Neutral Citation Number: [2009] EWHC 223 (Admin)

Case No: CO/8591/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2009

Before :

THE HON. MR. JUSTICE LLOYD JONES

- -

Between :

R on the application of SS (Sri Lanka)	**Claimant**
- and -	
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)

Mr. Iain Palmer (instructed by **Nag & Co Solicitors**) for the **Claimant**
Miss Lisa Busch (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing date: Monday 19th January 2009

- -

Judgment
As Approved by the Court

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The Hon Mr. Justice Lloyd Jones:

1. The Claimant, to whom I shall refer as SS, seeks judicial review of the decisions of the Secretary of State for the Home Department ("the Secretary of State") dated 26th September 2007, 16th November 2007 and 5th January 2009 not to treat submissions made on the Claimant's behalf as giving rise to a fresh claim on asylum or human rights grounds for the purposes of paragraph 353 of the Immigration Rules.

2. The Claimant is a national of Sri Lanka. He arrived in the United Kingdom on 15th August 2002 and claimed asylum the next day. His claim for asylum was refused by the Secretary of State on 26th September 2002 but his appeal against this decision was allowed by an adjudicator on 29th January 2003. Thereafter the Secretary of State appealed against that decision and the appeal was allowed by the Immigration and Asylum Tribunal ("IAT") on 10th September 2003. Permission to appeal to the Court of Appeal was refused and the Claimant's appeal rights were exhausted on 13th November 2003. Thereafter the Claimant made further submissions to the Secretary of State in support of a fresh asylum or human rights claim on 19th August 2005 and again on 18th August 2006. Both sets of submissions were on the basis that his claim should be reconsidered in the light of recent objective evidence concerning the situation in Sri Lanka. On 23rd February 2007 the Secretary of State rejected the submissions made on 19th August 2005. On 26th February 2007 the Claimant lodged his first claim for judicial review. Permission was thereafter refused on the basis that the Secretary of State would consider the submissions of 18th August 2006 and would reconsider the submissions of 19th August 2005. It is convenient to record in this chronology that the decision of the Asylum and Immigration Tribunal in ***LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG*** [2007] UKAIT 00076 was promulgated on 6th August 2007. By letter dated 26th September 2007 the Secretary of State rejected the submissions of 19th August 2005 and 18th August 2006. The Claimant was then detained and further removal directions were issued providing for his removal to Sri Lanka on 2nd October 2007. On 1st October 2007 the present claim for judicial review was filed. The Secretary of State issued a further decision letter dated 16th November 2007 rejecting the Claimant's submissions. On 29th February 2008 Keith J. granted permission to apply for judicial review in this action. The judgment of the European Court of Human Rights in Application No. 25904/07 ***NA v The United Kingdom*** was delivered on 17th July 2008. On 5th January 2009 the Secretary of State issued a further decision rejecting the Claimant's representations.

3. Paragraph 353 of the Immigration Rules provides:

> "When a human rights or asylum claim has been refused and any appeal relating to that appeal is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be seen as significantly different if the content:
>
> (i) had not already been considered;

(ii) taken together with previously considered material, created a realistic prospect of success, notwithstanding its rejection

This paragraph does not apply to claims made overseas."

The correct approach to be followed by the Secretary of State when considering further submissions is laid down in ***WM (DRC) v Secretary of State for the Home Department*** and ***Secretary of State for the Home Department v AR (Afghanistan)*** [2006] EWCA Civ. 1495. The question for the Secretary of State is whether there is a realistic prospect of success in an application before an Immigration Judge. In ***AK (Afghanistan) v. Secretary of State for the Home Department*** [2007] EWCA Civ 535 the Court of Appeal affirmed that the Secretary of State is required to consider "whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim on considering the new material together with the material previously considered". In considering and answering that question, the Secretary of State must subject the material to anxious scrutiny. (***WM*** per Buxton LJ at paragraph 7).

4. The Court of Appeal in ***WM*** also addressed the role of this court on an application such as this. It emphasised that the decision is that of the Secretary of State and it is open to challenge only on grounds of Wednesbury unreasonableness. At paragraph 11 of his judgment Buxton LJ identified the two questions which must be addressed by the reviewing court. First, has the Secretary of State asked herself the correct question i.e. whether there is a realistic prospect of an immigration judge, applying anxious scrutiny, concluding that the applicant will be exposed to a real risk of persecution on return? Secondly, in addressing that question has the Secretary of State satisfied the requirement of anxious scrutiny?

5. The issue to be determined on this application is, therefore, whether the Secretary of State acted irrationally in concluding that the further submissions, taken together with the previously considered material, did not create a realistic prospect of the Claimant succeeding before an immigration judge, bearing in mind the requirements of anxious scrutiny.

6. The Claimant submits on the basis of findings of fact made in his favour by the adjudicator that the security forces in Sri Lanka will hold information on him as a person who has been detained for a prolonged period on the basis of LTTE involvement and who has admitted to this involvement. On this basis he submits that his case is made out when considered in the light of the changed circumstances in Sri Lanka and the current case law from the AIT and the European Court of Human Rights.

