Neutral Citation Number: [2008] EWCA Civ 1210

Case No: C5/2008/0638

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE ASYLUM AND IMMIGRATION TRIBUNAL
(Appeal Number HR/01258/2004)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2008

Before :

LORD JUSTICE RIX
LORD JUSTICE RICHARDS
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between :

RA (Sri Lanka)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Alasdair Mackenzie (instructed by **Birnberg Peirce & Partners**) for the **Appellant**
Rory Dunlop (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 8 October 2008

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Judgment

Lord Justice Richards :

1. The appellant is a Sri Lankan Tamil who applied for asylum in the United Kingdom in May 1999. His application was refused and an appeal was dismissed by an adjudicator, Mr Varcoe, in November 2000. Further asylum representations made in January 2001 were rejected. There was then an application on human rights grounds, in October 2003. That application was refused in November 2004 and an appeal was dismissed. A reconsideration was ordered but the appeal was dismissed again on the reconsideration. There followed an appeal to this court, resulting in a remittal for the reconsideration decision to be taken again. The remitted case was heard by Senior Immigration Judge Gill who notified her decision on 11 January 2008. The appeal to this court is against that decision.

2. In the light of the history of the case, Senior Immigration Judge Gill decided "to leave no stone unturned in assessing the evidence in this appeal and in reaching my conclusions". Her decision therefore dealt with the issues before her at considerable length and with great care. In my view she is to be commended on its quality. Although permission to appeal was granted by Sir Henry Brooke on three grounds, I am satisfied after hearing full argument that her decision should stand.

3. In his human rights appeal the appellant relied on articles 3 and 8 ECHR. The article 3 claim was based on two distinct points: first, a fear of being ill-treated in Sri Lanka on account of the matters upon which his asylum claim had been based, namely actual or suspected involvement with the LTTE; secondly, his mental health and in particular the risk of suicide in Sri Lanka if he were returned there. The article 8 claim was based on the risk of suicide and interference with the private life he had established in the United Kingdom.

4. It was agreed that, because the earlier asylum decision of the adjudicator, Mr Varcoe, had not been overturned, the senior immigration judge should approach the redetermination on the basis of the guidance in *Devaseelan (Second Appeals – ECHR – Extra-territorial Effect) Sri Lanka* [2002] UKIAT 00702, that is by taking the adjudicator's decision as the starting-point for her own decision. The adjudicator had found that the appellant helped the LTTE at a very low level indeed and had rejected his evidence as to arrest and detention, finding him to have fabricated the greater part of his asylum application. Fresh evidence was placed before the senior immigration judge with a view to persuading her to take a different view on this, but she reached the same conclusion as the adjudicator had done. She found there to be no credible evidence that the appellant or any member of his family had ever been arrested or detained in Sri Lanka on account of any suspicion of being involved in the LTTE. Her adverse credibility findings are not challenged in this court.

5. The appeal is pursued on the basis of risks which are said to exist independently of the appellant's credibility and to arise out of the appellant's physical scars and his psychiatric condition.

The appellant's scars

6. A report from Dr Michael Seear, a registered medical practitioner, listed the marks he had found on examination of the appellant and considered their consistency with the appellant's account of having been beaten, burnt and dragged along a rough floor

while detained by the Sri Lankan authorities. On the left leg there were two small, pale scars consistent with blows; a small, pale, very well healed scar consistent with a childhood injury; some irregular scarring of the knee, consistent with the appellant having been dragged on the floor; and, on the back of the knee, a scar 2 inches in length and ½ inch in maximum width which was highly consistent with the appellant's account of having been burnt with an iron rod. On the right leg there were a small, pale, well healed scar consistent with a cigarette burn; three pale, small, very well healed scars highly consistent with childhood injuries; and two pale scars (one measuring ¾ inch by ⅛ inch, the other 1¼ inches by ¼ inch) consistent with cigarette burns.

The appellant's psychiatric condition

7. There was a body of evidence before the senior immigration judge on the subject of the appellant's mental health. It is sufficient to refer to a report by Dr David Bell, a consultant psychiatrist, who was in agreement with earlier diagnoses and gave a full assessment of the appellant's condition. Dr Bell said that the appellant was suffering from severe depressive disorder, with typical symptoms of objective features of depression, pervasive apathy, pervasive depressed mood, very poor appetite, guilt and self-blame, history of suicide attempts, disturbed sleep and morbid existential preoccupations. There were also typical symptoms of post-traumatic stress disorder, with a typical pattern of intrusive thought, noise sensitivity, flash-back phenomena, hallucinatory experiences, nightmares, avoidance of stimuli that might trigger anxiety attacks, and paranoid ideation.

