

Neutral Citation Number: [2008] EWCA Civ 717
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
(MR JUSTICE FORBES)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 5th June 2008

Before:

LORD JUSTICE TOULSON
LORD JUSTICE RIX
and
LORD JUSTICE STANLEY BURNTON

AS (SRI LANKA)

Appellant

- and -

**SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

Respondent

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Ms C Bayati (instructed by Polpitiya & Co) appeared on behalf of the **Appellant**.
Ms L Busch (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

Judgment

Lord Justice Toulson:

1. This is an appeal from a judgment of Forbes J in the Administrative Court refusing the appellant's application for permission to claim judicial review of a decision by the Secretary of State to certify her asylum claim as clearly unfounded within the meaning of section 94(2) of the Nationality Immigration and Asylum Act 2002. That section prohibits a person from appealing against a refusal of an asylum claim or human rights claim if the Secretary of State certifies that the claim is clearly unfounded.
2. The test to be applied was set out by this court in ZL & VL v SSHD [2003] EWCA Civ 25. On a judicial review application the role of the court was considered by this court most recently in WM (DRC) v SSHD [2006] EWCA Civ 1495. I share the sense of difficulty expressed by Buxton LJ in paragraphs 13 and following as to the court's approach to decisions to certify by the Secretary of State, but we have heard no argument on the subject and both parties have approached the case on the basis summarised by Buxton LJ in paragraph 11 of his judgment.
3. The appellant is a citizen of Sri Lanka, born on 4 January 1971. She comes from the north of the island. She arrived in the UK by air from Colombo on 18 September 2005 and claimed asylum two days later. She claimed that her father had worked for the LTTE until he was arrested by the army in 2002, since when the family have not heard from him or about him. Her brother was also a member of the LTTE.
4. In the summer of 2005 she began to help the LTTE by sticking up posters and by doing some information gathering for its political wing. She said that she received no training for this purpose, but she was asked to provide information about houses that the army was visiting, to attend political meetings and to acquire information about who were natural supporters of the LTTE and who belonged to various other splinter opposition groups.
5. During this time she fell in love with a man who was an LTTE member. He came to be arrested and had a photograph of her in his wallet. She said that under duress he disclosed her name. The upshot of that was that she was arrested on 19 August 1995 at a checkpoint in her home area after she had taken her mother to a local hospital. She was arrested because her face fitted with the picture in her boyfriend's wallet. She was blindfolded and taken to an army camp, where she was detained for four days. During that time she was accused of supporting the LTTE; she was beaten; and on two occasions she was raped. After four days she was dressed in army uniform, taken out of the camp and released. She was told not to tell anyone what had happened at the camp or she would be shot. On release she went back to her home and then to her brother's house before fleeing through arrangements made by an agent. She said that if she returned to Sri Lanka she feared the army because of her previous ill-treatment and also feared that the LTTE would want her to join them.

6. On 4 October 2005 her claim was refused by the Secretary of State and certified under section 94(2) as clearly unfounded. In July 2006 she was arrested and Notice of Removal directions were issued. On 3 August 2006 she issued her claim for judicial review. On 3 October 2006 her solicitors lodged further representations with the Secretary of State requesting a review of the decision to certify her claim. On 12 February 2007 her solicitors lodged yet further representations with the Secretary of State, enclosing a UNHCR position paper dated 18 December 2006 and a report of the Canadian Immigration and Refugee Board (CIRB) dated 22 December 2006. On 22 February 2007 the Secretary of State sent her solicitors a letter maintaining her previous position, that is, that the claim was clearly unfounded.
7. The application for judicial review had been due to be heard on 23 February 2007 but it was adjourned because now there was a separate issue as to whether the representations made on 12 February should have been treated as a fresh asylum claim. On 9 July 2007 the Secretary of State wrote to the appellant's solicitors, again maintaining the previous position.
8. Against that tortuous background, the application for permission was finally heard by Forbes J on 16 July 2007. By this time he had a number of written sets of submissions on behalf of the appellant and a good deal of evidence, both in the form of the appellant's original screening interview and also in the form of various pieces of background country information, supplied at various stages during the legal process.
9. The position maintained by the Secretary of State can be summarised by quoting two paragraphs of the letter of 9 July 2007.

“4. With regards to the change in situation, whilst it is accepted that the general situation in Sri Lanka has changed since the consideration of your client's claim in 2005, the general condition of Sri Lanka was reconsidered in our letter of 22 February 2007 and we still maintain the view that the authorities would not be concerned with those individuals with no or only low-level support for the LTTE. This also applies to those with no police or criminal record or those who may have been arrested in the past and subsequently released. Those individuals who may be of continuing interest to the authorities would be those wanted in a relatively serious fashion. There is no evidence that your client was of interest to the authorities before she left Sri Lanka or that she would be of interest to them on return. Although your client claimed she was detained, it was also her claim that she was released without charge. By her own account, she was detained without knowledge of the government and was released for fear that senior officers would visit

the camp. In view of this, it is not accepted that there would be a record of your client's arrest and as a result she would not be targeted at the airport nor would she be at risk of any persecutory treatment on return to Sri Lanka.

5. While it is acknowledged that there continues to be incidences of violence between the LTTE and the authorities, and also those affiliated to either party, on the facts of your client's particular case it is clear that the situation in Sri Lanka falls short of supporting a well-founded fear of persecution.”