7. The Claimant's case before the adjudicator was that he was at risk from both the government authorities and the LTTE. His account in evidence was that he had joined the LTTE in 1996 and later became a member of its intelligence wing. In 1997 he was sent to a government controlled area with another spy to observe government troop movements. The information he gathered he sent back to LTTE command. However, as a result of incorrect information being sent back to LTTE command in early 2001 an attack went wrong and the LTTE suffered casualties. The LTTE summoned the Claimant and his colleague to LTTE command. The

colleague returned first. The Claimant attended a first meeting and was told to return on the 25th April 2001. Before that date the Claimant discovered that his colleague had been executed by the LTTE. The Claimant fled rather than attend his appointment. He was arrested by members of the People's Liberation Organisation of Tamil Eelam ("PLOTE"), a pro-government political party with a paramilitary wing, during a random check on 26th April 2001. He was interrogated and severely ill-treated. He confessed to working for the LTTE and to passing information to the LTTE. He was then transferred to Army custody and gave further information about the LTTE. On the 15th July 2002 he was released from custody on the payment of a bribe by his uncle following which arrangements were made for him to flee Sri Lanka. Following his release he learnt that his brother and sister had been detained by the LTTE following his failure to answer his summons. Both, in fact, were later released. Following his release both the LTTE and PLOTE had made enquiries about his whereabouts. He arrived in the United Kingdom on 15th August 2002, one month after his release had been secured.

8. In a very thorough and careful decision the adjudicator allowed his appeal. She found him credible. She made express findings that he was a Tamil from the Jaffna peninsula. He was a member of the LTTE and was involved with passing information to them. He feared that they would execute him as a result of his passing on incorrect information. He was then arrested and detained by PLOTE for over a year, being at some point turned over to the Army. He admitted his involvement with the LTTE to PLOTE and to the Army. He was then released when his uncle paid a bribe to the Army. He had suffered psychological effects from his ill-treatment while in custody. On this basis the adjudicator found him to have a well founded fear of persecution from the Sri Lankan authorities on the basis that he was known to have been an LTTE informer, the length of time he had spent in custody and PLOTE's interest in him despite his having been released on payment of a bribe.
9. Her consideration of his fear of the authorities is out at paragraphs 34-37 of the determination.

> "34. The appellant's representative submits that he should be considered as "wanted" because he was an LTTE spy and would therefore fit the exceptional case category in ***Jeyachandran*** (2002) UKIAT 01869. However I must take into account that the appellant was released, although his release may have been facilitated by a bribe. I note that the Home Office Report of the United Kingdom Delegation to Sri Lanka 14-23 March 2002 states that release through bribery is likely to be recorded as an official release.
> 35. However there are other significant matters to also consider here. The first is that the authorities knew that the appellant was a LTTE informer or spy. This may well be part of the record. Secondly the appellant was only released after a year in detention. When asked about why it took him so long to arrange his release he said it took time for him to be passed over to the army and for the right person in the army to be identified for the bribe. Thirdly the appellant states that PLOTE came to look for him after his release by the army. He said they didn't know about the bribe and wanted to know how he could have been released.

> 36. If the appellant returned to Colombo airport, I accept that he may well be simply waved through. However there remains a real possibility that he could be stopped in order to check his identity. Although there is evidence to suggest that a person released through bribery would be likely to be recorded as having been released officially, given that this appellant was actually known to have been an LTTE informer, given the length of time it took to arrange his release and given that PLOTE have maintained an interest in him following his release through bribery, I am not satisfied that a real risk of further detention upon return does not still remain in this particular case. The background evidence does not give me confidence that a further period of detention would not involve a real risk of further serious ill-treatment.
>
> 37. Although I find that on the balance of probabilities the appellant would not be detained and interrogated upon return, on the lower standard of proof the possibility remains real."

10. The adjudicator also found, so far as the alleged threat from the LTTE was concerned, that the LTTE could still pose a real threat to the security of the Claimant and that that threat could exist outside his home area or areas controlled by the LTTE. However in the light of her decision as to the threat from the Sri Lankan authorities she did not go on to consider whether the authorities would be able to offer him effective protection against the LTTE if he were to relocate within Sri Lanka.

11. Accordingly, on the basis of the authorities as they then stood, she concluded that this was an exceptional case in which the Claimant would not be able to return to Sri Lanka in safety and she allowed the appeal. (See ***TJ (Risk - Returns) Sri Lanka CG*** [2002] UKIAT 01869 at paragraph 8, cited below.)

12. The decision of the IAT dated 10th September 2003 is, by contrast, very brief. Having summarized the submissions of the parties the Tribunal overturned the determination of the adjudicator on the basis of ***PT (Risk-Bribery-Release) Sri Lanka CG*** [2002] UKIAT 03444 which indicated that in circumstances where a person had been released on payment of a bribe he was clearly of no further interest to the authorities. They also found that the Claimant would not be at risk from the LTTE or the PLOTE as they had done nothing to the Claimant personally following his release from custody. Its reasoning is contained in paragraphs 6-9:

> "6. We have concluded that we must allow the Secretary of State's appeal.
>
> 7. We are satisfied that, having been released on payment of a bribe by the authorities after having, apparently, admitted being a spy on behalf of the LTTE but not having been charged, this respondent was clearly of no further interest to the authorities. We do not believe that he will have been regarded as an escapee and neither do we believe that his name will have been included on a list of individuals who are wanted by the authorities.
>
> 8. In so far as any possible risk to him from PLOTE or the LTTE is concerned, we note that nothing happened to him after his release while he was staying with his uncle and before his departure from Colombo, despite the fact that apparently the LTTE and PLOTE knew where he was. We do not believe that, given the current situation in Sri Lanka, he is likely to be

> of any continuing interest to either PLOTE or the LTTE, which is now a legally recognised body in Sri Lanka.
> 9. We therefore allow the Secretary of State's appeal."