8. As regards treatment, Dr Bell said this:

> "Psychotropic medication would not be expected to make a big difference in this case. This is because so many features of his mental state are overwhelmingly determined by his current context of insecurity and terror (I refer particularly to the fear of being returned). Further, it is important that psychotropic medication be administered where there is a context of enduring trusting relationship with mental health personnel. Clearly this cannot be the case when he is under threat of removal ….
>
> Psychological help is likely to be helpful in the longer term. However it would be hazardous at the present time to embark on any in-depth psychotherapy or counselling, as this again requires a context of an enduring trusting relationship with a therapist ….
>
> The most important feature of his treatment currently is the care that is being provided by his cousin and Mr N [a friend]. If it were not for this care, it is my view that his condition would deteriorate very substantially to a state in which he would be likely to need admission to hospital …."

9. Under the heading of "suicidality", Dr Bell dealt as follows with the existing position:

> "The syndrome of severe depressive disorder is associated with an elevated risk of acts of self-harm/suicide. There is already a history of three suicide attempts and currently there is evidence of suicidal thinking. There is therefore a significant risk of suicide or self-harm currently, and I would regard that risk as moderate …."

10. Dr Bell was of the clear view that the threat of immediate return to Sri Lanka would bring about a "serious and precipitated deterioration" in the appellant's psychiatric state, for a number of reasons: (1) removal to Sri Lanka would return him "to the context in which he suffered serious trauma", and his mind would be flooded with thoughts, memories and feelings that he would not be able to manage; (2) he was very attached to the context in which his daily needs were taken care of, and the threatened or actual breaking of this attachment would be experienced as a violent and traumatic event; (3) his belief that he would be under threat of immediate detention, torture and possibly murder would be material to the deterioration in his state; and (4) he suffered from a significant degree of paranoid ideation, and if he found himself in a context in which he believed he was under immediate threat it would make it very difficult for him to distinguish between his paranoid imaginings and actual threats. The deterioration in his psychiatric state would be associated with an immediate change in the risk of self-harm/suicide, from moderate to being very high. The increased suicide risk would take place from the moment he heard of a negative determination and would remain very high while he was awaiting removal, during removal and indefinitely thereafter.

11. I should also set out Dr Bell's responses to a number of questions he had been asked:

> "I have been specifically asked if the care and support that [the appellant] receives from his cousin … and his friend … could be provided by someone else. I believe I have already dealt with this matter above, namely I have made it clear that [the appellant] has formed very secure attachments to those immediately around him and these attachments are not of a promiscuous nature, and the figures supporting him could not be easily replaced.
>
> I would also like to point out that apart from the fact that appropriate psychiatric resources are not likely to be available in Sri Lanka, it is my view that [the appellant] would be most unlikely to be able to make use of them. This is because he is likely to view psychiatric personnel as agents of the state and therefore is likely to be distrustful of them.
>
> I have commented above on the risk of suicide, however another outcome needs to be borne in mind. Given the degree of profound apathy and self-neglect that is a feature of his psychiatric state, it is also possible that in Sri Lanka his situation would deteriorate to a severe state of self-neglect and inanition and that he would die of some intercurrent infection (i.e. a less manifest suicide).

> I have also been specifically asked if [the appellant] were returned to Sri Lanka whether he would be able to explain himself to the Sri Lankan authorities if he were questioned by them. It is clear to me that [the appellant] would be in such a deteriorated psychiatric state that he would be quite unable to explain himself and would also be likely to be extremely fearful of such authorities, indeed to be frankly paranoid. He would be likely to respond to questioning, however straightforward this is in reality, in an acutely paranoid way."

Ground 1: risk arising from scarring

12. I have referred above to Dr Seear's report on the appellant's scars. The senior immigration judge took that report into account, making certain criticisms of it which were relevant to her credibility findings but need not be examined here. She also bore in mind that the adjudicator, Mr Varcoe, had had a medical report on the scars and had had the advantage of seeing the scars himself. Mr Varcoe said in his decision that "[h]aving myself seen the scars I would, despite lacking any expertise in this field, give a layman's view that all the marks that I was shown by the appellant could have been caused in any one of a number of different ways". He said later that none of the scars was particularly prominent. The mark on the back of the left leg, looking like a cut of some kind, was perhaps the most obvious but even that could have been the result of any number of different causes. The markings around the knees were again entirely consistent with someone living in a rural environment. The adjudicator noted the decision of the Immigration Appeal Tribunal in *Pardeepan* (an unreported decision of 12 October 2000) which emphasised that each case must turn on its own facts and it was not every scar which would cause a Tamil to encounter difficulties with the authorities on account of suspected involvement with the LTTE. He was satisfied that the appellant could not reasonably be viewed in that way.

