CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 58510/00
by Ramachandraiyer VENKADAJALASARMA
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 9 July 2002 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 7 April 2000,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ramachandraiyer Venkadajalasarma, is a Sri Lankan national, who was born in 1958 and currently resides in Heerlen, the Netherlands. He was represented before the Court by Ms E.H.F. van 't Hoff, a lawyer practising in The Hague. The respondent Government were represented by their Agent, Mr R. Böcker, of the Ministry of Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 2 November 1995 the applicant arrived in the Netherlands, where, on 3 November 1995, he applied for asylum or, alternatively, a residence permit for compelling reasons of a humanitarian nature (*klemmende redenen van humanitaire aard*). In support of his claim for asylum he submitted the following.

He belonged to the Tamil population group, was married with two children and lived in the town of Jaffna on the Jaffna peninsula. This area was controlled by the Liberation Tigers of Tamil Eelam ("LTTE"), a Tamil terrorist organisation, engaged in an armed struggle for independence.

The applicant owned a minibus which was his livelihood. From January 1994 the LTTE forced him to transport foodstuffs as well as LTTE members two or three times a month. The LTTE would pay for his petrol. In March 1995 the LTTE confiscated his minibus because he had refused to transport bombs for them. They subsequently forced him to work in their kitchens and to help dig trenches. On 21 September 1995 some LTTE members came to his house and told his wife that the applicant had to report to their camp, which meant that he was expected to fight alongside them and to transport their weapons. Upon hearing this, the applicant immediately went into hiding. Since two friends of his, who had also driven his minibus, had recently been shot dead by the LTTE when they had refused to join the LTTE's ranks, the applicant decided to flee to the national capital Colombo.

On 1 October 1995 he went to the army camp at Vavuniya to apply for the required travel pass. He was apprehended and held until 3 October 1995 as he was suspected of being an LTTE supporter. He was taken to a mill where he was undressed and beaten with a small iron rod. This left a horizontal scar of about five centimetres in length on the heel of his right foot. He was also stabbed with a knife, leaving a number of scars on the underside of his forearms, and a cigarette was put out on his left arm, leaving a round scar. His hands were tied and he was strung up and beaten. After two days he was made to stand in a line. A man wearing a black mask walked past the people in the line, indicating the moment he recognised

somebody. This man was an informant. The applicant was not recognised. He was released and issued with a travel pass on condition that he return from Colombo within one week.

He travelled to Colombo by train. In Colombo he stayed at the house of an acquaintance for one month without leaving the house as he feared arrest by the army. A doctor came to the house to see to his injuries. As he was not allowed to settle in Colombo, and he could not go back to Jaffna because of his problems with the LTTE, he decided to leave the country. An acquaintance of his father's arranged for his flight to Amsterdam via Bombay. He left the country using his own passport, but the "travel agent" kept his passport in Bombay.

After his arrival in the Netherlands on 2 November 1995, he was interviewed by an official of the Immigration and Naturalisation Service (*Immigratie- en Naturalisatie dienst*) on 6 December 1995. According to this official, the scars which the applicant showed him were much more than two months' old, and the round scar on the applicant's left forearm was bigger than the diameter of a cigarette.

On 5 January 1996 the State Secretary of Justice (*Staatssecretaris van Justitie*) rejected the applicant's requests. It was noted that it had not appeared that the Sri Lankan authorities had such grave presumptions against the applicant that he could be said to have a well-founded fear of persecution. Although he had once been detained for a short period, there had been no evidence against him of any LTTE involvement. The fact that the applicant had been able to leave his country using his own passport did not suggest either that the applicant had to fear persecution. Finally, according to a country report (*ambtsbericht*) of the Ministry of Foreign Affairs of 15 December 1995, Tamils coming from the Jaffna peninsula were able to find safety in the centre, south and west of Sri Lanka.

The State Secretary further informed the applicant that he would not be allowed to remain in the Netherlands pending the consideration of any objection (*bezwaar*) he might wish to submit against the decision to refuse his requests.

The applicant filed on objection on 10 January 1996 and, on the same date, also applied for an interim measure (*voorlopige voorziening*) to the President of the Regional Court (*arrondissementsrechtbank*) of The Hague. By letter of 10 May 1996, the applicant was informed that his expulsion would in fact be suspended while his objection was being considered. The applicant withdrew his request for an interim measure.

