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Case No: CO/9157/2006 &
CO/9159/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 December 2008

Before:

MR ANTONY EDWARDS-STUART QC
Sitting as a Deputy Judge of the High Court

- -

Between:

THE QUEEN **on the application of** **(1) ABIRAMY SIVAPALAN** **(2) MEERA SIVAPALAN**	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Ms Shivani Jegarajah (instructed by) for the **Claimant**
Ms Susan Chan (instructed by **the Treasury Solicitors**) for the **Defendant**

Hearing date: 30 September 2008

- -

Judgment
As Approved by the Court

Mr Antony Edwards-Stuart QC:

Introduction

1. On 15 February 2001 Thanaleduchumy Sivapalan (to whom I will refer to in this judgment as "the mother") arrived in England with her two daughters and claimed asylum, both on her behalf and on behalf of her daughters. Her claim was based on fear of persecution by the authorities in Sri Lanka, from where they had come. Her daughters, Abiramy and Meera, who were then aged 15 and 16, are now the claimants in these proceedings.

2. The mother, together with her daughters who were then dependent on her, was refused permission to enter this country. Her appeal against that decision failed. The appeal was heard by Mr Thomas Ward, whose decision was promulgated on 21 March 2002.

3. Subsequently the claimants made their own applications for asylum and under Articles 5, 6 and 8 of the ECHR. These were refused by two letters dated 25 October 2006. In each case, it was certified on behalf of the Secretary of State under section 94(2) of the Nationality, Immigration and Asylum Act 2002 that the claims for asylum and under the ECHR were clearly unfounded.

The claim

4. The effect of these certificates is that the claimants cannot appeal against the Secretary of State's decisions whilst they are in the United Kingdom so that, unless the certification is quashed, they will be removed to Sri Lanka.

5. Accordingly, each claimant seeks judicial review of the certification of her claims as being clearly unfounded. These claims came before me on 30 September 2008.

The background to the claims

6. I take the summary that follows largely from the records of the interviews with the two claimants. These interviews took place on 17 October 2006.

7. From their birth until October 1995, the claimants lived at Chundukuli in Jaffna, which is the North of Sri Lanka, a region largely under control of the LTTE (the Tamil Tigers). They had to leave in 1995 because of the fighting. Between then and late 1996 the family moved from place to place until settling briefly in Skanthapuram.

8. According to Abiramy's account, on 12 January 1997, whilst they were living at Kanagapuram, their father disappeared. His disappearance was reported to the LTTE camp at Viluthankulam, but they were told not to worry and that the LTTE would look into it. The following day, two men in Tamil tiger uniforms visited their home and asked if they were spying for the army. She says that she was hit and beaten and the men threatened to return.

9. Both daughters describe a harrowing incident on the following day when some more men, wearing some form of military uniform, came in three trucks. They entered their house and began hitting her mother. Abiramy tried to run away but a man ran after her and slashed her shoulder with a bayonet and brought her back.

10. The men then said they would show them where their father was and produced a man, who was hooded and badly injured all over his body. The man was then shot dead in front of them, although they were not allowed to see his face. According to Abiramy, the men said we've shot your father - "do you know why? Your father was spying for the Tigers, that's why we shot him". The men then started burning her with cigarettes and told her that she deserved to be killed. This left her with scars on her legs. Meera also says that she had cigarette burns inflicted on her thighs and legs in the same incident.

11. After this incident there was further harassment, some of it sexual, from the same troops and so after several months their mother decided to move to somewhere safer.

12. However, they then began to attract the attention of the Tigers. One day in July 2000 Meera was abducted by the Tigers and taken to their camp, where they tried to recruit her into the LTTE. She says that she was made to cut bunkers and jump through fences of nails and hoops of fire. However, after a day or two she managed to attach herself to a group of children who were to be released and managed to escape. She was then 16.

13. After this incident their mother decided that they must move to a safer part of the country. Their flight from the North was arranged by a teacher whose son, a member of the LTTE, had recently been killed. They had to pay 2,000 rupees each for a pass, which was provided by the LTTE.