13. In the context of her credibility findings, the senior immigration judge acknowledged (at para 75) that the appellant had the scars recorded in Dr Seear's report but found that it was not reasonably likely that they were caused in the manner claimed.

14. She also had regard to the appellant's scars when considering the risk of return on the basis of her findings of fact. She said this (para 80):

> "The risk which may arise as a result of an individual's scarring has now reverted to the position prior to the cease-fire. The Special Adjudicator assessed the risk on account of the Appellant's scarring prior to the cease-fire. The guidance then as to the risk which might be posed on account of an individual's scarring is to *[sic]* essentially the same as it is now. The Special Adjudicator had the advantage of seeing the Appellant's scars for himself. Whilst I have the benefit of Dr Seear's report (which I stress I have taken into account), I do not have the benefit of any photographs. I find that it is not reasonably likely that the Appellant's scars would expose him to treatment in breach of Article 3. I adopt the reasons given by the Special Adjudicator."

15. Mr Mackenzie challenges the senior immigration judge's finding that the appellant's scars would not expose him to a risk of ill-treatment on return. He submits that she simply adopted the previous adjudicator's findings, effectively treating them as determinative, without taking account of the recent guidance of the tribunal in *LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG* [2007] UKAIT 00076; alternatively, if she did have the guidance in *LP* in mind, she gave inadequate reasons as to why, in the light of the guidance, she reached the conclusion she did.

16. I reject at once the contention that the senior immigration judge treated the adjudicator's findings as determinative. It is plain from her decision that she examined what the adjudicator had said on the issue of scarring in the context of the asylum claim, she agreed with it, she made a corresponding finding of her own that it was not reasonably likely that the appellant's scars would expose him to treatment in breach of article 3, and she adopted the adjudicator's reasons without setting them out again. That was a permissible and sensible approach, fully in line with *Devaseelan*. In *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804, at para 30, the court stated that perhaps the most important feature of the guidance in *Devaseelan* was that the fundamental obligation to decide each new application on its own individual merits was preserved. I have no doubt that in this case the senior immigration judge decided the scarring issue and the claim as a whole on its own individual merits.

17. I also think it clear that the senior immigration judge took account of the guidance in *LP*. When she turned, at para 78 of her decision, to assess the risk on return on the basis of her findings of fact, she referred immediately to the guidance in *LP*; and in paras 78-81 she can be seen to have examined, so far as they were relevant, each of the risk factors identified in *LP*. That was the context within which, at para 80, she considered the factor of scarring. Moreover, when she said at para 80 that the guidance as to the risk which might be posed on account of an individual's scarring was essentially the same at the time of the adjudicator's decision "as it is now", she was evidently comparing the guidance at the time of the adjudicator's position with the current guidance in *LP*.

18. The tribunal in *LP* said this in relation to scarring:

> "The background evidence on the issue of scarring has fluctuated. Up until the time of the ceasefire it was generally accepted as something which the Sri Lankan authorities noted and took into account both at the airport and on detention and in strip searches of suspected Tamil LTTE supporters. Their perception that it may indicate training by the LTTE or participation in active warfare, was self-evident, and simply was 'good' policing, as appeared to be suggested by the Inspector General of Police in his discussions with Dr Smith. On the same logic it was also valid to conclude that the impact of scarring was of far less interest during the period 2002-late 2005 while the ceasefire agreement was having some effective impact. The evidence that was provided in this case, including that from Dr Smith following his discussions with the Inspector General of Police …, the BHC letter of 24 August 2006, and the COIR all indicate that scarring may again be relevant. We

agree with the comments in Dr Smith's report, that the issue of scarring was considered by the police to be a very serious indicator of whether a Tamil might have been involved in the LTTE. However, *on the evidence now before us we consider that the scarring issue should be one that only has significance when there are other factors that would bring an applicant to the attention of the authorities*, either at the airport or subsequently in Colombo, such as being wanted on an outstanding arrest warrant or a lack of identity. We therefore agree with the COIR remarks that it may be a relevant, but not an overriding, factor. Thus, *whilst the presence of scarring may promote an interest in a young Tamil under investigation by the Sri Lankan authorities, we do not consider that, merely because a young Tamil has scars, he will automatically be ill-treated in detention*" (para 217, emphasis added).

