CO/5327/07

Neutral Citation Number: [2008] EWHC 3505 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Friday, 17 October 2008

B e f o r e:

MR ROBIN PURCHAS QC

(Sitting as a Deputy Judge)

- -

Between:
THE QUEEN ON THE APPLICATION OF RAJASEKARAN

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

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Mr Jonathan Martin and **Miss A Seehra** (instructed by Ravi Solicitors) appeared on behalf of the **Claimant**
Ms Parishil Patel and **Miss N Greaney** (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. THE DEPUTY JUDGE: The claimant seeks judicial review of the decision of the defendant in letters dated 7 and 26 March 2007 that the claimant's claim for asylum was clearly unfounded, and to confirm the certificate to that effect under section 94(2) of the 2002 Act. The Secretary of State reconsidered her decision following commencement of proceedings for judicial review and confirmed her earlier decision in a letter dated 6 October 2008, which was also considered as part of these proceedings.

2. The basis of the claim for asylum is the claimant's fear of persecution and mistreatment by the authorities if he is returned to Sri Lanka in breach of his rights under Article 3.

The facts

3. The claimant is a Tamil born in Jaffna. He is 35 years of age. As a student he became a member of the LTTE in 1993 and became a teacher in 1995. In that year he (with other Tamils) was displaced to Vanni. After some years he wished to return to Jaffna which he sought to do in 2000. On his way there on 1 September 2000 he was arrested at Vavuniya and while in detention severely ill-treated, including being beaten over a period of two weeks as a result of which he has scarring to his head and face and one leg.

4. He was released on 26 December 2000 following the payment of money by his mother for that purpose, following which he spent four days in hospital. His release was subject to reporting restrictions. He reported on three occasions and then missed the fourth. As a result of that he was rearrested on 30 January 2001 for failing to report, and again was beaten and mistreated, although on that occasion without lasting injury. He was released after three weeks, again subject to reporting conditions.

5. The applicant left Sri Lanka on 14 March 2001 and arrived in France in June 2001. In that year a ceasefire was arranged in Sri Lanka. As a result asylum was refused and he returned to Sri Lanka on 12 November 2002. There was then peace in Sri Lanka and he had no problems. He returned to the north of the island which was controlled by the LTTE and worked as a teacher. He became a member of the LTTE's teacher group in 2003. By 2006 the ceasefire was breaking down, and in September of that year he was recruited to undertake military training for the LTTE, but because of his heart condition he was unable to complete his training. He was also distressed by the mistreatment of children. In September 2006 he left the LTTE controlled part of the island and went to Colombo arriving on 10 October 2006 and went into hiding until 18 October 2006, when he departed for the United Kingdom where he arrived on 22 October. He made his claim for asylum on 24 October 2006. That was refused by letter of the defendant on 7 November 2006 who certified the claim as clearly unfounded under section 94.

6. Judicial review proceedings were commenced. Permission was refused on the papers by Owen J on the grounds that there was no realistic prospect of success. That was not renewed to an oral hearing. On 22 February 2006 he made submissions to the defendant for reconsideration of his asylum claim. That was rejected, as I have said, in a letter of 7 March 2007. There were further submissions made on 20 and 23 March and they were again rejected in a letter dated 26 March and the certificate was confirmed.

7. Judicial review was commenced on 27 June 2007 which must have been at the very end of the three month-time limit. Permission was granted on 24 July 2008 by Goldring J, giving the reason that:

> "Given the current situation in Sri Lanka it seems to me the court should consider whether it was appropriate for the defendant to certify this case as clearly unfounded."

The issue

8. The outset of the case the parties helpfully clarified the issue to be determined and it is accepted by both parties that I should approach the claim as a challenge to the certificate made by the Secretary of State on 26 March 2007 for the reasons given in that letter and in the letter dated 7 March, together with the letter of 8 October 2008 which the Secretary of State wrote following further reconsideration in the context of the claim that had been made. It has been further helpfully clarified by Mr Martin, who appears for the claimant, that in the light of recent authority the claimant limits his claim to fear of persecution and maltreatment by the authorities in Sri Lanka. He does not rely on threats from the LTTE because he accepts that the claimant will be able to live in other parts of Sri Lanka, notably Colombo.

