Case No: C4/2008/1162

Neutral Citation Number: [2008] EWCA Civ 1549
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE MUNBY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 16th December 2008

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE KEENE
and
LADY JUSTICE SMITH DBE

- -

Between:

THE QUEEN ON THE APPLICATION OF TR (SRI LANKA)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Ms J Jegarajah (instructed by K Ravi Solicitors) appeared on behalf of the **Appellant**.

Ms S Chan (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Keene:

1. This appeal concerns a decision by the Secretary of State for the Home Department not to treat certain representations made by the appellant, a failed asylum seeker, as a fresh claim for asylum.

2. The appellant is a Sri Lankan national of Tamil ethnicity. He arrived in the United Kingdom on 31 October 2000 aged 22 and applied for asylum. Subsequently he also sought leave to enter on human rights grounds. Those claims were refused by the Secretary of State and the refusal was upheld on appeal by an adjudicator by way of a determination dated 13 March 2003. Permission to appeal against that determination was refused. It goes without saying that the present appeal is not to be treated as an appeal against that adjudicator's decision.

3. However, the appellant made further representations to the Secretary of State contending that these amounted to a fresh claim for asylum. The Secretary of State, by a number of decisions, the last of which is one dated 11 December 2007, held that the representations and material relied on did not amount to a fresh claim. That last decision formed the subject matter of an application for judicial review. Permission to seek judicial review was granted but the substantive application was dismissed by Munby J on 11 April 2008. It is against that decision that this appeal is now brought.

4. The legal framework for deciding whether representations amount to a fresh claim is well established. The basic test is to be found in the Immigration Rules, Rule 353; namely that they will amount to a fresh claim "if they are significantly different from the material that has previously been considered". To be "significantly different" requires that the content:

> "(i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

5. The approach required by the second of those conditions has been considered in more detail by this court in the case of WM (DRC) v SSHD [2006] EWCA Civ 1495, a decision to which the Secretary of State expressly referred when making his own decision of 11 December 2007 in the present case. Munby J also reminded himself of the relevant passages from WM (DRC) at paragraphs 10 and 11, which set out how a court must approach the issue:

> "First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on

> return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

6. It is in consequence not a high hurdle to be surmounted, save that the court proceedings are those of judicial review where the ultimate question is whether it was open to the Secretary of State applying the test set out in WM (DRC) to arrive at the conclusion which he has. The intensity of the court's review must, however, reflect the dire consequences for an applicant that may result if the conclusion reached by the Secretary of State were wrong. It is not in the present case argued that the Secretary of State has not asked to solve the right question, nor that she has not given the case anxious scrutiny. The letter of 11 December 2007 is lengthy in detail and obviously does reflect a careful analysis.

7. The original claim for asylum was based on an allegedly well-founded fear of persecution both by the Sri Lankan authorities and by the LTTE, the Liberation Tigers of Tamil Ealam, and the further representations adopted the same approach. However, the issue has now been narrowed. This appeal concerns solely the alleged risk to the appellant from the LTTE, were he to be returned to Sri Lanka.

8. It is necessary to begin with the relevant facts as found by the adjudicator in 2003. The appellant comes from Batticaloa in north east Sri Lanka. His father had been killed by the LTTE in 1987 and an uncle in 1988 had also been killed. Another uncle was taken away by the same organisation in 1990. The appellant was approached by the LTTE from time to time to do various odd jobs for them, which he did. In October 2000 the LTTE came to the family home enquiring about his elder brother and wanted the appellant to accompany them, but villagers prevented that from happening. The next day he was arrested by the army and taken away for questioning but released a week later. He decided to leave Sri Lanka. Since his departure the grandson of an uncle has been taken away by the LTTE.

9. There is no doubt that in rejecting the appellant's asylum claim the adjudicator placed considerable emphasis on the then ceasefire in Sri Lanka which was agreed between the government and the Tamil Tigers in February 2002. The

breakdown of that ceasefire is one of the matters now relied on by the appellant as contributing to his fresh claim. However, the adjudicator also expressly found that the appellant had not himself been persecuted in Sri Lanka, a finding which applied both to governmental and LTTE persecution.

