

Heard at Field House YP (Maintenance - Detention Records) Sri Lanka CG [2003] UKIAT
00145

On 7 May 2003
Written 9 May 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination Notified

12.11.03

Before

Mr S L Batiste (Chairman)
Mr C A N Edinboro
Ms S S Ramsumair JP

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Respondent

DETERMINATION AND REASONS

1. The Respondent is a citizen of Sri Lanka. The Appellant appeals, with leave, against the determination of an Adjudicator, Mr N K M Lawrence, allowing the Respondent's appeal against the decision of the Appellant on 28 June 2002 to issue removal directions and refuse asylum
2. Mr D Saville, a Home Office Presenting Officer, represented the Appellant. Ms M Shaw represented the Respondent.
3. There is no dispute over the specific facts relevant to this appeal. They can be summarised as follows. The Respondent is a single young Tamil male from the village of Kodikamam. In 1996 the army began to search for one of his brothers, Thevakumar, on suspicion of his being an LTTE supporter. In 1998 this brother sought asylum in the UK. On 26 June 1998 the army arrested the Respondent and his father to interrogate them under torture about Thevakumar's whereabouts. The father was released after three days and the Respondent after fifteen days. Thereafter when there was a local incident involving the LTTE, the Respondent would be arrested detained and tortured, but then released without charge. This happened on 18 March 1999, when he was held for eighteen days, and on 17 October 1999 when he was held for about a month. The final arrest was on 1 March 2000 when he was held for fourteen days.

4. The Appellant did not seek to flee from Sri Lanka as a consequence of these detentions. But on 26 September 2000, some six months after the last detention, during general fighting, a shell exploded on the family home. The Respondent's father and sister were killed. His mother suffered very serious injuries, including the loss of her left arm but survived. His younger brother lost his right leg but also survived. The Respondent was at the back of the house and suffered minor injuries for which he was treated at the local hospital. However he suffered psychological damage. During the hours of darkness he would call out for his parents and sister. He would sleepwalk looking for his dead family, and was shot at whilst doing so during curfew. Finally the family decided that the Respondent should leave Sri Lanka and with the assistance of an agent he left via Colombo airport for Moscow, where he stayed for five months, before being brought to the UK.
5. Whether that history, tragic as it is, would result in the authorities now having any adverse interest in the Respondent, has to be considered in the light of the objective material. It is a curious feature of this determination that the Adjudicator, though he directed himself correctly as to the general principles of the applicable law, made no reference whatsoever to any of the very many Tribunal assessments of the objective material made since the ceasefire. It is all the more curious because Ms Shaw, who represented the Respondent at the hearing before the Adjudicator, confirmed that she would at the least have supplied him with a copy of Jeyachandran [2002] UKIAT 01869. Indeed part of her argument to us today, which we shall return to later, is that the Respondent in this appeal is an exceptional case within the terms of Jeyachandran. The Adjudicator however made no finding about whether the Respondent was an exceptional case. He did not follow Jeyachandran or give no indication that he had even read it, or any other of the many Tribunal decisions that have followed Jeyachandran.
6. His analysis in paragraph 5 of the determination starts with the observation that “the CIPU report of April 2002 suggests that peace process is in place and therefore it is safe to return Tamils to Sri Lanka. This document is general in nature and only has a small section on the peace process.” He then appears to ignore what was in the CIPU report but devoted a number of pages of the determination to a summary of a report from the Refugee Council of the United Kingdom. In the light of this he concluded that
“The peace process, if there is one, is fragile; many previous peace agreements were dishonoured by the Sinhala government; therefore asylum seekers may be unwilling to trust the Sinhala government any more..... the Armed Forces of the Sri Lankan state and the LTTE on the ground level do not appear to observe the letter let alone the spirit of the agreement; there continues to be violations of human rights by both the combatants; the Respondent will be a returnee on temporary documents indicating a failed asylum seeker; therefore I find it is reasonably likely that he will be stopped, interrogated and/or detained.”
7. On this basis and without addressing in terms whether there was any real risk of ill-treatment on return on the basis of his record, even if he were stopped and interrogated, he allowed the asylum appeal. In so doing he made a curious finding concerning internal flight, which is presumably the result of the typographical error. He said
“I do not find there is the option of internal flight for this Respondent. He is a young male. The conflict in Sri Lanka is far from over. In the light of the breaches in the ceasefire agreement noted above I am not satisfied the

Respondent would come to the adverse attention of the Sri Lankan forces regardless of which part of the island the Respondent locates himself.”