The applicant's objection was rejected by the State Secretary of Justice on 5 November 1996. He was also informed that he would not be allowed to remain in the Netherlands pending the examination of any appeal he might lodge. On 11 December 1997 the applicant lodged an appeal with the Regional Court of The Hague and at the same time requested an interim measure from the President of that court. By final decision of 9 July 1997

the acting President of the Regional Court of The Hague, Judge H., rejected the applicant's appeal against the State Secretary's decision as well as his request for an interim measure.

Following this decision, an expulsion order was issued to the Aliens Police (*vreemdelingendienst*) in the applicant's place of residence on 16 July 1997. However, the applicant did not leave the country and neither was he forcibly expelled.

On 5 September 1997 he lodged a new request for a residence permit based on compelling reasons of a humanitarian nature. Finding that the applicant had not submitted any new facts or circumstances which invalidated the decision of the Regional Court of 9 July 1997, the State Secretary of Justice rejected this request on 24 April 1998. In his objection to this decision, the applicant argued that according to information that had recently become available, some groups of Tamils in Colombo ran an increased risk of persecution or treatment contrary to Article 3 of the Convention. The applicant submitted that he belonged to one of these identified "risk categories", given that he came from Jaffna, spoke no Sinhalese, was suspected of LTTE membership, had already been detained for more than 48 hours on the basis of that suspicion and had been seriously ill-treated on that occasion.

The State Secretary rejected the objection on 8 December 1998. Referring to domestic case-law, the State Secretary held that merely belonging to one of the "risk categories" was an insufficient basis on which to accept that Article 3 of the Convention might be violated if the applicant was expelled. Since it had not appeared that, in addition to belonging to one of the "risk categories", any other special circumstances existed which could give rise to the assumption that the Sri Lankan authorities wished to apprehend the applicant, he was not eligible for residence in the Netherlands. As regards the applicant's argument that the State Secretary of Justice ought to have sought the advice of the Ministry's Medical Adviser to have his scars examined, it was held that such a step would only have been called for if doubts existed as to the truthfulness of the applicant's account, which was not the case. The State Secretary also informed the applicant that he would not be allowed to remain in the Netherlands pending the examination of any appeal he might lodge against this decision.

By letter of 5 January 1999 the applicant appealed to the Regional Court of The Hague against the decision of 8 December 1998. In order to prevent his expulsion, he also requested an interim measure from the President of that court.

In his appeal, the applicant argued that he did run an increased risk of being subjected to treatment contrary to Article 3 if expelled, because he had given practical assistance to the LTTE. His chances of being apprehended were also increased, given that he had no identity card, no fixed address and no accommodation. If he was arrested and detained for a

second time, he would certainly not be treated well or released after only a few days. There would, on the contrary, be a great likelihood that he would be killed. Moreover, arrested Tamils ran a real risk of being tortured if their bodies bore signs of military training or deployment, such as grazes or scars.

In addition, the applicant lodged a request for revision (*herziening*) of the State Secretary's decision of 8 December 1998, submitting that the fact that he bore scars increased the risk of being subjected to torture, and informing the State Secretary that a member of Amnesty International's Medical Examination Group was going to conduct an examination of his scars. In the applicant's submission, this development required the State Secretary to review the decision of 8 December 1998.

On 16 September 1999 a single-judge chamber of the Regional Court of The Hague, consisting of Judge H., rejected the applicant's appeal of 5 January 1999 in a judgment delivered orally. The Regional Court found that the applicant had failed to adduce new facts or changed circumstances, and added that the matter of the applicant's scars had already been taken into account in the determination of his first requests. In view of this decision, Judge H., as acting President of the Regional Court, also declared the request for an interim measure inadmissible. The record (*proces-verbaal*) of the oral judgment, containing the Regional Court's reasoning, was sent to the applicant's representative on 8 October 1999.

Following the Regional Court's judgment, an expulsion order was issued to the Aliens Police in the applicant's place of residence on 28 October 1999.

By decision of 4 January 2000, the application for revision of the State Secretary's decision of 8 December 1998 was dismissed by that authority.

On 11 January 2000 the applicant was examined by a physician belonging to Amnesty International's Medical Examination Group. The applicant's lawyer had put the following questions to the physician:

- could the applicant's scars be linked to the torture he had undergone?
- was the applicant traumatised as a result of his experiences in Sri Lanka?