13. The decision of the adjudicator and that of the IAT were made against the objective background of a ceasefire between LTTE and the Sri Lankan government which began in February 2002 and which remained in force at that time. Furthermore, the reported decisions relied upon by the IAT were themselves decided in the context of the ceasefire. As matters then stood, the test for determining claims of Sri Lankan Tamil asylum seekers was whether the particular facts of the case brought it within an exceptional category of risk as identified by the IAT in ***TJ (Risk - Returns) Sri Lanka CG*** [2002] UKIAT 01869. In that case the IAT referred to the "somewhat fluid" situation following the ceasefire which had only been in place for a short period. It stated that "the authorities are still interested so far as we are aware, and it would be surprising if they were not, in those who may have been involved in active assistance of the terrorists in the past" (paragraph 7). It continued:

    > "The reality is in our judgment that it is as yet premature to accept that everyone who has claimed asylum in this country would be able to return safely. We certainly are of the view that in the present situation and having regard to the present trends it is only the exceptional cases that will not be able to return in safety." (at paragraph 8).

14. The IAT in the case of this Claimant also relied on ***PT (Risk-Bribery-Release) (Sri Lanka)*** [2002] UKIAT 03444 in support of its conclusion that a person who was released on payment of a bribe would not be treated as an escapee or be on a list of wanted persons. On behalf of the Claimant, the sustainability in law of the IAT's findings in the legal and factual context prevailing at that time is accepted. However, it is said that since ***LP (Sri Lanka)*** [2007] UKIAT 00076 the exceptionality test laid down in ***TJ*** is no longer to be applied and that this Claimant's case must now be considered in the light of very different conditions.

15. The further submissions made by the Claimant on 19th August 2005 and 18th August 2006 in support of his asylum and human rights claims outlined his previous submissions and invited the Secretary of State to review these claims in the light of objective evidence relating to the situation in Sri Lanka. In support of his case he relied on a UNHCR report of March 2006 and a report by Professor Anthony Goode dated 12th April 2006 in addition to other objective country evidence.

16. By a decision letter dated 26th September 2007 the Secretary of State rejected both sets of submissions. The Secretary of State referred to paragraphs 7 and 8 of the IAT decision and stated that in the light of these facts there were no substantial grounds for believing that there was a real risk that the Claimant would face treatment contrary to Articles 2 or 3 ECHR if he were returned to Sri Lanka. It was not considered that the objective evidence demonstrated that he would be at risk upon his return. "More importantly it does not provide sufficient grounds for overturning the findings of the Tribunal who reconsidered and overturned the adjudicator's previous decision and found that that action would not cause the

United Kingdom to be in breach of the law or its obligations under the 1951 Refugee Convention." It is to be noted that the letter does not refer to the decision of the AIT in ***LP*** which was promulgated on 6th August 2007.

17. Following the filing of the present claim for judicial review on 1st October 2007 the Secretary of State issued a further decision letter on the 16th November 2007. It referred to the decision of the AIT in ***LP*** which it summarised as follows. The evidence does not show that the Tamil population of Colombo are at risk of serious harm from the Sri Lankan authorities merely because they are Tamils. However, a number of factors had been identified by the AIT which may increase risk and those factors and the weight to be ascribed to them, individually and cumulatively, must be considered in the light of the facts of each case. At paragraph 13 of the letter the author appears to have confused the decision of the adjudicator and that of the IAT in the present case. The Secretary of State considered that the further submissions failed to establish how, in the light of recent events, the Claimant was at risk of persecution. At paragraph 18 the letter referred to paragraph 7 of the IAT decision (wrongly ascribing it to the Immigration Judge) and then observed:

> "The case of ***LP*** states, in paragraph 236, those who were released following payment of a bribe are not necessarily of interest to the authorities. It is therefore considered unlikely that your case would be of any interest to the authorities now on his return."

At paragraphs 24-25 of the letter the Secretary of State concluded:

> "24. It is considered that your client does not fall within the categories of risk as outlined above, and no evidence has been provided to demonstrate that he would be at risk now. Bearing in mind your client's long absence from Sri Lanka it is considered unlikely that he would now be at risk because of his ethnicity or his alleged involvement with the LTTE. Anxious scrutiny has been given to your client's case. Your client's illegal departure, lack of ID and the fact that he has made an asylum claim abroad have been taken into account. However, when taken together with the other factors under the case of ***LP*** it is considered that there is little or nothing in your client's case to differentiate his case from thousands of other Tamils who have returned to Colombo without suffering mistreatment under either of the Conventions.
> 25. This view is supported when it is noted that your client's case does not possess any of the more weightier risk factors outlined in the case of ***LP***. Your client does not have a previous criminal record and it is considered that, given the lapse of time, your client's involvement with the LTTE was not sufficiently remarkable as to cause the authorities there to have a continuing interest in him. Further, your client did not escape from custody or jump bail, but was released on the payment of a bribe. For the reasons stated it has been concluded that your client has not provided evidence which would show that his case is significantly different from the material that has previously been considered."

18. Permission to apply for judicial review was granted on the 29th February 2008 by Keith J. He was clearly influenced by his understanding that the Secretary of State had not considered the decision in ***LP***. In fact, ***LP*** had been considered in

the second decision letter dated 16th November 2007 but it appears that the judge's attention was not drawn to this letter.

19. In her further decision letter of the 5th January 2009 the Secretary of State considered that there was no realistic prospect of an immigration judge concluding that the Claimant faced a real risk of persecution merely on account of his ethnicity (paragraph 13) and then turned to certain specific matters.

