Neutral Citation Number: [2008] EWHC 2968 (Admin)

Case No: CO/10365/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2008

Before :

THE HONOURABLE MR JUSTICE WYN WILLIAMS

- -

Between :

THE QUEEN
on the application of

SENATHIRAJAH LENIN **Claimant**

- and -

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

- -
- -

Mr Nishan Paramjorthy (instructed by **Messrs S. Satha & Co Solicitors**) for the **Claimant**
Mr David Blundell (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 25 November 2008

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Judgment

Mr Justice Wyn Williams :

1. The Claimant is a Sri Lankan Tamil. He arrived in the United Kingdom on 9 July 1998 and probably claimed asylum on that day. On 11 October 2001 the claim was refused on procedural grounds. The merits were not considered.

2. The Claimant immediately appealed against that decision as was his right. His appeal was dismissed by an adjudicator in a determination promulgated on 14 April 2003. The Claimant did not seek permission to appeal to the Immigration Appeal Tribunal.

3. On 5 October 2005 the Claimant submitted an application for permission to work in the United Kingdom. The application was refused on 23 December 2005.

4. By letter dated 3 January 2006 the Claimant's solicitor made what he described as an application under paragraph 353 of the Immigration Rules (HC395, as amended by HC1112). The application, in summary, was said to be based upon a drastic change in the security/political situation in Sri Lanka. The Claimant claimed that his removal to Sri Lanka would be in breach of Articles 2, 3 and 5 of the European Convention on

Human Rights and that he had a well founded fear of persecution at the hands of the Sri Lankan authorities should he be returned.

5. During the early months of 2006 the Claimant was at liberty within the United Kingdom. However, on 17 July 2006 the Claimant was arrested in respect of an alleged sexual offence committed against a minor. He was then remanded in custody. In due course the Claimant was convicted of that offence and sentenced to a term of 26 weeks' imprisonment. On 17 October 2006 the Claimant was released from his custodial sentence but, on that day, immediately detained under immigration powers. He has been so detained ever since.

6. On 29 November 2006 the Defendant set directions for the Claimant's removal to Sri Lanka on 11 December 2006. On both 9 and 10 December 2006 the Claimant made representations to the effect that his removal directions should be cancelled. On 10 December 2006 the Claimant applied for and obtained an injunction to restrain removal.

7. On 11 December 2006 the Claimant commenced these proceedings. Further representations were made on his behalf on 3 January 2007. By letter dated 29 January 2007 the Defendant responded to the representations which had been made by the Claimant successively on 3 January, 9 December and 10 December 2006 and 3 January 2007.

8. On 9 February 2007 the Claimant submitted amended grounds for seeking judicial review. These amended grounds were aimed specifically at the letter of 29 January 2007 issued on behalf of the Defendant.

9. On 14 May 2007, Collins J refused the Claimant permission to apply for judicial review. By then the Defendant had filed an Acknowledgement of Service and Summary Grounds in which the claim was opposed vigorously. The Claimant renewed his application for permission. As it happened his application came before me on 22 August 2007. I granted the Claimant permission to apply for judicial review.

10. Without rehearsing again my reasoning at that stage, I granted permission because of the possible impact of a determination of the Asylum and Immigration Tribunal (AIT) in **LP(LTTE area-Tamils-Colombo-risk?) Sri Lanka CG** [2007] UKAIT 000076. This case was and still is a country guidance determination of the AIT. It was heard over three days (27 and 28 November 2006 and 12 April 2007) and the determination of the AIT was promulgated on 6 August 2007. In the light of **LP** the Claimant had, yet again, amended his grounds for judicial review and it was on the basis of the amended grounds that I granted permission.

11. On 18 October 2007 the Defendant issued another decision letter. Essentially this was a decision letter which responded to the amended grounds for judicial review filed on 14 August 2007.

12. On 10 June 2008 the AIT issued its determination in **AN&SS (Tamils – Colombo – risk?) Sri Lanka CG**[2008] UKAIT 00063. As its citation indicates this is also a country guidance case.

