

Neutral Citation Number: [2009] EWHC 1658 (Admin)

CO/6211/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 10 June 2009

B e f o r e :

SIR THAYNE FORBES

Between:

THE QUEEN ON THE APPLICATION OF SRITHARAN

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

MR N PARAMJORTHY (instructed by SATHA & CO) appeared on behalf of the
Claimant

MR J JOHNSON (instructed by TREASURY SOLICITORS) appeared on behalf of the
Defendant

J U D G M E N T

SIR THAYNE FORBES:

Introduction

1. In these proceedings the claimant challenges the decision of the Secretary of State, made on 3 July 2007, not to treat representations made in a letter, dated 15 November 2006, as a fresh claim for asylum and/or a fresh claim that it would be contrary to the Human Rights Act 1998 to remove the claimant from the United Kingdom. Stated shortly, Mr Johnson submitted, on behalf of the Secretary of State, that she had been plainly entitled to conclude that the representations advanced by the claimant did not have a realistic prospect of success, and that his further representations therefore did not amount to a fresh claim within the meaning of rule 353 of the Immigration Rules.

Factual background

2. The claimant is a citizen of Sri Lanka. He arrived in the United Kingdom on 5 July 2001 and claimed asylum on 13 July 2001. His claim was that:
 - i) he had printed leaflets entitled 'Tamil Resurgence', and that, as a result, he had been arrested by the authorities;
 - ii) One of his brothers had died fighting for the LTTE, so he would be regarded by the authorities as closely affiliated with the LTTE and there was therefore a real risk that he would be subjected to ill treatment by the authorities which would be inconsistent with his rights under article 3 of the European Convention on Human Rights; and
 - iii) one of his brothers had been shot by the LTTE because he was a PLOTE member, so he would be targeted by the LTTE and there was therefore a real risk that he would be subjected to ill treatment by the LTTE which, again, would be inconsistent with his rights under article 3 of the European Convention on Human Rights.
3. The claimant's claim was rejected by letter dated 15 August 2001 and he duly appealed. His appeal was dismissed by determination promulgated on 25 June 2003. The adjudicator found that the claimant's account of printing leaflets was untrue. In respect of the risk that arose as a result of his two brothers the adjudicator said this at paragraph 10 of his written determination:

"I am prepared to accept, as I must in applying the lower standard of proof, that the appellant's family circumstances are as stated by him, namely that his two brothers do have the history that the appellant claimed. I do not consider that the appellant would face any risk on account of his political activity or arrest in the past. He has no political history at all, and I have rejected his claim that he was arrested for printing leaflets...

"In assessing the level of risk to the appellant upon return therefore, the important consideration is whether his brother's involvement in the LTTE would expose him to the risk of persecution. As he has never been arrested I do not believe that the authorities would have any cause to link him with his brother, and even if this information came to light I do not think that, under current conditions in Sri Lanka, this would trigger his

persecution".

4. On 14 November 2006 the claimant was detained for the purposes of removal. By a letter dated 15 November 2006 his solicitors made further representations against removal. It was said that he was at risk for the following reasons:

"1) Our client's brother is a former member of the PLOTE (sic), the LTTE has shot him in 1999. Beside, one of the brothers, namely Subaharan, had been a member of the LTTE. He died in 1995.

"2) Our client was arrested and detained by the authorities. He was detained during which time he was severely tortured. He has scarring as a result of the torture.

"3) The Fact Finding Mission Report of 2001 of the Home Office confirms that records are centralised and computerised in the South, and in the north they are paper based but passed on to those in the South to be centralised. There will therefore be both a record of our client's detention in 1988, details of his irregular release, and there will be records relating to brother's link in respect of which will immediately be made since our client is required to provide all details of all family members before his return to Sri Lanka and such details are passed on to immigration and CID."

5. Pausing there at this stage, I interpolate to observe that a significant part of the points made by the solicitor in that letter are dependent upon the claimant having been arrested in Sri Lanka for printing and distributing leaflets. It is to be borne in mind, however, that the adjudicator had specifically rejected the claimant's account to that effect as a fabrication. Furthermore, the reference to the need for the client to provide all details of family members before returning to Sri Lanka is a reference to a document called the Bio Data form that has to be filled in by returning failed asylum seekers.

6. The claimant's solicitors' letter confirms as follows:

"4) The COIS report of September 2005 confirms, at paragraph 6.248, that details of all returnees are forwarded to immigration in Sri Lanka who pass them on to CID, and that upon to return to Sri Lanka all returnees are initially checked and questioned by immigration and are then passed on to CID to be questioned and checked.

"5) The COIS report of September 2005 confirms, at paragraph 6.252, that the UNHCR's position in relation to scarring is that Tamils are at risk of adverse treatment if they have scars. They take issue with the previous comments in relation to this issue in CIPU."