The law

9. Section 96 enables the Secretary of State to certify that an asylum claim is clearly unfounded, a consequence of which the claimant is unable to appeal to the Secretary of State's decision on relevant specified ground. The meaning of "clearly unfounded" was considered in ZL and VL v Secretary of State for the Home Department [2003] EWCA Civ 25. Lord Phillips MR held that the test was objective, which did not depend on the Secretary of State's subjective view but upon criteria which the court could reapply in the light of the material before the Secretary of State. As to the approach, Lord Phillips said this:

> "The decision-maker will –
>
> 1. consider the factual substance and detail of the claim.
>
> 2. consider how it stands with the known background data.
>
> 3. consider whether in the round it is capable of belief.
>
> 4. if not, consider whether some part of it is capable of belief.
>
> 5. consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention.

10. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not."

11. That is, in essence, the same test as was adopted by Lord Hope in Thangarasa v Secretary of State 2002] UKHL 36 at 34 in applying the manifestly unfounded test under section 72(2)(a) of the Asylum Act 1999; namely, that the claim "is so lacking in substance that the appeal would be bound to fail."

12. Lord Hope emphasised in his opinion that the issue:

> "Must be approached in a way that gives full weight to the United Kingdom's obligations under the ECHR."

Lord Bingham adopted a similar test; namely, the Secretary of State must be satisfied that the allegation must clearly fail. Lord Hutton drew attention to the fact that in considering the question whether the claim was manifestly unfounded, the Secretary of State should have regard to the fact that the onus rests with the applicant to show that there are substantial grounds for believing that if removed he would face a real risk of mistreatment contrary to Article 3.

13. I should record that when the defendant first considered the asylum claim in November 2006 Sri Lanka was still listed under section 94(4) of the Act. That meant that the Secretary of State had to certify the claim unless she was satisfied that it was not clearly unfounded. In December 2006 Sri Lanka was taken out of section 94(4) and so the question was straightforwardly whether the Secretary of State concluded that the claim was clearly unfounded.

Country of origin guidance

14. In LP (Sri Lanka) CG [2007] UKIAT 76 the tribunal gave binding guidance for immigration judges as to the position in Sri Lanka at that time. At paragraph 238 the tribunal identified factors relevant to the question of risk. That was subject to further guidance by Collins J in R v Secretary of State for the Home Department ex parte Five Sri Lankan Tamils [2007] EWHC 3288, dividing the factors into what could properly be regarded as risk factors and others that could be better regarded as background factors.

15. In the present case it is agreed that two risk factors are engaged. First, the claimant's previous record as a suspected or actual LTTE member or supporter; and second, bail jumping. In addition, the claimant's scarring was, on the guidance of Collins J, a confirmatory rather than a free-standing risk element. Thus if the claimant was found to be scarred, it may lead to suspicion which coupled with the other factors to interrogation involving mistreatment or torture.

16. In respect of the first risk factor, previous record of suspected or actual LTTE member or supporter, the tribunal said at paragraph 209:

> "Dr Smith, at paragraph 121 of his second report, identified this as a risk element noting that the appellant in this case had been detained on

> suspicion of being an LTTE member and then released on bail. Dr Gunaratna went [on] further to state that it was very likely the Sri Lankan Government would have a record of the appellant firstly because he had been arrested and jumped bail, and secondly because Sri Lankan Government records would state he was a member or supporter of the LTTE.
>
> 210. From our assessment of the background evidence, we find that it is of vital importance, in the assessment of each Sri Lankan Tamil case, to establish an applicant's profile, and the credibility of his background, in some depth. For example if the appellant was not credible as to his background from the north or the east, which left a situation where he could be a Tamil from Colombo who had little or no involvement with the LTTE, there could be, based on the reality of the assessment of his predicament, little risk (or almost certainly not risk at the level of engaging either Convention."

In respect of bail jumping, at paragraph 212 the tribunal said:

> "The background information provided to us here indicated that those who had jumped bail would be at a real risk of being detained either at the airport or if they later come in contact with the Sri Lankan authorities. In Professor Goode's specific report on the appellant, he deals with this issue. He noted in this case that the appellant was taken (in Colombo) and subsequently released on formal bail. He notes this as a 'relatively unusual aspect' of the appellant's account. (We agree for reasons we set out below). He stated that it appears to be far more common practice, especially outside Colombo, to release a detainee without the requirement of a bail bond although generally through the payment of a bribe, not least because it is only in very rare cases the detainee will ever have been produced in court. He states that in any case the available evidence does not support the contention that the detainee's release of itself indicates the authorities have no continuing interest in him. He considers that it cannot be concluded that release without charge or without the payment of a bribe precludes subsequent detention and notes a report from the Swiss Refugee Council in that regard. He submits that the issue is one of logic that having detained persons in Sri Lanka there is a practice and routinely re-arresting and re-detaining people on the basis of obtaining confession evidence by torture. This evidence appears to be supported by Dr Smith and Dr Gunaratna."