10. At the forefront of the appellant's further representations which are said to constitute a fresh claim are three letters, each dated 25 July 2002 and addressed to the appellant and his two brothers. Each letter requests the recipient to be present at 2.30 pm on that same day at some LTTE offices "to discuss some important matters". Those three letters were one of the enclosures to the appellant's witness statement which was before the adjudicator in 2003, although it is right to note that the appellant made no express reference to them in his representations, nor did the adjudicator in his determination.

11. When those letters were relied on as part of a fresh claim, the Secretary of State, apart from noting that the letters had been before the adjudicator in 2003, observed that the one addressed to the appellant's brother -- G, as I shall call him -- had been submitted in support of G's asylum claim and had been found by an adjudicator to be of dubious authenticity. The appellant had also submitted as part of his further representations a UNHCR report or paper dated April 2004 and a report from an acknowledged expert on Sri Lanka, Dr Chris Smith, dated 8 March 2006. The UNHCR paper referred to persons carrying an LTTE letter summoning them to report and stated that those who had adhered to the summons were at risk of prolonged detention and in some instances their lives. The Secretary of State commented at paragraph 40 of her decision letter that:

> "The UNHCR report contains no further details or examples of any persons who have been detained or ill-treated following the receipt of such a letter. It is also noted that the report's comments are very broad and generalised and so of questionable relevance to your client's individual case."

12. She went on to refer to the IAT country guidance case of PS (LTTE internal flight -- sufficiency of protection) Sri Lanka CG [2004] UKIAT 00297, which had concluded that a number of generalisations in the April 2004 paper from UNHCR were not sourced and were not supported by specific instances.

13. As for Dr Smith's report, the Secretary of State observed that he did not appear to have taken into account the fact that an adjudicator had found the appellant's brother G not to be credible, even though he too had produced the letters. The Secretary of State goes on to say in her decision at paragraphs 31 and 32 this:

> "It is also noted that Dr Smith did not provide his opinion as to whether or not the letters submitted by

> your client were genuine documents. He simply stated that he has never had any reason to doubt that requests sent via letter by the LTTE were not authentic. Further, Dr Smith did not provide any objective evidence to support his implied assertions with regard to the authenticity of the letters allegedly sent by the LTTE.
>
> 32. Since the Adjudicator's determination of Mr [G's] appeal in 2002 and your client's own appeal in March 2003, neither your client or his brother [G] have adduced any objective evidence to corroborate their account as to how these documents came into their possession or to authenticate the documents."

14. Reference was then made by the Secretary of State to the case of Naseer v SSHD [2006] EWHC) 1671 (Admin), where Collins J emphasised the importance of an explanation as to how documents had come into existence or were obtained.

15. The Secretary of State noted that the letters, even if genuine, only stated that the LTTE wanted to discuss important matters, and she added at paragraph 36:

> "…your client's own evidence is that he has never been detained or tortured by the LTTE, despite his family history. No evidence has furthermore been provided to show that the LTTE have any present and continuing interest in the Claimant given his long absence from Sri Lanka."

16. Finally, referring to the country guidance case again of PS, the Secretary of State said that the appellant did not fall into any of the categories of Tamils at risk from the LTTE as identified in that case, particularly in Colombo, and that there was no evidence that he would be at risk from that organisation in that city.

17. Munby J in a detailed reserved judgment concluded that the Secretary of State was entitled to reach the conclusion that she did. His judgment is available as [2008] EWHC 747 (Admin). Ms Jegarajah, in her concise and attractive submissions on behalf of the appellant, acknowledges that the three letters of 25 July 2002 were before the adjudicator in 2003, but she argues that this goes to establish their authenticity since at paragraph 56 the adjudicator says of the appellant:

> "I accept what he tells me."

18. She goes on to argue that the letters were not given close scrutiny by the adjudicator, so that this is the first process during which that has happened. She places particular emphasis on the UNHCR paper. That, she submits, was

and is key to the fresh claim. It referred to the LTTE practice of sending such letters. Such a paper from such a body was and is entitled, she contends, to serious weight. It is also submitted that the assessment of risk to Tamils in Colombo from the LTTE contained in the October 2004 case of PS, referred to by the Secretary of State and by Munby J, is out of date; but Ms Jegarajah also argues that the appellant should be seen as at risk of being regarded as a renegade or defector and so falling within the terms of that particular determination. She submits that the appellant is of sufficient interest to the Tamil Tigers to be at risk even were he to be returned to and to remain in Colombo.