7. On 16 November 2006 these representations were rejected because the Secretary of State decided that they did not amount to a fresh claim. The claimant then issued proceedings for judicial review. By a Consent Order dated 24 May 2007 the Secretary of State agreed to reconsider the representations made on 15 November 2006 and the

further representations that had been made in the grounds for claiming judicial review. On 3 July 2007 the representations were again rejected, the Secretary of State having again decided that they did not amount to a fresh claim. In relation to the reliance on the claimant's brothers, the Secretary of State said this:

"Although it is noted that the adjudicator was prepared to accept your client's two brothers do have the history that your client claimed, given that your client's parents and other members of his family still reside in Sri Lanka without any problems, we consider that your client would not be at risk from the army or the LTTE."

8. The Secretary of State also added the following:

"Your client has no political history of his own, and even if the authorities became aware of his brother's identity, that is not likely to put your client at risk. First, there is no evidence that your client has had any problems with the authorities as a result of his brother's activities, he was able to live in his home area from 1995 until 2001 without any problems".

9. In relation to the contention that he had previously been detained, it was pointed out by the Secretary of State, as I have myself just pointed out, that this account had been rejected by the adjudicator who found the account of detention to have been fabricated.

10. On 23 July 2007 the claimant issued these proceedings for judicial review. By an order dated 10 December 2007 the application for permission was refused by Wyn Williams J. He made the following observations:

"The defendant was entitled to reject the submission that the further representations amounted to a fresh claim. She applied the correct test as laid down by the Court of Appeal in *WM*, she obviously had regard to all the relevant factors in determining the human rights claim. I do not think the decision of the AIT in *LP* impacts upon this case in any material way given the negative credibility findings made by the adjudicator when considering the claimant's own history."

11. Under cover of a letter erroneously dated 10 April 2008, but not received by the Secretary of State until 2 May 2008, the claimant's solicitors submitted a lengthy expert report from Dr Chris Smith, dated 2 May 2008. In summary, Dr Smith suggested that of the 12 risk factors identified by the AIT in the case of *LP* the following were present in the claimant's case:

- i) Tamil ethnicity.
- ii) Previous record as a suspected or actual LTTE member or supporter.
- ...
- vi) Having been asked by the security forces to become an informer.
- vii) The presence of scarring.
- viii) Return from London or other centre of LTTE activity or fund raising.
- ix) Illegal departure from Sri Lanka.

- x) Having no ID card.
 - xi) Having made an asylum claim abroad.
 - xii) Having relatives in the LTTE.
12. Before passing on it is to be observed that there is not, and never was, any evidence that the claimant had been asked by security forces to become an informer.
 13. The further submissions were rejected by the Secretary of State by letter dated 30 May 2008, in which the risk factors identified by Dr Smith were comprehensively dealt with. I refer to the contents of that letter and adopt them, but do not quote them, having regard to the need to keep this judgment as succinct as possible. Suffice it to say that I see no inherent defect, or indeed any defect, in the Secretary of State's reasoning with regard to those various risk factors as set out in that particular letter.
 14. Under cover of a letter dated 3 June 2008 the claimant's solicitors then submitted a further report from Dr Smith. In that report Dr Smith made a number of points in answer to questions raised by the Secretary of State. He also made a number of points inter alia about ID cards and disagreed with the Secretary of State's contention that an emergency travel document would generally suffice to establish identity.
 15. The claimant renewed his application for permission to claim judicial review. It was said that the critical factors which put the claimant at risk were the scarring, the fact that he had a brother in the LTTE, the fact that he would be unable to obtain an ID card within a reasonable period of time and the general state of civil war in Sri Lanka. The renewed application for permission was heard on 18 July 2008 by Bean J who granted permission.

Legal frame work

16. Rule 353 of the Immigration Rules is a very familiar rule, however it is necessary to quote its terms as follows:

"353) Fresh claims: 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."
17. It is a matter for the Secretary of State to decide whether the threshold test is met. It is common ground that the court can only intervene if the Secretary of State asks herself

the wrong question, or if her decision is unreasonable or irrational in a Wednesbury sense - see *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495.

