Case No: C5/2010/0433

Neutral Citation Number: [2011] EWCA Civ 76
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM APPEALS TRIBUNAL
THE ASYLUM & IMMIGRATION TRIBUNAL
(THE SINGLE JUDGE)
REF NO: AA/04131/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2011

Before :

LORD JUSTICE MAURICE KAY
(Vice President of the Court of Appeal, Civil Division
LORD JUSTICE THOMAS
and
LORD JUSTICE ETHERTON

- -

Between :

SS(SRI LANKA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Ms Charlotte Bayati (instructed by **Birnberg Peirce & Partners**) for the **Appellant**
Mr Denis Edwards (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 19 January 2011

- -

Judgment

Lord Justice Maurice Kay :

1. The appellant is a national of Sri Lanka who was born on 16 August 1987. He left Sri Lanka on 20 July 2008 when he flew to Ivory Coast, where he remained for three months, before moving on to Congo (Brazzaville) where he remained for a further four months. In February 2009 he spent several days in France but eventually arrived in the United Kingdom on 14 February 2009. He claimed asylum on entry. His application was refused by the Secretary of State in a decision letter dated 9 March 2009. In a Determination promulgated on 29 June 2009, Immigration Judge Braybrook dismissed his appeal on asylum and human rights grounds. Following an order for reconsideration, Senior Immigration Judge McKee found no error of law in the determination of IJ Braybrook. SIJ McKee subsequently refused permission to appeal to this court. However the appellant later obtained permission from this court on limited grounds.

2. The appellant's account, significant parts of which were not accepted by the Immigration Judge, can be summarised as follows. He is a Tamil from Karaitivu in eastern Sri Lanka. In January 2007 he and others were approached by the LTTE, held for some days and pressurised into providing assistance. He proceeded to spy for the LTTE on the local Karuna camp and on the police. On 26 November 2007, he and others were preparing to display a banner for Heroes Day. They were seen by Karuna group members who captured them. He was held for two days but told his captors that all that he had done to help the LTTE was done under pressure and amounted to no more than assistance towards the display of the banner. The Karuna group then handed him over to the Special Task Force (STF) who detained him for between 10 and 15 days and subjected him to ill-treatment. He was questioned about a recent shooting of STF members but he insisted that he had done no more than assist with the banner. In January 2008 he was released without charge but was required to report every day to the Karuna office. Following his release in January he was admitted to the Karaitivu Government Hospital where he was visited, pressurised and threatened by the LTTE. He spent two days in hospital and stitches were inserted to a 1cm wound to his head. On discharge he went into hiding because the LTTE were following him. He stayed with an uncle and aunt in Karaitivu. Initially he complied with his reporting requirement but stopped doing so because two of his group were shot whilst reporting. He then moved to an aunt's house in Kalmunai some 4-5 Km away. In April he was spotted by the LTTE when they were looking for someone else. He ran off but they chased after him and shot at him. He then hid in a cousin's house also in Kalmunai. On 18 June 2008 he travelled to Colombo, where he stayed in a hotel with his father. However, after a week he was arrested in a police raid. He was detained in a police station for a week and ill-treated. His father secured his release by payment of a bribe. He finally left Colombo on 20 July 2008 with the help of an agent paid for by his father.

3. The appellant's case before the Immigration Judge was that he had a well-founded fear of persecution by the LTTE and/or by the Sri Lankan authorities. By the time his appeal was heard, the general situation in Sri Lanka had changed. The Immigration Judge, relying on recent country material, found that the LTTE "are finished as a political and military force". No meaningful and active LTTE organisation remained in the appellant's home area. He was at no risk of harassment and persecution at the hands of the LTTE. This part of the Immigration Judge's determination is not

challenged. The issue on appeal relates to the risk of persecution at the hands of the authorities. Although the claim is also put by reference to Articles 2 and 3 of the ECHR, it is common ground that in this case the appellant will succeed by reference to both the Refugee Convention and the ECHR.

4. The Immigration Judge did not accept that the appellant had been engaged in spying for the LTTE. She concluded that his only assistance had been in relation to the banner on the single occasion on 26 November 2007. She did not accept that he had been visited by LTTE members whilst he had been in a Government Hospital. She rejected his evidence about detention and ill-treatment in Colombo immediately prior to his departure from Sri Lanka.