The tribunal continued at paragraph 214:

> "The situation however, in respect of those who have not been to court and may have been released after the payment of a bribe we do not consider falls into the same category. Much will depend on the evidence relating to the formality of the detention (or lack of it) and the manner in which the bribe was taken and the credibility of the total story. If the

> detention is an informal one, or it is highly unlikely that the bribe or 'bail' has been officially recorded, then the risk level to the applicant is likely to be below that of a real risk. The respondent contends that a detention by the authorities, when there is a suspicion of bail jumping or escape from detention, would lead to harassment only, and not maltreatment rising to the level of persecution, or a breach of the humanitarian protection or Article 3 thresholds. While we would agree that there may well be situations where Tamils, with little or no profile related to the LTTE, or other 'terrorist' groups, could be briefly detained and harassed, as no doubt happens in round ups in Colombo and elsewhere, we consider it illogical to assume that an escapee, from Sri Lankan government detention, or a bail jumper from the Sri Lankan court system, would be merely 'harassed' given the climate of torture with impunity that is repeatedly confirmed as existent in the background material from all sources. We consider, (as we think it does in the appellant's particular case), that the totality of the evidence may point to a real risk, in some cases, of persecution or really serious harm when a recorded escapee or bail jumper is discovered, on return to Sri Lanka."

In respect of that I should draw attention to the interview of the claimant in respect of his first detention from the continuation sheet. He was asked:

> "Q. What date were you released on your second occasion?"
>
> A. I was arrested on 31st and released after three weeks.
>
> Q. What month?
>
> A. January 2001.
>
> Q. Were you ill-treated during your second detention?
>
> A. I was beaten, asked why I did not come and sign. Q. How many times were you beaten?
>
> A. I was beaten on the whole day I was arrested."

17. Mr Martin drew attention to that part of the interview as reflecting on the claimant's account as to the reason for the second arrest being that he had failed to sign in accordance with the conditions on his first release, suggesting that there must have been a record of the requirement to sign, notwithstanding that money was paid by the mother to secure his release on the first occasion.

18. Returning then to the decision in LP, the tribunal dealt with scarring at paragraph 217:

> "The background evidence on the issue of scarring has fluctuated. Up until the time of the ceasefire it was generally accepted as something which the Sri Lankan authorities noted and took into account both at the airport and on detention and in strip searches of suspected Tamil LTTE

supporters. Their perception that it may indicate training by the LTTE, or participation in active warfare, was self-evident, and simply was 'good' policing, as appeared to be suggested by the Inspector General of Police in his discussions with Dr Smith. On the same logic it was also valid to conclude that the impact of scarring was of far less interest during the period 2002 - late 2005 while the ceasefire agreement was having some effective impact. ...

We agree with the comments in Dr Smith's report, that the issue of scarring was considered by the police to be a very serious indicator of whether a Tamil might have been involved in the LTTE. However, on the evidence now before us we consider that the scarring issue should be one that only has significance when there are other factors that would bring an applicant to the attention of the authorities, either at the airport or subsequently in Colombo, such as being wanted on an outstanding arrest warrant or a lack of identity. We therefore agree that the COIR remarks that it may be a relevant, but not an overriding, factor. Thus, whilst the presence of scarring may promote interest in a young Tamil under investigation by the Sri Lankan authorities, we do not consider that, merely because a young Tamil has scars, he will automatically be ill-treated in detention."

The tribunal considered risk profiles for Tamils at paragraph 227:

"Our assessment of the various risk factors above has highlighted that each case must be determined on its own facts. It may be that in some credible cases one of these individual risk factors on its own will establish a real risk of persecution or serious harm on return by the Sri Lankan authorities for Sri Lankan Tamils who are failed asylum seekers from the United Kingdom. For those with a lower profile, assessed on one or a combination of the risk factors we have noted however, such as this appellant, their specific profiles must be assessed in each situation and set against the above non-exhaustive and non-conclusive, set of risk factors and the volatile country situation. As can be noted, several factors, such as being subject to an outstanding arrest warrant, or a proven bail jumper from a formal bail hearing may establish a much higher level of propensity to risk than various other factors. In this situation therefore, the assessment exercise is a much larger and more detailed one than may have been the situation up to 2002 and certainly during the period of the cease fire agreement. The current worsening situation in Sri Lanka requires serious consideration of all of the above factors, a review of up to date country of origin information set against the very carefully assessed profile of the appellant."