13. On 17 July 2008 the European Court of Human Rights issued its judgment in the case of **NA v The United Kingdom** (unreported). In the light of that judgment the Defendant issued yet a further decision letter dated 2 September 2008.

14. It is common ground between the parties that the focus of these proceedings is the lawfulness of the decision letters issued by the Defendant on 18 October 2007 and 2 September 2008. These letters respond to a claim made by the Claimant that he has a well-founded fear of persecution and that, accordingly, he should be accorded refugee status and permitted to remain in the United Kingdom. The letters also respond to his claim that his return to Sri Lanka would infringe his rights under Articles 2, 3 and 5 of the European Convention on Human Rights and, accordingly, should not take place. I should say, now, however, that in order to understand these two decisions it is also necessary to consider the decision which the Defendant issued on 29 January 2007.

15. It is to be observed, of course, that the Claimant's assertions that he should be afforded refugee status and that his removal would infringe his convention rights had been the subject of a determination by an adjudicator in 2003. Accordingly, the claims made on 3 January 2006 and thereafter are to be considered in the context of paragraph 353 of the Immigration Rules. That paragraph provides:-

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

16. In summary, the Claimant submits that although the Defendant rejected his further submissions, she should have determined that they amounted to a fresh claim. Had she made that determination it is common ground that the Claimant would be entitled to appeal in this country against the rejection of his submissions. Mr Paramjorthy, counsel for the Claimant, submits that the Defendant acted unlawfully in determining that the Claimant's submissions did not amount to a fresh claim. As I have said, the decision letters which are impugned are those of 18 October 2007 and 2 September 2008.

17. The correct legal approach to the question whether further submissions amount to a fresh claim is not controversial in these proceedings. In **WM(DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495** the Court of Appeal set out the governing principles. These principles are to be found in the judgment of Buxton LJ but Jonathan Parker and Moore-Bick LJJ expressly agreed with his judgment. I quote :-

> "*6. There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgments.*

> *First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(1) according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an Adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the Applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.*
>
> *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 Nichol 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.……".*

At paragraph 11 of his judgment Buxton LJ considered the role of the court. He suggested that the court could interfere with a decision of the decision maker only if it concluded that the decision in question was unreasonable or irrational. He said also that the reviewing court would have to address the following questions:

> "*11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see [para. 7 above]. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of the question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the Court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."*

18. These governing principles relating to fresh claims must be applied in this case in the context of **LP**, **AN&SS**, **NA** and two other recent decisions of this court identified in paragraph 23 below. **NA, LP** and **AN&SS** in particular, are important not just because of their legal content but also because of some of the conclusions expressed about factual matters as they relate to the safety or otherwise of persons who are returned to the airport at Colombo. These decisions provide a wealth of material which the decision maker should consider when considering whether or not representations or submissions amount to a fresh claim.

19. I was told that my decision in this case may be the first substantive decision on the issue of whether the Defendant should have categorised a claim as a fresh claim in the context of a Tamil faced with removal since the publication of the decision in **NA**. For that reason I will set out extracts from the relevant case-law more fully than might otherwise be thought desirable in a case of this sort.

20. I begin by describing the relevant facts in **LP**. I stress at the outset that I do this not because the facts in **LP** are important to the resolution of this case but simply so that the uninformed reader can understand the factual background against which important principles have been formulated. LP was an ethnic Tamil from Jaffna in the north of Sri Lanka. He fled Sri Lanka via Colombo airport on 29 December 1999. He arrived in the United Kingdom on 5 January 2000 and claimed asylum that day. The basis of his claim was that while living in an LTTE controlled area of Sri Lanka between 1995 and 1999 he assisted the LTTE (albeit unwillingly). In October 1999 he moved to a Government controlled area of Sri Lanka in order to avoid being pressurised into undertaking military training with the LTTE. He was suspected of supporting the LTTE and was detained and tortured by the Government forces in November 1999. Under torture he admitted assisting the LTTE. He was eventually released on bail by a Court, in Colombo, with his uncle as surety. He then continued to be of interest to the authorities and pressurised by them into agreeing to become an informer against the LTTE. In order to avoid this he fled to the United Kingdom. His asylum claim was refused in July 2005. Detailed reasons were given in a refusal letter dated 11 July 2005 and it is to be observed that the refusal letter did not challenge the appellant's credibility in relation to material events in Sri Lanka. The appellant appealed to an Immigration Judge who dismissed his appeal on both asylum and human rights grounds in a determination promulgated on 13 October 2005. The appellant applied for reconsideration and, ultimately, an order was made for reconsideration before a senior panel of the AIT. In its determination the AIT considered in detail the risks, if any, which would be faced by the appellant in Colombo (including the risks at the airport) from the Sri Lankan authorities – see para. 7 of the determination.