5. The principal ground of appeal is that the Immigration Judge fell into material legal error by failing to hold that there was a well-founded fear of persecution upon return to Sri Lanka on the basis of her own findings of fact. It is then submitted that SIJ McKee also erred in law by failing to detect that legal flaw.

6. SIJ McKee observed that the determination of the Immigration Judge had an "unusual structure". He described it as one in which she "has not set down all her findings in one place. Rather, they are interspersed with a chronological recapitulation of the appellant's account". That is a fair description. In order to understand IJ Braybrook's reasoning, it is necessary to piece together findings located in different parts of her Determination. On any view, she did not find the appellant to be an impressive witness. At various points she described his evidence as "of limited plausibility", "scarcely plausible" and "not always straightforward".

7. The Immigration Judge found that the appellant had no sympathy for the LTTE and the very limited help he provided to them was the result of pressure and fear. So far as his detention by the Karuna group and the STF was concerned, he had told them that his assistance was limited to the preparation of the banner and that he had only become involved in that through fear. The Immigration Judge said:

> "He was released without charge and all the indications are that the STF accepted his story of his very limited involvement. In his witness statement he confirms that 'the STF could not prove me a LTTE informer at the time of my arrest'. All of this suggests he would have been of very little interest to the authorities."

It is necessary to set out the further findings of the Immigration Judge in more detail.

8. The Immigration Judge stated:

> "28. This lack of interest is further supported by the fact that the appellant had no further direct contact with Karuna or the STF in the six months he was in his home area after his release. The appellant asserts that Karuna came looking for him at his Karaitivu residence when he failed to sign on. It is unclear whether he means his home or his aunt's home … There is no indication that if there was a search it was

very intensive given that they never found him. He claims that because of pressure from Karuna (as well as the LTTE) he went to his aunt's house in Kalmunai. This is 4-5 Km from his home in Karaitivu. When spotted by the LTTE he ran away and went to hide at his aunt's daughter's house which he stated was 1 Km away and remained there until June 2008. There is no evidence at all that Karuna or the STF made any attempt to trace him in this period. … He did not leave for Colombo until 18 June. Asked why he stayed that long if he was being sought by Karuna and LTTE he said in oral evidence that he wanted to stay in his own country. There was no particular incident which on his account prompted him to go to Colombo and overall little or anything to indicate he left because he was targeted and at real risk of persecution or ill-treatment.

29. During this six-month period in his home area when he claimed he was in hiding and failing to report, he had applied for a passport in his own name and gave his home address. He had applied for a passport because his father advised him to do so. The fact that he was seeking to obtain a passport in his own name suggests that he was planning to leave using his own ID through normal channels and saw no particular risk in doing so. He asserts that he did not do so because the passport never came in the post. None of this suggests that the appellant felt he was being sought by the authorities …

…

32. I considered the appellant's account of his injuries and scars [about which there was a medical report from Dr Josse]

…

35. I concluded that the physical evidence of very limited scarring and the report of Dr Josse did not assist in corroborating the appellant's overall account of his experiences in Sri Lanka.

…

37. I considered the appellant's account of his journey to the UK … I did not consider [it] credible."

9. All this led to the crucial findings set out in paragraph 39 as follows:

"I considered whether the appellant faced a real risk of persecution or ill-treatment on return following the guidance of