19. The appellant faces a problem, obviously, about the letters of July 2002 if they were taken by themselves as the basis for a fresh claim, simply because the letters were before the adjudicator in 2003. He did not expressly deal with them, which is perhaps not surprising when one appreciates there was no reference to them or reliance placed upon them by the appellant, either in his written witness statement or, so far as one can tell, in his oral evidence. That does not of course render them in any way irrelevant, but it does mean that by themselves they would fail to meet the first criterion in Rule 353, namely that they had not already been considered. So even if the letters are authentic, the only new material being put before the Secretary of State consisted of the UNHCR report and Dr Smith's report, which dealt both with the changing situation in that country and with letters generally sent of this kind by the LTTE.

20. I would add that it does not seem to me that the adjudicator in 2003 can be treated as having held that the letters of July 2002 were genuine. He makes, after all, no finding one way or the other on that, and when he says "I accept what he tells me", referring to the appellant, that must be read in the context of the appellant making no specific reference to those letters in the course of his own evidence. For my part I cannot accept that the Secretary of State was in some way prohibited from doubting their authenticity, especially given the doubts cast by the adjudicator who dismissed the claim by the appellant's brother G. These were letters which had come into existence between the date of the appellant lodging his asylum claim and the time of his appeal hearing. Above all it seems to me, as it did to Munby J, to be an important and relevant factor that there has been no explanation as to how these letters came into the appellant's hands. That is something the Secretary of State was entitled to take into account, as the case of Naseer indicated.

21. I can see that potentially the UNHCR report may give some greater credibility to these letters. The comments in the report are, as the Secretary of State said, in very general terms. That is certainly not to belittle such reports or papers by the UNHCR, which are generally deserving of considerable weight, though this particular report of April 2004 has been the subject of adverse comment by the IAT in the case of PS. That is something which the Secretary of State was entitled to take into account when she was making her assessment. As Ms Chan on behalf of the Secretary of State emphasises, the report gives not a single example of a person who had received and failed to respond to such a

summons from the Tigers and who had then in consequence suffered detention or ill-treatment of any kind from that organisation.

22. Again the Secretary of State was clearly entitled to attach weight to the fact that the appellant had never been detained or ill-treated by the LTTE, even if other members of his family had. It seems that the only attempt to detain him was when the LTTE were seeking one of his brothers, and the attempt was not persisted with.

23. Of course all of that was over seven years before the Secretary of State's decision. There are, it seems to me, two aspects to that passage of time. First, the appellant had been out of Sri Lanka for that length of time, a factor referred to by the Secretary of State in her decision. Secondly, the situation in Sri Lanka has deteriorated since the adjudicator's decision in 2003, with the breakdown of the ceasefire. The situation since then has been the subject of careful analysis by the AIT in the case of PS and in later cases, in respect of the risk from the LTTE. It is of course right, as is emphasised on behalf of the appellant, that PS was decided in October 2004; but it nevertheless does provide a valuable starting point as a country guidance case, as Munby J himself said. It identified three categories of Tamils who might be at risk even in Colombo: those in political opposition to the LTTE in high profile positions; those who were defectors from the LTTE; and those who were supporters of Colonel Karuna. I cannot accept the submission that the appellant comes into any of those categories. What the AIT said at paragraph 59 in that case was that those reasonably likely to be targeted by the LTTE in Colombo were those with a high profile, not simply those against whom the LTTE might harbour some suspicion. The reference to LTTE defectors is followed immediately by the words:

> "…particularly those who have then aligned themselves with the Sri Lankan army military intelligence units --"

24. I can see no reason why the appellant would be seen as an LTTE defector of any kind, far less one of the varieties specifically identified by the AIT as being at risk.

25. That analysis in PS, though carried out in 2004, has since been considered in a number of cases, including that of Nadanasikamani v SSHD in this court ([2006] EWCA Civ 173) which generally endorsed it. In one of the other cases in 2006, that of Martin [2006] EWHC 799 (Admin), the administrative court had before it a report by Dr Smith on the situation in Sri Lanka in October 2005, only three months before his most recent visit at the time of writing the report now relied upon as part of the further representations. In Martin the court concluded that, while the situation had deteriorated since the material used in PS, the essential thrust of the reasoning in PS remained valid.