19. That passage shows that scarring was a potentially important factor at the time of the adjudicator's decision in this case (November 2000, well before the ceasefire), was of less importance during the cease-fire, but had assumed an increased significance again since the breakdown of the ceasefire agreement. I doubt whether, on the guidance in *LP* (which has been the subject of consideration in a number of later cases to which I think it unnecessary to make reference), scarring can be said to have recovered fully the position it had as a risk factor in the days before the cease-fire, but there was no material error in Senior Immigration Judge Gill summarising the position in terms of the guidance being "essentially the same" then as now. In any event she was effectively accepting a submission made on the appellant's behalf that the position in relation to scarring had reverted to the pre-ceasefire situation; and in his oral submissions to us Mr Mackenzie abandoned the criticism in his skeleton argument of this aspect of her analysis.

20. Accordingly, I am satisfied that the senior immigration judge, in referring to the original adjudicator's decision on scarring and in adopting the adjudicator's reasons, did so with proper regard to the current guidance and that there was nothing in the current guidance to undermine the original adjudicator's approach or to make it inappropriate to adopt his reasons. Moreover the reasoning that led to the senior immigration judge's own conclusion was itself clear and sufficient.

21. Mr Mackenzie sought to make something of the failure of the senior immigration judge to refer in this connection to the evidence on scarring contained in an opinion of Dr Chris Smith which was included in the documents before her. Dr Smith, referring to information obtained from a senior police officer in Colombo in May 2004, said in his opinion that scarring had long been considered by the police in Sri Lanka to be a significant indicator and that scarring of knees and elbows attracted particular interest. He also said that it appeared to be routine that when people were detained for other reasons they were stripped to their underwear during interrogation and torture; and members of the security forces at the airport took a special interest in Sri Lankans who arrived with visible scars or whose scars were revealed during a strip search. In my judgment, however, there was no need for the senior immigration judge to refer to Dr Smith's opinion. Dr Smith gave materially identical evidence to the tribunal in *LP*, which took that evidence carefully into account and made repeated reference to it

in reaching its findings and formulating its guidance (as in para 217, already quoted). It was therefore sufficient for the senior immigration judge in the present case to refer to the guidance in *LP*. She did not have to cover the whole ground again in her own decision.

22. Mr Mackenzie stressed that the risk factors have to be considered not just individually but also cumulatively. That is clear from *LP* itself (for example, in the introduction to the summary of risk factors at para 238). It is underlined in the judgment of the European Court of Human Rights in *NA v United Kingdom* (application no. 25904/07, judgment of 17 July 2008), which draws heavily on *LP* and states:

> "142. In assessing the risk to the applicant from the Sri Lankan authorities, the Court will examine the strength of the applicant's claim to be at real risk as a result of an accumulation of the risk factors identified in *LP* …. However, it will do so in light of its own observations set out in paragraphs 130-136 above. In particular, the Court underlines first, the need to have due regard for the deterioration of the security situation in Sri Lanka and the corresponding increase in general violence and heightened security; and second, the need to take a cumulative approach to all possible risk factors identified by the applicant as applicable to his case ….
>
> 144. The Court also accepts the assessment of the AIT that scarring will have significance only when there are other factors that will bring the applicant to the attention of the authorities such as being wanted on an outstanding arrest warrant or a lack of means of identification …. However, where there is a sufficient risk that an applicant will be detained, interrogated and searched, the presence of scarring, with all the significance the Sri Lankan authorities are then likely to attach to it, must be taken as greatly increasing the cumulative risk of ill-treatment to that applicant."

23. Thus it was submitted by Mr Mackenzie that the senior immigration judge failed to take account of scarring in conjunction with the fact that the appellant would attract attention as a person being returned as a failed asylum seeker and who, at least on arrival, would not have a national identity card: if those factors led to the appellant being questioned, his scarring could then be important and be taken as an indicator of LTTE involvement.

24. Those submissions do not do justice to the senior immigration judge's decision. Among the factors she considered were that the appellant had left Sri Lanka illegally, had made an asylum claim and would be returning without an identity card. In addition, of course, she considered such matters as the absence of any credible evidence that the appellant had ever come to the attention of the Sri Lankan security authorities. She did not just look at relevant factors individually but stated expressly that she had considered all of them cumulatively.

25. Another aspect of Mr Mackenzie's submissions was that the senior immigration judge failed to give proper consideration in this context to the appellant's mental illness. She said this (at para 79):

> "It is said that the Appellant's mental condition is such that he would behave irrationally when questioned on arrival and that he would not be able to answer questions as to what he has been doing in the United Kingdom. The Appellant is clearly mentally ill. I do not find that it is reasonably likely that his irrational or paranoid behaviour on arrival would give cause for any suspicion on the part of the Sri Lankan security forces. I did not find that his behaviour would be seen as being due to any reason other than the fact that he is mentally ill."

