Neutral Citation Number: [2009] EWHC 30 (Admin)

Case No: CO/8783/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 January 2009

Before :

MR STEPHEN MORRIS QC
Sitting as Deputy High Court Judge

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Between :

THE QUEEN ON THE APPLICATION OF SIVAGURU ARULIRAIVAN	Claimant
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	Defendant

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Matthew Fletcher (instructed by **K Ravi,** solicitors) for the **Claimant**
David Blundell (instructed by **Treasury Solicitor)** for the **Defendant**

Hearing dates: 21 November 2008

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Judgment

Mr Stephen Morris QC:

Introduction

1. The Claimant, Sivaguru Aruliraivan, seeks judicial review of the refusal of the Defendant, the Secretary of State for the Home Department, to treat his further representations as a fresh asylum or human rights claim under paragraph 353 of the Immigration Rules. As matters have developed, the relevant refusals are contained in letters from the Defendant dated 22 January 2008 and 17 November 2008. The Claimant seeks a declaration that his claim represents a fresh claim and should be dealt with on that basis.

2. The issue is whether the Defendant's decision to refuse to treat the Claimant's representations as a fresh claim was unreasonable.

Factual background

3. The Claimant is a Sri Lankan national aged 43**.** He arrived in the United Kingdom on 28 April 2002 and claimed asylum. His claim was refused in a letter dated 16 June 2002 and in a supplementary letter dated 10 September 2002. He appealed to an adjudicator, who dismissed his appeal in a determination promulgated on 22 April 2003 ("the Adjudicator's Determination"). Permission to appeal to the Immigration Appeal Tribunal was refused on 14 June 2003.

4. On 1 June 2004, the Claimant made further representations on asylum and human rights grounds. Between April and June 2006, he made an unsuccessful application for a residence document on the basis that he was the relative of an EEA national exercising EU Treaty rights in the UK. The Claimant was detained on 13 October 2006 with removal directions set for 23 October 2006. Further submissions were received on 16 October 2006. These, together with the representations dated 1 June 2004, were refused by a letter dated 20 October 2006.

5. The application for judicial review was made on 23 October 2006, initially on grounds relating to the EEA application. Mr. Justice Silber, by an order dated 19 April 2007, refused permission on the papers. On 6 August 2007, the Asylum and Immigration Tribunal ("AIT") promulgated its determination in the Country Guidance case of *LP (Sri Lanka)* CG [2007] UKAIT 00076 ("*LP* ").

6. At the renewed oral hearing on 21 November 2007, the Claimant sought to rely on *LP* and Mr. Justice Sullivan (as he then was) granted permission. At that stage, the Defendant had not yet considered the Claimant's case in the light of *LP*. The Defendant then did so, by way of its further decision letter of 22 January 2008 ("the January Decision"). That letter concluded (at paragraph 34) that "*having reviewed your client's case with anxious scrutiny, and having regard to the risk factors set in* ***LP (Sri Lanka)*** *it is concluded that your submissions do not create a realistic prospect of success before an Immigration Judge when taken together with the evidence previously considered*." On 24 February 2008, the Claimant filed Amended Grounds for judicial review, setting out his case, as now based on *LP*.

7. In a further decision letter of 17 November 2008 ("the November Decision"), the Defendant stated that further consideration had been given to the Claimant's case in the

light of the recent European Court of Human Rights ("ECtHR") judgment in *NA v. United Kingdom* of 17 July 2008 ("*NA* "). At paragraph 16 of the November Decision, the Defendant concluded that "*it is considered that there is no realistic prospect that the decision in NA will, when taken together with all the previously considered material, lead an immigration judge to decide that your client should be allowed to stay in the United Kingdom and accordingly it does not amount to a fresh claim under paragraph 353*". A similar conclusion was reached in respect of the claim based on human rights.

8. The Adjudicator's Determination and the January Decision and the November Decision (together referred to as "the Decision letters") are considered in more detail below. Before doing so, I set out the relevant legal principles applicable to the Claimant's case.

The relevant legal principles

Fresh claims and judicial review

9. Paragraph 353 of the Immigration Rules sets out the correct approach to material presented by way of further submissions after the dismissal of an asylum claim where there is no extant appeal. It is in the following terms:

"When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
(i) had not already been considered; and
(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
This paragraph does not apply to claims made overseas."

10. The appropriate approach for *the Secretary of State* when dealing with an application under paragraph 353 has been clarified in the case of *R (on the application of) WM DRC* [2006] EWCA Civ 1495, where Buxton LJ stated as follows:

"6. There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that

was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in Bugdaycay v. SSHD [1987] AC 514 at p 53."

11. As to the approach to be adopted by *the Court* when itself reviewing a decision of the Secretary of State taken pursuant to paragraph 353, Buxton LJ stated:

"11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

12. The issue before me therefore is whether, applying the requirement of anxious scrutiny, the decision of the Defendant that, considering the Claimant's personal circumstances in the light of *LP* and *NA*, there is no realistic prospect of the Claimant establishing, before an immigration judge, that there is a real risk of persecution or ill-treatment upon return to Sri Lanka was unreasonable and whether in reaching that conclusion the Defendant herself satisfied the requirement of anxious scrutiny.

13. The Claimant also seeks to rely upon the principle now enshrined in the Immigration Rules at paragraph 339K:

"339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated"

The principles to be applied to Sri Lankan Tamil cases

14. There is substantial recent case law in relation to the state of the civil war in Sri Lanka and the risk of persecution in Sri Lanka of Tamils. The starting point is the AIT's country guidance determination in *LP*. Following *LP*, there have been four important cases where further guidance has been given on the correct approach to the assessment of claims from Sri Lankan asylum-seekers. In chronological order, these cases are *R (on the application of Thangeswarajah) v. Secretary of State for the Home Department* [2007] EWHC 3288 (Admin), a decision of Collins J on a renewed application for permission to claim judicial review[1]; *R (on the application of Sivanesan) v. Secretary of State for the Home Department* [2008] EWHC 1146 (Admin), a decision of Sir George Newman; *AN and SS (Tamils-Colombo-risk?) Sri Lanka* CG [2008] UKAIT 00063, a decision of the AIT; and the ECtHR's decision in *NA v. United Kingdom*.

15. Most recently, since the conclusion of oral argument in the present case, there have been two further judgments of this Court applying the foregoing up-to-date guidance case law and in particular *AN and SS* and *NA*: the judgment of Wyn Williams J in *R (on the application of Lenin) v. Secretary of State for the Home Department* [2008] EWHC 2968 (Admin), and the judgment of Blake J in *R (on the application of Veerasingam) v. Secretary of State for the Home Department* [2008] EWHC 3044 (Admin). At my invitation, the parties made further written submissions – the Defendant on both cases and the Claimant on the *Lenin* case.