In his report, the physician described, *inter alia*, the scars he had noted on the applicant's body. There were a number of horizontal scars, three to six centimetres in length and differing in width, on the underside of the forearms (four on the left and one on the right), consistent with unsutured, open wounds, possibly caused by knives. There were also two round scars on the right forearm and one round scar on the left forearm, with a diameter of 10 millimetres, consistent with burns, possibly caused by the putting out of a cigarette. Finally, there was a round scar, sensitive to pressure, 15 millimetres in diameter, and level with the Achilles tendon of the right foot, from which ran a three-centimetre scar outwardly with clear traces of

sutures. In the conclusion to his report, the physician answered the questions put by the applicant's lawyer in the affirmative.

B. Relevant domestic law and practice

1. Entitlement to refugee status or residence permits on humanitarian grounds

Under Article 15 § 1 of the Aliens Act 1965 (*vreemdelingenwet*, hereinafter "the Act"), in force at the relevant time, aliens coming from a country where they have a well-founded reason to fear persecution on account of their religious or political conviction, or of belonging to a particular race or a particular social group, may be admitted by the Minister of Justice as refugees.

The expression "refugee" in this provision is construed to have the same meaning as in Article 1 of the Convention relating to the Status of Refugees of 28 July 1951 (decision of the Judicial Division of the *Raad van State* of 16 October 1980, *Rechtspraak Vreemdelingenrecht* – Immigration Law Reports – 1981, no. 1).

Aliens, other than refugees, wishing to reside in the Netherlands for any length of time have to hold a residence permit (Article 9 of the Act). Such a permit is to be requested from, and granted by, the Minister of Justice (Article 11 § 1 of the Act).

Given the situation obtaining in the Netherlands with regard to population size and employment, government policy is aimed at restricting the number of aliens admitted to the Netherlands. In general, aliens are only granted admission for residence purposes if:

(a) the Netherlands are obliged under international law to do so, as in the case of citizens of the European Union or Benelux member States and refugees covered by the above-mentioned Geneva Convention; or

(b) this serves the "essential interests of the Netherlands", e.g. economic or cultural interests; or

(c) there are "compelling reasons of a humanitarian nature".

An alien not, or no longer, qualifying for admission to the Netherlands may be expelled (Article 22 § 1 of the Act). However, aliens claiming that their removal from the Netherlands will compel them to travel to a country where they have reason to fear persecution on one of the grounds set out in Article 15 § 1 (see above) could not be expelled except by a specific order of the Minister of Justice (Article 22 § 2).

2. Legal remedies

An objection (*bezwaar*) against the refusal to grant refugee status or a residence permit lay to the State Secretary of Justice (Articles 6:4 and 7:1 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), Article 29 of the Aliens Act). An appeal against the rejection of an objection lay to the Administrative Law Section of the Regional Court of The Hague (Article 8:1 of the General Administrative Law Act; Article 33a of the Aliens Act). No further appeal was allowed (Article 33e of the Act).

The Regional Court gives its decision either in writing or orally (Article 8:66 of the General Administrative Law Act). An oral judgment consists of the decision and the grounds for the decision. A record of the oral judgment is drawn up by the registrar (Article 8:67 §§ 2-3 of the General Administrative Law Act). Within two weeks of the date of the judgment the registrar sends the parties a copy of the judgment, or of the record of the oral judgment, free of charge (Article 8:79 of the General Administrative Law Act).

C. Conditions in Sri Lanka

For the past 19 years, the Government of Sri Lanka have been fighting the LTTE, a terrorist organisation engaged in an armed struggle for an independent Tamil homeland in the north and east of the country. The conflict has claimed more than 64,000 lives.

In February 2002, with Norwegian mediation, a cease-fire agreement was signed, and formal peace talks – the first since 1995 – are expected to take place in Thailand later this year.

The applicant as well as the respondent Government have provided the Court with information on the situation in Sri Lanka and the Dutch policy on asylum seekers from that country (see 1. below). The Court has further taken note of the publications summarised under 2. below.

1. Dutch policy on asylum seekers of Sri Lankan nationality

(a) General

At the time of the decision on the applicant's objection (8 December 1998), Dutch policy was based on country reports issued by the Ministry of Foreign Affairs on 24 March and 6 November 1998.

To assess whether a person ran a real risk of being treated in a manner contrary to the provisions of Article 3 of the Convention, the following factors were taken into account:

- All young Tamils in Colombo who speak little Sinhalese and whose documents reveal that they were born in the north run the risk of being taken to a police station for questioning following an identity check. Most are released within 48 to 72 hours once their identity has been established and they have explained their reasons for being in the city.