26. Mr Mackenzie submitted that the senior immigration judge failed to engage with the prospect, confirmed by Dr Bell, that if the appellant were questioned about his scars he would be unable to dispel the suspicions that the scars would be likely to arouse and he would suffer possible acute mental distress, in itself reaching the article 3 threshold. In *AN & SS (Tamils – Colombo – risk?) Sri Lanka CG* [2008] UKAIT 00063 the appellant SS was diagnosed as having such an acute degree of psychosis that his behaviour on return was likely to get him into serious difficulties: his psychosis was so severe that "he cannot function at all in society" and "[h]e certainly would not be able to render an account of himself if stopped at a checkpoint" (para 121). It was accepted by the Secretary of State (at para 7) that SS was therefore at real risk of ill-treatment on return, crossing the article 3 threshold. Mr Mackenzie submitted that the present appellant fell into the same category as SS and that the risk that SS was considered to run would also apply to this appellant.

27. I do not accept that the mental illness of the present appellant, although very serious, is of the same severity as that of SS, or that there is any inconsistency in the Secretary of State resisting the appellant's claim in this case whilst having conceded the risk of article 3 ill-treatment in the case of SS. Further, it is clear that the senior immigration judge took into account Dr Bell's evidence, to which she made extensive reference elsewhere in her decision (and see the separate grounds, below, relating to her treatment of the appellant's psychiatric condition). In my judgment she dealt with the matter sufficiently and was entitled to conclude that the appellant's mental illness would not put him at risk either by itself or in conjunction with his scarring and other relevant factors.

28. I should mention finally under this ground that Mr Mackenzie stopped short of contending that the special immigration judge's conclusion in relation to scarring was *Wednesbury* unreasonable. He was right to do so. To my mind there is no doubt that the conclusion she reached was reasonably open on the evidence before her.

Ground 2: risk arising from psychiatric condition

29. The remaining grounds of appeal relate to the separate claims under articles 3 and 8 based on the appellant's psychiatric condition and in particular the risk of deterioration in that condition, and of suicide or self-harm, if he were returned to Sri Lanka. The senior immigration judge dealt with this in the last main section of her

decision. She had previously given a full summary of the relevant medical evidence, including in particular that of Dr Bell.

30. Her analysis started with a survey of the case-law, including the decision of the Court of Appeal in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629 and the decisions of the European Court of Human Rights in *Bensaid v United Kingdom* (2001) 33 EHRR 205 and *D v United Kingdom* (1997) 24 EHRR 425. She then turned to consider the evidence of Dr Bell.

31. Her first point, to which no exception is taken, was that she did not place much weight on Dr Bell's prognosis of the effect of removal on the appellant to the extent that this depended on an acceptance of the appellant's evidence that he was tortured previously and that, if returned, he would be "flooded with memories". That followed from her findings that the appellant knew full well that he had not been tortured previously and did not suffer serious trauma.

32. She continued:

> "88. Dr Bell also says that the Appellant believes that he would be under the threat of immediate detention, torture and possibly of being murdered, that he believes this with conviction, that it is his belief which is material to the deterioration in his state if he is immediately under threat of return, that the Appellant suffers from a great deal of paranoid ideation, and that it would be very difficult for him to distinguish paranoid imaginings from actual threats. I take this into account in the Appellant's favour. The Appellant has taken an overdose of medication on three occasions in the United Kingdom. I place weight on that. On the other hand, the risk of suicide in the United Kingdom and en route to Sri Lanka can be adequately addressed (see the judgment in the *J* case). On my findings, there is no reason why the Appellant's mother and sister should not be able to assist him after his arrival in [Sri Lanka]. In his statement, Mr R [the appellant's cousin who had been caring for him] said that he would not be able to return to Sri Lanka with the Appellant because he fears he would be targeted by the Sri Lankan authorities or the LTTE or Tamil militant groups that work with the LTTE. However, he is a Dutch national now, and not a refugee. Furthermore, I was not told whether Mr R would be able to accompany the Appellant to Sri Lanka for the temporary purpose of handing him over to his mother and sister.
>
> 89. Dr Bell states that the Appellant cannot be expected to transfer from the care of Mr R and his friend to others. However, the question is not whether the Appellant *can be* expected to transfer to the care of persons other than those who are currently looking after him. The question is whether, if he is removed and *is* transferred to the care of others (for example, his own mother and sister and/or other medical professionals if he needs to be hospitalised on return), he would suffer such

> consequences as amount to a breach of his protected rights under Article 3 …" (original emphasis).