The "LP factors" and summary of general principles

16. In *LP*, at §238, the AIT set out a list of twelve risk factors which might make a person's return to Sri Lanka a matter which would cause the UK to be in breach of its obligations under the United Nations Convention on the Status of Refugees (the "Refugee Convention") and the European Convention on Human Rights ("ECHR"). These are as follows:

    i. Tamil ethnicity

    ii. Previous record as a suspected or actual LTTE member or supporter

    iii Previous criminal record and/or outstanding arrest warrant

    iv. Bail jumping and/or escaping from custody

    v. Having signed a confession or similar document

    vi. Having been asked by the security forces to become an informer

    vii. The presence of scarring

    viii. Being returned from London or other centre of LTTE activity or fund-raising

    ix. Illegal departure from Sri Lanka

    x. Lack of ID card or other documentation

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[1] In *NA*, this case was cited as *R v. Secretary of State for the Home Department, ex parte five Sri Lankan Tamils*.

xi. Having made an asylum claim abroad

xii. Having relatives in the LTTE.

It was by reference to these twelve factors that the Claimant's claim was considered in the January Decision.

17. From *LP* and the four cases referred to in paragraph 14 above, I draw the following points of principle of particular relevance to the present case (which apply to the assessment of risk under the Refugee Convention as well as to that of Article 2 or 3 ECHR ill-treatment). First, the test to be applied is whether a claimant "*can establish that there are serious reasons to believe that he or she would be of sufficient interest to the authorities in their efforts to combat the LTTE as to warrant his or her detention and interrogation*": *NA*, §133 (and see also *Sivanesan* §41 set out in paragraph 19 below). Secondly, there is a greater risk of interrogation and detention at the airport than in Colombo city and thus the Court's assessment may turn on whether that person would be likely to be detained at the airport: *NA*, §134. Thirdly, it is legitimate to carry out the assessment of risk in the individual case based on the twelve *LP* factors, whilst recalling that they are neither a checklist nor exhaustive; these factors have to be assessed both individually and cumulatively: *NA*, §§129, 130 and *Thangeswarajah* and *Sivanesan*. Fourthly, there is a distinction in the *LP* risk factors between "risk factors *per se*", one or more of which may be enough to cause a returnee to be detained and ill-treated, and "background factors" which do not create such a risk without the presence of a "risk factor *per se*": *Thangeswarajah* as summarised in *Sivanesan*, §§ 22-24 and AN *and SS*, §§109, 122(e). As regards the nature of the computerised records available at Colombo airport, this is considered in further detail below. In the following paragraphs I set out further relevant passages from the cases.

LP (Sri Lanka Country Guidance)

18. The following passages from the AIT's reasoning are of particular relevance to the present case:

"Previous Record as a suspected or actual LTTE Member or Supporter

210. From our assessment of the background evidence, we find that it is of vital importance, in the assessment of each Sri Lankan Tamil case, to establish an applicant's profile, and the credibility of his background, in some depth. …

Bail Jumping and/or Escape from Custody

212. … [Professor Goode] states that in any case the available evidence does not support the contention that the detainee's release of itself indicates the authorities have no continuing interest in him. He considers that it cannot be concluded that release without charge or without the payment of a bribe precludes subsequent detention and notes a report from the Swiss Refugee Council in that regard. He submits that the issue is one of logic that having detained persons in Sri Lanka there is a practice of routinely re-arresting and re-detaining people on the basis of obtaining confession evidence by torture. This evidence appears to be supported by Dr Smith at paragraph 121 and Dr Gunaratna

213. We noted in particular the comments made by Professor Goode that the appellant's account here is an unusual one. It is unusual in that it has been shown that the appellant was granted bail by a court in Colombo. We agree with the logic that those who have been released after going to court and released from custody on formal bail are reasonably likely, on the evidence, to be not only recorded on the police records as bail jumpers but obviously on the court records as well. Thus we would identify those in the situation such as this appellant who have been found to have been to court in Colombo, and subsequently released on formal bail, as having a profile that could place them at a higher level of risk of being identified from police computers at the airport. …

214. The situation however, in respect of those who have not been to court and may have been released after the payment of a bribe we do not consider falls into the same category. Much will depend on the evidence relating to the formality of the detention (or lack of it) and the manner in which the bribe was taken and the credibility of the total story. If the detention is an informal one, or it is highly unlikely that the bribe or "bail" has been officially recorded, then the risk level to the applicant is likely to be below that of a real risk …

…

Summary of Conclusions

…

235. As in most asylum cases the first, and most important task is the assessment of the credibility of the appellant's claim. In the course of that assessment the Tribunal will have regard to the history of the appellant including the part of Sri Lanka from which he comes and his actual involvement, if any, with the LTTE. Such involvement can vary between being a full-time fighting member to the informal periodic supply of food. Issues of exclusion may arise. The extent to which their involvement may be known by the Sri Lankan authorities (or the extent to which they perceive there to be an involvement) will be relevant

236. Other issues which require careful evaluation involve the previous attention paid to the appellant by the Sri Lankan authorities. Questions of whether the appellant has been previously detained and for how long will be significant, as will the reasons for the detention. A short detention following a round-up may be of little significance; a longer detention as a result of a targeted operation will be much more significant. The question of release and how that came about may be important. It should be recognised that the procurement of bribes is a common occurrence in Sri Lanka and that the release following payment of a bribe is not necessarily evidence of any continuing interest.

…

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

Otherwise the strong preponderance of the evidence is that the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment"

(emphasis added)

Thangeswarajah and Sivanesan

19. In *Thangeswarajah,* Collins J set out guidance on the approach in general to the determination of Sri Lankan claims which was subsequently summarised and approved by Sir George Newman in *Sivanesan,* at §§ 22 to 24. It was also cited by the ECtHR in *NA* and endorsed by the AIT in *AN and SS*. The main points are referred to above. In *Sivanesan,* Sir George Newman further stated, at §41, that:

"*the central question is whether a real risk exists that the authorities would suspect the claimant of having a sufficiently significant link to the LTTE which could cause him to be detained on his return to Sri Lanka."*

Then at §43, he stated:

"*An examination of decisions in other cases, apparently similar, should be avoided. The detailed facts of another case can be an unreliable barometer of risk and are likely to lead to a decision being taken in the case under consideration which is driven, not after anxious scrutiny in the case in question, but by the decision of a judge in a different case. That is not to say that a comparative exercise cannot help a decision-maker, but undue weight should not be attached to the result*"

AN and SS

20. The determination in *AN and SS* is the latest AIT country guidance decision relating to Sri Lanka. The determination was dated 10 June 2008 and thus before *NA*. Like *NA*, it concerned a claimant who claimed to face ill-treatment from both the LTTE and the Sri Lankan authorities. In relation to the computer records available at Colombo airport, the AIT summarised its conclusion at §122 (f) as follows