Discussion

18. The decision letter of 3 July 2007 is the only decision that is challenged in the claim form and grounds. That letter addressed two discrete risks that had been relied upon by the claimant in his representations of 15 November 2006, ie a risk from the authorities and a risk from the LTTE. In effect it is only the former that is a live issue in these proceedings and it is therefore to that issue that I now turn.
19. The alleged risk from the Sri Lankan authorities is largely, if not almost entirely, based upon the fact that the claimant had a brother who was said to have died fighting for the LTTE. This issue was a core issue before the adjudicator who concluded as follows:
 - i) that the brother had indeed died fighting for the LTTE.
 - ii) the authorities would not link the claimant with that brother.
 - iii) even if they did, this would not give rise to a risk of persecution (see paragraph 10 of the written determination quoted above).
20. The reason why the Secretary of State decided that the representation did not have any realistic prospect of success was because, even if the brother had died fighting for the LTTE, and even if the authorities did link the claimant with his brother, there was no realistic prospect that an immigration judge would find that this gave rise to a real risk of persecution. Mr Johnson submitted that the Secretary of State was entitled to so find because:
 - i) an adjudicator had already found there was no real risk of persecution as a result of the LTTE brother;
 - ii) any immigration judge would treat the determination of the original adjudicator as the appropriate starting point - see *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1;
 - iii) the claimant's brother had died in 1995 and thereafter the claimant had remained in Sri Lanka until 2001, a total of 6 years, without any difficulty; and
 - iv) the claimant's family have remained in Sri Lanka since 1995 and there is no suggestion that they have had any difficulties as a result of the claimant's LTTE brother dying whilst fighting for the LTTE.
21. However, at the hearing before me on 28 April 2009, Mr Paramjorthy, on behalf of the claimant, stressed that the claimant had filled in the name of his LTTE brother in the Bio Data form and that this information would therefore be provided to the Sri Lankan authorities and to the Sri Lankan CID who would thus be alerted to this significant relationship. This particular approach to the circumstances relating to the LTTE brother became the main point in the claimant's case in these proceedings. However, as it turned out, contrary to Mr Paramjorthy's submissions, and to his obvious discomfiture, it transpired that the Bio Data form did not include any reference to the claimant's LTTE brother. This point then almost entirely disappeared, having been put at the very forefront of Mr Paramjorthy's submissions. I wish to stress that there is no suggestion that Mr Paramjorthy was aware of the absence of these details from the Bio

Data form. He made his submissions based on clear instructions from his client and it was only when he was provided with a copy of the Bio Data form at the hearing before me that he became aware that the form did not contain the material that he had been instructed it did contain. He then, very properly, applied for an adjournment to review the position and to take instructions from his client. The result of that was that, at the hearing before me today, Mr Paramjorthy very properly submitted that it was no longer open to him to stress the importance of, or rely upon, the assertion that the Bio Data form contained details of the LTTE brother. As I have just indicated, as it turned out, the Bio Data form did not include any reference to the LTTE brother and therefore this point almost entirely disappeared.

22. At today's hearing Mr Paramjorthy valiantly tried to preserve some life in the argument by asserting that the claimant would, in any event, tell the truth when questioned by the authorities in Sri Lanka on his return, and would then admit that his brother had been a member of the LTTE, and that the same consequences would flow. Mr Paramjorthy was at pains to point out that this was an argument of logic, not one that could be supported by reference to any specific evidence. I can not accept that submission. As Mr Johnson pointed out, there is no evidence as to what the claimant would say when questioned by the authorities in Sri Lanka. In fact, such evidence as there is strongly suggests that he would not reveal the details of his LTTE brother because he quite deliberately left out any reference to that particular brother on the Bio Data form, as is now common ground. In case it should be thought that this was an accidental slip, it is important to bear in mind that the claimant carefully named six other brothers whilst omitting the details relating to the LTTE brother. Second, there is no evidence as to what questions would actually be put to the claimant, with regard to this aspect of the matter, on arrival in Sri Lanka. I accept that, in paragraph 92 of Dr Smith's most recent addendum report, there is speculation as to what questions would be put. However, I accept Mr Johnson's submission that the various questions suggested by Dr Smith can all be answered perfectly truthfully by the claimant without revealing any details of his LTTE brother.
23. I am therefore satisfied that there is nothing in this principal point, and that the Secretary of State's decision with regard to the LTTE brother and the significance of that as a potential risk factor, is plainly not *Wednesbury* unreasonable and can not be stigmatised as such.
24. The other risk factors relied upon by Mr Paramjorthy in support of the claimant's case are set out succinctly and clearly in paragraph 6 of his very helpful written skeleton argument. They are as follows:

"6) The claimant essentially pleads his case relying on the following main factors of risk as established by *LP* Sri Lanka, and submits that the defendant's most recent decision, dated 20 April 2009, is irrational or fails to properly carry out the test established in *WMDRC*, and thus the defendant has reached the wrong decision. The following factors of risk establish that the claimant's removal will result in a breach of article 3 of the Human Right's Act, and that the claimant's further representations amount to a fresh claim and admit of a realistic prospect of success if

examined by an immigration judge today. Those factors are:

I) Tamil ethnicity.

II) Scarring.

III) Return from London or other centre of LTTE activity or fund raising.

IV) Illegal departure from Sri Lanka.

V) Having no ID card.

VI) Having made an asylum claim abroad."