14. On 25 January 2001 a man came to collect them and he led them through the jungle, avoiding the roads. Unfortunately, these precautions did not help them because they ran into an army patrol and were arrested, seemingly as suspected LTTE sympathisers. The following evening were taken to a camp or jail at a place called Kolikudi. There they were photographed, according to Abiramy. A day or two later, Abiramy was questioned about the whereabouts of the Tiger camp, and it was put to her that she was a Tiger spy. She says that they then searched her and saw the burn marks and the scar from the bayonet wound. Fortunately, her mother was able to get a message through to her cousin, called Sokkalingam, who owned a press and was well known locally.

15. Meera says that at the camp she was taken to a room and locked in with several men, who began abusing her and touching her. One of them started to remove her clothes and she was hit when she tried to resist. She says that she managed to get to the door and shout through to people outside, who unlocked it and released her.

16. Fortunately, their uncle Sokkalingam was able to make the arrangements that were necessary to get them out of the camp, and on 4 February they escaped and made their way by train to Colombo. It seems that their accommodation in Colombo was arranged by their uncle, who told them they must stay indoors and that they should not go out. On 11 February they left Colombo on a flight to Singapore, from where they made their way to England, arriving on 15 February 2001.

17. As I have already mentioned, their mother's claim for asylum was rejected. It is apparent from the adjudicator's Determination and Reasons that he did not believe several aspects of the mother's evidence. This has given to rise to a separate issue,

and that is the extent to which this finding of lack of credibility taints the current applications by the daughters, given that they were parties to the mother's appeal.

The history of the claims and the proceedings

18. The following summary is taken largely from the skeleton argument served by Ms Susan Chan, who appeared for the Secretary of State. The claimants made their claims for asylum and under the HRA in their own right on 12 October 2006, they were interviewed on 17 October and the claims were refused on 25 October 2006. At the same time the claims were also certified as being clearly unfounded under section 94(2) of the Nationality, Immigration and Asylum Act 2002.

19. These proceedings were started on 2 November 2006, and permission to apply for judicial review was granted by McCombe J at an oral hearing on 2 March 2007 in the light of the fact that there was new material which had not been available at the original decision.

20. The cases were reconsidered by the Secretary of State, but in two letters dated 12 April 2007 the certification was maintained. Detailed grounds of defence were filed on 17 April 2007.

21. On 22 May 2008, K Ravi Solicitors, wrote two letters, one on behalf of each claimant, enclosing further materials and saying that the security situation in Sri Lanka

> "had intensified to an unprecedented level, with Tamils being targeted, even those with tenuous links to the LTTE. Our client, in particular, will be extremely vulnerable as a young single Tamil woman in the present country situation."

The letters also stated that the claimants had no relatives in Colombo and would face insurmountable difficulties in Sri Lanka. Under cover of these letters the solicitors served copies of 19 letters and documents, which consisted of references, academic certificates and testimonials to show what the two claimants had achieved and how they had integrated into their local community in Glasgow.

22. Some of these letters, although written separately for each claimant, were in virtually identical terms, which perhaps reduces the weight to be attached to them: but nevertheless, taken as a whole, they convey an impression of two young women who have become very well integrated into their local community and who clearly give up a lot of their time to helping others. There is no reason to doubt that the two claimants are now studying Accounting and Finance at Strathclyde University, as is claimed on their behalf. To the extent that this last matter is put in issue by the Defendant, I would resolve the point in favour of the claimants.

23. On 21 August 2008 the Secretary of State responded to this latest round of material and maintained her position as set out in the earlier decisions. The decision letters referred to the country guidance case of *LP* [2007] UKAIT 00076 and to the recent ECHR decision in *NA v The United Kingdom* ECHR [2008] Application No 25904/07 dated 17 July 2008.

24. It is said that in addition to their mother tongue, Tamil, the claimants speak English fluently (with a Scots accent), present as young westernised British women but cannot speak Sinhala, the pricipal language spoken in Colombo.