"The National Intelligence Bureau in Sri Lanka maintains a computerized database of persons who are thought to pose a threat, while immigration officers at Bandaranaike International Airport use a computer system which can flag up whether a newly-arrived passenger is on the 'Wanted List' or 'Stop List' . The CID at the airport will be alerted when this happens. But there is no firm evidence to support the contention that everyone who has ever been detained by the police or army is likely to be on the database. "

21. Further detail on the existence and contents of the security forces' database was provided in §§106 and 107. At §106, the AIT accepted the evidence demonstrating the existence of a centralised national computer database to which the security services had access. The question, accordingly, was who would be on that database. At §107, the AIT did not accept further expert evidence on this question and stated:

"We think it intrinsically unlikely that everyone who has ever been detained by the authorities in the course of the Sri Lankan conflict, or at least in the last 10-15 years, is now on a computer database which is checked by the Immigration Service when failed asylum seekers arrive at the airport, and is checked by the police or army when people are picked up at road-blocks or in cordon-and-search operations. The evidence suggests, on the contrary, that the database is far narrower than that. When Tamils are picked up in Colombo the authorities want to know why they have come and what they are doing, if they are not long-term residents of the city. There are no reports of people being detained and perhaps sent to Boossa camp at Galle because they were once held for questioning in Jaffna or Batticaloa years before. As for arrivals at Bandaranaike International Airport, the 'Watch List' and the 'Stop List' clearly contain the names of people who are 'seriously' wanted (to use a phrase of Mr Justice Collins) by the authorities. Equally clearly, the evidence does not indicate that they contain the names of everyone who has ever been questioned about possible knowledge of, or involvement in, the LTTE. The majority of Sri Lankan asylum seekers coming to this country claim to have been detained at some time by the authorities, but there are no reports of any being detained at the airport on return because they were once held for questioning years ago and then released"

(emphasis added)

NA

22. On 10 July 2008, the ECtHR gave judgment in *NA*, a case concerned with an applicant who claimed that he would face ill-treatment contrary to Articles 2 and 3 ECHR by both the LTTE and the Sri Lankan authorities. In general, the Court approved the approach of the AIT in *LP*. At §124, the Court noted that the deterioration in country conditions was common ground. The following passages of the Court's judgment are of particular relevance:

"8. … . It was found that the applicant's account was credible: namely, he had been arrested by the army on some six occasions between 1990 and 1997 on suspicion of his involvement with the LTTE. He was detained for less than twenty-four hours on the first occasion and for two days on the last. There was no evidence as to how long the other periods of detention had lasted. On each occasion he was released without charge. During one or possibly more of these periods of detention he was ill-treated and his legs had scars from being beaten with batons. According to the Adjudicator, it may have been that the arrests took place in the course of round-ups. During the 1997 detention the applicant was photographed and his fingerprints were taken and his father signed certain papers in order to secure his release. …

…

135. … , the Court notes that the objective evidence before it contains different accounts of the precise nature of the procedures followed at Colombo airport and the nature of the information technology there (see the British High Commission letters and the Immigration and Refugee Board of Canada report at paragraphs 60 -63 and 74 above). Indeed, the evidence suggests that the procedures followed by the Sri Lankan authorities may change over time. However, the Court also notes that, with the exception of the extracts of the British High Commission's letter of 25 January 2008 that appeared in the March 2008 COI Report (see paragraph 60 above), all the above

evidence was considered by the AIT in LP where it was undisputed that records were kept and interviews conducted at the airport and where the AIT found that computerised records were available to the police at the airport, from which they could identify possible "bail jumpers" (see paragraph 35 above). In the light of the extensive evidence before the AIT on this subject and its findings, the Court cannot come to a different conclusion on the basis of the uncorroborated British High Commission's letter of 25 January 2008 and the observations therein that the Sri Lankan CID do not use computers, particularly when, as the COI Report noted, in its letter of 24 August 2006, the British High Commission had previously reported that "the Sri Lankan authorities have a good IT system to track arrivals and departures at the main airport and are able to track, in most cases, whether an individual is in the country or not" (see paragraph 60 above). The Court also considers it to be of some significance that both the British High Commission letters and the assessment of the Immigration and Refugee Board of Canada indicate that there are established and routine procedures for briefly detaining and questioning returnees at the airport

136. This evidence on procedures and facilities at the airport must be placed alongside the AIT's finding on the availability of lists of failed asylum seekers to the Sri Lankan authorities, which was based on the British High Commission's letter of 24 August 2006 … and the evidence that scarring has been used in the past by the authorities as a means of identifying Tamils who will be of interest to them …. The Court notes the AIT's finding, in light of that evidence, that "failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment" … but it considers that at the very least the Sri Lankan authorities have the technological means and procedures in place to identify at the airport failed asylum seekers and those who are wanted by the authorities. The Court further finds that it is a logical inference from these findings that the rigour of the checks at the airport is capable of varying from time to time, depending on the security concerns of the authorities. These considerations must inform the Court's assessment of the risk to the applicant.

…

139. … [the Court] observes that the Government do not appear to have disputed the Adjudicator's findings as to the credibility of the applicant's account. These were that the applicant bears scars from ill-treatment during detention; that he was arrested by the army six times between 1990 and 1997 on suspicion of his involvement with the LTTE and that on the last occasion he was photographed, fingerprinted and released after his father signed a document (see paragraph 8 above). The Court also notes the Adjudicator's finding that, following the ceasefire agreement, the applicant would be of no interest to the Sri Lankan authorities because he had been held for short periods and released without charge on each occasion (see paragraph 9 above). Finally, the Court notes the Adjudicator's findings that it was unlikely that the LTTE would have any interest in the applicant and unlikely that they could track him down in Colombo (see paragraph 10 above).

…

143. In LP, the AIT considered a previous criminal record and/or arrest warrant to be a significant factor… The Court recalls that the AIT also found that the issue was to establish the credibility for the criminal record, or an arrest warrant, and to decide whether it was reasonably likely to exist in respect of the applicant in the particular

case …. In the Court's view, the present applicant, who was arrested and detained by the Sri Lankan authorities six times, photographed and fingerprinted, can rely on this risk factor, particularly since his claim was found credible on this point. The applicant did not jump bail or abscond from police custody so as to engage this separate risk factor identified by the AIT in LP and the Court accepts the AIT's view that persons who jump bail or abscond are at a higher level of risk of being identified from police computers at the airport. However, the applicant's father signed a document to secure his son's release. … The Court accepts that no firm conclusion can be drawn as to whether the document amounted to a confession. … However in the Court's view it is not necessary to consider whether the document additionally engages the particular risk factor identified by the AIT as relating to confessions or statements, since whatever the nature of that document, at the very least it amounts to a record of the applicant's detention.

