Case No: C5/2008/2290

Neutral Citation Number: [2009] EWCA Civ 84
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/14229/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 19th January 2009

Before:

LORD JUSTICE WILSON

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Between:

VK (SRI LANKA) **Applicant**

- and -

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

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Ms S Jegarajah (instructed by K Ravi Solicitors, Rayners Lane, Pinner, Middlesex HA5) appeared on behalf of the **Applicant**.

The **Respondent** did not attend and was not represented.

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Judgment

(As Approved by the Court)

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Lord Justice Wilson:

1. The applicant, a male citizen of Sri Lanka now aged 32, makes a renewed application for permission to appeal on point of law from a determination of the Asylum and Immigration Tribunal, specifically of Designated Immigration Judge Shaerf, on 21 July 2008. The DIJ had then dismissed the applicant's appeal against the refusal by the Secretary of State to recognise his claim for refugee status under the 1951 Convention and/or for humanitarian protection and/or under Article 3 of the 1950 Convention.

2. In 1991 the applicant's family, which is by ethnicity Tamil, moved to Colombo. The applicant does not contend that he himself was either a member or a supporter of the Tamil Tigers ("the LTTE"). But in 1998 his father and one of his brothers, namely a brother only slightly older than himself, were both arrested and detained on the grounds that, while not being members of the LTTE, they had assisted it by the provision of maps and of accommodation. In 1999 the father and the brother were convicted of offences in that regard and they remained in prison until about 2002.

3. The applicant left Sri Lanka in 1999, at the time of the conviction of his father and of his brother; and in October 2000, following several months in Moscow, he arrived in the UK and claimed asylum. It was part of the applicant's case that, at the time of the arrest of his father and brother on suspicion of helping the LTTE, the authorities had also been looking for him, notwithstanding that he had had no involvement with it or with their activities in relation to it in any way; and that therefore he had gone into hiding for the period of time prior to his flight to Moscow in 1999.

4. There is a long forensic history to the applicant's struggle to obtain a right of residence in the UK. Put briefly, the Secretary of State refused his application in February 2001; an adjudicator dismissed his appeal in September 2001; that appeal was directed to be heard again; another adjudicator again dismissed his appeal in March 2003; he was refused permission to appeal in June 2003 and thus began to remain in the UK unlawfully; he renewed his application in 2006, basing it upon the severely deteriorating situation between the authorities and the LTTE in Sri Lanka and added an alternative basis of application, namely linked to the residence in the UK of a cousin who was French, ie an EU national; those applications were refused in November 2006; his appeal against the refusal was dismissed by an immigration judge in April 2007; and a judge of the AIT concluded in March 2008 that the determination in April 2007 had been vitiated by an error of law and that it should be reconducted. Such was the background to the hearing before the DIJ in July 2008 which led to the determination now under proposed appeal.

5. The perceived error of law in the determination in April 2007 was that the immigration judge had failed specifically to determine the truth of the applicant's assertion that, at the time when his father and brother were arrested, the authorities were also looking for him. In the determination now under proposed appeal the DIJ held, by reference to the lower standard of proof and particularly in the light of the close age between the applicant and

the arrested brother (and notwithstanding that that applicant had not in any way involved himself in supporting the LTTE), that the authorities had, as the applicant contended, at that time been looking for him; and that his disappearance into hiding would have accentuated their interest in him at that time. One of the complaints of Ms Jegarajah, who represents the applicant today, is that the DIJ never translated that important finding into his conclusion about the risks which the applicant would now face if returned to Colombo.

6. In that regard the DIJ on any view weighed the applicant's Tamil ethnicity; the fact that he would be returning as a failed asylum-seeker; the fact that, in that he left Sri Lanka on a false passport, he lacks a passport or other Sri Lankan documents relevant to his identity; and the fact that ten years ago his father and brother were convicted of serious offences of assisting the LTTE and were sentenced to a significant term of imprisonment but were released from prison about seven years ago. The DIJ also referred to the fact that, notwithstanding that the family had moved from the north to Colombo in 1991, the applicant spoke little Sinhala. He also noted that the applicant had a number of scars on his legs. Although at one stage having, I believe, claimed that he himself had been detained by the authorities, being a claim which was rejected at the hearing in 2003 and has thereafter been taken on all sides as not established, the applicant never suggested otherwise than that his scars were innocently sustained in the course of his childhood. I should add that, whereas the DIJ alleges that, in the course of the hearing, the applicant, on request, rolled up his trousers above his knees and that he, the DIJ, was unable to discern some further scarring on the knees to which in 2002 a doctor had referred along with those on his lower legs, counsel (other than Ms Jegarajah) who appeared before the DIJ wrote in her skeleton argument in support of this proposed appeal that the scars on the knees or abrasions on the knees are indeed visible and she, for her part, did not accept that, at the hearing before the DIJ, the applicant's trousers had not been rolled up above the knees. This point, if only for the obvious reason that Ms Jegarajah comes newly to the case and cannot speak as to what occurred before the DIJ, is not pressed on me today. But I could not in any event have regarded it as of any major significance: the fact is that the applicant does have scars on his lower body, albeit apparently not on his upper body; that they were sustained innocently; that they were sustained a very long time ago and are therefore demonstrably ancient scars; but that, as the DIJ recognised, any scarring of that sort would be likely to intensify any interest which the authorities might already have developed in the applicant following his return.

7. This leads conveniently to a new point now taken by Ms Jegarajah, who was first instructed in the matter only yesterday, Sunday 18 January. It is, so she says, that there is an inconsistency between the DIJ's recognition of at any rate some significance in relation to the scarring and a later paragraph of his determination in which he said:

> "…the Appellant has not shown that there is a real risk that if stopped in Colombo or caught in a cordon and search operation he would be at real risk

> of further detention because of his family history. Even if he were subjected to questioning beyond initial questioning, and I find that there is no real risk that he would be, Dr Steadman's report does not note any scars or damage to the Appellant's chest or elbows which might give rise to suspicion…."