10. The appellant's written submissions before the judge asserted that the Secretary of State had ignored extensive background evidence about the current situation and she relied, in particular, on the CIRB report to which I have referred.
11. It is unnecessary for me to set out the details of the judgment because events have moved on, for reasons that I will indicate. But in summary the judge began by summarising the various heads of challenge to the Secretary of State's decision. He then addressed in some detail the CIRB report, which obviously featured heavily in the argument before him, and he concluded that the Secretary of State's certificate had been entirely appropriate.
12. His judgment was attacked on a number of grounds. Leave to appeal was given by Sedley LJ, who directed that the matter should proceed before this court as a substantive judicial review application. Since the matter was before Forbes J there has now been a new country guidance decision of the Asylum and Immigration Tribunal in the case of LP (Sri Lanka) v SSHD (AA/07365/2005).
13. Counsel on both sides have adopted a tidy and succinct approach to this appeal. They are agreed that the question which this court now has to decide, treating this as a substantive judicial review application, is whether, on the factual material before the judge and on the authorities which we now have, including LP, the claim is indeed clearly unfounded or whether it is one in respect of which there would be a real, as distinct from fanciful, possibility that an immigration judge might allow an appeal if the ordinary appeal process were permitted to continue. The argument has proceeded without any reference to the CIRB report, although we have read it, because we now have the more recent analysis of the situation in Sri Lanka in LP.
14. It is therefore possible for me to cut to the chase and summarise the reasons why the appellant contends that this claim is not clearly unfounded. In LP, after a detailed review of the country evidence, the Tribunal expressed its conclusions on the risks facing returning Tamils at paragraphs 197 onwards. It is accepted by Ms Bayati on behalf of the appellant that it cannot be said that Tamils *per se* are now at risk on return to Sri Lanka. However, in that case the Tribunal examined a number of risk factors which had been identified

by the appellant's counsel and considered with care by the Tribunal. She says that a number of those risk factors are present in this case and that, when one looks at them cumulatively, it cannot be said that the appellant's asylum and human rights claims are doomed to failure.

15. She identifies four factors as particularly pertinent. She relies on the fact that appellant has no ID card; she relies on the fact that the appellant has family links with the LTTE; she relies on the appellant's history of previous detention; and she relies on the details which she says must have been kept on the appellant to have led to her arrest. Ms Busch in response has submitted that none of these factors, on careful analysis, could make her claim potentially sustainable.
16. I take them in turn. As to the ID card, it is accepted that the appellant has, or certainly had, an ID card prior to leaving Sri Lanka but she left it behind. In answer to questions by my Lord, Lord Justice Stanley Burnton, whether there was any practical difficulty in her family getting her ID card back to the appellant, Ms Bayati was not able to point to any obvious difficulty. In any event this is only one of a number of factors to be considered.
17. As to family links with the LTTE, it is to be noted that her father had been arrested in 2002; it was not until 2005 that the appellant fled. She herself said in interview that she had no problems with the army or the government after her father's arrest. The point is made by Ms Bayati that there has been in the meantime a worsening of the political situation; nevertheless, it is a fact that the appellant has not in the past suffered any form of harassment or molestation on account of any behaviour of any other members of her family. Indeed it is not insignificant that, on her release from detention, the place that she went to after gathering her belongings from her own home was her brother's home. He appears to have been content to remain living in the area without molestation.
18. Close attention has rightly been paid to the circumstances in which the appellant was detained. She said that after her release she did not report the matter for fear that the army personnel who detained her would carry out their threat to kill her. It is notable that she did not suggest that she did not report the matter for fear that she would then be herself detained again. She herself said, when questioned in her screening interview, that she did not believe that there was any warrant for her arrest and that it did not appear that the government knew anything about the incident in which she had been detained. She also said that those who had detained her released her because they were worried in case higher-ranked officers might visit the camp. Those answers from her point to this deplorable behaviour having been the conduct of relatively junior army personnel, without any approval of higher authority; indeed, on her account, the personnel responsible for it were most anxious that those superior to them should not know what they had done.
19. The point is nevertheless made by Ms Bayati that even if these army personnel were acting without any higher authority in their abuse of her, nevertheless there must have been some form of record about her which caused her to be

detained, and therefore there is a risk that this might happen again. The circumstances in which she came to be detained were, on her own account, simply that her picture had been in her boyfriend's wallet. She gave no account of detailed questioning about her role in the LTTE. The picture which presents itself from her own account is not one of the authorities having serious concern about what she had done or might do, or being anxious to find out more about her; if there had been any subsisting interest in her, this would have been expected to show itself in a number of possible ways. There was none.

20. In LP, the Tribunal considered the position of those who are detained but subsequently released, possibly through payment of a bribe, and not brought to court. The Tribunal observed that if the detention was an informal one, the risk level to the applicant was likely to be below that of a real risk. That observation is, in my judgment, highly pertinent in this case. There is simply no indication of any record being made of her detention or any continuing interest in her; to the contrary, the indication is that this was an opportunistic detention of a young woman, followed by shocking abuse of her by certain individuals, and then an anxiety to get her off the scene so that nobody should know what had happened.

21. Looking at all the various factors, cumulatively as well as individually, I can see no true basis for an immigration judge finding that this appellant has a well-founded fear of persecution for a Convention reason, or of abuse of her human rights so as to warrant a successful appeal on that ground. As I have indicated, the argument before this court has taken a very different form from the way in which the matter proceeded before Forbes J. Looking at the matter afresh in the light of the arguments that have been presented today, I do regard her claim as clearly unfounded, and I would therefore dismiss this appeal.

Lord Justice Stanley Burnton:

22. I entirely agree that this appeal should be dismissed, for the reasons given by my Lord. I should also like to associate myself with the reservation expressed by him in relation to the function of the court on a challenge by way of judicial review of a certificate of the Secretary of State under section 94(2) of the 2002 Act.

Lord Justice Rix:

23. I agree with both judgments.

Order: Appeal dismissed.