> "Previous record as a suspected or actual LTTE member or supporter.
> 15. The Adjudicator in the determination promulgated on 29 January 2003 accepted that your client was a member of LTTE. However, the Tribunal's finding in paragraph 7 on the determination dated 10 September 2003 states; "*We are satisfied that, having been released on payment of a bribe by the authorities after having, apparently, admitted being a spy on behalf of the LTTE but not having been charged, this respondent is of no further interest to the authorities. We do not believe that he will have been regarded as an escapee and neither do we believe that his name will have been included on a list of individuals who are wanted by the authorities."* It is noted that your client stayed with his uncle before his departure from Colombo even though the PLOTE and the LTTE knew where he was, nothing happened to him afterwards. (sic) The Tribunal found that you client is not "*likely to be of continuing interest to either PLOTE or the LTTE*" (paragraph 8). It is therefore considered not reasonably likely that your client would now be of any interest to the authorities on his return.
>
> Having signed a confession or similar document.
> 16 Further, the findings of the AIT indicate that your client may have confessed to his involvement within the LTTE but there is no finding by the AIT, no evidence and it has never before been suggested that there is any signed confession or written record of any confession so as to bring him to the attention of the Sri Lankan authorities upon his return.
> …
> Release from custody.
> 19 Your client asserts that he was released on payment of a bribe. The case of ***LP*** states that those who were released following payment of a bribe are not necessarily of interest to the authorities: "*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*" (paragraph 236). In the case of ***Thangeswarajah*** (quoted by Sir George Newman at paragraph 22 of his judgment in ***Sivanesan*** [2008] EWHC 1146 (Admin)), Collins J. found that "*Release on payment of a bribe without more would not indicate that there was an ongoing risk because it would be likely to be recorded as a release…*". As stated above, your client was not charged before or after his release and was considered by the Tribunal to be of no further interest to the authorities. The Tribunal did not believe that his name would be included in a list of individuals who are wanted by the authorities. In the particular circumstances of your client's case it is therefore not considered that there is a realistic prospect of an Immigration Judge concluding that your client would now be of any interest to the authorities on this basis.

> …
>
> 25 Considering your client's asylum Article 3 claims in the round, when taken together with the other factors under the case of ***LP***, ***AN*** & ***SS*** and ***NA***, it is considered that there is little or nothing in your client's case to differentiate his circumstances from thousands of other failed Tamil asylum seekers who have returned to Colombo without suffering mistreatment under either of the Conventions."

20. The Claimant no longer relies on any possible threat to him from the LTTE. Rather, his case now rests solely on the alleged threat from the Sri Lankan authorities. The Claimant does not rely on any fresh evidence demonstrating a change in his personal circumstances. Rather his submissions to the Secretary of State and his application to this court are founded on changes in the circumstances prevailing in Sri Lanka which have been reflected in the authorities governing the correct approach to matters alleged to give rise to a risk of persecution. On behalf of the Claimant on this application, Mr. Palmer submits that his case must now be considered in this new legal and factual context and that when one has regard to the reported cases it cannot reasonably be said that this Claimant's case would have no real prospect of success if referred once again to the Tribunal.

21. On behalf of the Secretary of State Miss Busch submits that on examination it becomes apparent that nothing in the Claimant's case has changed since it was considered and rejected by the IAT in September 2003. She relies on findings of fact made by that Tribunal. In particular she points to the fact that, following ***LP***, ***PT*** remains a country guidance case and she submits that release following payment of a bribe does not, without more, support the existence of a continuing interest on the part of the Sri Lankan authorities. She submits further that the Claimant's case is now based on a series of inferences which are unsustainable. The authorities, she submits, would compel the Tribunal to dismiss the Claimant's case and that, accordingly, the Secretary of State was entitled to conclude that the case would have no real prospect of success.

<u>Judicial decisions on assessment of risk.</u>

22. At the date of the original consideration of the Claimant's case by the Secretary of State, the adjudicator and the IAT, the approach to be followed in evaluating evidence of risk of persecution was that laid down by the IAT in ***TJ (Risk - Returns) Sri Lanka CG*** [2002] UKIAT 01869. The conclusion in that case that it was only in exceptional cases that an ethnic Tamil would not be able to return to Sri Lanka in safety was closely linked by the Tribunal to the then current situation which was one of a ceasefire. Moreover, the Tribunal was there at pains to emphasise the necessity of always considering the circumstances of each individual case.

> "We make it clear that the Tribunal is in a difficult position, as indeed are all Adjudicators as this time in relation to Sri Lankan Tamils. It is still too early to be satisfied that the situation has changed to such an extent that there is now no risk to anyone. Equally we take the view that there are few who now would be at risk, but it is necessary always to consider the circumstances of each individual case. That can only be done by considering the facts of that individual case against the information that

> exists at the precise date on which the Adjudicator of the Tribunal has to reach a decision." (at paragraph 9.)

23. Specific guidance in relation to the assessment of risk in cases where the applicant had been released from custody following the payment of a bribe had been provided by the IAT in ***PT (Risk-Bribery-Release) (Sri Lanka)*** [2002] UKIAT 03444. There the IAT stated:

    > "21 When someone has been in custody for a significant period of time it is reasonable to presume that some record was made of the detention and this record may still exist and be available for inspection by the authorities. If the record does still exist one may also reasonably presume that it includes a reference to the individual's current status. By this we mean that he is currently wanted by the authorities, or whether his release concluded the authorities' adverse interest in him. These presumptions are supported by the statement from the CID superintendent…that their computer only holds the name and address and age of wanted people. We also note in passing that this record kept by the CID does not include people who have failed to comply with reporting restrictions after a release."

    The IAT concluded "that bribery related releases, especially from Army custody, would not, in the absence of some special and credible reason, be likely to be treated as escapes, and would not result in the inclusion of the individuals involved on a wanted list." (at paragraph 25). The Tribunal referred to the fact that bribery is widespread in Sri Lanka.

    > "Thus the mere fact of the payment of a bribe does not in itself imply that the bribe is procuring action, which would not otherwise in time be taken. Nor does it necessarily imply that the person bribed would be willing to take a serious personal risk by for example releasing a suspected terrorist. Payment of a bribe on a release may mean nothing more than that a person in detention who is no longer of adverse interest to the authorities may be expected to offer a bribe to his custodians to initiate the release procedures." (at paragraph 26).