…

145. The Court recognises that it has been over ten years since the applicant was last detained by the Sri Lankan army. However the Court considers that the greatest possible caution should be taken when, as in the applicant's case, it is accepted that a returnee has previously been detained and a record made of that detention. As the AIT found in LP (see paragraph 44 above), such a record may be readily accessible to airport authorities, meaning the person in question may become of interest to the authorities during his or her passage through the airport. Where there is a likelihood that this will result in delay in entering the country, there is clearly a greater risk of detention and interrogation and with it a greater risk of ill-treatment contrary to Article 3 (see paragraphs 131 -133 above). Equally, in light of its observations at paragraphs 130 -136 and 142 above, the Court finds the passage of time cannot be determinative of the risk to the present applicant without a corresponding assessment of the current general policies of the Sri Lankan authorities (see, mutatis mutandis, Saadi v. Italy, cited above, § 43; the Jabari judgment, cited above, § 41, in fine). Their interest in particular categories of returnees is likely to change over time in response to domestic developments and may increase as well as decrease. In the Court's view, it cannot be excluded that on any given date if there is an increase in the general situation of violence then the security situation in Sri Lanka will be such as to require additional security at the airport. The Court also recalls its finding at paragraphs 134 -136 above, notably that computerised records are available to the airport authorities. Given that it is undisputed that the applicant was arrested six times between 1990 and 1997, that he was ill-treated in detention and that it appears a record was made of his detention on at least one occasion, the Court considers that there is a real risk that the applicant's record will be available to the authorities at the airport. Furthermore, it cannot be excluded that on any given date the security situation in Sri Lanka would be such as to require additional security at the airport and that, due to his risk profile, the applicant would be at even greater risk of detention and interrogation."

(emphasis added)

Lenin

23. In *Lenin*, the issue, as in the present case, centred upon the likelihood of the availability at Colombo airport of a record of the claimant's arrest, detention and release (in that case in 1998). Wyn Williams J considered the above-cited cases and concluded (§40) that the Defendant had been entitled to conclude that the claimant had no realistic

prospect of success before an immigration judge. Applying *LP, AN and SS* and *NA*, he stated (at §39):

" Is the Defendant's decision to be categorised as irrational or unreasonable or one lacking in anxious scrutiny by virtue of her failure to engage expressly with this issue? In my judgment, it is not since (a) the Defendant justifiably proceeded on the basis that the Claimant's profile was very low and secondly the conclusions expressed in ***LP*** *and* ***AN&SS*** *do not support the conclusion that it is likely that the Claimant's details were computerised and available at the airport. I appreciate that there are passages in paragraphs 135 and 136 of the judgment in NA which demonstrates that computerised records of some persons who have been detained previously are likely to be available at the airport. In my judgment, however, those passages must be understood against the undisputed fact in that case that the details of NA had been recorded at the time of one of his many arrests. On the basis of the adjudicator's findings in this case and in the light of the recent factual conclusions expressed in* ***AN&SS*** *(as to which see the extracts quoted at paragraph 22 above) there is simply no proper factual basis upon which it would be proper to infer that details of the Claimant's arrest, detention and release in 1998 would be available to the authorities at the airport."*

(emphasis added)

Veerasingam

24. Most recently, in *Veerasingam,* Blake J reached a different conclusion and quashed decisions by the Secretary of State that fresh representations did not amount to a fresh claim. In that case, the claimant was a Sri Lankan Tamil who had been involved in the LTTE, but not as a fighting member. However his brother had been a fighting member. The claimant had been arrested and briefly detained on three occasions during army round ups. Then, and following a tip off from an informer that he was involved with the LTTE, the claimant was arrested again and, on that occasion, detained for a period of three months, during which time he was fingerprinted, interrogated and tortured. He was released on payment of a bribe.

25. In reaching his conclusion that, in that case, the Secretary of State could not reasonably have concluded that there was no reasonable prospect of success before the immigration judge, Blake J relied specifically upon the final, three month, period of detention - how it came about (the fact that it was not random, but rather based on specific information provided to the military about the claimant himself), its prolonged duration, and its circumstances: see §§14. 15, 20, 26, 29.

26. Blake J considered both *NA* and *AN and SS* in relation to the risk of detention at Colombo airport in the context of a claimant's own particular profile and record. First, in reaching his conclusion, Blake J (at §§23 and 24) placed significant reliance upon §§143 and 145 of *NA* (set out in paragraph 22 above) and in particular, the final two sentences of §145 addressing the risk of detention at the airport, given the claimant's record of detention. Secondly, as regards *AN and SS*, he referred (at §26) to the passage from §107 of *AN* (set out in paragraph 21 above) which points out that it is unlikely that everyone detained in the last 10-15 years would be on the computer database checked at the airport. He continued:

"That may be right, but in this case the claimant is not merely relying on the random detentions on three occasions to which he has been subject but the prolonged detention to which reference has been made. In the absence of any positive evidence that records have been destroyed in anticipation of the peace process, it is not possible to characterise as fanciful or without substance the claimant's case as to his fears"

27. Finally, at §29, and in contrasting the case with that in *Lenin*, Blake J stated

"*I have made plain in this judgment the importance to be attached to the implications of the prolonged detention from April-July 1998 that was occasioned by a report of an informer and that is a distinction from the apparent scenario identified by the adjudicator in the case of Lenin and the issue before this court whether the Secretary of Secretary of State's decision fell to be quashed*."

The Adjudicator's Determination

28. In his determination, the Adjudicator made the following relevant findings:

"*27. … I find the Appellant to be a credible witness and his claim insofar as it relates to his past experiences in Sri Lanka to be credible and to fit with the background information. There were some inconsistencies in his various accounts but an adequate explanation was given by the Appellant for these inconsistencies, which I accepted. I find that he was persecuted by the Sri Lankan Army.*

28. I find that the Appellant was an ethnic Tamil who originated from Myliddy, Jaffna. He was briefly involved with the LTTE in 1985-86 and then more substantially between 1999 and 2001, being involved in the transportation of goods and supplies between India and Sri Lanka. Having informed the LTTE that he intended to cease working for them following an incident when his boat was attacked by the Sri Lankan Navy, he was detained by the LTTE until agreeing to continue to work for them. After one further trip he moved to Vavuniya where he was arrested, detained and tortured by the Sri Lankan Army in April, 2001 having been identified to them by members of the EPRLF who reported him to be a pro-LTTE Tamil living within the army controlled area. Following payment of a bribe he was released in August following which he subsequently left the country during the same month. The Appellant has scars, some of which, he claims, were received when he was ill-treated by the army. However, whilst I accept that the Appellant has been persecuted in the past, I do not find that he has established a well-founded fear of persecution for a Convention reason going to the future.
…

31. The Appellant has some scarring. …

32. … Scarring, in itself, does not justify a conclusion that the appellant has a well-founded fear of persecution. Not every scar makes a person a refugee and it is not their cause that counts but their effect. It would be wrong to treat scars as being of no consequence simply because they were caused accidentally. The question is whether the scars are such as to give rise to the risk that a Sri Lankan official will think that the person is an insurgent.
…

37. The Appellant received some scars as a result of his ill-treatment at the hands of the Sri Lankan Army, including one small scar to the face, but I do not find that they are such as to draw adverse attention from the authorities. I do not find that scarring is an issue in this appeal.