- People who have recently come to Colombo from a war zone and have no identity documents or "valid" reason for being in Colombo run the risk of being held for longer than 48 to 72 hours so that further enquiries can be made. People who fail to register on arrival also lay themselves open to suspicion.

- Tamils suspected of LTTE activities on the basis of police files or information from other sources run the risk of being held for more than a week. This also applies to people whom the authorities believe could provide information on the LTTE, such as people known to have a relative who is an LTTE member.

- People can be detained for 3, 12 or 18 months under the Emergency Regulations or the Prevention of Terrorism Act if there is firm evidence that they are involved with the LTTE. Such evidence includes arms caches or suspect documents.

Persons held for longer than 48 to 72 hours for further questioning may be treated roughly (beatings). Where the person concerned is held for more than a week, and questioned about LTTE involvement, the risk of ill-treatment is considerable.

Exceeding a particular period of residence in Colombo does not automatically lead the authorities to suspect that the person concerned is involved with the LTTE. A specified period of residence is often exceeded without this giving rise to any problems.

The mere fact that a Tamil belongs to one or more of the above categories of people who in theory run the risk of longer detention does not necessarily mean that there is a real risk of their being subjected to treatment prohibited by Article 3 of the Convention. According to the country report of 6 November 1998, it can be assumed that, in any event, no such risk exists in the case of Tamils who fall into the first two categories.

A country report of 30 September 1999 contains information on the procedure followed by police in respect of persons apprehended at the airport or in the course of a round-up. The list of names of the arrested persons is passed to the National Intelligence Bureau to see if any of the names feature in the database held by the Bureau. All persons suspected of violating the Prevention of Terrorism Act or the Emergency Regulations are included in the files of wanted persons. However, the police do not in all cases have information concerning that person. Information is only available if the person concerned had either been arrested previously or been informed upon by another detainee.

This report also states that an amendment to the Immigrants and Emigrants Act entered into force on 28 July 1998 pursuant to which the penalty for using forged travel documents was increased. According to the report, at the time of a person's return to Sri Lanka there is generally insufficient evidence of use having been made of forged documents for the outward journey. A subsequent letter of the Ministry of Foreign Affairs of 15 December 1999 adds that although persons returning may be questioned about their earlier departure, the Sri Lankan authorities do not have the technical capacity to determine whether somebody left the country illegally.

The Dutch policy in force when the Government submitted their observations in the present case was based on the country reports of 28 July and 22 August 2000. These reports indicated that Tamils fleeing the war could find an alternative place of residence in Government-controlled areas, including Colombo. Tamils are subject to frequent identity checks in Government-controlled areas, especially on or around public holidays, after attacks and if the military position of Government troops deteriorates. Tamils who cannot identify themselves on the spot or who are believed to come from the north or east of Sri Lanka may be arrested. Most are released within 48 to 72 hours, after their identity and background have been checked. As to the factors which may occasion a longer detention, the report of 28 July 2000 referred to that of 6 November 1998.

A country report of 11 July 2001 stated that Tamils who are accused and found guilty of carrying out supportive activities for the LTTE, such as harbouring LTTE fighters, building bunkers, selling goods which the LTTE can put to use in the war (fuel, chemicals, rubber, etc.), are sentenced to one or two years' imprisonment. When a person was forced to carry out these activities, he is formally not liable to punishment. In theory, the burden of proof should lie with the public prosecutor, but in practice it is usually the accused himself who must demonstrate that he was forced to perform services for the LTTE.

(b) Scarring

According to the country report of 30 September 1999, persons who are suspected of LTTE membership because they bear scars run a risk of detention for longer than 48-72 hours. A country report of 27 April 2001, dealing specifically with the risk of arrest for persons with scars, stated that this risk was limited to a person who has been arrested for other reasons and where it subsequently appears at the police station that he or she bears scars which clearly suggest participation in combat. This may then lead to further questioning. Generally, detention on this basis will not last for more than a week. Only if there are other indications, contained in police files for example, that the person concerned has carried out activities for the LTTE, may the detention be expected to be of longer duration.

This later report further stated that the presence of scars may constitute an indication for further questioning, but this element alone will not be a reason for such questioning. If a Tamil, when checked in the street or during a round-up, has valid identity documents and a credible explanation for his presence in Colombo, there will generally be no reason to question that person further. None of the sources interviewed by the Ministry of Foreign Affairs thought it likely that in that case the presence of scars would constitute an element of risk.