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 scaring.

(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:-

> *"231. The country guidance available in this determination relates only to the risk to returning Tamils and problems which they may experience with the Sri Lankan authorities. It deals only with the risks in Colombo where they will be returned ……*
>
> *232. It has been accepted during the course of this determination that the general security situation in Sri Lanka has deteriorated following the effective breakdown of the ceasefire and the increase in terrorist activity by the LTTE. That has resulted in increased vigilance on the part of the Sri Lankan authorities and with it a greater scope for human rights abuses and persecution.*
>
> *233……..*
>
> *234. Tamils make up over 10% of the population of Colombo …. It cannot be argued that …….. as a general presumption it is unduly harsh to expect a Tamil to relocate to Colombo or that it would be a breach of Article 3 to expect him or her to do so, or that doing so would put him or her at real risk of serious harm entitling them to humanitarian protection.*
>
> *235. As in most asylum cases, the first, and most important task is the assessment of the credibility of the Appellant's claim. In the course of that assessment the Tribunal will have regard to the history of the Appellant including the part of Sri Lanka from which he comes and his actual involvement, if any, with the LTTE. Such involvement can vary between being a full-time fighting member to the informal periodic supply of food. ……... The extent to which their involvement may be known by the Sri Lankan authorities (or the extent to which they perceive there to be an involvement) will be relevant.*

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.

237. When assessing those who have relatives who are members of the LTTE, it is not only important to consider the relationship, and the involvement of the relative but whether, and to what extent, knowledge of the relative's activities are likely to have been known to the security forces. This will vary depending on the relative's profile and whether or not he or she has been previously detained. The question of how the authorities would know that an individual was so related may also be of concern.

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.

240. ……"

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 expressed at (f) above 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."*

23. In **R(Sivanesan) v Secretary of State for the Home Department [2008]** EWHC 1146 (Admin) Sir George Newman considered the proper approach to the risk factors which had been identified in **LP** in the light of a judgment of Collins J when granting permission to apply for judicial review in **Nishantbar Thangeswarajah and Others** [2007] EWHC 3288 (Admin). In paragraphs 22 and 23 of his judgment, Sir George Newman set out extracts from the judgment of Collins J as follows:-

> *"22. Collins J set out the 12 factors listed in LP which I have already cited above. In paragraph 10 he observed:*

(1). ….Tamil ethnicity by itself does not create a real risk of relevant ill treatment. Accordingly some of these sole-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). He categorised:

(a) Tamil ethnicity;

(b) illegal departure from Sri Lanka;

(c) lack of ID card or other documentation;

(d) an asylum claim made abroad;

as factors which neither "in themselves, or even cumulatively, would create a real risk".

(4). He categorised:

(a) a previous record as a suspected or actual member or supporter "at a level which would mean the authorities" retains an interest as "likely to create a risk".

(b) a previous criminal record and an outstanding arrest warrant as "highly material and clearly capable of ……..producing a real risk".

(5). In paragraphs 11 and 12 he categorised:

(a) Bail jumping and/or escaping from custody as "……..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" and stated

(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). He observed that "……. 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".

23. 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".*

In paragraph 24 of his judgment Sir George Newman expressed his complete agreement with the views expressed by Collins J as set out above.