…

Conclusion

48. Whilst I accept that the Appellant has been persecuted in the past, I do not find that he has established a well-founded fear of persecution for a Convention reason going to the present and to the future. This is largely because of the changes that have taken place within Sri Lanka during the last fifteen months. I have considered the report of Dr Good and noted the misgivings he continues to hold … but other background information … indicate[s] that whilst not all Sri Lankan asylum seekers could be safely returned, appellants such as Mr Aruliraivan can be safely returned.

49. Whilst the Appellant undertook some tasks for the LTTE, principally transporting goods by sea between India and Sri Lanka, he was never a fighting member of the organisation. Although arrested by the authorities on one occasion, he has never been charged or convicted of any offence, nor is he wanted in respect of any offence. It is not likely that any record of his arrest and detention that might exist would show that he was released on payment of a bribe, something that is likely to have an adverse effect on those responsible for his detention. It is likely that he was released because he was of no further interest to the authorities. The payment of the bribe probably assisted his release but it is not likely, even on payment of a bribe, that he would have been released if the authorities regarded him as of continuing interest, a terrorist, a security risk or a person previously involved with the LTTE. There is no evidence of any outstanding warrant issued against him or that the authorities have been looking for him. There is no evidence that he is wanted or is on any wanted list. I do not find that he is likely to be at risk even taking into account his limited scarring. If he should be stopped upon return at the airport it will be for no reason other than to check his identity and even if his one arrest is revealed it is unlikely that he will be detained or at risk. …

50. The Appellant will be returning to a country in which the situation has improved considerably since his departure. Whilst there is still no concluded peace agreement, the cease-fire, is, on the whole, being observed, the peace talks are continuing, the emergency regulations have not been renewed, the Government has lifted the ban on the LTTE. It is part of that cease-fire agreement that those who have been involved with the LTTE would not now be in any way dealt with by the authorities merely because of that involvement. … If there were indications that those involved in any way with the LTTE, or suspected of any such involvement, were being stopped on arrival at the airport and taken into custody for that reason, there would be some indication that it was happening and would have attracted adverse publicity. ….

51. … I do not find that the Appellant has established a well- founded fear of persecution for a Convention reason should he be returned to Sri Lanka. … "

(emphasis added)

29. The Claimant relies upon the following further passage in the Determination, taken from the section recording the Claimant's submissions:

15. With regard to the risk from the Authorities, he was held in detention and secured his release by a bribe. However before he left he was recorded, photographed and fingerprinted. Whilst being held in detention, out of a desire to save his wife, he admitted that he had worked for LTTE. […]. "

(emphasis added)

The January Decision

30. In the January Decision, the Defendant referred, at paragraph 3, to paragraphs 48 and 49 of the Adjudicator's Determination and stated that she had reconsidered the Claimant's position in the light of *LP*. She then continued:

"*11. The determination relates to the risk of returning Tamils to Colombo and problems which they may experience with the Sri Lankan authorities. It was concluded that the evidence does not show that Tamils in Colombo are at risk of serious harm from the Sri Lankan authorities merely because they are Tamils or that it would be unduly harsh to expect a Tamil to relocate to Colombo. A number of factors may increase risk (listed at paragraph 238 of the determination but not intended to be a check list) and those factors and the weight to be ascribed to them, individually and cumulatively, must be considered in the light of the facts of each case.*

… it is considered that eight out of the twelve factors identified at paragraph 238 of ***LP (Sri Lanka)*** *apply to your client*."

31. The January Decision then listed factors i), ii), v), vii), viii) ix), x) and xi) from the list in *LP*. It went on, in paragraphs 15 to 28, to deal, not simply with the eight factors relied upon, but, in fact, with all twelve *LP* factors. I deal with the Defendant's reasoning on particular factors, in the course of addressing the Claimant's case below.

The November Decision

32. In the November Decision, the Defendant stated that further consideration had been given to the Claimant's case in the light of *NA*. At paragraph 8, the Defendant stated that "*Consideration has been given to whether he would be at risk upon return to Sri Lanka based on the findings of* ***NA.*** *For all the reasons set out below, it has been concluded that the earlier decision taken in your client's case is not altered by the judgment of the ECtHR in* ***NA.***" The Defendant referred to the fact that *NA* had endorsed the list of factors in *LP* and to §130 of the ECtHR's judgment and concluded that in the Claimant's case, the case of *NA* did not lead to a different conclusion than that that had been reached in the January Decision. No distinct consideration is given, in the November Decision, to those passages of *NA* (including in particular §145 of the judgment) dealing with the issue of the records available at Colombo airport.

The Claimant's case for judicial review

33. The Claimant's amended grounds for judicial review put forward five errors of law said to have been made by the Defendant in the Decision letters.

(1) The Decision letters give too much weight to the Adjudicator's assessment of whether the Claimant would be at risk on return in 2003 during the period of ceasefire.

(2) The Decision letters give insufficient weight to what has been described in the authorities as a state of virtual civil war.

(3) The *LP* risk factors identified are more than sufficient to create a realistic prospect of

(4) success before an immigration judge.

(5) The analysis that the Claimant is of extremely low profile is not borne out by the objective evidence. The Claimant was an integral part of the LTTE supply chain assisting and supporting the LTTE in the continued conflict against the Sri Lankan authorities.

(6) The Decision letters failed to take the Adjudicator's finding of persecution of the Claimant as the starting point.

34. I deal with Ground (5) first. I then address Ground (3), dealing with the application of the *LP* factors (as developed) to the Claimant. The argument here was refined in the course of argument and is at the heart of the Claimant's case. Thereafter I address briefly Grounds (1) and (2). Ground (4), in substance, forms part of the argument made on Ground (3) and is not separately addressed.

Ground (5): Failure to take finding of past persecution as the starting point

35. The Claimant contends that, in the Decision letters, the Defendant should have taken as her starting point the clear finding that the Claimant had been the subject of past persecution in Sri Lanka and that the risk of persecution upon return had to be assessed with that fact uppermost in her mind.

36. In my judgment, this criticism of the Decision letters is unfounded. As the Claimant accepts, the Defendant did take, as her starting point in the January Decision, the Adjudicator's Determination. The January Decision, at paragraph 3, expressly refers to the fact that the Adjudicator found (at paragraphs 48 and 49) that the Claimant did not have a well founded fear of persecution largely because of the changes which had taken place in Sri Lanka and explained why the Claimant would not be of interest to the authorities upon return. Whilst it is correct that, in the January Decision, the Defendant does not also quote the first part of the first sentence of paragraph 48 which refers, in terms, to the past persecution of the Claimant, there is no basis for the Claimant's suggestion that the Defendant did not appreciate or recognise this fact. As appears from the remainder of the January Decision (paragraphs 12, 13, 18, 22), the Defendant was aware of, and took into account, the Adjudicator's findings that the Claimant had been arrested and detained and that he had received some scars as a result of his ill treatment at the hands of the Sri Lankan Army.