    However, once again, at paragraph 27 the Tribunal emphasised that each case must be decided on its own facts.

24. A fundamental reappraisal of the assessment of risk in Sri Lankan cases was undertaken by the AIT in ***LP*** in 2007. That decision was taken against the background that the general security situation in Sri Lanka had deteriorated following the effective breakdown of the ceasefire and the increase in terrorist activity by the LTTE. That had resulted in increased vigilance on the part of the Sri Lankan authorities and, with it, a greater scope for human rights abuses and persecution. (***LP*** at paragraph 232).

25. Following ***LP***, it is clear that the exceptionality test no longer applies. It is no longer necessary for the Claimant to establish that he falls within an exceptional category of risk. At paragraph 229 of its decision the Tribunal stated that ***TJ*** is no longer to be treated as country guidance. In ***LP*** the Tribunal identified twelve principal risk factors for a person returned as a failed asylum seeker from the

United Kingdom to Sri Lanka who fears persecution or serious ill-treatment from the Sri Lankan authorities. I do not propose to deal with all of these in detail. For present purposes it is sufficient to record that these include Tamil ethnicity, a previous record as a suspected or actual LTTE member or supporter, bail jumping and/or escaping from custody, having signed a confession or similar document, returning from London which is a known centre of LTTE activity, illegal departure from Sri Lanka, lack of an ID card or other documentation and having made an asylum claim abroad. Having considered the risk in the case of bail jumpers the Tribunal continued:

> "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, the risk level to the applicant is likely to be that of a real risk." (at paragraph 214).

With regard to signing a confession or similar document the Tribunal observed:

> "We see no reason to depart from the established guidance set out in ***Selvaratnam*** that this can be a significant risk factor. Confession evidence, credibly deduced, was noted by Professor Goode at paragraph 47 of his specific report and indeed we note the relevant and significant of Dr. Foster that many Tamils are released after signing statements made in Sinhala that they often do not understand. It is again a fact that must be considered in the totality of the risk" (at paragraph 215).

26. In relation to the use of these risk factors to establish risk profiles the Tribunal said this:

> "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 would 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 and may have been the situation up to 2002 and certainly during the period of the ceasefire 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" (at paragraph 227).

27. The Tribunal in ***LP*** (at paragraph 230) makes clear that the observations in ***PT*** (at paragraphs 19-27) on the issue of bribery remain consistent with the evidence and submissions heard in ***LP*** and contain what continues to be a commonsense approach to the issue of bribery-related releases. However the Tribunal emphasised that while this authority retains country guidance status it must, as always, be looked at in the context of the developing situation and the light of any more up to date evidence (at paragraph 230). At paragraph 236 the Tribunal observed:

> "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 reason 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 the release following payment of a bribe is not necessarily evidence of any continuing interest. Care should be taken to distinguish between release following 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…" (at paragraph 236).

It appears therefore that careful evaluation will be required of the facts relating to the nature and duration of detention as well as the precise circumstances of the release.

28. In ***Thangeswarajah*** [2007] EWHC 3288 (Admin) Collins J. considered in some detail the twelve risk factors listed in ***LP***. He considered that Tamil ethnicity by itself does not create a real risk relevant to ill treatment and that, accordingly, some of these risk factors are in reality background factors. However, if there is a factor which does give rise to a real risk that the individual would be suspected of involvement in the LTTE, background factors will add to the significance of that risk. He categorised Tamil ethnicity, illegal departure from Sri Lanka, lack of an ID card or other documentation and an asylum claim made abroad as factors which neither in themselves or even cumulatively would create a real risk. He categorised a previous record as a suspected or actual member or supporter of LTTE at a level which would mean the authorities retain an interest as likely to create a risk. He considered that release on payment of a bribe without more would not indicate that there was an ongoing risk because it would be likely to be recorded as a release, but stated that whether the nature of the release was such as to lead to a risk would depend upon the individual circumstances. In his view a signed confession or similar document obviously would be an important consideration. In his judgement the applicable test was:

> "…whether there are factors in an individual case, or one or more, which might indicate that the authorities would regard the individual as someone who may well have been involved in the LTTE in a significant fashion to warrant his detention or interrogation" (at paragraph 16).

29. These observations were adopted by Sir George Newman in ***R. (Sivarajah Sivanesan) v Secretary of State for the Home Department*** [2008] EWHC 1146 (Admin). I would draw attention to the following passage in the judgment of Sir George Newman in that case which, to my mind, has a particular relevance to the present case.

> "41. The lesson to be learned from this case is that the central question is whether a real risk exists that the authorities would suspect the claimant of having a sufficiently significant link to the LTTE which could cause him to be detained on his return to Sri Lanka.
>
> 42. The question must be answered after a thorough assessment has been made of the finding made by the judge in connection with the original claim. This is required because a fresh judge will take the original conclusion as his starting point. In the cases now pending, depending as they do on changed circumstances in Sri Lanka, the assessment should be directed to the conclusions which have been reached which establish the profile of the claimant. It is likely that the claimant (or his lawyers) will have advanced a profile by reference to a number of risk factors. Each case must be considered on its own facts. The factors in ***LP*** are not exhaustive but are ones commonly found to have been present in many cases. They may be reflected in any one case in a different manner to that described in ***LP***. The requirement that each case should be considered on its own facts means that the formulaic repetition of a conclusion in ***LP*** will not be sufficient if differences of detail are present. Where facts capable of showing a connection of significance to the LTTE are relied upon, a careful assessment of the detail will be required. The judgment of Collins J [in ***Thangeswarajah***] provides clear guidance on the line between real risk factors and background factors. That said, a combination of factors could materially affect the conclusion. It must always be remembered that the requirements for anxious scrutiny means addressing the relevant representations which have been advanced. A failure to do so would not be saved by repetitive citation of principle from cases or sections of the Determination which are arguably in point without the reason for referring to the section being stated.
>
> 43 An examination of decisions in other cases, apparently similar, should be avoided. The detailed facts of another case can be an unreliable barometer of risk and are likely to lead to a decision being taken in the case under consideration which is driven, not after anxious scrutiny in the case in question, but by the decision of a judge in a different case. That is not to say that a comparative exercise cannot help a decision-maker, but undue weight should not be attached to the result."