They concluded at paragraph 234:

"Tamils make up over 10% of the population of Colombo. Despite evidence of some forms of discrimination, the evidence does not show

they face serious hardships merely because they are Tamils. As a result, other considerations apart and subject to individual assessment of each applicant's specific case, it cannot be argued that, even if he faces serious harm in his home area, 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.

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 the police in Sri Lanka do, in appropriate circumstances, grant bail. In this particular case bail was granted by a court. If the Tribunal is satisfied that the appellant has jumped bail (and that would include failing to report under a reporting condition), it is necessary to assess the reason for which bail was granted in the first place. Not every young, male Tamil who is arrested will have been so arrested because of sectarian activity. As in any other society a proportion will have committed, or been suspected of committing more mundane criminal, and often minor, offences."

19. The position in Sri Lanka was further considered by the European Court in NA v United Kingdom [2008] ECHR. The judgment was delivered on 17 July of that year. It was a case which differed on its facts from this case. There was specific evidence of a record of the detention both through photographs of the claimant and his fingerprints being taken, and that his father had signed papers. At paragraph 133 the court said:

"On the basis of this evidence, the Court therefore finds that, 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.

134. 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 crystalise. 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."

The court continued at paragraph 136:

> "This evidence on procedures and facilities at the airport must also be placed 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 and the evidence that scarring has been used in the past by the authorities as a means of identifying Tamils who will be of interest to them. The Court notes 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' 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 logic 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."

The court went on to consider the particular facts in that case (and paragraph 142 follows the approach in LP), saying that the court will assess the strength of the applicant's claim to be at real risk as a result of the accumulation of the risk factors identified in LP, or that it will do so in the light of its own observations:

> "In particular, the court underlines first, the need to have due regard for the deterioration of the security situation in Sri Lanka and the corresponding increase in general violence and heightened security, and second, the need to take a cumulative approach to all possible risk factors identified by the applicant as applicable to his case."

The court continued at 144:

> "The Court also accepts the assessment of the AIT that scarring will have significance only when there are other factors that will bring the applicant

to the attention of the authorities such as being wanted on an outstanding arrest warrant or a lack of means of identification. However, where there is a sufficient risk that an applicant will be detained, interrogated and searched, the presence of scarring, with all the significance that the Sri Lankan authorities are then likely to attach to it, must be taken as greatly increasing the cumulative risk of ill-treatment to that applicant. 145. The Court recognises that it has been over ten years since the applicant was last detained by the Sri Lankan army. However, the Court considers that the greatest possible caution should be taken when, as in the applicant's case, it is accepted that a returnee has previously been detained and a record made of that detention. As the AIT found in LP, such a record may be readily accessible to airport authorities, meaning the person in question may become of interest to the authorities during his or her passage through the airport. Where there is a likelihood this will result in delay in entering the country, there is clearly a greater risk of detention and interrogation and with it a greater risk of ill-treatment contrary to Article 3. Equally, in light of its observations ... , the Court finds the passage of time cannot be determinative of the risk to the present applicant without a corresponding assessment of the current general policies of the Sri Lankan authorities. Their interest in particular categories of returnees is likely to change over time in response to domestic documents developments and may increase as well as decrease. In the Court's view, it cannot be excluded that on any given date if there is an increase in the general situation of violence then the security situation in Sri Lanka will be such as to require additional security at the airport. The Court also recalls its findings, notably that computerised records are available to the airport authorities. Given that it is undisputed that the applicant was arrested six times between 1990 and 1997, that he was ill-treated in detention and that it appears a record was made of his detention on at least one occasion, the Court considers that there is a real risk that the applicant's record will be available to the authorities at the airport. Furthermore, it cannot be excluded that on any given date the security situation in Sri Lanka would be such as to require additional security at the airport and that, due to his risk profile, the applicant would be at even greater risk of detention and interrogation."

Finally at 147 the court said:

"The Court has taken note of the current climate of general violence in Sri Lanka and has considered cumulatively the factors present in the applicant's case. It also notes its finding that those considered by the authorities to be of interest in their efforts to combat the LTTE are systematically exposed to torture and ill-treatment. There is a real risk that the authorities at Colombo airport would be able to access the records relating to the applicant's detention and if they did so, when taken cumulatively with the other risk factors he has relied upon, it is likely the applicant would be detained and strip-searched. This in turn would lead to the discovery of his scars. On this basis, the Court finds that these are

substantial grounds for finding that the applicant would be of interest to the Sri Lankan authorities in their efforts to combat the LTTE. In those circumstances, the Court finds that at the present time there would be a violation of Article 3 if the applicant were to be returned."