33. She went on to consider the availability of psychiatric facilities and treatment in Sri Lanka, which is an issue considered separately under ground 3. She then said:

> "92. Whether or not any deterioration in the Appellant's mental condition on arrival in Sri Lanka is such that he requires hospitalisation, I do not accept that he would not have the assistance, care and support of his mother and sister. I do not accept that, if the Appellant is transferred from the care of his cousin and good friend in the United Kingdom, to the care of his own mother and sister, his health would deteriorate or that it would deteriorate to such an extent that it would amount to a breach of his protected rights under Article 3."

34. She applied much the same reasoning to Dr Bell's concern about "a less manifest suicide", namely that the appellant's situation might deteriorate to a severe state of self-neglect and inanition and that he might die of some intercurrent infection.

35. She concluded, in relation to article 3:

> "95. For all the above reasons, I do not find that the increase in the risk of suicide is such that it is reasonably likely to result in completed suicide or lead to his mental health being sufficiently adversely affected so as to reach the Article 3 threshold. I bear in mind the availability of hospitalisation if his condition warrants it, the availability of private treatment if his condition does not warrant hospitalisation, and, in either case, the availability of support from his mother and sister. I do not find that his mental health would deteriorate to the extent that his physical and moral integrity is compromised sufficiently to reach the Article 3 threshold. I do not find that there are exceptional circumstances comparable in impact to those of the terminal patient in *D v UK*."

36. The reasons given for concluding that the appellant's removal would not be reasonably likely to be in breach of article 3 were said to apply to article 8 as well; and after a further assessment of relevant considerations, the finding was made that the appellant's removal would not prejudice his private life in a manner sufficiently serious as to amount to a breach of his protected rights under article 8.

37. The passages I have quoted reveal a heavy reliance by the senior immigration judge on the availability of care from the appellant's mother and sister on his return to Sri Lanka. Mr Mackenzie submitted that she fell into error on this point. She did not raise the point during the hearing (which proceeded by reference to the possibility of the appellant being alone in Colombo or having to travel to join his family) and did not address in her decision the risks and difficulties that the mother and sister would face in travelling from their home area in the north to Colombo, or how they would overcome them. There was evidence before her, in the COI report, that it was particularly difficult for Tamils to travel in government-controlled areas; and that for

those born in LTTE-controlled areas it was difficult to cross the checkpoints, and they faced varying levels of harassment. The frequency with which Tamils are stopped at checkpoints is also referred to at para 240 of *LP*. The senior immigration judge did not say why these problems would not prevent the appellant's family from travelling to Colombo and being available there to support him on his return. Mr Mackenzie reminded us that all the appellant has to show is the existence of a real risk that the support of his family would not be available.

38. The senior immigration judge's finding that the appellant's mother and sister would be able to travel to Colombo was in fact first made earlier in her decision, in the context of the appellant's ability (with the help of his family, if necessary) to obtain a replacement identity card in Colombo. In that context she said (at para 81):

> "Since this is not a family which has come to the adverse attention of the Sri Lankan forces for any reason, there is no reason why the Appellant's mother and sister would not be able to undertake the journey from the north to Colombo safely, albeit that I accept that such journeys are now more risky than they were previously. Tamils in Sri Lanka do experience problems, not least of which are difficulties in travelling around. Life for Tamils in Colombo is also very difficult, as is clear from the *LP* case. However, the Appellant's situation would be no different from other Tamils from the north."

39. It is clear from that passage that she had well in mind the difficulties faced by Tamils in travelling to Colombo and indeed in living in Colombo, but she considered that the appellant's mother and sister would nevertheless be able to get to Colombo and provide support to the appellant. The fact that, on her findings, the family had not come to the adverse attention of the Sri Lankan authorities for any reason was obviously a very important consideration. Whilst acknowledging the problems that would nonetheless arise, she found that they would not prevent a safe journey. She took account of the relevant evidence and reached a conclusion on it that in my view was reasonably open to her. I therefore reject the submission that she fell into error in relying as she did on the ability of the mother and sister to get to Colombo.

40. A further submission by Mr Mackenzie was that in finding that the appellant could be transferred into the care of his mother and sister, the senior immigration judge went behind the evidence of Dr Bell, who had stressed the importance of the appellant's attachments to his existing carers and had said they could not easily be replaced. Mr Mackenzie submitted that it was not at all obvious that the appellant would be able to respond to his mother or that she would be capable of helping him. I do not accept that the senior immigration judge went behind Dr Bell's evidence. Dr Bell did not deal in his report with the possibility of the mother and sister being available in Colombo to support the appellant. The senior immigration judge took into account what he did say about the importance of the existing care arrangements and the difficulty of replacing them, but reached the conclusion that if the appellant were transferred into the care of his family he would not suffer such consequences as to amount to a breach of article 3. It seems to me that she was entitled to reach that conclusion on the evidence. It is also relevant to note in this connection that she had previously found (at para 77) that the appellant was in direct or indirect contact with

his mother and had rejected his evidence that his sister was not able to help and support him on his return.