25. It has, I think, always been accepted on behalf of the Secretary of State that it is the position of the claimants in Colombo, where the risk to a young Tamil is reduced, that the court should consider (I take this from paragraphs 69 to 72 of the Reasons for Refusal dated 25 October 2006 in Abiramy's case, and paragraphs 80 to 82 in Meera's case, and the skeleton arguments served on behalf of the Secretary of State in February 2007 and in September 2008 for this hearing). As I read the letters, the Secretary of State is not asserting positively that the claimants would be safe in the north or east of Sri Lanka. It is, of course, the former from which the claimants originate.

The position and arguments at the hearing

26. At the hearing Ms Shivani Jegarajah, who appeared for the claimants, concentrated her submissions on the asylum and Article 3 claims and the claim to the right to private life (as opposed to family life) under Article 8. In my view, this was a realistic course. In particular, I was told that the mother is still in the UK in spite of her unsuccessful claims, and so if the claimants are removed to Sri Lanka she will inevitably go with them.

27. In *LP* the AIT identified the risk indicators for asylum seekers at risk of being returned to Sri Lanka, and to Tamils in Colombo in particular. Ms Jegarajah does not rely on all the matters identified in *LP*, but she relies on the following:

    1) A previous record as a suspected LTTE member.

    2) A previous escape from custody.

    3) The presence of scarring.

    4) Lack of ID card or other proper form of identification.

    5) Having relatives in the LTTE (in this case, the suspected connections of the claimants' father).

28. In relation to the claim for interference with their private life under Article 8, Ms Jegarajah relies on the following matters:

    1) That they were aged 15 and 16 on arrival.

    2) They have lived in the UK for more than 7 years, during which they have been educated and have turned from being children to being adults.

    3) They are well integrated into their community, well liked and take part in many communal activities (such as with churches and support centres).

    4) They are now studying at university and will be in a good position to qualify as accountants when they finish.

5) They have no relatives in Colombo.

6) They will face all the deprivations of war when in Sri Lanka.

7) Without ID cards and not speaking Sinhala, they will be vulnerable to being rounded up and detained during routine security measures. As young women they will be particularly vulnerable if detained for any length of time in these circumstances.

29. Ms Chan, on the other hand, makes the following points:

1) Tamils are not at risk of persecution from the authorities as a result of routine operations, in the absence of the presence of relevant risk factors.

2) The claimants have never supported the LTTE.

3) Their release from custody was not formal, but was obtained by a bribe, so there is likely to be no record of it.

4) The lack of identification is not a problem because they will be issued with suitable emergency travel documentation.

5) There is no evidence that they have relatives in the LTTE, and the mother's account of her husband having been shot was disbelieved.

6) The scarring, to the extent that it may be visible, would not be apparent when wearing clothes and would not be a reason for either claimant being picked up.

7) As to Article 8, the claimants have established their life here in the knowledge that they could be removed at any time, and

8) Any interference with their private lives would be proportionate in the interests of national immigration control.

30. In short, in relation to the risk that they would face if returned to Sri Lanka, Ms Chan submits that the claimants have a low profile, no previous arrest warrant or criminal record, had not escaped from formal custody and there was no other reason to suppose that they might be a target for persecution or be at real risk of treatment likely to breach their Article 3 rights. She reminds me, correctly, that a general situation of violence in a country will not, of itself, usually entail a risk of a breach of Article 3 rights.

31. As to Article 8, and subject to the possibly disputed question of whether the claimants are now at university (as to which, see above), Ms Chan understandably puts the proportionality argument at the forefront of her submissions, given the circumstances under which the claimants have established a life in the UK.

32. There is a self contained, but subsidiary, issue in relation to point (5) above, which concerns the extent to which the claimants are "bound" by any findings adverse to their mother in her application for asylum. The claimants were parties to that claim, because they were minors at the time and could not make applications in their own right.

The question of the extent to which the lack of credibility of the mother is relevant

33. The mother's claim for asylum and/or that removal would constitute a breach of Article 3 was heard by an adjudicator, Mr Thomas Ward, on 7 March 2002 (Determination dated 21 March 2002). The mother was accompanied at the hearing by the claimants, but they did not give evidence. The mother was represented.