20. I also refer to the Asylum and Immigration Tribunal's decision in AN and SS [2008] UKAIT 63. At paragraph 105 the tribunal was dealing with risk from the Sri Lankan authorities and said:

> "Although the country guidance has not been sought regarding this aspect of the appeal, we need also to address the issue of the risk to returnees from the authorities. We have been asked in particular to give our view on whether the second of the risk factors identified in LP applies to Miss AN, namely whether she has a *'previous record as a suspected or actual LTTE member or supporter.'* Much energy was initially expended on the question whether the CID at the airport have computers or not, but as Professor Good observed, even id the CID do not, the Immigration Service certainly does, and when incoming passengers are being checked, a 'Stop List' and a 'Watch List' on the computer will alert the immigration officer to anyone in whom the CID would have an interest. The Tribunal in LP accepted that this is so, and found that the appellant in that case would be on the computer record because he had been formally brought before a court and had been granted bail before absconding. He therefore came within the fourth of the risk categories, namely *'bail jumping'*. We note also that the head of the CID told a Home Office [commission] in 2002 that photographs of wanted persons were not available at the airport, but that their names were on the computer.
>
> 106. The background evidence clearly supports the existence of a centralised national database accessible by the security services. The National Intelligence Bureau is said to have records going back ten years or even longer, and to have had a central database since 2004. Although there is a lack of computer facilities in the north of the island, paper records are sent south and are transferred onto the computer database. The question for us then is not whether, as in the case of the LTTE, the database exists at all, but who would be on the database. In his oral evidence, Professor Good did not venture to surmise who was likely to be stopped at the airport, save those for whom an arrest warrant has been issued, although in his written report he expressed the view that the authorities have every incentive to maintain official records of suspects who have been arrested, even if they have subsequently been released without charge. Dr Smith was less cautious, asserting that the central database contains the names of all those who have ever been detained and subsequently released as *'unacquitted suspects*.'
>
> 107. 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 who (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."

21. On the current position in Sri Lanka my attention was also drawn to the country guidance, dated 11 June 2008. Paragraph 8.26, dealing with incidents in 2008, refers to a Daily Mirror report at the beginning of the year, referring to a search into Colombo City with 198 persons arrested on suspicion. At paragraph 8.75, in respect of torture it refers to the USSD report 2007 of the regular use of torture and other mistreatment as part of interrogation. And at paragraph 28.21 it refers to a report on 25 January 2008 as to the reintroduction of road blocks and check points in Colombo and detention of Tamils.

22. Mr Martin also drew the attention of the court to various articles in 2008 dealing with increasing lawlessness, coupled with detention of Tamils and road blocks during 2008.

23. As I have said, the defendant considered the question of certification on three occasions during 2007 and 2008, and having regard to the potential engagement of Article 3 the parties in this court have focused on the most recent letter dated 8 October 2008 and I intend to do the same.

24. In her letter, the defendant sets out accurately the appropriate approach to the question of certification. In section B of the letter she refers to the authority of LP and the risk factors. On previous record as a suspected or actual LTTE member, paragraph 20, she says this:

> "It is noted that your client has not been charged with any offence by the Sri Lankan authorities and was released after his periods in detention. Furthermore he was not detained because of his work as a teacher for the

> LTTE. When your client's claim was rejected by the French authorities he returned to Sri Lanka and did not claim to have encountered any problems with the Sri Lankan authorities on his return. Although he continued to work for the LTTE as a teacher."

And at paragraph 21:

> "It is therefore considered that the Sri Lankan authorities would not have an interest in your client when he is returned to Sri Lanka."

On bail jumping, paragraph 24, the Secretary of State refers to part of the judgment of Collins J in Thangeswarajaj [2007] EWHC 3288, and in particular the frequency of bribes being paid in the context of custody release. The Secretary of State goes on in paragraph 25:

> "In view of the fact that your client was at least on one occasion released as the result of a bribe and stated that he had no problems with the authorities upon his return in 2002, it is considered that this factor does not apply to your client."

On scarring at paragraph 30 the defendant says:

> "As noted above, it is not accepted that the Sri Lankan authorities would have any record of your client. It is therefore considered that, this factor alone would not place him at risk."

The defendant deals with the risk of detention, saying, at paragraph 41:

> "Your client will possibly be identified as a failed asylum-seeker who is returning to London by the authorities at Colombo airport when it is not considered the information about indicates that failed asylum seekers **per se** face any great difficulty on return the evidence indicates that it is when there is an outstanding warrant there is a real risk -- is there a real risk of detention. There is no evidence that there is an outstanding warrant for your client's arrest indeed as previously stated he was released without charge from his two periods of detention.
>
> 42. No evidence has been supplied to indicate that the authorities would now have any adverse interest in your client beyond the initial immigration screening."