24. It is also worth quoting from paragraphs 41 or 42 of the judgment in **Sivanesan.** In those paragraphs Sir George Newman says:-

> *"41. The lesson to be learned from this case is that 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.*

25. I turn finally to consider **NA**. Essentially, the European Court of Human Rights gave its approval to the approach of the AIT in **LP**. It noted that there had been a 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 (see para. 124). 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 (para. 128). 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 (paras. 129 and 130). At paragraph 130 the Court stressed:-

> *"…… due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk. Both the need to consider all relevant factors cumulatively and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case……"*

26. 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."*

27. Paragraphs 134 to 136 of the judgment are important in the context of this case. They read-

> "*In respect of returns to Sri Lanka through Colombo, the Court also finds that there is a greater risk of detention and interrogation at the airport than in Colombo city since the authorities will have a greater control over the passage of persons through any airport than they will over the population at large. In addition, the majority of the risk factors identified by the AIT in LP will be more likely to bring a returnee to the attention of the authorities at the airport than in Colombo city. It is also at the airport that the cumulative risk to an applicant arising from two or more factors will crystallise. Hence the Court's assessment of whether a returnee is at real risk of ill-treatment may turn on whether that person would be likely to be detained and interrogated at Colombo airport as someone of interest to the authorities. While this assessment is an individual one, it too must be carried out with appropriate regard to all relevant factors taken cumulatively including any heightened security measures that may be in place as a result of an increase in the general situation of violence in Sri Lanka.*
>
> *135. In this connection, the Court notes that the objective evidence before it contains different accounts of the precise nature of the procedures followed at Colombo airport and the nature of the information technology there (see the British High Commission letters and the Immigration and Refugee Board of Canada report at paragraphs 60-63 and 74 above). Indeed, the evidence suggests that the procedures followed by the Sri Lankan authorities may change over time. However, the Court also notes that, with the exception of the extracts of the British High Commission's letter of 25 January 2008 that appeared in the March 2008 COI Report (see paragraph 60 above), all the above evidence was considered by the AIT in LP where it was undisputed that records were kept and interviews conducted at the airport and where the AIT found that computerised records were available to the police at the airport, from which they could identify possible "bail jumpers" (see paragraph 35 above). In the light of the extensive evidence before the AIT on this subject and its findings, the Court cannot come to a different conclusion on the*

> *basis of the uncorroborated British High Commission's letter of 25 January 2008 and the observations therein that the Sri Lankan CID do not use computers, particularly when, as the COI Report noted, in its letter of 24 August 2006, the British High Commission had previously reported that "the Sri Lankan authorities have a good IT system to track arrivals and departures at the main airport and are able to track, in most cases, whether an individual is in the country or not" (see paragraph 60 above). The Court also considers it to be of some significance that both the British High Commission letters and the assessment of the Immigration and Refugee Board of Canada indicate that there are established and routine procedures for briefly detaining and questioning returnees at the airport.*
>
> *136. The evidence on procedures and facilities at the airport must also be place alongside the AIT's finding on the availability of lists of failed asylum seekers to the Sri Lankan authorities, which was based on the British High Commission's letter of 24 August 2006 (see paragraph 40 above) and the evidence that scarring had been used in the past by the authorities as a means of identifying Tamils who will be of interest to them (see the findings of the AIT set out at paragraph 37 above). The Court notes that the AIT's finding, in the light of that evidence, that "failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment" (see paragraph 44 above) but it considers that at the very least the Sri Lankan authorities have the technological means and procedures in place to identify at the airport failed asylum seekers and those who are wanted by the authorities. The Court further finds that it is a logical inference from these findings that the rigour of the checks at the airport is capable of varying from time to time, depending on the security concerns of the authorities. These considerations must inform the Court's assessment of the risk to the applicant".*

28. With the principles set out above firmly in mind I turn to consider the Defendant's decisions in this case. Although, as I have said, the focus of the hearing before me was the decision issued in October 2007 and the further decision in September 2008 the starting point, as I have said, is the decision which the Defendant issued on 29 January 2007.