30. In its judgment in Application No. 25904/07 ***NA v The United Kingdom***, delivered on 17th July 2008, the European Court of Human Rights approved the general approach adopted in ***LP***.

Consideration

31. Against this background I turn to consider the application of these principles to the facts of this particular case.

32. Mr. Palmer on behalf of the Claimant places at the forefront of his submissions the finding of the adjudicator that the Claimant was a member of the LTTE who had acted as a spy for them, that he had confessed all of this to PLOTE and to the Army and that he had been detained for a total of some 15 months before being released on payment of a bribe. All of these matters are accepted by the Secretary of State.

33. At the heart of the dispute before me has been the issue of the likelihood of any record having been made and remaining in the possession of the Sri Lankan authorities recording the fact of this Claimant's detention or his admitted membership of the LTTE. In this regard I agree with the conclusion of Sir George Newman in ***Sivanesan*** that the relevance of the risk factors identified in ***LP*** and in ***Thangeswarajah*** will depend upon the likelihood that the detention or release has been recorded. It is the existence of a record which could give rise to the risk of suspicion on return. The degree of risk will depend upon the case in question and the likely content of the record (***Sivanesan*** at paragraph 45(3)).

34. In her decision of 23rd January 2003 in this case the adjudicator expressly referred to the Home Office Report of March 2002 which stated that release through bribery was likely to be recorded as an official release. However she identified three significant matters to be weighed against that in this case. The first was that the authorities knew that the Claimant was an LTTE informer or spy. She made an express finding that that may well be part of the record. Secondly she noted that the Claimant was released only after a year in detention. (In fact it was a period of almost 15 months from the 26th April 2001 to 15th July 2002.) Thirdly, PLOTE came to look for him after his release by the Army. They were unaware of the bribe and wanted to know how he could have been released. While she accepted that the Claimant may well be simply waved through on his return to Colombo airport, these three factors led her to conclude that she was not satisfied that a real risk of further detention on return did not still remain. Moreover the background evidence did not give her confidence that a further period of detention would not involve a real risk of further serious ill treatment.

35. Contrary to the submission of Miss Busch before me, the IAT on the appeal from the adjudicator did not make a finding that there was no record in relation to this Claimant. Rather, they concluded that having been released on payment of a bribe he was of no further interest to the authorities, he would not have been regarded as an escapee and his name would not have been included on a list of individuals wanted by the authorities. They also concluded that "given the current situation in Sri Lanka" he was unlikely to be of any continuing interest to PLOTE.

36. To my mind there are certain features of the present case which increase the likelihood of the authorities having kept a record of the Claimant's case and which therefore support the conclusion of the adjudicator in this regard. These features are identified in a number of decisions both before and after the decision of the adjudicator and the IAT in this case.

37. One such feature is the length of the period during which the Claimant was detained by PLOTE and the Army, totalling some 15 months. The longer the period of detention, the more likely it is that a record was made and kept. In ***PT***

the IAT observed that when someone has been in custody for a significant period of time it is reasonable to presume that some record was made of the detention and that this record may still exist and be available for inspection by the authorities. If the record does still exist it is reasonable to presume that it includes a reference to the individual's current status i.e. whether he is wanted or whether his release concluded the authorities' adverse interest in him (at paragraph 21, cited above). Similarly, in ***R (Veerasingam) v Secretary of State for the Home Department*** [2008] EWHC 3044 (Admin.) Blake J (at paragraph 26) distinguished in this regard between random brief detentions and a prolonged period of detention.

38. A second factor bearing on the likelihood of a record having been made and kept in the circumstances of the present case is the undisputed fact that this Claimant admitted to being a member of the LTTE and to having spied for them. To my mind this must increase the likelihood of a record having been made. As Blake J. observed in ***Veerasingam***:

    > "The Sri Lankan security forces have been engaged in a long struggle against terrorist insurgency in their country and there is no reason to believe that they would have completely failed to adopt what any similar security force would be likely to do in such circumstances which is to gather information and record it for future use in making assessments of those who may be members or supporters" (at paragraph 16).

    While there is no evidence of a written confession in the present case, I consider it likely that the Claimant's confession of his involvement with LTTE would have been recorded in this case. This was, in fact, the view of the adjudicator whose conclusion that the record in relation to the Claimant may well include reference to the fact that he was known to be an LTTE informer or spy was not disturbed on appeal by the IAT. To my mind, there was a sound basis for this conclusion of the adjudicator.

39. What then is the significance of the possible existence of such a record? In approaching this question I gratefully adopt the observation of Blake J. in ***Veerasingam***, at paragraph 27, that the task of the Tribunal is not to make an assessment of certainties or even probabilities but to consider whether there is a real possibility or a real risk that his profile will have continued to be recorded and could in appropriate circumstances be made available to anyone interested. Furthermore, it is clear that an assessment by the Tribunal and any assessment by the Secretary of State as to the outcome if the case were referred to the Tribunal must proceed on the basis of up to date information as to country conditions. Thus, for example, conclusions drawn in 2002 as to the extent of computerised records available at the airport at that time would now be of limited, if any, significance.