41. A further contention in Mr Mackenzie's skeleton argument was that the senior immigration judge did not take account of the potential difficulties for the appellant in placing trust in doctors in Sri Lanka, given Dr Bell's view that the appellant was likely to view psychiatric personnel as agents of the state. For my part, however, I think it plain that she did take this into account, along with the rest of Dr Bell's evidence, but that in the context of all her other findings (including the support that the appellant would receive from his mother and sister) she took the view that it would not in practice prevent the appellant from being hospitalised or receiving treatment as necessary. That was a conclusion properly open to her.

Ground 3: availability of psychiatric care in Sri Lanka

42. The senior immigration judge's findings as to the availability of psychiatric care in Sri Lanka are the subject of a separate ground of appeal. The principal relevant passages of her decision are these:

> "89. … Paragraph 26.18 of the COI report states that all treatments for acute psychological/psychiatric disorders can be provided in the public sector at Angoda and Mulleriawa mental hospitals in addition to the University Unit in the Colombo National Hospital at no cost. Dr Kanagaratnam states that these hospitals are all in Sinhalese areas of Colombo. He states that a Tamil asylum seeker who is mentally ill would have to cope with social hostility and antagonism from many in the Sinhalese community. I am prepared to determine this appeal on this basis.
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> 90. If the Appellant's state on arrival in Colombo is such that he does not require hospitalisation on arrival, then he is in a better position than many failed asylum seekers. This is because he has a successful business in the United Kingdom. I was not given any credible reason why that business could not be sold and the proceeds used to purchase private treatment for the Appellant which, according to the background evidence, is available, especially in Colombo ….
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> 91. If, on arrival, the Appellant's condition deteriorates to the extent that he requires hospitalisation, I am satisfied he would be admitted into hospital. Whilst I acknowledge that there is a great pressure on available psychiatric care in Sri Lanka, I do not consider that the evidence shows that it is reasonably likely that a mentally ill patient who is at very high risk of suicide (see the opinion of Dr Bell), especially one who behaves in a paranoid fashion on arrival on account of his mental illness, would be denied hospital admission if this is needed. I acknowledge that Dr Kanagaratnam states that the awareness of the diagnostic criteria for PTSD is unsatisfactory. However, it is reasonably likely that the Appellant would at least receive the

> medication he currently receives (or suitable alternatives). Currently, he only receives occasional counselling, although I appreciate that it is said that, if his status in the United Kingdom is resolved, better treatment could commence. That is equivalent to saying that, if returned, the Appellant would lose the opportunity for his health to improve. I am not persuaded that this argument helps the Appellant establish his Article 3 claim, having regard to the judgment of the House of Lords in *N v SSHD* [2005] UKHL 31. I take into account the fact that the Appellant has overdosed himself on three occasions. Dr Bell states that removal or the threat of removal would increase the risk of suicide from moderate to very high. If, on arrival, the risk of suicide remains very high, I am satisfied that he would be hospitalised, especially given that the evidence is that he would behave in a paranoid way. Once in hospital, it is reasonably likely that the risk of suicide would be adequately contained."

43. Mr Mackenzie submitted that the last sentence in that passage contained a material error of law, in that the correct test is not whether it is reasonably likely that the risk of suicide would be adequately contained, but whether it is reasonably likely that the risk of suicide would *not* be contained. But I have no doubt that this was simply an immaterial slip in the way in which the senior immigration judge expressed her reasons. From her decision as a whole it is clear that she had the correct burden of proof and relevant legal test clearly in mind throughout.

44. The major submission made by Mr Mackenzie in relation to this ground, however, was that the senior immigration judge's conclusion was inadequately reasoned. The evidence revealed a shortage of effective psychiatric facilities and personnel. For example, the information contained in the COI report, quoting a Sri Lankan government source, was that 376,000 Sri Lankans suffered from serious debilitating mental illness, yet only 41 Ministry of Health and university psychiatrists were available for the whole country and there were very few support staff in the mental health sector. The same source noted that there were no regular basic treatments in Sri Lanka for PTSD but only consultation with a psychiatrist (though the precise scope of that observation is unclear, since the same paragraph stated that treatment for PTSD was available in all private hospitals and clinics in Colombo, and also in various public sector hospitals in Colombo and elsewhere). Dr Kanagaratnam's report also drew attention to the severe limitations on psychiatric treatment in Sri Lanka, especially for Tamils. Mr Mackenzie's submission was that if the senior immigration judge was to take a more optimistic view of the position and reach the conclusion she did, it was incumbent on her to provide a clear process of reasoning by which that conclusion was reached. It was not sufficient for her to note the evidence and state her conclusion. Mr Mackenzie also expressed this as a *Wednesbury* challenge, submitting that on the evidence before the senior immigration judge there was no reasonable basis for the senior immigration judge's conclusion: the weight of the evidence was all one way.