29. In my judgment it is clear from a reading of this decision that the Defendant properly understood her task under rule 353. To recap, her tasks were to consider whether the new material was significantly different from that already submitted and, if it was, to consider whether the new material, taken together with the material previously considered, created a realistic prospect of success in a further asylum or human rights claim.

30. In paragraph 28 of the decision the Defendant wrote:-

> *"Some of the points raised in your submissions have not previously been considered but taken together with the material which was considered in the letter giving reasons for refusal dated 11 October 2001, and in the appeal determination of 14 April 2003, for the reasons given above, they do not create a realistic prospect of success."*

31. In my judgment this was no mere repetition of a formula; the paragraphs which preceded that conclusion demonstrate clearly that the Defendant had considered whether the material submitted to her in 2006 and 2007 was new; she had then gone on to

consider its impact when taken together with the previously considered material. The importance of the decision of 29 January 2007, in my judgment, is that it demonstrates that the Defendant, from the outset, was approaching the issue of whether the Claimant was making a fresh claim squarely in accordance with the principles set out in **WM**.

32. I can find no basis to conclude that the Defendant departed from the correct approach in her subsequent decision letters. I have read and re-read those letters with care but, to repeat, I can find no basis to conclude that the Defendant did not follow the approach which **WM** demands that she should when considering Rule 353. Accordingly it seems to me that this challenge can succeed only if I am persuaded that the Defendant's conclusion to the effect that the new material, as it has evolved, taken together with the material previously considered does not create a realistic prospect of success before a tribunal is unreasonable or irrational.

33. As Sir George Newman points out in **Sivanesan** the starting point for a decision maker who is considering whether further representations amount to a fresh claim is to make a thorough assessment of the findings of the adjudicator in connection with the original claim. As he says such an assessment is required because any tribunal hearing a fresh claim would take the original conclusion of the adjudicator as a starting point in its consideration.

34. The relevant findings of the adjudicator are those set out in the following extracts of his determination.

> *"24. Nonetheless I find that there is a serious possibility that, at some time between 1995 and 1997, this appellant was forced to assist the LTTE by digging bunkers, transporting food and looking after the wounded. No doubt many other Tamils were in the same position. It is significant that the appellant refused to fight for the LTTE. It is not clear how the appellant managed to escape from the LTTE. He did not say after he left them they had any continuing interest in him. The appellant does have some scars to his back, near his eye, on his thumb and perhaps also on his leg. I understand that he says he acquired them when a bomb was dropped near where he was while he was with the LTTE. There is no medical evidence of the origins of these scars but it may be the case that the appellant somehow was injured in the course of the civil war there has been in Sri Lanka in recent years.*
>
> *25 After the appellant left the LTTE he said that he was arrested by the army at a checkpoint in or near Vavuniya on 10 August 1997. He said he was detained until October 1997 when there was an LTTE camp and in the confusion the appellant managed to run away. Although the appellant's account of his escape was a little vague and implausible I am prepared to accept that this appellant, again no doubt like many others, has been detained, perhaps for a month or two, by the Sri Lankan army back in 1997. Presumably in the course of that detention they took his details. It is what did not happen thereafter that is significant.*
>
> *26. The appellant then said that he was arrested after a bomb explosion on 20 April 1998. He said in his statement that he was arrested when he was asleep but in his oral evidence that he was on the way to a shop. Of itself this discrepancy is not of much significance but what is significant is that the appellant said that when he was arrested on this occasion the authorities did not have his details. This suggests that if he was detained the previous year (as he may have been) he was not of any*

particular significance or continuing interest to the authorities. If they really wanted him as a suspected LTTE terrorist then no doubt the authorities would have known this or found it out soon enough when the appellant was arrested in 1998. It is significant too that the appellant was released from that detention on payment of a bribe. I accept the bribes are sometimes paid in Sri Lanka but the Sri Lankan authorities are engaged in a vigorous campaign against what they perceive as terrorist enemy. I have no doubt that, bribe or not, the Sri Lankan authorities would not release anyone that they perceived as being involved in any significant way with the LTTE. The fact that this appellant was released in 1998, admittedly on payment of a bribe, indicates very strongly that the authorities then had no significant interest in him.