At paragraph 50 the defendant concluded:

> "Whilst some of the LP risk factors are applicable to your client, in light of the analysis above (when assessing these factors in line with the judgment in NA), there is no prospect of your client persuading the AIT (on any appeal) that he would face a real risk of ill-treatment from the

authorities upon his return to Sri Lanka."

In respect of the current situation in Sri Lanka, at paragraph 62 the defendant says:

> "Concern has been raised over recent abductions and disappearances within Colombo. Reports have implicated the Sri Lankan security services in several instances, with the re-emergence of enforced disappearances being linked to the introduction of new Emergency Regulations in August 2005. It is considered that due to the still relatively small number of abductions that have taken place in the Colombo area since 20 August 2006, together with the professional background of many of those abducted, with either high informatory or financial value, that the vast majority of the Tamil population in Colombo are not at real risk of abduction in Colombo.
>
> 63. Furthermore it is noted that there have been some violent incidents in Sri Lanka recently in 2008. On 6 August 2008, it was noted that 24 civilians were killed in the past month during the proposal to extend emergency. The death of persons including two children and seven women injured in an Liberation Tigers of Tamil Eelam (LTTE) triggered parcel bomb explosion. Furthermore on 1 September 2008, the BBC reported that civilians living in the LTTE-held areas were urged by the outfit to construct bunkers in all places as Safety Mechanism. The Government announced the Ministry of Defence had taken *'swift measures to establish a safe corridor'* to enable passage of civilians in the LTTE-held territory in the north.
>
> 64. Although it is accepted that the general security situation has deteriorated as a result of heightened conflict between the Government and LTTE, it is equally clear that the main incidents of insecurity continued to be reported in the northern and eastern districts. Your client would be removed to Colombo in the South of Sri Lanka and not to the North or East area. It is considered that the periodic large-scale cordon and search security operations in Colombo in recent months that have led to the typically brief arrest of persons to establish their identity, do not establish a real risk of arrest, detention and ill-treatment for the general Tamil populace in Colombo. There is no evidence to suggest that your client would be at risk in Colombo.
>
> 65. It is not accepted that this evidence changes the position. For the reasons stated above, it is not considered that your client fears persecution from either the Sri Lankan authorities or the LTTE or that his removal to Sri Lanka would breach his rights under Articles 2 and 3 of the European Convention on Human Rights."

Submissions

25. Mr Martin submits that it is clear from LP and the Country of Origin Report that records in Sri Lanka go back at least ten years and would cover the period of 2000/2001 when the claimant was detained and mistreated. He draws attention to the heightened security, together with the evidence of road blocks and detention in Sri Lanka. He submits that, while Tamil ethnicity is not in itself conclusive because of the large body of Tamils in Colombo, the claimant is a man who comes from the north. He has absconded. He was originally detained on what appears to have been suspicion of membership or support of the LTTE for some three months, and he has scars to corroborate his involvement and with that the suspicion of the authorities. Apart from general inference, the reason again for his second detention was the failure to report on the conditions for his release from the first period of detention which means that there must have been a record of his bail or reporting conditions at that time.

26. As an asylum reject, he will have to return via the airport where the availability of records is, as recognised in AN**,** of a higher order. There is likely to be at least risk of his detention for interview and with that a real risk of discovery of the past records. Behind all this is the fact that the claimant is someone who was in fact a member of the LTTE and trained for military service. His incident-free return in 2002 does not demonstrate anything because it was at a time of peace and the state of security would have been low and involvement with the LTTE not of the same significance. In any event he spent most of his time in LTTE controlled territory.

27. Mr Martin also submits that there is nothing inherently implausible in what the claimant says. Therefore the case should be tested on the basis that what he says is true. If that is done, it is impossible to say that an immigration judge could not conclude that there is a real risk of the claimant being detained and with that the accepted risk of persecution and mistreatment contrary to Article 3.

28. The particular reference to the Secretary of State's letter dated 8 October 2008 it is at least arguable that the detentions here were of such a length and on a basis that a record would have been created, and that is supported by the evidence of the claimant in interview as to the reasons for the second arrest.

29. Moreover, on the claimant's evidence he was detained for three months on the first occasion, three weeks on the second occasion, on both occasions formally released on reporting restrictions. That tends to indicate that there was underlying suspicion at the time which itself increases the likelihood of records being made.