40. In ***LP*** the Tribunal observed, at paragraph 239:

    > "When examining the risk factors it is of course necessary to also consider the likelihood of an appellant being either apprehended at the airport or subsequently within Colombo. We have referred earlier to the Wanted and Watched Lists held at the airport and concluded that those who are actively wanted by the police or who are on a watch list for a significant offence

> maybe at risk of being detained at the airport. Otherwise the strong preponderance of the evidence is that the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment".

41. In ***AN & SS (Tamils-Colombo) (Sri Lanka) CG*** [2008] UK AIT 00063 the AIT, in a judgment delivered on the 10 June 2008, concluded at paragraph 107:

> "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" (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 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."

The Claimant in the present case can, quite legitimately, point to his confession and the duration of his detention as potentially distinguishing his case from the general category described by the Tribunal in this passage.

42. However, the judgment of the European Court of Human Rights in ***NA*** delivered on the 17 July 2008, some five weeks after the decision in ***AN & SS***, appears to have taken a much less optimistic view as to the likelihood of interception at the airport. The Court deals with the matter at paragraph 145 in a passage which has a particular relevance to the present case.

> "145. The Court recognises that it has been over 10 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 that 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, … the Court finds the passage of time cannot be determinative of the risk to the present applicant without

> 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 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 finding …, 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."

I note that the tribunal in ***AN*** did not have the benefit of the very detailed assessment carried out by the European Court of Human Rights in ***NA***. I consider that the judgment of the Strasbourg Court in ***NA*** is to be taken as an authoritative statement of the current risk and, to the extent that it portrays a bleaker assessment of those risks, it is to be preferred to the judgment of the AIT in ***AN & SS***. In this regard I would respectfully agree with the observations of Blake J in ***Veerasingam*** at paragraph 28.

43. In these circumstances I conclude that the only reasonable conclusions open to the Secretary of State were that there exists a real risk that a record was taken and maintained by the Sri Lankan authorities of this Claimant's membership of LTTE and his activities on their behalf and that there is a real risk that this record would be accessible to the airport authorities.

44. Miss Busch submits, however, that the Claimant is unable to show that there is a real risk that his record would cause him to be of any continuing interest to the authorities. In this regard she relies on the judgment of the IAT which concluded, on the basis of his release on payment of a bribe after having admitted being a spy on behalf of the LTTE but not having been charged, that he was clearly of no further interest to the authorities. She also points to the conclusion of the IAT, at paragraph 8, that he is unlikely to be of any continuing interest to PLOTE "given the current situation in Sri Lanka". To my mind the difficulty with this submission is that the conclusions of the IAT were clearly rooted in their assessment of the risk having regard to the then current conditions when a ceasefire was in force. It is not open to the Secretary of State simply to rely on the conclusion of the IAT in September 2003 in relation to the conditions then prevailing. As the European Court of Human Rights observed in ***NA***, at paragraph 145 cited above, the interest of the authorities in particular categories of returnees is likely to change over time in response to domestic developments and may increase as well as decrease. Accordingly the decision of the IAT does not provide an answer.

45. Rather, the Secretary of State is required to carry out an assessment of risks, and in particular, the risk of this Claimant being of interest to the authorities, in the light of current conditions. In this regard I consider that the Secretary of State is entitled to point to the fact that ***PT*** remains a country guidance case and to conclude that this would be a weighty authority in her support were the case considered once again by the AIT. The release of a detainee by the Army following the payment of a bribe may well indicate that an individual is no longer of any interest to the authorities. However, the guidance provided by ***PT*** in this regard must now be qualified in a number of ways. First, it is clear from ***LP*** that a claimant need no longer establish that he falls within an exceptional category of risk. Secondly, the issue of risk has to be assessed in the context of the developing situation in Sri Lanka and in the light of the most up to date evidence. Thirdly, a careful evaluation would be required on the specific facts of each individual case.

46. I consider that there are present in this case features which indicate that the Claimant may well be of interest to the authorities in the climate currently prevailing in Sri Lanka. First, a previous record as a suspected or actual member or supporter of the LTTE at a level which would mean the authorities retained an interest was accepted by Collins J in ***Thangeswarajah*** as likely to create a risk. In the present case it is established that the Claimant's membership of the LTTE and his spying activities on their behalf are known to the authorities. Secondly, the Claimant has confessed his LTTE membership and activities to the authorities. I note that in ***LP*** (at paragraph 215) and in ***Thangeswarajah*** (at paragraph 12) reference is made to a signed confession or similar document as constituting an important consideration. The Claimant's evidence before the adjudicator did not suggest that there was a written confession. However, the confession related to matters of considerable importance to the authorities and, for reasons given earlier in this judgment, I consider it likely that a record would have been kept. Thirdly, the adjudicator accepted that PLOTE maintained an interest in the Claimant following his release through bribery. This may be of significance in various ways. It may support the existence of a continuing interest in the Claimant. It may also support the view that following his release the Claimant was not recorded as having been released. On appeal the members of the IAT were dismissive of this point, observing that they noted that nothing had happened to the Claimant after his release while he was staying with his uncle and before his departure from Colombo, despite the fact that apparently the LTTE and PLOTE knew where he was. This may not be strictly accurate. The Claimant's evidence was that he stayed at his uncle's house and the LTTE and PLOTE came to ask for him. It is not clear that they knew that he was there. What is significant is the Claimant's evidence that they did not know about the bribe and wanted to know why he had been released. This may support the view that he was not recorded as released. Fourthly, I consider it significant that the Claimant was released by the Army in July 2002, some months after the start of the ceasefire. It is an unhappy fact that the decision of the Secretary of State's which is now challenged was taken in very different circumstances.