> the authorities cited including *NA v United Kingdom* [2008] EHRR 616. The court in *NA* accepted there was no general risk to Tamils. I accept that the appellant would be returning as a failed asylum seeker. However, if questioned at the airport there is no indication that there was anything to trigger suspicions that the appellant supported the LTTE. I concluded that the appellant's scarring was so limited [it] would not of itself have triggered suspicions on the part of the authorities on return. He had never been charged either in Karaitivu in 2007/8 or in Colombo. The authorities in his home area had accepted his explanation that he helped the LTTE only with a banner and in fear. The respondent concluded that the fact that the STF and Karuna had accepted his explanation and released him without charge meant he was not of interest to them … The appellant refers to this in his witness statement and confirms that 'the STF could not prove me as a LTTE informer at that time of my arrest'. I did not accept that the appellant had been detained and questioned for a week in Colombo but even if he had the authorities in Colombo appeared to be unaware that he had failed to sign on in Karaitivu and there was minimal evidence that he was considered of significance. There was no evidence his family [were] involved in LTTE politics. There is no evidence of any pressure on the appellant's family. The appellant indicates … in June 2009 that his father continues to work as an irrigational department officer, his mother lives at home and both his sisters were currently studying. The appellant has been in contact with his parents and two sisters since his arrival in the UK. There is no suggestion that his family has been harassed in any way either by the LTTE or the authorities. There was no evidence either the appellant or the family friend with whom he was staying were active in politics in the UK. The appellant could be met by his family at the airport on his return. His ID was on his account at home and could be produced. I have taken into account the overall security situation in the east of Sri Lanka at the time the appellant left. However, on all the evidence I concluded that the appellant had left Sri Lanka for reasons other than a fear that he was targeted by the LTTE or the authorities. Overall I am not satisfied that the appellant would be at real risk either from the LTTE or the authorities on return to his home area."

I now turn to the question whether any material error of law is disclosed in these passages or elsewhere in the Determination.

10. As I have said, the principal ground of appeal is that it was an error of law for the Immigration Judge not to have come to the contrary conclusion on the basis of her own findings of fact. This is essentially a perversity challenge. However, before I address it I should deal with two subsidiary grounds. The first, put in the alternative, is that the Immigration Judge failed to make a finding on the question whether the

appellant had been detained by the Karuna group and the STF. I am entirely satisfied that there was no such failure. The Immigration Judge referred in paragraph 27 to the appellant having been "detained by the Karuna and the STF" and set out her findings about what had transpired. Moreover, in paragraph 39 she accepted that "the authorities in his home area had accepted his explanation" which can only be a reference to the explanation given during those detentions.

11. The second subsidiary ground is in the form of a complaint that the judge erred in paragraph 28 of her determination when she said that "there is no evidence at all that the Karuna or the STF made any attempt to trace [the appellant]" after he failed to report. Miss Bayati draws attention to the appellant's witness statement where he states that, following his move to his aunt's house, "after two months they started to search [for] me at aunt's place as well. Therefore I relocated to Kalmunai". The statement then continues that, following his relocation to his cousin's house, "I heard that Karuna group had regularly visited to my Karaitivu residence to find me". The Immigration Judge's findings on these matters are to be found in paragraph 28. She accepted, or at least did not reject, that the Karuna group had come looking for the appellant at Karaitivu when he failed to report. However, she said "there is no indication that, if there was a search, it was very intensive, given they never found him". Turning to the period between April and June 2008 when the appellant was in Kalmunai, she said: "There is no evidence at all that Karuna or the STF made any attempt to trace him in this period". That is not strictly correct. There was the reference in the witness statement to the appellant having heard that the Karuna Group had visited the Karaitivu residence looking for him during that period. However, given the relative proximity of these various locations, even when one compensates for the Immigration Judge's error, it is impossible to escape the conclusion that the totality of the evidence about the authorities looking for him was somewhat desultory. I do not think that Miss Bayati dissents from the proposition that, if she is to succeed, she needs to make good her principal ground of appeal, to which I now turn.

12. The established facts emphasised by Miss Bayati are that the appellant is a Tamil who had provided assistance, albeit limited and under pressure, to the LTTE, that he had been detained and questioned by the Karuna group and the STF, that upon release he had been subjected to a reporting condition, that he had ceased to comply with that condition and that his non-compliance had caused the authorities to search for him in his home area. Her submission has to be that those facts, when considered against the appropriate country guidance decisions, required a conclusion that there is a real likelihood of persecution or ill-treatment on return.

13. One of the difficulties about Sri Lankan cases is that conditions in the country have been fluid. In 2007 the AIT gave guidance in *LP v Secretary of State for the Home Department, LP(LTTE area – Tamils – Colombo – risk?) Sri Lanka CG* [2007] UK AIT 00076. It provided that, whilst Tamils are not automatically at risk of serious harm from the Sri Lankan authorities in Colombo, a number of factors may increase the risk. Twelve such factors were identified (at paragraph 238) as follows:

> "(i) Tamil ethnicity.
>
> (ii) previous record as a suspected or actual LTTE member or supporter.

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

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

(v) having signed a confession or similar document.

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

(vii) the presence of scarring.