The report of 11 July 2001 stated that the presence of scars alone does not lead to an increased risk of detention longer than 48-72 hours.

2. Relevant reports

The US Department of State "Country Reports on Human Rights Practices for 2001" stated in respect of Sri Lanka:

> "Torture remained a problem and prison conditions remained poor. Arbitrary arrests (including short-term mass arrests and detentions) continued, often accompanied by failure of the security forces to comply with legal protections. In most cases, there was no investigation or prosecution, giving the appearance of impunity for those responsible for human rights violations. ...
>
> Despite legal prohibitions, the security forces and police continue to torture and mistreat persons in police custody and prisons, particularly Tamils suspected of supporting the LTTE. ...
>
> Large-scale arrests of Tamils continued during the year. ... Most detentions lasted a maximum of several days although some extended to several months."

A report by the Sri Lanka Project of the Refugee Council in the United Kingdom entitled "Sri Lanka: Human Rights and Return of Refugees", dated December 2001, stated:

> "A large number of returnees have been arrested on arrival or taken into custody while staying in Colombo. ... The risk of returned asylum seekers deported from abroad being arrested in Colombo and other southern areas, remains. The security forces constantly raid lodges where returned asylum seekers reside. They carry out search operations almost daily in Colombo and other southern areas, particularly at night."

In a letter of 15 April 2002 to a solicitor in London, UNHCR noted:

> "Although steps towards peace have been taken in Sri Lanka recently, it is still premature to advocate that the situation has reached a satisfactory level of safety to warrant the return of all unsuccessful asylum applicants to Sri Lanka. In this regard, UNHCR has been aware that returning Tamils are potentially open to risk of serious harm similar to those generally encountered by young male Tamils in certain circumstances. ... In UNHCR's view, the presence of torture-related scars on the body of a returnee should be a relevant consideration in assessing the likelihood of danger upon the return of Sri Lankan Tamil asylum seekers. Where such scars are related to human rights abuses, they would likely be seen as evidence of the security forces' previous interest in the particular individual. This could in turn serve to trigger further adverse attention to that individual. While every case should be assessed on its own merits, UNHCR would reiterate its view that special care must be taken in relation to the return of failed asylum seekers to Sri Lanka."

A report by the Medical Foundation for the Victims of Torture entitled "Caught In The Middle: A study of Tamil torture survivors coming to the UK from Sri Lanka" dated June 2000 stated:

> "The evidence available to the Medical Foundation suggests that any sort of scar can be interpreted by the Sri Lankan security forces as linking that person to the LTTE. ... Nor is it the presence of easily visible scars alone that leads the security forces to the conclusion that the person arrested is an LTTE supporter. Several of our clients have reported that their bodies were actively searched for scars, which, when discovered, were taken as evidence of LTTE support. Thus we maintain that any sort of scar can be and has been taken by the Sri Lankan security forces as 'evidence' of LTTE support and the bearers of such scars detained and tortured. ... It is our view therefore that whether an asylum seeker has the type of scars described as 'battle' or 'combat', whether the scars are 'significant and visible' is not relevant to an assessment of the likelihood of further persecution if returned. What is relevant is simply whether or not they have scars. "

One of the recommendations made in the Medical Foundation's report mentioned above read:

> "That it is not safe to return to Colombo Tamils with scars, or who do not have proper identity documents until the Sri Lankan Government ends its torture of many of the Tamils arrested."

A letter dated 1 September 1999 from the Dutch section of Amnesty International to the applicant's representative stated:

> "Amnesty International are aware that the presence of scars suggestive of LTTE-training may cause army and police to suspect him or her of LTTE-membership. Police look for traces on the body of an arrested person, such as grazes or scars, which may point to military training or deployment as a fighter for the LTTE."

COMPLAINTS

The applicant complains under Articles 2 and 3 of the Convention that his expulsion to Sri Lanka would expose him to a real risk of death, torture or inhuman or degrading treatment. He further complains under Article 6 of the Convention that the same judge who rejected his appeal in the proceedings relating to his first requests for asylum and a residence permit also examined his appeal in the second set of proceedings. Finally, the applicant alleges a violation of Article 13 of the Convention.

THE LAW

The applicant alleges violations of Articles 2 (right to life), 3 (prohibition of torture and ill-treatment), 6 (right to a fair trial) and 13 (right to an effective remedy) of the Convention.