34. There are, unfortunately, one or two aspects of this determination that are not as clear as they might be. It is clear that the adjudicator did not believe much of what the mother told him and he did not find her to be a credible witness. She recounted the incident in which the hooded man was shot, making it clear that it was her husband.

35. The adjudicator was shown photographs of the husband's funeral and was provided with a copy of a death certificate showing that the claimants' father had suffered an accidental death and had died in the District Hospital in Kilinochchi. It was submitted that the true cause of death would not have been put on the certificate if the husband had been shot by the army. The adjudicator said that he could see no reason why if the husband had died of a gunshot wound that would not have been stated in the certificate. In any event, having heard this evidence he said that he was "*not satisfied that the Appellant's husband had indeed been shot*". From this finding alone it is not clear whether the adjudicator was rejecting the account of the shooting incident altogether, or was simply rejecting the evidence that the man shot was the mother's husband. Whilst I suspect that he probably took the former view that is not reflected in the finding that I have quoted. At its highest, all that can be said is that the finding is consistent with either view.

36. In addition, he rejected the mother's account about Meera having been abducted by the Tigers and taken to their camp and forced to dig bunkers. His reason for this seems to have been that he considered it "*very unlikely that the child would be released so soon after the abduction*". However, it seems that he was not told that she was not released but rather that, according to her subsequent account, after a day or two she attached herself to a group of children who were to be released and thereby managed to escape. The terms of and reason for this finding in relation to the mother's evidence strike me as a very shaky basis for rejecting Meera's account of this incident.

37. Finally, the adjudicator rejected, or at least doubted, evidence given by the mother that she had been arrested, detained and had her photograph and fingerprints taken in January 2000. It is possible that the mother was here referring to the arrest in January 2001 described by the claimants as having happened when they were making their escape through the jungle. Either way, it does not take matters further because Ms Chan very properly accepted that it was not clear whether the adjudicator was rejecting the mother's account that she had been detained, or the details of that detention – such as being fingerprinted and photographed.

38. Again, subject to one qualification, I find that the adjudicator's views of this incident – assuming it was the January 2001 detention to which he was referring – are not sufficiently clear or precise so as to provide any sound basis for rejecting or tainting the claimants' accounts of their detention in January 2001. The qualification relates to the question of whether or not photographs were taken. Here the adjudicator found

that they were not, and that finding must be kept in mind as casting doubt on the claimants' allegation that they were photographed.

39. I readily accept that what are known as the *Devaseelan* guidelines (*Devaseelan v SSHD* [2002] UKAIT 702, (2003) Imm AR 1) should be applied in cases where the parties involved are the same or where, if they are not the same, there is a material overlap of evidence. The effect of these is that whilst a previous decision on the same issue in immigration proceedings between the same parties is not binding (in the *res judicata* sense) in subsequent immigration proceedings between them, the second adjudicator should regard the issues as settled by the first adjudicator's decision and make his findings in line with it unless there is some very good reason for departing from it. In *AA (Somalia) v SSHD* [2007] EWCA Civ 1040, the Court of Appeal held that the guidelines should apply also to cases where the parties involved are not the same but where there is a material overlap of evidence.

40. Applying these principles to this case I should, submits Ms Chan, regard some of the incidents relied on by the claimants in this application as having been determined against them in the previous proceedings brought by their mother and to which they were parties.

41. I reject this submission, for three reasons. First, as I have already indicated, it is not at all clear exactly what findings of fact the adjudicator actually made on two of the relevant questions. Second, whilst I accept that the claimants were parties to the earlier proceedings, they were still minors and there is no indication that they took any part in the proceedings, still less had any effective role in the conduct of them. Third, the incident when Meera was abducted by the LTTE was pure hearsay, so far as the mother was concerned. She was only repeating, possibly inaccurately, what she thought Meera had told her (and Meera said subsequently that she did not tell her mother everything about this incident). I am in no position to say what opportunity Meera might have had for correcting any mistakes or misunderstandings in the evidence given by her mother at the hearing (assuming that she realised that they had occurred). I do not know whether the adjudicator's apparent finding that Meera was *released* after one day was based on what the mother said, or was simply his own assumption.