8. Speaking for myself, I do not read that passage as arguably conflicting in any material way with the earlier passage. It seems to me that the DIJ's overall conclusions are that the applicant might be questioned upon return, might be subjected to more than initial and cursory questioning on return, might then be found to be bearing the scars which he has on his legs and might find that those scars increased suspicion; but that, in the light of their age, of the absence of scarring on his upper body, and, centrally, of the overall lack of hard historical evidence of offences against this applicant, it would be unlikely to lead the authorities to detain him.

9. I cannot accept Ms Jegarajah's essential charge that, knowing that the previous determination had been flawed by a failure to determine whether the authorities were looking for the applicant in 1998, and finding that they had indeed then been looking for him, the DIJ failed to weigh that feature in his appraisal of what would be likely to face him on return to Colombo, particularly at the airport and thereafter in the city until such time as he was able to return to the north and find the remaining members of his family.

10. The whole foundation of the DIJ's determination is that, whatever interest was shown by the authorities in the applicant in 1998, it could not be said to be likely to remain in 2008. The applicant's evidence was that, so he understood, his family had in about August 2006 moved from Colombo back to Vanni, being an LTTE area, because of the fast deteriorating situation for Tamils in Colombo. In seeking to assess the current risks for the applicant, the DIJ observed that there was no evidence that, following the release of the father and the brother in about 2002 and even while it remained in Colombo, the family had been "harassed".

11. In the grounds of appeal drafted by previous counsel there was a particular complaint about that observation. I need not refer to it because Ms Jegarajah replaces that complaint with a different complaint about that observation. The new complaint has, with respect to previous counsel, somewhat greater force. It is that, in the light of the fact that there was a ceasefire between the authorities and the LTTE until, so the DIJ found, the first half of 2006, one would not expect harassment of the family, at any rate prior to the start of the deterioration in the situation which ultimately led the family to decide to move back to the north. So in my view Ms Jegarajah is entitled to suggest that the period of the family's possible exposure to harassment in Colombo was significantly shorter than the DIJ seems to have had in mind. My problem is that I cannot see that the reduction in the force of that particular point can be said to have had a material effect upon the DIJ's overall reasoning.

12. The DIJ accepted the applicant's evidence that in 2007 one of his much younger brothers had come to the UK in order to study and for that purpose had received entry clearance and had travelled, without complication, from the north, thus across a LTTE checkpoint, to Colombo and then through Colombo airport in order to fly to the UK. The DIJ noted that he had done so without difficulty. Previous counsel was right to point out in her skeleton argument that, in an earlier passage of his determination, the DIJ had observed that that brother was so much younger than the applicant, and indeed than the brother who was arrested and convicted, that he, at any rate, would have been unlikely to have been, even in 1998, of any interest to the authorities. So in my view, although this is not a matter that Ms Jegarajah chose to press today, previous counsel was entitled to argue that it is insignificant that in 2007 that younger brother was able to travel without complication to the UK. It is a fair point but, with respect, it is a small point. The essential facts are that the applicant never had any dealings whatever with the LTTE; that there is no outstanding warrant for his arrest; that there never was any such warrant; that he was never detained by reference to suspected involvement with the LTTE; and that, over ten years later, such limited interest as the authorities had in the applicant by reference to the activities of his father and brother would be -- such was the DIJ's conclusion, which in my view was open to him on the evidence -- unlikely to lead to his being at any real risk upon return.

13. The objective evidence in recent years has essentially been to the effect that the authorities' records at Colombo airport are now computerised and go back between ten and 15 years. The DIJ noted a recent letter from the British High Commission which seemed to cast doubt on the extent of computerisation at the airport; and, reasonably enough, the DIJ observed that he was unable to reconcile this difference. He certainly did not, however, proceed upon any positive conclusion that there was no such computerisation at Colombo airport. Ms Jegarajah relies strongly upon a recent decision of the ECHJ in NA v United Kingdom (Application no 25904/07) which, in fact, came to the attention of the DIJ following the hearing but prior to promulgation of his determination: for he referred to it at the foot of his determination and concluded that there was nothing in it which should cause him to reconsider it. Ms Jegarajah says, by contrast, that it did contain matter which should have caused him to reconsider it, namely a conclusion that the recent doubts of the British High Commission about the level of computerisation at Colombo airport, being inconsistent with clear earlier objective evidence to the contrary, should not be given weight. In that the DIJ did not actively place weight on it but simply referred to it as inconsistent with the earlier evidence, the decision of the ECHJ calls, at most, for some difference of emphasis in the terminology adopted by the DIJ in his determination and I do not consider that it could sensibly be considered by this court to strike at his essential conclusion.

14. The thrust of the decision in NA seems to me to be that, where a Tamil applicant was detained in Sri Lanka and where it is demonstrated or can be inferred that a record was made of his detention, particular caution should be exercised by a state before returning him there; but clearly that is not a situation analogous to the present case.

15. Equally, both the decision of the Strasbourg court in NA and the decision of the AIT in LP [2007] UKAIT 00076 indicate that, while the possibility must always be weighed that records will exist in relation to all those in whom the authorities are found in the past to have been interested, records in relation to those who have been detained or who have jumped bail or who have been the subject of an arrest warrant are obviously more likely to have been made in the first place, to have been kept, and indeed not to have been erased along the many years.

16. It is for those reasons that, notwithstanding Ms Jegarajah's admirable efforts on behalf of this applicant, I refuse him permission to appeal.

Order: Application refused