37. In any event, the fact of past persecution is not of itself sufficient to establish a future risk on return (even in the current changed circumstances), without looking at the particular factors identified in *LP*. Paragraph 339K of the Immigration Rules, upon which the

Claimant relies in this connection, expressly states that past persecution is not sufficient if there are good reasons to consider that such persecution will not be repeated. Whether such good reasons exist falls to be considered under Ground (3).

Ground (3): Application of the *LP* Risk Factors

38. Put broadly, the Claimant's case is that, in the Decision letters, the Defendant failed to give sufficient weight to the fact and extent of, and the circumstances surrounding, his detention by the Sri Lankan Army in 2001. These circumstances need to be considered in the light of §§ 214 and 236 of *LP* itself and all point to the Claimant being of greater interest to the authorities, and to his having a higher profile, than that which forms the basis of the Defendant's decisions. Thus the Defendant's conclusion on the *LP* factors of "Previous record as an LTTE member" and the "Bail jumping and/or escape from custody" was wrong. Further, the Defendant gave insufficient weight to the Claimant's scarring. These failures, when relevant background factors applicable to the Claimant are also taken into account, lead to the conclusion that there was, and is, a real risk on return, and the Defendant's view that there was no realistic prospect of an immigration judge reaching such a conclusion was unreasonable.

39. The Claimant relies upon four "per se" risk factors, upon scarring and a number of "background" factors. The "per se" risk factors relied upon are: previous LTTE record (factor ii)), bail jumping/escape (factor iv)), confession and relatives in the LTTE. In argument, the focus was on the first two of these. It seemed to me that, in some ways, the Claimant appeared also to relying upon factor iii) "criminal record and/or outstanding warrant", and, in any case, there may be much overlap between factors ii), iii) and iv). Ultimately, as stated in paragraph 17 above, and as became clear in the course of argument in this case, a central issue is the risk of being detained on arrival at Colombo airport, and it seems to me that these three factors, where present, all feed in to this risk. Here I consider the main argument under factor ii) below - although I give separate consideration, under factor iv), to certain discrete arguments.

40. By way of preliminary observation, in my judgment, it is important to distinguish between, on the one hand, a claimant's record, in the sense of history, of involvement with the LTTE and, on the other, his record, in the sense of the recording by the Sri Lankan authorities of that history (and in particular detention). Thus, the reference to "previous record" in *LP* factor ii) covers both these senses of "record"; whilst "previous criminal record" in factor iii) is directed towards the second sense only and is a reference to a formal record of previous conviction. (In this regard, I am not sure that this is a distinction which was made by the ECtHR in *NA*, particularly at §143.) Thus the fact of detention, without charge or outstanding warrant, falls within factor ii) and not factor iii). On this basis, strictly, factor iii) does not apply in the present case.

Background factors

41. The Claimant seeks to rely upon a number of "background" factors; and it is indeed the case that a number of these factors identified in *LP* do apply to the present case, namely Tamil ethnicity, return from London, illegal departure from Sri Lanka, lack of an ID card and having made an asylum claim abroad. However, for the reasons given by Collins J in *Thangeswarajah*, if the Defendant's conclusion relating to relevant "per se" risk factors was reasonable, the existence of any one or more of these "background" factors cannot

materially improve the Claimant's case for judicial review,. On the other hand, if the Defendant's conclusion on any one or more "per se" risk factors is open to question, then the existence of these background factors can only increase the prospect of establishing a real risk before an immigration judge.

Scarring: LP factor vii)

42. Moreover, it is also the case that, as the Adjudicator found (at paragraph 37), the Claimant received some scars as a result of ill-treatment at the hands of the SLA. Of itself, this would not be sufficient to put him at risk (and the Claimant's specific criticisms of paragraph 22 of the January Decision are of themselves unfounded). Nevertheless, in the presence of one or more other, "per se" risk factors, the existence of scarring here may well also add to the risk of detention and ill-treatment.

Previous record as an actual or suspected LTTE member: LP factor ii)

43. This factor was addressed at paragraphs 16 and 17 of the January Decision. At paragraph 17, the Defendant concluded that the Claimant's profile was so low that he was of little interest to the authorities, and that, applying the *LP* guidance at §210 which emphasises the importance of the applicant's profile, the Claimant would have no prospect of success before an immigration judge. The Defendant relied upon facts, found by the Adjudicator at paragraph 49 of the Determination, that the Claimant was not a fighting member of the LTTE, that he had been neither convicted nor charged of any offence; that he was not wanted, that any record of his arrest would not refer to the payment of a bribe and that it was likely that he had been released because he was of no further interest to the authorities.

44. The Claimant contends that, first, his profile was in fact higher (and thus that the record of his involvement would be more detailed) and, secondly, that this is all the more significant given the change in circumstances in Sri Lanka since the Adjudicator's Determination. The Defendant, in response, emphasises, as being crucial, the further finding in paragraph 49 of the Adjudicator's Determination, that there was no evidence that the Claimant was on any wanted list.

45. There are two distinct aspects which fall for consideration here: first, the degree or level of the Claimant's actual involvement with the LTTE; secondly, what, if anything of this involvement is likely to be contained in the records of the Sri Lankan authorities and, in particular, on the records available at Colombo airport, thereby giving rise to the risk of the Claimant being detained at that airport on his return.

Degree of actual involvement with the LTTE

46. The Claimant contends that his involvement with the LTTE was substantial and thus his profile is higher than recognised by the Defendant. On a scale of involvement from "a full-time fighting member to the informal periodic supply of food" suggested at §235 of *LP*, the Claimant says that his activities were closer to the former. His activities formed an integral part of a key supply route. However, in my judgment, this description overstates the Adjudicator's findings, upon which the Defendant relied in the Decision letters. The Adjudicator found, in paragraphs 28 and 49, that the Claimant was involved with the LTTE, briefly in 1985-86 and then more substantially between 1999 and 2001

and that his involvement was in the transportation of goods and supplies between India and Sri Lanka. There is no reference in the evidence or the findings to the significance or importance of the particular supplies in question nor to the Claimant's particular role in those supplies (save for a single reference to involvement in "smuggling" (but not of arms)). In summary, and on these findings, the Adjudicator found (at paragraph 49) only that the Claimant "undertook some tasks for the LTTE" and then pointed out, by contrast, that he "was never a fighting member of the organisation". In my judgment, the Defendant made no error in assessing the Claimant's level of past involvement with the LTTE.

Record of the Claimant's involvement and detention at Colombo airport

47. The Claimant contends that it is very likely that the Sri Lankan authorities will hold a record of his past involvement with the LTTE and that there is a real risk that that record will cause him to be detained at the airport in Colombo if he is returned to Sri Lanka.