8. He also assessed a psychiatric report from Dr Kanagaratnam, but although noting that the doctor made an observation about lack of the availability of treatment in Sri Lanka he also noted that the doctor gave no indication of the basis of his knowledge about medical facilities in Sri Lanka. Nevertheless, the Adjudicator concluded that because the doctor was approved under section 12 of the Mental Health Act he would not be given to making unsubstantiated claims and therefore accepted unconditionally the opinions expressed concerning the lack of availability of suitable treatment in Sri Lanka. He therefore also allowed the human rights appeal under Articles 2, 3, 5, and 8.
9. The grounds of appeal argue that the Adjudicator erred in failing to take into account the full range of objective material concerning Sri Lanka, and the many decisions of the Tribunal concerning this and the present risk to returnees, and especially Jeyachandran. He also made an error of fact concerning the availability of medical facilities in Sri Lanka, which has also been confirmed in a number of Tribunal decisions.
10. The Tribunal under the chairmanship of Collins J in Jeyachandran undertook a most detailed review of the objective country material as at May 2002. It concluded as follows.

“The situation has changed in recent months. There was a ceasefire in February of this year and the most recent CIPU report for April 2002 records some of the relaxations that have occurred since that ceasefire. Paragraph 3.67 notes that in April 2002 the LTTE opened a political office in a Government held area in the north of the country and that that had been inaugurated under the ceasefire agreement. There had been permission for LTTE cadres wearing cyanide capsules to move back to an LTTE controlled area and those who were clearly recognised as being LTTE activists were permitted to move around unmolested. On 13 April the LTTE signed a pact with the Sri Lankan Muslim Congress and agreed that nearly 100,000 Muslims expelled from the north by the Tamil Tigers would be allowed to return. All this indicates a change of the situation and gives hope that the situation will stabilise to such an extent that the persecution which has existed in the past and the havoc created by the civil war will cease. The likelihood of any difficulties on return has also been considered by a fact finding mission to Sri Lanka which visited that country at the end of March this year and those involved discussed the situation with among others the Director and the Senior Superintendent in the Criminal Investigations Department. The report records that if a returnee were not wanted he would not be stopped at the airport. We underline ‘if a returnee were not wanted’ because there is of course a finding in this case that the appellant was wanted. He went on a computer which holds the name, address and age of a wanted man. The police purely go on records, scars would not make a difference and the authorities would not make a decision on this basis.

Accordingly it seems to us that it is clear that there is every likelihood that on return this appellant would because he was on a wanted list, be investigated. He would be stopped at the airport and would be questioned. That should not of itself mean necessarily that he would be tortured but although the Government has regularly said that it is taking steps to prevent torture by the

investigating authorities, that has not been achieved. Mr Buckley has submitted that the only basis upon which the appellant could be wanted was because of a political involvement in that the LTTE materials that he had been involved in printing had been found at his Tutor. We do not know on what basis the authorities wanted him and what suspicions they may have had. We note the finding about his mother. That does not suggest to us that he was necessarily to be regarded as someone who was only a low level supporter who would not be considered to have been involved with assisting the LTTE militarily. We do not feel that we would be justified in making the assumption that it was in the circumstances merely as a political sympathiser.

We note that the UNHCR has indicated that although in general it may be that asylum seekers can properly be returned and that scarring was perhaps not a significant factor, nonetheless it could not be accepted that there was even now no risk to anyone. The situation is still somewhat fluid, although there are reasons to be optimistic. The fact is that this ceasefire has only been in place for a relatively short period and the authorities are still interested so far as we are aware, and it would be surprising if they were not, in those who may have been involved in active assistance of the terrorists in the past. There are signs from reports that there is still a degree of mistrust and suggestions that the Tigers are taking some opportunity to regroup and possibly even to re-arm. Whether that in fact will result in a breakdown of the ceasefire in due course we do not know. We hope that it will not but we cannot at this stage be sure about it.

The reality is in our judgment that it is as yet premature to accept that everyone who has claimed asylum in this country would be able to return safely. We certainly are of the view that in the present situation and having regard to the present trends it is only the exceptional cases that will not be able to return in safety. The question is whether this appellant is such an exceptional case. In our judgment he is for the reasons that we have indicated, namely that he is someone who is wanted and is someone in our view who must be wanted in a relatively serious fashion, if we may put it that way, because of the attitude in relation to his mother. We do not think that the scars add anything to the danger. They were inflicted a very long time ago and, as the Chief Adjudicator found, they were in no way prominent nor were they caused in any form of combat. He did conclude that there was a possibility that he might be investigated because of the scars. We regard that as a remote possibility and we do not believe that there is indeed a real risk that the scars themselves would have resulted in any danger. However we have to have regard to the scars in conjunction with the fact that he was on a wanted list. They are in that context of perhaps some marginal relevance.