42. Therefore, in relation of two of the three potential areas of conflict, the guidelines do not apply at all because of the lack of clarity of the findings in the earlier proceedings. In relation to the findings in relation to Meera's abduction, I consider that the second and third reasons above amount to very good reasons against concluding that the abduction did not take place as Meera claims.

43. However, having said this, I think that it is right that I should treat the evidence of the claimants on the disputed issues as evidence which should be accorded a little more scepticism than would otherwise be warranted, particularly on the question of whether or not they were photographed by the army whilst in detention.

The asylum and Article 3 claims – discussion and conclusions

44. There is no real evidence to support the conclusion that either of the claimants' details are or might be on any computer database held by the security forces in Sri Lanka,

although I can well understand that the claimants may have great apprehension that they may be.

45. Apart from the alleged involvement of their father, and the brief incident involving Meera, there is also no real evidence to link the claimants personally with the LTTE: at most, if their claim about the threats from the army are correct, there is a risk that someone in Colombo might recognise their father's name and remember that he was thought to have, or was suspected of having, connections with the LTTE. Once again, whilst one cannot dismiss any subjective apprehensions about this that the claimants may have as fanciful, in my judgment those apprehensions do not by themselves amount to evidence of a real risk of serious ill treatment of the type contemplated by Article 3.

46. I regard the possible effects of scarring as more difficult to assess. The first problem is that there is no medical evidence about the present state of the scarring, for example how visible it is, which occurred from torture and mistreatment that took place over 10 years ago when the claimants were in their teens. Whilst Abiramy invited her interviewer to examine the scar on her shoulder from the bayonet wound, that invitation was, perhaps understandably, declined.

47. In these circumstances, I consider that the court must proceed on the assumption that if either of the claimants, and Abiramy in particular, was examined closely by, say, a female member of the security forces carrying out an intimate search, the scars would be noticed. In the case of a young Tamil, scarring might indicate that the person had undergone rigorous training by the LTTE and incurred the scars as a result of it. Alternatively, and more likely, it seems to me, is that the scars from the cigarette burns would be recognised for what they are, namely the results of torture. That would lead to speculation as to why the claimant had been tortured, which could in turn lead to suspicion that it might have been the result of suspected association with the LTTE. Indeed, if questioned the claimants would probably say how they came by their scars.

48. In the case of both claimants, it is submitted on their behalf that they escaped from formal detention in January 2001, albeit by means of a bribe, and so there may well be records of their details (particularly if they were photographed). If I assume, as I think I must, that they were arrested by the military whilst trying to escape through the jungle and taken to a camp where they were detained for several days, then I must assume also that there is a risk that their details have been recorded. However, I do not consider that it can be regarded as anything more than a risk.

49. As to the question of lack of identification documents, I readily accept that they would be provided with suitable travel documents to ease their path through immigration when they arrive in Sri Lanka. However, I have seen nothing in the material before the court that explains how they might go about obtaining proper papers thereafter. This seems to me to present a real problem, and for so long as they lack proper identification, it seems all too obvious they would be exposed to random arrest and harassment from the authorities. There is ample material in the papers that shows that those arrested in a round up who do not have satisfactory identification are likely to be detained and not released immediately. It is also, unfortunately, notorious that young women who are detained by the military authorities in Sri Lanka are all too likely to be subjected to some form of sexual abuse or other ill treatment.

50. There seems to be no doubt that many Tamils live peacefully in Colombo without encountering problems. However, the material before the court suggests that there is a difference between those Tamils who have been born and brought up in Colombo, and those who have moved to Colombo from the north or east of Sri Lanka. The latter are likely to be regarded as having, at the least, LTTE sympathies.