A. The Government's preliminary objections

1. Observance of the six month rule

The Government argue that the final decision within the meaning of Article 35 § 1 of the Convention was that of the Regional Court of The Hague of 16 September 1999. Since the applicant only introduced his complaints to the Court on 7 April 2000, the application had been submitted out of time.

The applicant replies that the six-month period referred to in Article 35 § 1 started to run on 8 October 1999, the date on which the record of the oral judgment of the Regional Court had been sent to his representative.

The Court refers to its case-law according to which the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the written judgment in cases where the applicant is entitled, pursuant to domestic law, to be served *ex officio* with a written copy of the final domestic decision, irrespective of whether that judgment was previously delivered orally (see the Worm v. Austria judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1547, § 33; *Drosopoulos v. Greece* (dec.), no. 40442/98, 7.12.2000, unreported).

While it is true that in the present case the applicant's representative was served only with the record of the oral judgment rather than with a copy of the judgment itself, the Court is nevertheless of the opinion that its case-law as set out above applies by analogy. It reiterates in this context that the six-month rule contained in Article 35 § 1 not only pursues the aim of

ensuring legal certainty, it also affords a prospective applicant time to consider whether to lodge an application with the Court. The Court notes that the record of the oral judgment sent to the applicant's representative contained the Regional Court's reasoning, thus allowing the applicant to make an informed decision as to the specific complaints and arguments to be raised in an application to the Court. Moreover, domestic law (Article 8:79 of the General Administrative Law Act) stipulated that the record of the oral judgment be sent to the applicant.

In these circumstances the Court agrees with the applicant that the six-month period started to run on 8 October 2000. Accordingly, the application was introduced in time.

For these reasons, the Court dismisses the Government's objection.

2. Exhaustion of domestic remedies

(a) Remedies following the State Secretary of Justice's decision of 4 January 2000

The Government submit, in so far as the application is directed against the State Secretary of Justice's decision of 4 January 2000 dismissing the applicant's request for a revision of the decision of 8 December 1998, that the applicant failed to make use of the domestic remedies provided in the General Administrative Law Act against such a decision, to wit the lodging of an objection with the State Secretary and, if necessary, of a further appeal to the Regional Court. Had the applicant lodged such an objection, the report of Amnesty International's Medical Examination Group could then have been taken into consideration as the examination of an objection by the State Secretary was *ex nunc* in character.

Alternatively, the applicant could have made a new application for asylum in which he could have submitted the medical report for consideration.

At the same time as lodging an objection or filing a fresh application for asylum, the applicant could have requested an interim measure from the President of the Regional Court to prevent his expulsion from the Netherlands.

The applicant argues that his application to the Court is not directed against the decision of 4 January 2000. In fact, he is not sure why that decision was taken at all, given that it was superseded by the judgment of 16 September 1999 in which the Regional Court rejected his appeal against the same decision as the one whose revision he sought, namely the State Secretary's decision of 8 December 1998. Domestic law provides for no further remedies against the judgment of the Regional Court.

The applicant further expresses surprise at the fact that the Dutch authorities are now apparently prepared to consider the medical report of Amnesty International as a "new fact or circumstance" which could be

taken into consideration if he were to lodge a new request for asylum. Nevertheless, as such a request was not guaranteed to suspend his expulsion, he did not consider this an avenue upon which he was required to embark.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2431, § 71; *Selmouni v. France* [GC], no. 25803/94, §§ 74-75, ECHR 1999-V).

Furthermore, the Court emphasises that the application of the exhaustion of domestic remedies rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means in particular that the Court must take realistic account, not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him to exhaust domestic remedies (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1221, § 69, and the Yaşa judgment cited above, p. 2432, § 77).

The Court observes that the applicant requested to be allowed to reside in the Netherlands on two occasions, which requests led to two sets of administrative proceedings. Throughout these proceedings, the applicant maintained that he had grave concerns for his safety in Sri Lanka, thus bringing this matter to the attention of the Dutch authorities. While the applicant may in theory still have been able to lodge an objection against the State Secretary's decision of 4 January 2000 or to make a fresh application for asylum, the Court notes that these remedies do not enjoy automatic suspensive effect: in order for the applicant not to be expelled pending the examination of either an objection or a new request for asylum, he would first have to apply for an interim measure. Given that he had already been refused such an interim measure twice, and that his expulsion had been

ordered following the final judgment of the Regional Court (i.e. prior to the decision of 4 January 2000), these are not effective remedies the applicant was required to exhaust (cf. the Bahaddar v. the Netherlands judgment of 19 February 1998, *Reports* 1998-I, p. 264, § 47).