We make it clear that the Tribunal is in a difficult position, as indeed are all Adjudicators at this time in relation to Sri Lankan Tamils. It is still too early to be satisfied that the situation has changed to such an extent that there is now no risk to anyone. Equally we take the view that there are few who now would be at risk, but it is necessary always to consider the circumstances of each individual case. That can only be done by considering the facts of that individual case against the information that exists at the precise date on which the Adjudicator or the Tribunal has to reach a decision. If things are seen to be

improving the time may well come and may well come soon when it can be said that all can be returned. Equally it may be unfortunately that things do not turn out quite so well.

11. In October 2002, in Thiagarajah [2002] UKIAT 04917, a different Tribunal reviewed the up to date objective material in the light of developments since Jeyachandran. It was promulgated a couple of weeks before the Adjudicator wrote his determination and was based upon similar objective material as before him. It concluded as follows.

“Since May 2002 [when Jeyachandran was decided] the situation in Sri Lanka has developed further and for the better. The continued passage of time without the collapse of the ceasefire is in itself a positive factor. However the parties have gone significantly further in establishing their commitment to reaching a lasting peace agreement. The Government has lifted its ban on the LTTE, and the LTTE has abandoned its claim to independence. These were the two major obstacles to the commencement of negotiations, and after the concessions by both sides, those negotiations have begun in earnest and have now continued for some weeks. This comes on top of the suspension of the Prevention of Terrorism Act. Whilst it is true, as Mr O'Connor suggested, that there has not as yet been any general amnesty, or a full release of prisoners detained prior to the ceasefire, it is clear that there has been a dramatic change in the political and security situation in Sri Lanka. In these circumstances and on the facts as established in this appeal, we conclude that the Adjudicator was wrong to find that there is a reasonable likelihood that the Respondent will be stopped and questioned on return to Colombo airport and as a result of inquiries into his record there will be a real risk of continued detention and ill-treatment. Most returnees, even those on emergency travel documents, are waved through the airport controls. Even if the Respondent were stopped and his record investigated, we conclude there is no real risk to him. There is nothing exceptional in his record. Most Tamils in LTTE controlled areas were coerced into low level activities for them and there is no evidence that the authorities are interested any longer in such people. The Prevention of Terrorism Act has been suspended and membership of the LTTE is no longer illegal. Known LTTE members are able to travel in government controlled areas. If arrests of people like the Respondent were taking place, there would by now be evidence of it from UNHCR and the NGO's but there is not.”

12. These conclusions represent the overwhelming consensus of many Tribunal decisions. The approach in Jeyachandran has also been approved by the Court of Appeal in Selvaratnam. All this was ignored by the Adjudicator, who reached very different conclusions concerning the objective situation in Sri Lanka. Ms Shaw has argued that the Adjudicator's conclusions about the objective evidence were sustainable. We do not agree. The matters upon which he relied were in the main considered by the Tribunal in Jeyachandran and in many other subsequent determinations. It is not that the facts he described are wrong, but that there are other important positive balancing factors that he failed to take adequately into account. There clearly is a ceasefire in place, which has held for a considerable time notwithstanding some breaches on both sides. There has been violence by the LTTE against individuals especially in particular localities under their control. The use of torture by the security forces still continues, though the Government disapproves it. Nevertheless there is and remains on the ground a huge change for the better since the ceasefire began. There is an ongoing peace process,

albeit subject to setbacks as each side jockeys for position in the negotiations. We consider that the Adjudicator's assessment of the objective evidence before him was unbalanced and incomplete, and his overall assessment is wrong and unsustainable. Hence he also erred in his approach to the nature of the current risk to returnees. With regard to his assessment of the medical situation, the reasoning given by the Adjudicator for concluding that there were no adequate facilities for treating the Respondent in Sri Lanka is also unsustainable. The doctor, upon whom he relied, proffered no expertise on the situation in Sri Lanka. The Adjudicator did not have regard to the guidance of the Tribunal in dealing with such health issues given in AE and FE [2002] UKIAT 05237*. For all these reasons we find that the determination is fatally flawed and must be set aside.