30. This was plainly a formal and to that extent targeted detention.

31. As to the significance of the money paid by the claimant's mother, he was released on formal reporting conditions and then rearrested for breach. It indicates at the very least that any bribe did not prevent a record being made and could well have been in the form of a surety or was otherwise consistent with a record being maintained.

32. Mr Patel, who appears for the Secretary of State, the defendant, submits that it is impossible for the claimant to suggest, and he does not, that the claimant would be of "serious interest" to the authorities without more if he returns to Sri Lanka. There is no

evidence that the authorities are aware of the claimant's involvement in 2006 with the LTTE. The recent evidence reflected in AN shows that record keeping in Sri Lanka is not nearly as extensive as suggested in LP. Certainly there is nothing to demonstrate that the detentions in 2000 and 2001 would have been recorded, or that if recorded the records would be available to cause the claimant to be stopped and interrogated on his entry to Sri Lanka or otherwise. That would be consistent with his experience in 2002.

33. Mr Patel did accept that, if there was a record which came to the attention of the authorities of the events in 2000 and 2001 concerning the claimant, there was a real risk of interrogation, or at least a potential risk of that character. That would be an issue to be considered by an immigration judge.

34. Through all of this, while it would be a matter for the immigration judge to decide, Mr Patel submits that the onus remains on the claimant to show a case that has some legitimate prospect of success. There was no evidence to support that conclusion in the present case.

Consideration

35. In my judgment, so far as the case in support of a fear of mistreatment by the authorities is concerned, there is nothing in the claimant's case which is inherently incapable of belief. Indeed Mr Patel did not contend otherwise. Thus, the approach should be to consider whether on the facts as presented by the claimant there is a case that is capable of supporting the claim within the Convention, or in particular whether it is incapable on any legitimate view of successfully establishing a real fear of persecution or maltreatment on return to Sri Lanka contrary to Article 3.

36. I have no hesitation in recognising, as the defendant accepts in the present circumstances, that if the fact of the detention and absconding in 2000 and 2001 come to light, coupled with the existence of the scarring, there would be a real risk of interrogation and with that, regrettably, mistreatment at the hands of the authorities contrary to Article 3, or at least that that legitimately could be the conclusion of an immigration judge.

37. In my judgment there is here a real risk of interest from the authorities in the claimant as a young Tamil rejected asylum refugee on return to the airport, and with that the likelihood that his scarring will be noticed. As the courts have recognised, with delay comes the increased risk of past records coming to light. In these circumstances can it be legitimately ruled out on the available evidence that there would not be records available to the attention of the authorities of the events in 2000 and 2001? First, there is the evidence that there was a record reflected in the account by the claimant of the reason for his second detention and beating. Second, the first detention was no casual short-term road check. This was detention for three months with interrogation and mistreatment. That the mother paid money for release does not in my judgment negate the likelihood of there being a record because of the subsequent reporting and detention of the claimant when he failed to report. Furthermore, when he was detained for the second time he was detained for a period of three weeks and again released on formal reporting.

38. For my part I do not find the defendant's reliance on the absence of a formal charge conclusive in this respect. Nor do I find persuasive the reasoning advanced by the defendant based on the absence of a charge for concluding, as the defendant did, that the Sri Lankan authorities would have no interest in the claimant. In my judgment there is evidence to support the conclusion that there were records, and if there were records in 2000 and 2001 these would still be available to the authorities. I do not consider that this is in any way negated by the uneventful return in 2002 for the reasons submitted by Mr Martin, that is that there was at the time a ceasefire and peace and the fact he was mostly in LTTE controlled area.

39. In my judgment there is in these circumstances evidence of a real risk that the claimant would be of interest sufficient for him to be detained for the purpose of questioning at the airport and as part of that in the light of his scarring that records will come to light with the consequences to which I have referred. In these circumstances I conclude it is not possible in this case to say that the asylum claim could not on any legitimate view succeed, was so lacking in substance that on appeal it would be bound to fail. I therefore conclude that the defendant was not entitled to certify that the claim was clearly unfounded under section 142. The applicant accordingly succeeds.

40. MISS SEEHRA: My Lord I appear on behalf of the claimant in this matter and my learned friend Miss Greaney appears on behalf of the defendant. At this stage, my Lord, I apply for a mandatory order of requiring the defendant to give the claimant in-country rights of appeal.

41. THE DEPUTY JUDGE: Yes. I hear what you say on that. It would be my intention to make a declaration that the certificate was invalid; that would be the relief I would have in mind to give in the light of guidance from many authorities, if I may say so, as to the role of this court.

42. MISS SEEHRA: My Lord, I also have a second application and that is for costs. I have submitted an amended schedule which I served on my learned friend this morning.