51. In relation to the asylum claim, each claimant has to show, albeit to a low standard of proof, that she has a well founded fear of persecution in Sri Lanka at the hands of agents of the state on grounds of race or membership of a particular social group or for her political opinion on account of which she would be unwilling or unable to avail herself of the protection of that country. In relation to Article 3, there must be shown, again to a low standard of proof, a real risk of that they might suffer torture or be subjected to other inhuman or degrading treatment.

52. Turning to the question of the scope of the review and what has to be shown when a certificate was being attacked, I was referred to *R (Razgar) v Home Secretary* [2004] 2 AC 368, in which Lord Bingham said, at 389-390:

> "16. The parties to this appeal accepted that "manifestly unfounded" bore the meaning given to it by the House in R (Yogathas) v Secretary of State for the Home Department; R (Thangarasa) v Secretary of State for the Home Department [2002] UKHL 36, [2003] 1 AC 920, paragraphs 14, 34 and 72 and accepted the Court of Appeal's opinion (in paragraph 30 of its judgment) that those paragraphs called for no gloss or amplification. It was also, inevitably, accepted that on an application for judicial review of the Secretary of State's decision to certify, the court is exercising a supervisory jurisdiction, although one involving such careful scrutiny as is called for where an irrevocable step, potentially involving a breach of fundamental human rights, is in contemplation.
>
> 17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator."

53. Pausing there, it is now clear that there is no distinction to be drawn between the expressions "*manifestly unfounded*" and "*clearly unfounded*": it is the latter which I have to consider. In *R (ZL and VL) v SSHD* [2003] EWCA Civ 25, Lord Phillips MR, giving the judgment of the court, said, at [56]:

> "[56] Section 115(1) empowers – but does not require – the Home Secretary to certify any claim "which is clearly unfounded". The test is an objective one: it depends not on the

> Home Secretary's view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.
>
> [57] How, if at all, does the test in s.115(6) differ in practice from this? It requires the Home Secretary to certify all claims from the listed states "unless satisfied that the claim is not clearly unfounded". It is useful to start with the ordinary process, such as s.115(1) calls for. Here the decision-maker will:
>
> i) consider the factual substance and detail of the claim
>
> ii) consider how it stands with the known background data
>
> iii) consider whether in the round it is capable of belief
>
> iv) if not, consider whether some part of it is capable of belief
>
> v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention.
>
> If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.
>
> [58] Assuming that decision-makers – who are ordinarily at the level of executive officers - are sensible individuals but not trained logicians, there is no intelligible way of applying s.115(6) except by a similar process of inquiry and reasoning to that described above. In order to decide whether they are satisfied that the claim is not clearly unfounded, they will need to consider the same questions. If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded. If that point is reached, the decision-maker cannot conclude otherwise. He or she will by definition be satisfied that the claim is not clearly unfounded. Miss Carss-Frisk for the Home Secretary has properly accepted that this is the correct approach."

54. Accordingly, the question for the court on this application is whether this is a case that could not on any legitimate view succeed before an AIT.

55. Taking into account the test that I have to apply and considering all of the material before the court, I feel driven to conclude that there is no legitimate basis on which a tribunal properly directed could conclude that the threshold for the asylum claim has been crossed in the case of either claimant. The material before the court, taken at its highest, comes nowhere near to supporting, in the case of either claimant, a well founded fear of persecution at the hands of agents of the state. There is no evidence that shows that they might be targets for persecution, as opposed to ill treatment following some of random arrest.

56. However, I consider that the position is different in relation to the Article 3 claim. Without wishing to express any firm views, I consider that there would be a legitimate basis for an AIT to conclude that, when assessed objectively, there exists a real risk that the claimants might suffer serious harm or be exposed to degrading treatment if returned to Sri Lanka. There are grounds for concluding also that there is an obvious risk that, as Tamils in Colombo or its environs, they might be caught up in some round up and that they might be detained for longer than usual as a result of doubts about their identification and the origins of their scars (if they were detected). In such circumstances there is, regrettably, a real risk that these young women would be subjected at the least to degrading treatment of the type suffered by Meera during her previous detention.