13. However, there is no dispute over the material facts relating to the Respondent, and the Tribunal has therefore gone on to make its own assessment of the Respondent's claim in the light of the current objective material.
14. Ms Shaw has based her submissions to us on three propositions. The first is that the peace process, since the Adjudicator's decision has been undermined by recent developments. Second, the Respondent is an exceptional case within the terms of Jeyachandran. Third, the medical evidence shows that the Respondent is suffering from severe depression and post-traumatic stress disorder and there is a risk of suicide, with psychotic symptoms. He is in receipt of ongoing medical treatment in the UK and suitable help would be unavailable in practical terms in Sri Lanka. Mr Saville contested each of these propositions.
15. With regard to the current objective situation, we have taken into account the matters raised by Ms Shaw and contained in the two comprehensive bundles of documents helpfully supplied by her. It is to be expected that peace negotiations to bring to an end a long-running and very bitter conflict will be marked both by advances and setbacks. It is inevitable that there will be differences of opinion not just between the two sides, but also between individuals with different views on each side; even highly placed individuals such as the Sri Lankan President who is of a different party to the government and has taken over many months a different view from that of the Sri Lankan government. Each side will also seek advantage in negotiations and will use a variety of stratagems to achieve this. But we do not consider that the evidence as a whole suggests that the will and ability of both sides to achieve a settlement has eroded, or that the ceasefire, which has effectively held despite some since February 2002, has or, in the light of the current evidence, is reasonably likely to fail. Nor has the situation for returnees deteriorated.
16. We note in this context the positive impact of the determination of the United States Government, post September 11, to bear down on terrorism. Thus whilst the LTTE withdrew on 21 April 2003 from the formal negotiations, the BBC News article of 24 April 2003 shows the United States government pressing the LTTE to return to the negotiating table and to cease any actions inconsistent with the ceasefire and peace process. We also note the Sunday Observer of 27 April 2003 reporting the leading LTTE theoretician, Anton Balasingham stating, in response to the US criticism, that the present suspension of the peace process was only to give a timeframe to the government to fulfil its obligations. It also reports assurances that the withdrawal would not last long, and that the LTTE intended to continue to observe the ceasefire.

17. We accept that although very considerable progress has been made already, difficult issues remain to be resolved especially about LTTE decommissioning and power-sharing. We note the pessimistic view taken by the academic expert, Dr Anthony Good, about whether this can be achieved in a democratic context. However that is a prediction based upon evidence that is substantially before us also, and upon which we must reach our own judgment.
18. We consider that the substantial continuation of the ceasefire, even with the imperfections in its implementation on the ground on both sides, is still effectively holding. Moreover neither side has suggested any wish to bring it to an end. The peace talks have made substantial progress so far and although they are presently stalled, both sides have expressed the view that this is only temporary and it does not affect the agreements already reached. We cannot predict what the future will hold, or whether Dr Good's pessimism will prove to be justified. That however is not our task. We have to assess the situation as it is now, and in particular the risk to returnees. We conclude, in the light of the evidence as a whole, that the ceasefire and peace process remains viable and ongoing and the gains made remain in place. The substantial improvements in the security situation and the consequent change, since the conflict ended, in the risk profile for returnees is not now materially different from that described by the Tribunal in Jeyachandran, and approved by the Court of Appeal in Selvaratnam. We have therefore gone on to assess the risk to this Respondent on that basis.
19. Ms Shaw has then argued that the Respondent is an exceptional case though she accepted that he is not wanted in the sense that there is any warrant for his arrest. We accept her submission that an exceptional case in terms of Jeyachandran is not confined to a person being wanted, but that each case must be assessed upon its own facts. She relies upon the psychiatric report by Dr Kanagaratnam and submits that he will stand out on return because of his mental difficulties. He suffers panic attacks when he sees the police and he will present himself at the airport in a poor light. He will appear suspicious and will as a result be detained and questioned. His background will be examined and he will be seen as someone who has been targeted in past whenever there was LTTE activity. He will not then be able to explain himself properly.
20. The report upon which this submission is based is dated 15 October 2002. It was prepared by a Consultant Psychiatrist, Dr G Kanagaratnam, who works at the Southwest London and St George's Mental Health NHS Trust. He was not and is not responsible for treating the Respondent. Prior to the interview for the report, the Respondent, who came to the UK in April 2002, had not been receiving any medical attention at all. The doctor noted the evidence given to him by the Respondent that uniformed personnel or police trigger panic attacks and he would faint. Immediately after the death of his sister and father he had been distressed, wandering at night and being a risk to himself, whilst searching for the dead members of his family. He concluded that the Respondent suffered from post-traumatic disorder with depression of considerable severity and would experience psychotic symptoms. He has intense suicidal ideations with a sense of foreshortened future. He recommends that he will require treatment for his illness comprising antidepressants and psychotherapy. He considers that these forms of treatment are not readily available in Sri Lanka and should he failed to receive them, he will be extremely incapacitated and extremely likely to deteriorate further.