48. As to whether the Claimant's involvement is likely to be on the records, in general, of the Sri Lankan authorities, the Claimant refers to a number of factors: the fact that he was arrested as part of a targeted operation and having been personally identified to the SLA by the EPRLF and the length of his detention (namely 4 months). This was “a longer detention as a result of a targeted operation” and thus “much more significant” (per §236 of *LP* (paragraph 18 above)). In this connection he also relies upon §214 of *LP* (a point addressed further in paragraph 64 below). He also points to the fact (referred to, even if not formally found, in paragraph 15 of the Adjudicator's Determination) that before he was released, the Claimant was "recorded, photographed and fingerprinted". All these factors indicate that his arrest and detention was “formal”.

49. The Defendant, in argument, accepted that there is no express reference in the Decision letters to the formality or length of the detention, nor to §236 of *LP* at all. Nevertheless the Defendant suggests that these are all points which are evident in the Adjudicator's Determination and there is nothing to suggest that the Defendant did not have details of detention in mind. Further and in any event, the Defendant relies on the findings of the Adjudicator that, even if there is a record of his detention, it is likely that it will show that he was released because he was of no further interest to the authorities and that "there is no evidence that he is wanted or on any wanted list". This leads on to the specific question of the likely content of the records held at Colombo airport.

50. As stated above, it is now recognised that, in a case such as the present, the risk of detention *at the airport* is a key issue, and that in turn raises the issue of the nature of the records held by the Sri Lankan authorities, particularly the nature of the computerised records held at Colombo airport. The Defendant places substantial reliance upon *AN and SS* at §§106 and 107 and upon the finding of the Adjudicator in relation to a “wanted list”. The Defendant contends that the approach of the AIT at §107 of *AN and SS* (paragraph 21 above) represents a more detailed analysis of the position as regards computer records than that in *NA* and, to the extent that there is a difference between the two cases, *AN and SS* is to be preferred. Thus, since the Adjudicator found that there was no evidence that the Claimant was on any wanted list, then, applying *AN and SS*, there was no sufficient risk of him being detained at Colombo airport due to his record of detention showing up on the computer checks.

51. On the other hand, the Claimant relies heavily upon *NA* at §145 of the ECtHR's judgment in *NA* (paragraph 22 above) to support the proposition that the class of persons who are at risk of detention at Colombo airport is in fact wider than that indicated by §107 of AN *and SS*; and submits that I should accept the approach in *NA* in preference to that in *AN and SS.* §145 supports the contention that the nature and record of his detention puts the Claimant at substantial risk of being detained upon return at Colombo airport. The Claimant further suggests that the Claimant may have been put on the wanted list as a result of end of ceasefire.

Conclusions on LP factor ii)

52. There is no doubt that there are computerised records and that these are, to a greater or lesser extent, available to enable the authorities at Colombo airport to carry out such checks as considered appropriate. Nevertheless there does seem to me to be, at the least, a difference in approach between that of the AIT in *AN and SS* and that of the ECtHR in *NA.* I have concluded as follows.

53. First, and before turning to the specific issue of §145 *NA* and §107 *AN and SS*, in my judgment, in the Decision letters the Defendant failed to give any or any sufficient consideration (and certainly did not give "anxious scrutiny") to the nature and circumstances of the Claimant's four month detention in 2001 and the likely record of that detention. This is illustrated by the fact that neither Decision letter makes any reference at all to §236 of *LP* and the issue of the length of, and reasons for, the detention. On the issue of the record of that detention, the Claimant rightly points to paragraph 15 of the Adjudicator's Determination which recites the claim that, upon detention, the Claimant here was "recorded photographed and fingerprinted".

54. Secondly, *AN and SS* is neither necessarily comprehensive nor finally authoritative as to what may or may not happen at Colombo airport, either as to the specific issue of computer records or, more importantly, as to the wider overall risk of detention. Although a country guidance case, the AIT did not have before it the benefit of the assessment of the ECtHR in *NA.* For this reason, in *Veerasingam*, Blake J (§28) rejected a submission that he, or a future tribunal, should apply *AN* as a general assessment as opposed to the assessment of the ECtHR in *NA.*

55. Thirdly, *NA* is not just another case decided "on its own facts"; it is a substantial and important judgment from ECtHR and one to which the Defendant was under a duty to give careful consideration. In this regard, as well as failing to refer to §§214 and 236 of LP in either Decision letter, in the November Decision (directed, in terms, towards the effect of *NA*) the Defendant made no reference at all to §145 of *NA. NA* is important both in its general assessment and in its outcome.

56. Fourthly, §145 of *NA* is of central importance to the approach to be adopted where a claimant has been previously detained and a record has been made of that detention and to the risk that such a claimant faces upon return to Colombo airport. In my judgment, the approach to that risk at §145 is wider and more "holistic" than the very specific approach in §107 of *AN and SS* (decided without the benefit of *NA*). At §145, the ECtHR starts by stating that in general "the greatest possible caution" should be taken, where there has been a previous and recorded detention. It then identifies the specific risk arising from the availability of computer records at the airport, but then goes on to make

the further point that, on any given date, the security situation in Sri Lanka might require additional security at the airport (a point also made at §136).

57. Fifthly, I accept the Claimant's submission that his case is not distinguishable on the facts from those upon which the ECtHR's approach in §145 of *NA* is based. Whilst I take account of Sir George Newman's observations in *Sivanesan* at §43 about factual comparisons, the facts of *NA* form an essential part of the ECtHR's general reasoning in §145. The reference, in §145 of *NA*, to the fact that "a record was made of his detention" is not confined to the specific document signed by NA's father (referred to in the second half of §143) but refers equally to the more general statement at §8 (and in the first half of §143), which encompasses the facts that NA was photographed and fingerprinted. (In *Veerasingam* (at §27) Blake J declined to accept that the case of *NA* turned upon the specific fact of the document signed by NA's father.) In the present case (as in *NA*) the details of the Claimant were recorded during his detention and this distinguishes the present case from *Lenin* (where, at §39, Wyn Williams J distinguished *NA* on that basis).

58. Sixthly, §107 of *AN and SS* does not exclude the possibility that the Claimant's record will be available at Colombo airport or that he will be otherwise questioned at the airport. §107 refers only to two classes of past detainees, at different ends of the spectrum. In the present case the Claimant is not merely one of those "*who has ever been questioned about possible knowledge of, or involvement in, the LTTE*" or who was "*once held for questioning years ago and then released*". Rather he is someone who *was* involved in the LTTE, whose specific arrest was targeted for that reason, and who was then subsequently detained for four months and ill-treated. Thus, and as indicated by §236 *LP*, he falls into a narrower class whose risk on return must be greater than this general class identified in §107. In this regard I refer to Blake J's judgment at §26 (see paragraph 26 above). Further, the Adjudicator's finding that there was "no evidence" that the Claimant was on "any wanted list" was made during the period of the ceasefire and does not necessarily rule out the possibility that the Claimant would appear on one of the Lists variously now identified in *LP* and *AN and SS* (where there is also some confusion in the identification of the various lists i.e. "Stop", "Watch", "Watched" and "Wanted"). It is clear, from paragraph 50 of the Adjudicator's Determination, that his view on who was, at that time, "wanted" was based on the fact that under the *then current* cease-fire agreement, past involvement in the LTTE would not of itself have been a reason to be stopped. In any event, for the reasons given at §145 *NA* (paragraph 56 above), not being on any of the "Lists" does not rule out the risk of detention at the airport.