47. I consider that the Secretary of State was bound to have regard to these features when addressing the likely outcome were this case placed once again before the Tribunal. Moreover, she was required to have regard to the cumulative effect of

these features. As the European Court of Human Rights pointed out in ***NA***, regard must be given to the possibility that a number of individual factors which may not, when considered separately, constitute a real risk but, when taken cumulatively and when considered in a situation of general violence and heightened security, may give rise to a real risk (at paragraph 130). In this regard it would also be necessary in this case to take account of what may be considered less important but nevertheless relevant factors including Tamil ethnicity, illegal departure from Sri Lanka, return from London which is a known centre of LTTE activity, lack of an ID card or other documentation and having made an asylum claim in the United Kingdom. Approaching the matter on this basis and applying the test formulated by Collins J. in ***Thangeswarajah*** at paragraph 16, I have come to the clear conclusion that there are factors in this case which might indicate that the authorities would regard this Claimant as someone involved in the LTTE in such a significant fashion as to warrant his detention or interrogation on his return to Sri Lanka. Furthermore, having regard to all these considerations, I have come to the conclusion that it was not reasonably open to the Secretary of State to conclude in the particular circumstances of this case that an independent tribunal could not realistically come down in favour of the Claimant's asylum or human rights claim on consideration of the new material together with the material previously considered.

48. Furthermore, I am unable to conclude that the successive decision letters of the Secretary of State have applied the degree of anxious scrutiny which such cases inevitably require. In this regard I would draw attention to the following matters.

First decision letter: 26th September 2007.

(i) The first decision letter dated 26th September 2007 fails to take any account of the decision of the AIT in ***LP*** which was promulgated on 8th August 2007. It is surprising that the author of the letter of the 26th September 2007 was not aware of it. However, ***LP*** was, of course, addressed in subsequent decision letters.

(ii) In the first decision letter the Secretary of State relied very heavily on the conclusions drawn by the IAT in the Claimant's in 2003 and, while referring to changed circumstances in Sri Lanka failed to undertake an assessment of their significance to the particular facts of this Claimant's case.

Second decision letter: 16th November 2007.

(iii) The second decision letter of 16th November 2007 at paragraph 13 appears to confuse the decision of the adjudicator and the decision of the IAT.

(iv) At paragraph 18 of the second letter the author incorrectly deduces from the fact that those who are released following payment of a bribe are not necessarily of interest to the authorities the conclusion that it is unlikely that the Claimant would be of interest to the authorities.

(v) At paragraph 19 the letter states:

> "Your client claims to have been a spy for the LTTE, as your client was released on payment of a bribe, there will be no record showing your client as suspected LTTE which would put him at risk of persecution on return to Sri Lanka. (sic) Particularly as it is noted that your client was not asked to sign a confession or any similar document following his arrest".

It was of course established before the adjudicator that the Claimant was a member of the LTTE and a spy for the LTTE and that the authorities were aware of this following his conviction. The conclusion that there will be no records is completely unwarranted. The examination of this issue is superficial and inadequate.

(vi) At paragraph 25 the author states that the case does not possess any of the "more weightier risk factors outlined in the case of ***LP***". However, the decision letter fails to take account of the established facts of the Claimant's confession, his membership of the LTTE and his activities on their behalf. Furthermore, it fails to take any account of the duration of his detention, a matter identified as significant in paragraph 236 of ***LP***.

Third decision letter: 5th January 2009.

(vii) Although this letter states at paragraph 8 that it will assess the risk factors applicable in this case in the light of the consideration given by the European Court of Human Rights in ***NA*** and in the light of the prevailing country situation, it fails to do so.

(viii) The previous record of the Claimant "as a suspected or LTTE member or supporter" is addressed in paragraph 15. This simply recites the conclusions of the IAT in this case and concludes that it is therefore not considered reasonably likely that the Claimant will now be of any interest to the authorities on his return. There is no consideration of the established facts in the current circumstances.

(ix) At paragraph 16 the letter addresses the confession. It states that the tribunal's findings indicated "that your client may have confessed to his involvement in the LTTE" but makes the point that "there is no finding by the AIT (sic), no evidence and it has never before been suggested that there is any signed confession or written record of any confession so as to bring him to the attention of the Sri Lankan authorities on his return". I consider that the Secretary of State was under a duty to consider whether, despite the lack of a signed confession, there is a risk of the confession having been recorded.

(x) At paragraph 19 the letter deals with the Claimant's release from custody. The letter refers to ***LP*** and ***Thangeswarajah***. It refers to the conclusion of the IAT that the Claimant was of no further interest to the authorities. It does not make any attempt to address the duration of the detention or the circumstances of his release in the context of the current conditions.

(xi) In the absence of appropriate scrutiny of the Claimant's case and assessment of the risks to which he may be exposed, the conclusion at paragraph 25 "that there is little or nothing in your client's case to differentiate his circumstances from thousands of other failed Tamil asylum seekers who have returned to Colombo without suffering mis-treatment under either of the Conventions" was not open to the Secretary of State.

49. For these reasons I have come to the conclusions that the Secretary of State has failed to address the specific, established features of the Claimant's case by reference to the established risk factors and to assess them in the context of current conditions. The formulaic repetition of conclusions in ***LP*** and reliance on conclusions drawn by the IAT in the different circumstances in 2003 are, in my

judgement, inadequate and do not amount to the anxious scrutiny which cases such as this clearly require.

50. For these reasons I would quash the decisions of the Secretary of State.