45. I do not accept Mr Mackenzie's criticisms of the senior immigration judge's findings on this issue. Whilst he understandably concentrated on those aspects of the evidence

that indicate a shortage of relevant personnel and limitations on the availability of facilities and treatment, the overall picture presented by the objective material is one of governmental commitment to achieving high standards in mental health care but of tardiness in the delivery of that commitment. Provision is patchy but is available in Colombo and certain other locations, in particular in the private sector, and I do not read the evidence as demonstrating a general inability to cater for the appellant's psychiatric needs. In any event it is clear that the senior immigration judge looked carefully at the evidence and in my view she was entitled to conclude that the appellant would be able to obtain hospital admission and treatment to the extent that he needed it, especially as he had the financial resources to use the private sector if necessary. Her findings were reasonably open on the evidence and did not need additional reasoning to support them.

46. On the senior immigration judge's findings there is no real risk that the appellant would fail to receive the psychiatric care he would need in Sri Lanka even if his condition were to deteriorate on his return there. Merely speculative difficulties in accessing such care would not be sufficient to sustain a claim under article 3 or article 8, as Mr Mackenzie conceded: see, for example, the language used by the European Court of Human Rights in *Bensaid v United Kingdom* (2001) 33 EHRR 10, at para 39, and in *Paramsothy v Netherlands* (application no. 14492/03, admissibility decision of 10 November 2005 which also concerned, inter alia, psychiatric care in Sri Lanka).

47. The senior immigration judge was also right to stress the particularly high threshold that has to be crossed for a claim of this nature to succeed under article 3. One of the cases to which she referred was *D v United Kingdom*, but since the date of her decision the principles in *D v United Kingdom* have been reaffirmed by the European Court of Human Rights in *N v United Kingdom* (application no. 26565/05, judgment of 27 May 2008), which was the Strasbourg follow-up to the decision of the House of Lords in *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296. The court in *N v United Kingdom* began its assessment as follows:

> "29. According to the Court's constant case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 …. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible …."

48. After examining the previous case-law at some length, the judgment continued:

> "42. In summary, the Court observes that since *D v United Kingdom* it has consistently applied the following principles.
>
> Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not

> sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling ….
>
> 45. Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-related condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment, which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

49. There has been some debate in our domestic case-law as to the extent to which cases of mental illness, in particular where it is said that removal will give rise to a risk or increased risk of suicide, are analogous to cases of physical illness for the purposes of the application of article 3: see *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, para 42; *R (Tozlukaya) v Secretary of State for the Home Department* [2006] EWCA Civ 379, para 62; *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736, para 15; and *CN (Burundi) v Secretary of State for the Home Department* [2007] EWCA Civ 587, paras 25-26. Mr Mackenzie contended that a material difference exists between the two types of case, since in the suicide risk case the very act of expulsion causes or may cause a deterioration in the applicant's condition whereas in the HIV/AIDS situation it is the loss of assistance or services currently enjoyed that gives rise to the issue under article 3. Whilst there may be factual differences between the two types of case, the passage I have quoted from *N v United Kingdom* makes clear, as it seems to me, that the same principles are to be applied to them both. Nor do I detect any important difference of approach in the domestic cases on suicide risk. In the present case the senior immigration judge relied both on the line of domestic authority beginning with *J v Secretary of State for the Home Department* and on the line of Strasbourg authority beginning with *D v United Kingdom*. In my view that resulted in a perfectly coherent approach, in line with the statement of principles now to be found in *N v United Kingdom*.

50. In any event I am satisfied that the senior immigration judge was entitled to conclude that the appellant's removal to Sri Lanka would not have such adverse consequences for the appellant's psychiatric condition as to reach the article 3 threshold: on her findings of fact, this could not be said to be a very exceptional case where the humanitarian grounds against removal are compelling. She was similarly entitled to conclude that his removal would not be in breach of article 8.

Conclusion

51. For the reasons given I would dismiss the appeal.

Lord Justice Lawrence Collins :

52. I agree.

Lord Justice Rix :

53. I also agree.