(viii) return 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."

14. The AIT there noted that the general security situation in Sri Lanka had deteriorated following the effective breakdown of the ceasefire and the increase in terrorist activity by the LTTE. The AIT emphasised that the list of factors was not a checklist nor was it intended to be exhaustive. They fell to be considered both individually and cumulatively. It added (at paragraph 239):

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

15. The guidance in *LP* was endorsed by the Strasbourg Court in *NA v United Kingdom [*2008] EHRR 616. The following passages in the judgment are relevant:

> "128. … Both the assessment of the risk to Tamils of 'certain profiles' and the assessment of whether individual acts of harassment cumulatively amount to a serious violation of human rights can only be done on an individual basis …
>
> …

> 133. … The court therefore finds that, in the context of Tamils being returned to Sri Lanka, the protection of Article 3 … 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 …
>
> 134. … 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. Whilst 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."

16. Although both *LP* and *NA* were decided prior to the military defeat of the LTTE in May 2009, later country guidance from the AIT in *TK(Tamils – LP updated) Sri Lanka CG* [2009] UK AIT 00049 confirmed that the risk categories identified in *LP* and approved in *NA* remain valid. This latest guidance post-dated the hearing before and determination of the Immigration Judge in the present case. It seems that risks remain, not least because the authorities are concerned about the possibility that returning LTTE sympathisers may assist in the reconstruction of that defeated group. However, the AIT stated (at paragraph 76):

> "So far as concerns the likely approach of the Sri Lankan authorities to returned failed asylum seekers, we consider therefore that their principal focus would be on persons considered to be either LTTE members, fighters or operatives or persons who have played an active role in the international procurement network responsible for financing the LTTE and ensuring that it was supplied with arms."

17. I note that in *XY v Secretary of State for the Home Department* [2010] EWCA Civ 770, Sedley LJ appears tacitly to have accepted (at paragraph 11) that any risk to the appellant in that case would have been greater "at the height of the civil war".

18. Does the totality of the country guidance, in particular that in *LP* and *NA*, point to the Immigration Judge having reached a perverse conclusion in the light of her findings of fact? In my judgment, it does not. She undoubtedly had regard to the risk categories set out in *NA*. She refers to that authority in paragraph 39 and it is apparent from the way in which she expressed herself that she had the specific categories well in mind. Thus, for example, her reference to the availability of the appellant's ID was no doubt prompted by the reference in the *LP* categories to "lack of ID card or other documentation". She specifically had regard to what might transpire on arrival at the airport in Colombo, concluding that "there is no indication that there was anything to trigger suspicions that the appellant supported the LTTE". In the remainder of paragraph 39 she effectively explained that conclusion. Her reasoning was that the

appellant's activity with the banner had been insignificant, that his explanation had apparently been accepted by the authorities resulting in his release without charge. Whilst it is true that he was required to report and later failed to do so, the evidence about attempts on the part of the authorities to apprehend him suggested a lack of intensity on their part. The Immigration Judge relied, and was entitled to rely, on the fact that the appellant had applied for a passport in his own name giving his own address during the period following his release from detention and upon the fact that his family have been left to live a life of normality since then. Miss Bayati is right to criticise the Immigration Judge for the passage in paragraph 39 in which she postulated, hypothetically, that the authorities in Colombo appeared to be unaware of his failures to report in Karaitivu. That was a misconceived observation in the light of the unequivocal finding that the appellant had not come to the attention of the authorities in Colombo. However, it does not undermine the reasoning as a whole. The essence of that reasoning is that the profile of this particular appellant does not give rise to a real likelihood of persecution or ill-treatment upon his arrival at the airport in Colombo. He was and is not of sufficient interest for such a risk to have materialised. In my judgment, that conclusion was permissible and is not tainted by perversity.

19. This is an apt case in which to refer to the judgment of Sir John Dyson in *MA(Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 where he said (at paragraph 45):

> "… the Court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the Tribunal, the Court should be slow to infer that it has not been taken into account."

20. In the present case, the perversity challenge having failed, the appeal is "in truth, … no more than a disagreement with the AIT's assessment of the facts".

21. For all these reasons I would dismiss the appeal.

Lord Justice Thomas:

22. I agree.

Lord Justice Etherton:

23. I also agree.