21. The most recent medical evidence comes from the Respondent's GP, Dr Maheshwaran and is dated 30 April 2003. It would appear that the Respondent registered with him after the examination by Dr Kanagaratnam. He states that the Respondent has been counselled and treated with antidepressants. He is seen on a regular basis for medication. There is no indication in this report that in the UK the Respondent is currently receiving psychotherapy or other specialist treatment. There is no indication in the report either that, taking antidepressants, the Respondent is unable to function normally. We conclude from this, that the medication now being taken by the Respondent has been sufficient to deal with his problems because otherwise his GP would have referred him for psychotherapy.
22. We do not therefore accept Ms Shaw's assertions that the Respondent would be unable to function normally on return to Sri Lanka airport or thereafter. The likelihood is that he would be waved through like most other returnees and would experience no difficulties. However even if he did attract attention to himself in some way and as a consequence his record was examined, it would show nothing that would bring him to the adverse attention of the authorities. It would show that he had been detained on three occasions during the conflict for relatively brief periods and had been released on each occasion without charge. He is not wanted for any offence. The reason he left Sri Lanka was because members of his family were killed or mutilated in the shelling around his home 2½ years ago, in September 2000, and he was extremely disturbed thereafter. Given that he was treated in hospital after the shelling and indeed remained at home in Sri Lanka for more than a year afterward without any further detention, his record might show this as well. At all events there is nothing in his record, which would suggest to the authorities that the Respondent was of any adverse interest to them in the present circumstances. We do not therefore accept Ms Shaw's submission that the Respondent would be an exceptional case within the terms of Jeyachandran. On this basis, he therefore has no valid claim to asylum or under Articles 2, 3, 5 and 8.
23. The final issue relates to whether or not the Respondent would be able to receive appropriate medical treatment in Sri Lanka and whether this can give rise to a successful human rights appeal in its own right under Articles 3 and 8. In AE and FE [2002] UKIAT 05237*, the Tribunal, chaired by Collins J, summarised the current state of the law and authorities relating to the return to their home countries of people suffering from illness in these terms:
- "The absence of proper medical facilities to deal with a particular individual's problems will not normally be determinative unless his right to life is thereby put in jeopardy. If the proper facilities are available, a person's medical condition however serious cannot make him a refugee."
24. The evidence before the Tribunal is that the Respondent is presently receiving antidepressants only. He is not receiving psychotherapy, either as an inpatient or an outpatient. We must conclude that, as he is being treated by a competent GP in the UK that this medication, coupled with his initial counselling, is adequate to meet his needs. There is no evidence before us that suitable antidepressants are not available in Sri Lanka or that the Respondent would be unable to access them. He still has substantial family in Sri Lanka who can assist him. Some years have now past since the traumatic shelling of his family home. We consider in the light of all this that Ms Shaw's more alarming predictions about what will happen to the Respondent on return are

unjustified. The risk of suicide is very speculative, and the evidence about this relates to a period before the Respondent was receiving treatment.

25. The Respondent would not in the light of this be in need of referral to a psychiatric hospital, but even if he were, we are satisfied that there are proper facilities available in Sri Lanka, even if the quality of the care given is not comparable to that of the UK. The advice of the British High Commission in Sri Lanka in July 2002 is that there are hospitals specifically devoted to mental health in Angoda and Mulleriyawa, even though they lack the most modern standards of treatment. Also since 1996, psychiatric treatment has been available at all teaching hospitals and main district hospitals throughout the country, as well as in Colombo general Hospital. A report of June 2001 from the World Socialist Web Site criticises the quality of in-patient treatment at Angoda Hospital, but confirms that there are 4 psychiatric institutions in the country providing in-patient care, though these services are overstretched. A report from Psychiatric News states that 20% of general hospital patients and 24% of those visiting a family practitioner suffer from a significant psychiatric disorder. Given the extended conflict that has taken place in Sri Lanka for so many years, this is not surprising. Nor is it surprising that hospital and specialist resources for treating mental illness are overstretched. However the facilities available in Sri Lanka clearly meet the test described by Collins J in AE.
26. Having said that, the medical evidence in this appeal does not suggest that specialist or in-patient treatment will now be necessary. The Respondent will have access to the network of family practitioners and to the necessary anti-depressants. We do not therefore accept on the basis of this evidence that there is a viable Article 3 claim on medical grounds. In the light of the decision of the Court of Appeal in Ullah, as the conduct complained of in the country of return is not of the severity to engage Article 3, Article 8 will not avail the Respondent either.
27. For the reasons given above this appeal against the decision of the Adjudicator is allowed, and the appeal by the Respondent against the removal directions is dismissed

Spencer Batiste
Vice-President