57. It must therefore follow, that whilst I consider that the asylum claim would fail before an AIT, I cannot conclude that there is no legitimate prospect of the Article 3 claims succeeding. Accordingly, the decision that the Article 3 claims are clearly unfounded was a decision that could not properly have been reached on the material before the Secretary of State. The applications for judicial review of those certificates are therefore allowed and the certificates must be quashed.

The claims under Article 8 – discussion and conclusions

58. In the light of the conclusions reached in the previous paragraph, it may be that my views on the Article 8 claims are irrelevant. However, in case I am wrong on the Article 3 claims, it is appropriate that I should consider the position under Article 8. As I have already mentioned, these claims are limited to the right to private life. It is now settled that the failure of a claim under Article 3 does not mean that it must fail under Article 8 also, and I did not understand Ms Chan to suggest otherwise.

59. In *Razgar*, at 382, Lord Bingham cited with approval the following definition of private life taken from the decision of the European Court of Human rights in *Bensaid v United Kingdom* (2001) 33 EHRR 205, at 219:

> "47. Private life is a broad term not susceptible to exhaustive definition . . . Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world."

60. Ms Jegarajah relied also on the following passage in *Huang*, at paragraph 18:

> "18. . . . But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous

> history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non−nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment."

61. Whilst this passage is concerned with the right to family life, it provides some insight into the purpose of Article 8. It is important to note as well that a state must not only refrain from interference in a person's private life, but also it must show respect for it (I take this from an earlier passage in the paragraph from which I have quoted above).

62. Leaving aside the invasion of privacy cases, which are not relevant to this case, the guidance in the case law as to what constitutes an unwarranted interference with private life is fairly meagre. The reference in *Huang* to the potential impossibility of leading a full and fulfilling life provides a clue, as do the references to moral integrity and personal development in *Razgar*. It seems to me that if the effect of a proposed measure would be such as to impose restraints on an individual so that they could not enjoy the right to have a fulfilling life or was such as to put them in a permanent state of fear for their own safety, there would be a breach of Article 8. For example, in relation to the former aspect, an inability to obtain proper identification papers might amount to such a restraint – it might limit severely a person's freedom of movement and employability. In relation to the latter aspect, I consider that a constant fear for one's own safety, unless fanciful, would be an invasion of a person's moral integrity.

63. By contrast, and by analogy with some of the reasoning in the cases involving different levels of medical treatment in different countries, I do not consider that Article 8 guarantees any particular level of living standards. The fact that life might be much harder and more difficult in Sri Lanka than in the UK would not of itself, I think, be capable of making out a claim for breach of Article 8. The fact is that living standards and poverty levels vary greatly from country to country whereas the convention is concerned with human rights that are of universal application. Something more is required than just economic or physical hardship.

64. As I have already indicated, Ms Chan submits, as is the fact in many of these cases, that the claimants developed their life in the UK knowing that they were under threat of removal, and if that is what they chose to do they must accept the risk. I accept that, but only up to a point. It is important to remember that the claimants came to this country with their mother as girls of 15 and 16. They could hardly do otherwise

than follow their mother, and any suggestion that at that stage one or other of them could or should have gone back to Sri Lanka on her own would be quite unrealistic.

65. Further, the claimants arrived in the UK at a formative time in their lives and they had been in the UK for almost 18 months by the time the mother's (and their) appeal was finally dismissed. Meera was by then just 18, but Abiramy was not yet 17. If their mother wanted to remain thereafter, whether legally or illegally, the claimants had relatively little choice but to stay with her. I accept, of course, that as they have grown older their freedom of choice has increased, and so to this extent - but only to this extent - there remains something in Ms Chan's point.

66. Looking at the position today, it appears that the two claimants are very well settled in Glasgow: they have friends, many activities and are purposefully studying for their degrees. In short, they are in the position of many other students at university in the UK who live a fulfilling life and do not live in fear of any form of violence or harassment.

67. So what would face the claimants if they were returned to Sri Lanka? Assuming that they had an uneventful passage through the immigration authorities, they would find themselves - on the evidence - cast adrift in Colombo with no or little money, no contacts and facing the problem of having to find accommodation. They would have no friends, no proper identification papers and would be in a place whose principal language they did not speak. The language difficulty alone might, I anticipate, be a substantial obstacle to obtaining places at a university to continue their studies (or to start fresh ones).