In so far as the Government intend to suggest that the Court is precluded from taking the Amnesty International medical report into account because the applicant failed to give the Dutch authorities an opportunity to examine his request for a residence permit in the light of the findings contained in that report, the Court notes the following. According to the judgment of the Regional Court of 16 September 1999, the issue of the applicant's scars had already been addressed in the proceedings on his request for asylum. Moreover, in his decision of 8 December 1998, the State Secretary held that no questions had arisen as to the credibility of the applicant's account and the Court therefore assumes that the Dutch authorities accepted the applicant's claim that his scars had been caused by ill-treatment at the hands of the Sri Lankan army. The Amnesty International medical report merely lists the scars on the applicant's body and confirms that they are consistent with the types of injury which the applicant claimed were inflicted on him. This report thus does not contain any information which the applicant had not already brought to the attention of the Dutch authorities. In any event, the Court has previously accepted that in cases where an applicant alleges that Article 3 would be breached if he or she was expelled, it may have regard to material that has come to light after the final decision of the domestic authorities, by virtue of the fact that the material point in time for the assessment of a risk of treatment contrary to Article 3 of the Convention is the date of the Court's consideration of the case (see the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports* 1996-V, p. 1859, § 97). Accordingly, the Court perceives no cause to exclude the Amnesty International medical report from its examination.

For the above reasons, the Court dismisses the Government's objections under this head.

(b) Articles 2, 6 and 13 of the Convention

The Government also argue that neither the issue of the right to life nor that of the alleged bias of Judge H. were raised in the domestic proceedings. In addition, Article 2 was mentioned just once in the application form submitted to the Court, whereas the only conclusion which the applicant asked the Court to draw in that form was that Article 3 would be violated if he was expelled to Sri Lanka.

The applicant maintains that his life would be in danger in Sri Lanka, and considers it irrelevant that the matter of the alleged lack of partiality of Judge H. was not raised in the domestic proceedings.

As the Court has pointed out above, the requirement of exhaustion of domestic remedies must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that "the complaints intended to be made subsequently before the Convention organs" should have been raised at the national level "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law" (see the Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, p. 26, § 72, and the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 18, § 34).

The Court agrees with the Government that the main thrust of the applicant's arguments put forward in the domestic proceedings lay in his contention that his expulsion would expose him to a real risk of being subjected to treatment contrary to Article 3 of the Convention. Nevertheless, the fact remains that in his appeal of 5 January 1999 to the Regional Court the applicant submitted that a second arrest was likely to lead to his being killed. The applicant thus did advance an argument which raised the matter of the right to life, thereby drawing the national authorities' attention to the problem he intended to submit subsequently, if need be, to the Court (see, *mutatis mutandis*, Ahmet Sadik v. Greece judgment of 15 November 1996, *Reports* 1996-V, p. 1654, § 33). Whilst the Court would agree with the Government that the application form might have been filled out more clearly, there can be no doubt that the applicant raised a complaint under Article 2 with the Court. This limb of the Government's preliminary objection can therefore not be upheld.

However, the force of the Government's objection cannot be denied as far as the complaint under Article 6 is concerned since at no stage of the domestic proceedings did the applicant object to Judge H. dealing with his two appeals. The Court would in any event be unable to examine this complaint, since Article 6 does not apply to proceedings concerning the entry, stay and deportation of aliens (see *Maaouia v. France* [GC], no. 39652/98, § 40, to be reported in ECHR 2000-X). It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3, and must be rejected, in accordance with Article 35 § 4.

Finally, the Court observes that the applicant failed to raise either in form or in substance in the domestic proceedings the complaint under Article 13 of the Convention that is being made to the Court. He has therefore not exhausted domestic remedies as required by Article 35 § 1 of the Convention. It follows that this part of the application must be rejected, in accordance with Article 35 § 4.

B. Merits

1. Alleged violation of Article 2 of the Convention

The applicant complains that, if expelled to Sri Lanka, he would be in danger of being killed whilst in detention. He relies on Article 2 of the Convention which, in so far as relevant, provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Beyond arguing that this complaint should be declared inadmissible (see above), the Government have not addressed this issue.