26. Ms Chan has drawn our attention to a very recent country guidance case promulgated by the AIT on 6 July 2008, AN & SS (Sri Lanka) v SSHD CG [2008] UKAIT 00063, which looked at the situation since the end of the ceasefire and stated:

> "Since the breakdown of the ceasefire, heightened security in the capital has restricted the operations there of the LTTE, who are focusing on 'high-profile' targets. The background evidence does not show that Tamils in Colombo who have stopped supporting the Tigers, or who support parties opposed to them, are at real risk of reprisals, absent some feature bringing them to prominence. The conclusion to that effect in PS (LTTE – internal flight – sufficiency of protection) Sri Lanka CG [2004] UKIAT 297, which this determination updates and supersedes, is thus affirmed."

Of some importance, the tribunal went on to say in that case at paragraph 98 that the risk in Colombo from the LTTE is now less than it was in October 2004 when PS was heard.

27. Now that decision of course was not available to the Secretary of State when she made her decision in December 2007, but it does confirm the continuing reliability of the reasoning in PS on which she had placed reliance.

28. One is very conscious in this present case of the inevitable concerns which the appellant himself must have when so many members of his family have been killed or have disappeared, even if most of those events took place in the late 1980s or early 1990s. That, however, is not the test which this court has to apply. The test here must be an objective and rational one. It seems to me that, even if the letters of July 2002 were to be treated as genuine, the Secretary of State was entitled to conclude that the appellant would still be sufficiently free of risk in Colombo, and at least for that reason that there was not a realistic prospect of a successful appeal, were this to go to an immigration judge. That of course is a basis requirement of Rule 353 of the Immigration Rules, as further explained in WM (DRC), for a fresh claim.

29. Even approaching her decision with the greater intensity required for judicial review proceedings of this kind, I conclude for my part that her decision not to accept this as a fresh claim was one properly open to her and cannot be impugned.

30. I in consequence would dismiss this appeal.

Lady Justice Smith:

31. I agree

Lord Justice Sedley:

32. Although, given what has happened to his relatives, I entirely understand the appellant's subjective fear of LTTE violence if he is returned, this case concerns the question whether his fear is objectively well-founded. For the

reasons given by Keene LJ I am driven to the conclusion that the appellant has no fresh claim capable of superseding the adverse decision on this issue reached by the adjudicator in 2003. I do so, however, not by standing back and asking simply whether a rational Home Secretary could have decided that there was no fresh claim, but by taking a close look at the components of the claim and of what they arguably amount to. If the court, doing this, comes to the same conclusion as the Secretary of State, well and good.

33. If not, then a difficult question will arise whether the difference of view justifies intervention. This case, for the reasons that have been given, does not concretely raise that question but Ms Chan for the Secretary of State has accepted that the Secretary of State's margin of appreciation may be slenderer in the present class of case, that is to say in fresh claim cases, than in other judicial review contexts. This is so for at least three possible reasons which I mentioned when granting permission to appeal in this case: first, the Home Secretary acts as judge in her own cause in reaching the decision under attack; secondly, the matters ordinarily relevant to whether a claim is a fresh claim are matters which a court is for the most part at least is as well equipped as the Home Secretary to deal with; thirdly, in many of these cases, and the present is a strong example, we are concerned with what are potentially matters of life and death.

34. This was essentially, as I read it, the approach both of Munby J in the present case and of Mitting J in the case of Sinnarasa v SSHD [2005] EWHC 1126 (Admin). It means, as I said when I granted permission to appeal, that there is in reality not a great deal of room for deference in the judicial exercise. The primary question for the court is whether, whatever the Secretary of State thinks of it, there is here a fresh claim capable of succeeding before an immigration judge. As I have said, the difficult question of the margin of appreciation is not for us today. But the approach, as Ms Chan herself aptly put it in response to my question, is that it is anxious scrutiny in action.

35. I too would dismiss this appeal.

Order: Appeal dismissed