68. I accept also that the claimants may well be able to satisfy an AIT that they would be seriously in fear of their personal safety, even in Colombo. After all, from their point of view the last time they were there they were told that in the interests of their own safety they should not go out. In this context my attention was drawn to paragraphs 145-147 of the decision of the ECHR in *NA v The United Kingdom* (2008) Application No 25904/07.

69. In relation to the scope of the review in an Article 8 claim, in ***Razgar*** Lord Bingham said, at 389-390:

> "17. . . . In a case where removal is resisted in reliance on article 8, these questions are likely to be: (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

18. If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, Costello-Roberts v United Kingdom (1993) 19 EHRR 112. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate. If question (3) is reached, it is likely to permit of an affirmative answer only.

19. Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see Ullah [2004] 2 AC 323,329, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.

20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal."

70. In *Huang v SSHD* the House of Lords said:

"20. In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along

> the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in Razgar above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test."

71. Ms Chan accepted, as I understood her, that Article 8 was engaged – if only just. Even if she had not, I would have concluded that an AIT might well find that Article 8 was engaged. So the answer to each of Lord Bingham's questions 1 and 2 is therefore yes. The answers to questions 3 and 4 must also be yes (the contrary is not, and on the facts of this case could not be, argued). As I suspect is the case in many claims of this sort, the real dispute is about the answer to question 5 as Ms Chan realistically accepted. However, she submits that these are very, very weak Article 8 claims.

72. Whether or not these claims will succeed is essentially a question of fact for the decision maker. My task is to consider whether, on the material to which I have referred, there is no legitimate basis on which the claims under Article 8 could succeed.

73. It is at this point worth noting that the Article 8 claims in respect of private life have never been directly addressed in any of the reasons for refusal (the letters dated 25 October 2006, 12 April 2007 and 21 August 2008). Article 8 was considered only in the context of the right to family life. However, these claims have been addressed in the proceedings. In addition, there appears to have been no consideration on behalf of the Secretary of State of the languages spoken by the claimants and the extent of any difficulties that this might present in Colombo (all that is said is that, according to the CIA World Factbook 2004, either Sinhala or Tamil may be used by all citizens in transactions with government institutions – see, for example, paragraph 66 of the letter in relation to Abiramy of 25 October 2006).

74. Similarly, the consideration of the ability of a returned asylum seeker to obtain valid identification papers has, in my view, been treated somewhat cursorily. In the letter of 21 August 2008, it is said that emergency travel documents would be issued by the Sri Lankan High Commission in London and that the claimants "*could then obtain permanent documentation in Sri Lanka*": but it is not explained how they would obtain this (see, for example, paragraph 36 of the letter in relation to Abiramy of 21 August 2008).

75. It would not be appropriate for me to express views, even tentative ones, on the conclusion that I would reach if I were the relevant decision maker. However, I take into account that successful claims under Article 8 are likely to be rare. It suffices for me to say that, having considered all the material before the court and, in particular, that which I have identified in this judgment, I cannot say that there is no legitimate basis on which these claims under Article 8 could succeed before an AIT.

76. It follows that the certificates that the claims under Article 8 are clearly unfounded given by the two letters of 25 October 2006, and maintained in the subsequent letters of 12 April 2007 and 21 August 2008, must be quashed.

77. For the record I should mention that there is one mistake in the letter in relation to Meera of 21 August 2008, because at paragraph 38 she is referred to as having a scar on her right shoulder caused by a stabbing by a man in uniform and, at paragraph 49, as being 22 years old. It is apparent that these two paragraphs have simply been lifted directly from the letter of the same date written in relation to Abiramy. In the circumstances I do not attach any importance to these errors.

78. I am grateful to counsel for the parties for their arguments, and to the solicitors for their coherent organisation of the trial bundles. If necessary, I will hear the parties in relation to any questions of costs.