43. THE DEPUTY JUDGE: Is your client aided?

44. MISS SEEHRA: He is not legally aided, no.

45. THE DEPUTY JUDGE: Let's deal with the principle first then I will make assessments so far as that is necessary. Yes, Miss Greaney. Can we deal with relief then costs and any other application that you make.

46. MISS GREANEY: Yes, I am sorry, I was taking some instructions at the time --

47. THE DEPUTY JUDGE: Do you need time?

48. MISS GREANEY: -- as my learned friend was speaking, but I gather she was asking for a mandatory order.

49. THE DEPUTY JUDGE: I have given my indication, I will not trouble you on the mandatory order. What I had in mind is a declaration but I think all I need do is quash the decision to grant a certificate. I'm not sure that there is anything more than that.

50. MISS GREANEY: That is what I would suggest, my Lord, a decision just to quash the certificate. That would be the appropriate relief.

51. THE DEPUTY JUDGE: Then on costs can you resist the principle?

52. MISS GREANEY: I don't believe I can resist the principle, my Lord, no.

53. THE DEPUTY JUDGE: Have you been served with the summary assessment?

54. MISS GREANEY: Yes, I mean I've seen it this morning. I understand --

55. THE DEPUTY JUDGE: I have only just seen it. Will you give me a moment to look through it. **(Pause)** If you want to contest this --

56. MISS GREANEY: Yes, I understand, I have confirmed with my instructing solicitor that a version of the schedule was served yesterday. I mean my instructing solicitor says that this schedule as it appears is inadequately particularised and my solicitor would like to know more information as to exactly what has been done through the various hours that are claimed. So my primary submission is that the Treasury Solicitor ask for costs to be assessed if not agreed. If you were not minded to go down that route, my Lord, then the particular queries I would raise on what I would say is the limited information available.

57. THE DEPUTY JUDGE: What are the particular points that have alerted the interests of your instructing solicitor?

58. MISS GREANEY: I think particularly there's work done on documents which is 20 hours. That does seem high. I wasn't counsel involved in the case, I have seen the papers, they don't seem terribly extensive, particularly given obviously that's the work done on documents that the solicitor has done. Counsel obviously was instructing so he has done his own work, clearly on the document, preparing for case.

59. THE DEPUTY JUDGE: I am going to stop you there just to say to Miss Seehra that I was particularly ill-served by the documents in this case and it was the responsibility of the claimant to provide the documentation. In the light of that I see the hours here, I would be minded to make the order that Miss Greaney makes with a comment that this court found the provision on the documents -- I don't know the explanation for it so that is why I raise it -- unhelpful. In those circumstances I think the better way forward would be to leave this matter to be assessed if not agreed. Now do you resist that course being taken?

60. MISS SEEHRA: My Lord, can I can just take instructions? Certainly. **(Pause)** My Lord I am told in relation to the service of documents that the case owner in the case was hospitalised, and I think that may be --

61. THE DEPUTY JUDGE: It is just those sort of points but -- I don't think this court now would embark on an investigation, particularly as I was given this document a few minutes ago.

62. MISS SEEHRA: There was actually a previous schedule and the amendment only takes into account today's appearances.

63. THE DEPUTY JUDGE: However that has come about I have only seen it a few moments ago.

64. MISS SEEHRA: My Lord the second point raised by my instructing solicitors is that the work done on documents could be reduced to a day and they would be happy --

65. THE DEPUTY JUDGE: Well they can agree it today, I don't think there's a problem in that, regarding having a discussion, but I don't think it is appropriate in the court's time, bearing in mind the pressures on this court's time in embarking on that exercise that is why I am for the moment attracted by the course suggested by Miss Greaney.

66. MISS SEEHRA: Very well, my Lord.

67. THE DEPUTY JUDGE: Are there any further applications from --

68. MISS SEEHRA: No.

69. MISS GREANEY: Could I just take instructions briefly, my Lord. **(Pause)** I have no applications.

70. THE DEPUTY JUDGE: This application is allowed. The decisions of the Secretary of State to grant certificate, by that I mean the reconfirmation of the decision to grant the certificate on the 7, 26 March and 8 October so far as it is before me will be quashed. There will be the claimant's costs to be assessed if not agreed. I think that's all the relief you are looking for; is that right?

71. MISS SEEHRA: Yes.

72. THE DEPUTY JUDGE: Thank you very much indeed.

73. MISS SEEHRA: My Lord, I apologise, just one further point. My instructing solicitors state that it should say the costs are to be paid by the defendant.

74. THE DEPUTY JUDGE: If I need to say that, I say it.