25. It is not necessary to refer to the final one other than to say that that is the one that deals with having relatives in the LTTE.
26. It is to be noted, when looking at those risk factors in the round, that there is no evidence that the claimant has been involved in any LTTE activity or fund raising whilst in the United Kingdom.
27. Having regard to those particular risk factors it was Mr Johnson's submission that these other points (ie the points raised as risk factors other than circumstances relating to the LTTE brother) are insufficient for the purposes of the claimant succeeding in his claim. I agree with that submission. All the risk factors (other than the LTTE brother factor) that have been identified by Mr Paramjorthy in paragraph 6 of his written skeleton argument are what are now often referred to as background factors, and are insufficient in the ordinary way to create such a risk as to provide the necessary foundation for establishing a risk of persecution and/or a fresh claim.
28. It is necessary to refer only to paragraphs 88 and 89 of the decision in *AN & SS* (2008) UKAIT00063 to make that observation good, as follows:

"88) Miss Richards also invites us to take note of Collins J's observations on the country guidance in *LP*. Setting out the 12 'risk factors' identified by the tribunal, his Lordship takes the view that some of them are better characterised as background factors in that 'they do not in themselves indicate a real risk but they are matters which, if there is a fact which does give rise to a real risk that the individual will be suspected of involvement in the LTTE, add to the significance of that'. The factors which are properly to be regarded as background factors are [retaining the tribunal's numbering]:

(I) Tamil ethnicity.

...

(VII) The presence of scarring.

(VIII) Return from London.

(IX) Illegal departure from Sri Lanka.

(X) Lack of ID card, unless it goes beyond the period in which the individual might be expected to obtain an ID card after return.

(XI) Having made an asylum claim abroad.

...

"89) The remaining factors are the ones which are properly to be regarded as risk factors per se, these being:

(II) Previous record of suspected or actual LTTE member or supporter.

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

(VII) 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.

...

(XII) Having relatives in the LTTE."

29. Having regard to what I have already said with regard to matters such as having been asked by security forces to become an informer and to the claimant's LTTE brother, it is clear that none of the other points upon which the claimant relies as risk factors in this case can properly be regarded as risk factors per se. Those factors which remain arguable or viable are merely background factors which, as Mr Johnson submitted, I am satisfied are not capable of giving rise to a real risk that the individual will be suspected of involvement in the LTTE. Accordingly, I see no arguable reason as to why the conclusions upon those various factors that were set out by the Secretary of State in her letter, to which I referred earlier, can be in any way regarded as Wednesbury unreasonable.
30. Furthermore, in so far as one of those background factors relates to the claimant's alleged lack of an ID card, it is clear that this, in fact, is a non-point. That particular aspect of the matter is dealt with very clearly by the Secretary of State in her letter of 30 May 2008 where, at paragraphs 17 to 19, she makes it clear that the claimant has provided his birth certificate and that therefore he has the required "breeder document" to obtain an ID card without any difficulty. For those reasons there is no substance in that particular point in any event.
31. Accordingly, for all those reasons I have come to the firm conclusion that the Secretary of State's decision to reject the claimant's further representations as a fresh claim is not

irrational or Wednesbury unreasonable in any way at all. There is therefore no substance in this application which is accordingly, for all those reasons, dismissed.

32. MR JOHNSON: My Lord, I just ask for the defendant's costs, there will be a claim.
33. SIR THAYNE FORBES: Anything you want to say about that Mr Paramjorthy?
34. MR PARAMJORTHY: Your Lordship, all that I would say is that I could not object to it in principle, save to say that I am acting pro bono because of the circumstances of this case. My client has no permission to work in the UK, and the initial fees incurred for making that application were as a result of monies coming in from two friends in particular, one of whom has been removed back to Sri Lanka, and another who is in detention.
35. SIR THAYNE FORBES: Right.
36. MR PARAMJORTHY: That is all that I can say on the matter, but in principle I could not object.
37. SIR THAYNE FORBES: Well, enforcement of course, or any sort of practical application of the order, is not likely to meet with a great deal of success from what you are saying.
38. MR PARAMJORTHY: No, but again that is a different legal entity to what is being sought, but I thought you ought to know.
39. SIR THAYNE FORBES: Well, it is very appropriate of you to tell me but I do not, for my part, think that is a reason for refusing the order.
40. MR PARAMJORTHY: No.
41. SIR THAYNE FORBES: The application is dismissed and the claimant is to pay the Secretary of State's costs. Such costs to be the subject of a detailed assessment on the standard basis if not agreed.
42. MR JOHNSON: Very well.
43. SIR THAYNE FORBES: Mr Paramjorthy, I hope you have a very much happier trip home than you had coming here, so I suggest you get going as soon as possible.
44. MR PARAMJORTHY: I am grateful.
45. SIR THAYNE FORBES: Thank you very much for your assistance, both of you.