27. I am bolstered in this finding by the fact that the appellant was able to leave Sri Lanka, by air to Singapore, admittedly with the help of an agent and not on his own passport, but without being stopped. There are significant checks at Colombo International Airport and again the fact that the appellant was able to leave indicates strongly that the Sri Lankan authorities then had no continuing interest in him.

28. The appellant is a young male Tamil. Like no doubt many others he has had brushes with both the LTTE and the army. He worked for the LTTE under compulsion and in a fairly low key way sometime between 1995 and 1997. I am prepared to accept that he was detained by the army sometime in 1997 but however he got away the army had no continuing interest in him as evidenced by what did not happen when he was arrested again in 1998. I am prepared to accept that in 1998 the appellant was detained, for longer than a day or two, after a round-up following a bomb explosion. Such things did happen at that time. But again the appellant was released and left Sri Lanka. Nobody was interested in him then and nobody will be interested in him now.

29. ……It is not the case that all Sri Lankan Tamils can now safely be returned to Sri Lanka but the case of Jeyachandran [2002] UK IAT 01869 makes it clear that it is only the exceptional case that will not be able to return in safety. This Appellant is not such an exceptional case. No one was interested in him when he left and even more so will no one be interested in him now. The fact that this appellant like many others has some scars on his body adds nothing to any risk he may face if returned to Sri Lanka.

30. ……...

31. If this Appellant were returned to Sri Lanka he would be able to pass safely through Colombo Airport. I do not find that there is a serious possibility that he would be at risk of persecution or of ill-treatment that would occasion a breach of Article 3 were he to go to any part of Sri Lanka that is currently under the control of the Sri Lankan authorities.…"

It is clear, in my judgment, that the adjudicator made a trenchant finding to the effect that the profile of the Claimant was such that he would not be of any interest to the Sri Lankan security forces should he be returned to Colombo.

35. In her decision of 29 January 2007 the Defendant placed significant emphasis upon the Claimant's profile as determined by the adjudicator when reaching her own conclusion that the Claimant would not be of any interest to the Sri Lankan security forces (see in particular paragraph 9 of that decision letter). In her decision letter of 18 October 2007 the Defendant re-assessed that same issue in the light of the risk factors which had been identified in **LP**. She identified nine risks factors as applying, potentially, to the Claimant and then considered them in detail. It is noteworthy, however, that before embarking upon that assessment she set out her general approach to the risk factors. I quote:-

> *"9. The country guidance in the Determination relates to the risks of returning Tamils to Colombo and problems which they may experience with the Sri Lankan authorities. It was concluded that the evidence does not show that the Tamils in Colombo are at risk of serious harm from the Sri Lankan authorities merely because they are Tamils or that it would be unduly harsh to expect the Tamils to relocate to Colombo. A number of factors may increase risk (listed at paragraph 238 of the Determination but not intended to be checklist) and those factors and the weight to be ascribed to them, individually and cumulatively, must considered in the light of the facts of each case."*

In my judgment this paragraph accurately summarised some of the guidance to be found in **LP**.

36. The risk factors identified by the Defendant were:-

i) That the Claimant was a Tamil;

ii) That he had been arrested as being a suspected or actual LTTE supporter;

iii) He had a previous criminal record;

iv) He had escaped from custody;

v) He had visible scaring;

vi) That he was being removed from London to Sri Lanka;

vii) He left Sri Lanka illegally;

viii) He did not have an ID card; and

ix) He had claimed asylum in the United Kingdom.

Between paragraphs 11 and 20 the Defendant dealt in detail with each of those factors. In paragraph 20 the Defendant also dealt with an assertion which had been recorded in the determination of the adjudicator to the effect that the Claimant had a sister who was a member of the LTTE. Ostensibly, therefore, the Defendant considered each of the possible risk factors which might be relevant to the case of the Claimant. She gave reasons why she did not accept that the Claimant's profile was such (even in the light of those factors) that he would be at risk of persecution or ill-treatment in breach of his human rights should he be returned to Sri Lanka.