The applicant contends that the right to life is violated on a daily basis in Sri Lanka. If forced to return, he would be running a real and heightened risk of excessive punishment because of his scars from earlier torture; indeed, his life might be in immediate danger.

Observing that the applicant's submissions contain practically no arguments relating solely to Article 2, the Court considers this complaint indissociable from the substance of the applicant's complaint under Article 3 in respect of the consequences of the impugned decision for his life, health and welfare. It is therefore more appropriate to deal globally with this allegation when examining the related complaints under Article 3.

2. Alleged violation of Article 3 of the Convention

The applicant complains that his expulsion to Sri Lanka would expose him to a real risk of being subjected to inhuman treatment contrary to Article 3 of the Convention, which provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Government argue that it has not been demonstrated that the applicant is known to the Sri Lankan authorities to be an opponent of the regime or that he is regarded with suspicion by those authorities. In this context they note that, by his own admission, the applicant has never been politically active and he only worked for the LTTE under duress and then carried out merely peripheral tasks. The applicant obviously did not fear the authorities, since he went to the soldiers to request a travel document. Although he was then detained and allegedly suspected of being an LTTE supporter, he was released after two days because these suspicions could not be confirmed, and the requested travel document was issued to him. The Sri Lankan authorities were thus familiar with the applicant and were aware that he was not an LTTE supporter.

The Government admit that the applicant would probably be subjected to identity checks if he returned to Sri Lanka, and to more frequent identity

checks if he stayed in Colombo. However, they believe that it has not been shown that, if arrested, the applicant would run a greater risk than other young Tamils with limited Sinhalese who were born in the north. The mere fact that the applicant belonged to that group did not constitute a risk of being subjected to treatment contrary to Article 3 of the Convention. The country reports of 6 November 1998 and 30 September 1999 showed that a Tamil is at risk of detention of more than a week when suspected of LTTE activities on the basis of police files or information from others. Scars suggestive of military training or combat experience in the Tamil movement may also give rise to such suspicions, but the applicant's scars were not of the kind usually resulting from combat, as were for instance the scars of gunshot wounds.

As to the applicant's contention that the amendment to the Immigrants and Emigrants Act would render his expulsion to Sri Lanka contrary to Article 3, the Government submit that rejected asylum seekers who are sent back generally run no risk of prosecution under this Act unless they enter the country using a forged document. However, the applicant would be in possession of a valid travel document issued by the Sri Lankan Embassy. While it was true that rejected asylum seekers may on arrival in Sri Lanka be interrogated regarding the manner of their earlier departure, the Sri Lankan authorities did not have the technical capacity to determine whether a person had left the country illegally. In any event, the applicant had stated that he left Sri Lanka using a valid passport in his own name. He was therefore unlikely to be punished under the Immigrants and Emigrants Act.

The applicant maintains that, if returned to Sri Lanka, he would run a real risk of being subjected to treatment contrary to the provisions of Article 3 of the Convention.

He submits that he was simply lucky not to have been singled out as a member of the LTTE during his detention: most of the masked informants were themselves under pressure and obliged to identify LTTE members if they wanted to avoid becoming victims themselves. Upon his release, he was photographed and his fingerprints taken. He was therefore in the police files and known to the Sri Lankan authorities and the army. Furthermore, he had failed to comply with the condition on which he had obtained his travel pass as he had not returned from Colombo within a week.

The applicant further argues that the presence of scars on his body has been trivialised as a result of the fact that in the asylum proceedings he was interviewed by a medically unqualified person who formed an opinion on these scars. The examination carried out by Amnesty International showed that the torture which had caused the scars was of a much more serious nature than had been suggested by the non-expert official. The question of who had inflicted this torture or whether or not the scars were suggestive of combat activities was irrelevant to the tragic situation of the victim, and the

Sri Lankan authorities were in any event unlikely to admit that the scars had clearly been caused by them.

It would be naïve to think that he would just be allowed through since most Tamils are arrested upon arrival at the airport. The fact that he is known to the authorities and that he bears scars put him into the category of persons at real risk and not into the category of those for whom a risk was a mere possibility.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court by a majority

Declares admissible, without prejudging the merits, the applicant's complaint that his expulsion would expose him to a real risk of being subjected to treatment contrary to Article 3 of the Convention;

Declares inadmissible the remainder of the application.

S. DOLLÉ
Registrar

J.-P. COSTA
President