that those who have been released after going to court and released from custody on formal bail are reasonably likely, on the evidence, to be not only recorded on the police records as bail jumpers but obviously on the court records as well. […] Clearly punishment for bail jumping will not make someone a refugee. As we have said, the risk of detention and maltreatment will depend on the profile of the individual applicant.*
>
> *214. The situation however, in respect of those who have not been to court and may have been released after the payment of a bribe we do not consider falls into the same category. Much will depend on the evidence relating to the formality of the detention (or lack of it) and the manner in which the bribe was taken and the credibility of the total story. If the detention is an informal one, or it is highly unlikely that the bribe or "bail" has been officially recorded, then the risk*

> *level to the applicant is likely to be below that of a real risk. […]"*

45. In the circumstances of the present case, the Secretary of State submits that there is no real risk that the authorities' records will hold details of the Claimant indicating that he is of continuing interest. She says:

> *"(1) in particular, it is relevant to have regard to the low level nature of his involvement with the LTTE and that the Adjudicator found that it is unlikely that that there would be any other interest in him; "*
>
> *(2) whilst the authorities may be able to access computerised records at the airport, it is not accepted that the authorities would have on record details of all those who had previously been detained on suspicion of being an LTTE support and released without charge;*
>
> *(3) the fact that the Claimant had been released only on payment of a bribe is not a feature that would give further weight to the Claimant's argument regarding risk of return. As observed by Collins J in **Thangeswarajah**, release on payment of a bribe without more would not of itself indicate that there was an ongoing risk because it would be likely to be recorded as a release, not as a bribe. The fact that he had been released upon the payment of a bribe would tend to show that any record of his arrest would be likely to show that he had been released as being of no further interest to the authorities."*

46. Whilst it is accepted by the Secretary of State that the rigours of the checks carried out at the airport may vary depending on the security concerns of the authorities, it is contended that the Secretary of State was entitled to consider that there is not a real risk that the Claimant will be detained and interrogated upon arrival.

47. To the contrary, the Claimant submits that Immigration Judges in fact have a very wide discretion in deciding the significance of previous detentions and whether they might have led to a record having been created, thereby affecting what happens at the port of arrival.. He relies on the issues evaluated in **LP**, as discussed by Wyn Williams J in **Lenin** (see above).

48. In my judgment, on the facts of this case there is no real risk of the Claimant suffering unacceptable intervention on arrival. The analysis of the issues made by the Secretary of State is unimpeachably correct.

49. I have been urged to consider the risks of persecution after street arrest or stop and search as being possibly more significant than from intervention at the airport of arrival. I do not regard this as logical. Airport processes permit of immediate or near immediate search of watch and stop lists, intelligence material, criminal records and the other like data. An airport stop would involve more documentary rigour than a casual intervention by police in the street, and therefore would be more likely to

reveal that the Claimant had been held in custody and released on a previous occasion. At worst, I adjudge the airport and street situations as approximating to one another.

50. The absence of an identity document was discussed before me. On the evidence the Claimant would have no appropriate Sri Lankan identity document on return there. However, it was accepted that an identity document can be obtained – and that if there was delay in local bureaucracy an acceptable document can be obtained from a local office of the United Nations' UNHCR (the UN having a significant presence in Colombo on account of the political troubles there). Given that the Claimant is a medical practitioner with local qualifications, who in the past has worked as a doctor there, his identity could be checked easily. I consider this issue to be of no significant weight.

51. In this case there are three letters of assessment, respectively dated the 27th February 2007, the 11th December 2007 and the 20th November 2008. As submitted by the Secretary of State, the correct approach is to take the cumulative totality of those letters in assessing whether she applied the appropriate test to the facts of this particular case, each such case having to be considered on its own facts.

Conclusions

52. Applying the legal principles and guidance set out in detail above, in my judgment the Secretary of State was correct to conclude that that this Claimant was not at risk of persecution and/or treatment in breach of his human rights notwithstanding the worsened situation in Sri Lanka. She was justified in concluding that there was no reasonable prospect that any different view would be taken by an Immigration Judge. In considering these matters the Secretary of State considered the further submissions made by the Claimant in the light of the changed country conditions appertaining to Sri Lanka.

53. I find that in considering the totality of the material, she applied the "*relatively modest*" test of asking herself whether the material created a realistic prospect of an immigration judge, considering the matter afresh, finding that there is a real risk of the Claimant being persecuted on return to Sri Lanka? In asking herself those questions, the Secretary of State used the anxious scrutiny required in this exercise of her executive power. Her decision cannot be characterised as irrational.

54. Accordingly, I have reached the conclusion that this claim fails.