37. Mr Paramjorthy's principal submission during the course of the hearing before me was that the Sri Lankan authorities would be likely to have a computerised record of the Claimant's arrest, detention and release in 1998. It is likely submits Counsel that the computerised record would be available to the authorities at Colombo airport so that upon the Claimant's return he would at risk of arrest and consequent persecution or torture. Mr Paramjothy submits that the Defendant failed to address this central point in her decision of October 2007. He submits that this failure demonstrates either a lack of anxious scrutiny or unreasonableness or irrationality on the part of the Defendant.

38. It is true that the Defendant did not, specifically, address the issue of the likelihood of the Sri Lankan authorities having computerised details relating to the Claimant in her decision of October 2007. I add for completeness that she did not address this issue expressly in her decision of September 2008. That, however, is not entirely surprising. The whole thrust of the Defendant's assessment in her decision letters was that the Claimant's profile is such that he would be of no interest to the Sri Lankan authorities upon return. It is implicit in the Defendant's assessment that even if some record of his 1998 arrest and detention existed that would not alter the fact that he was of no interest to the authorities. That said, in my judgment it would have been desirable, at the very least, for the Defendant's decision letter to engage expressly with the issue of whether or not there was reason to believe that a computerised record of the arrest, detention and release of the Claimant in 1998 existed and was likely to be available to the authorities at the airport.

39. Is the Defendant's decision to be categorised as irrational or unreasonable or one lacking in anxious scrutiny by virtue of her failure to engage expressly with this issue? In my judgment, it is not since (a) the Defendant justifiably proceeded on the basis that the Claimant's profile was very low and secondly the conclusions expressed in **LP** and **AN**&**SS** do not support the conclusion that it is likely that the Claimant's details were computerised and available at the airport. I appreciate that there are passages in paragraphs 135 and 136 of the judgment in **NA** which demonstrates that computerised records of some persons who have been detained previously are likely to be available at the airport. In my judgment, however, those passages must be understood against the undisputed fact in that case that the details of NA had been recorded at the time of one of his many arrests. On the basis of the adjudicator's findings in this case and in the light of the recent factual conclusions expressed in **AN&SS** (as to which see the extracts quoted at paragraph 22 above) there is simply no proper factual basis upon which it would be proper to infer that details of the Claimant's arrest, detention and release in 1998 would be available to the authorities at the airport.

40. In my judgment the Defendant was entitled to conclude that the Claimant was not at risk of persecution and/or treatment in breach of his human rights notwithstanding the deteriorating situation in Sri Lanka. Further she was entitled to conclude that there was no reasonable prospect that any different view would be taken on an appeal from that decision. I appreciate, of course, that the decision in **AN&SS** came after the Defendant had issued two of her decision letters and that the decision is not mentioned in the Defendant's letter of 2 September 2008. Nonetheless it was relied upon, quite properly, by Mr. Blundell on behalf of the Defendant and it was not suggested on behalf of the Claimant that I should not have regard to it in making a decision about the lawfulness of the Defendant's decisions or when deciding whether to grant any relief.

41. In the paragraphs immediately proceeding I have dealt with the high water mark of the Claimant's case. I have found that the claim advanced has not been made out. I appreciate that other grounds are identified in the pleadings upon which it is said that the Defendant failed to consider her decision with anxious scrutiny or acted irrationally or unreasonably. It does not seem to me to be necessary, however, to spell out in this judgment why it is that I consider that those grounds should be rejected. All the grounds relied upon are resisted robustly by Mr. Blundell in his Skeleton Argument. I accept what he says in opposition to this claim and gratefully adopt his reasoning. In essence all the grounds are a variation on the theme that the Defendant misapplied the risk factors in this case and Mr. Blundell's response demonstrates that such a claim is not made out.

42. I have reached the conclusion that this claim fails. The Defendant does not apply for an order for costs and, accordingly, I make no order.