59. Finally, the Defendant submits that the present case is to be distinguished from *Veerasingam*, because in that case there were further factors which are not present in this case: the claimant's brother was also involved as a fighting member of the LTTE; when the claimant left the country, he was in breach of reporting requirements imposed upon him following release; and whilst in detention, he had acted as an informer. However, in my judgment, as explained in paragraphs 25 to 27 above, it is clear that the overriding factor which Blake J considered the Secretary of State not adequately to have taken into account was the fact, duration and circumstances of the three month detention.

60. For these reasons, I find that the Claimant has made out its case for judicial review based on *LP* factor ii) and that the Decision letters failed adequately to take account of the nature, duration and record of the Claimant's detention by the SLA in 2001 and thus

underestimated the risk that that record would cause him to be detained at the airport in Colombo, if he were to be returned to Sri Lanka.

Bail jumping and/or release from custody: LP factor iv)

61. Paragraph 19 of the January Decision recorded the facts that the Claimant does not claim to have ever jumped bail or to have escaped from custody, but rather that the Claimant was released following payment of a bribe. After then citing parts of paragraph 49 of the Adjudicator's Determination, paragraph 19 continued that there is nothing in *LP* to suggest that the Claimant would now be at risk in Sri Lanka. This issue is considered at §§212 to 214 of *LP* (set out at paragraphs 18 above). Whilst paragraph 19 makes no express reference to these paragraphs, I consider that there is no basis for the Defendant deciding that the Claimant falls into the specific "per se" risk category of bail jumpers or escapees identified in §213 of *LP*. (Somewhat inexplicably, §§213 and 214 of *LP are* set out expressly in paragraph 18 of the January Decision under the heading of Criminal Record (factor iv)), even though those paragraphs of *LP* do not address that distinct factor). However the Claimant raises two further arguments under this head.

62. First, the Claimant contends that, according to §212 of *LP*, even where there is release without charge, this does not preclude subsequent detention and that there is a practice of routinely re-arresting and re-detaining people. Thus, it is argued, §214 of *LP* (which states that, with release on payment of a bribe, the risk is low) has to be read in the light of §212. I do not agree. §212 of *LP* itself does no more than record the evidence of Professor Goode concerning the comparative risks of (a) release on bail and (b) release without charge and on payment of a bribe. Rather, it is §213 (together with §214) of *LP* which contains the AIT's own conclusions. The AIT compares those who go to court and have been released on bail (§213, higher risk) with those who do not go to court and may have been released on payment of a bribe (§214, lower risk). Accordingly, §212 does not qualify the analysis in §214.

63. Secondly, the Claimant further contends that in the present case, the fact that the Claimant was released on payment of a bribe does not mean that he falls into the lower risk category in §214, because here the detention was "formal" and not "informal". There is substance in this point. In my judgment, the effect of §214 as a whole is that, even if the bribe securing the release has not been recorded, nevertheless if the detention itself was formal (rather than informal), then it does not follow that the claimant will fall into the lower risk level identified in §214. Whilst, I note that, at one point in §214, informality of detention and unlikelihood of a record of bribe appear to be stated as alternatives, the correct analysis must be that if there is evidence that the detention was formal, then as a matter of logic, the claimant will be at a higher risk than if it had only been informal. Whether the formality of the detention truly falls within this factor or rather is an additional element under factor ii) does not, in my judgment, make any substantial difference. In either event, it is likely to increase the overall risk on return.

Having signed a confession or similar document: LP factor v)

64. In argument, the Claimant relied upon the claimed fact (recorded but not found in paragraph 15 of the Adjudicator's Determination) that, whilst detained, the Claimant had admitted that he had worked for the LTTE. In my judgment, there is no evidence that the Claimant had actually signed a confession and there is nothing inherently wrong in the

Defendant's reasoning at paragraph 20 of the January Decision rejecting this as a factor, based, as it was, on the assumption that the authorities would have no continuing interest. However since I have concluded that, based on factor ii) the Claimant's profile is higher than the Defendant found it to be, it follows that the fact that he did make an admission whilst in detention could be said to add to the significance of the risk upon return.

Having Relatives in the LTTE: LP factor xii)

65. Mr. Fletcher, counsel for the Claimant, also referred to a passage in the Claimant's earlier statement of evidence form in which he stated "I have relatives who were in the LTTE" and sought to contend that this was an additional "per se" risk factor that the Defendant had not taken into account. §222 of *LP* states that this factor "*on its own, without established and credible evidence of the details of the other family members and their known role or involvement with the LTTE, will be of limited weight*". In the present case the Claimant has not provided, either before the Adjudicator, the Defendant or this court, any further detail concerning the nature of the involvement in the LTTE of those relatives. Indeed paragraph 27 of the January Decision expressly leaves this factor out of account, because the Claimant had not claimed "to have any family members in the LTTE". Accordingly, the Decision letters cannot be impugned for failure adequately to address this factor.

Conclusion on Ground (3), the LP Risk Factors

66. In my judgment, and in the light of the conclusions in paragraphs 53 to 60, 63 and 64 (and 41 and 42) above, in the present case, the manner, nature and length of the Claimant's detention and the strong likelihood of there being a record of that detention, when taken together with the existence of scarring, the making of an admission and the background factors, give rise, at the very least, to a realistic prospect of the Claimant establishing before an immigration judge that there is a real risk of him being detained and persecuted or ill-treated upon return to Colombo and the Defendant's conclusion that there was no such realistic prospect was one which no reasonable Secretary of State, anxiously scrutinising both the relevant facts and the relevant case law, could properly have reached.

Ground (1): too much weight to the situation as at 2003
Ground (2): insufficient weight to current conditions in Sri Lanka

67. The Claimant contends that the Defendant's overall position was over-reliant upon findings of the Adjudicator made at a time when the situation in Sri Lanka was different (namely when there was a ceasefire) and that this approach wrongly influenced all the Defendant's findings in the Decision letters. He further contends that the Defendant failed to give sufficient weight to the current state of virtual civil war. In my judgment, these contentions do not materially assist the Claimant's case. The stated purpose of the January Decision was to reconsider the Claimant's position in the light of the then recent country guidance given in *LP*. Moreover, at paragraph 31 of the January Decision, the Defendant expressly took account of the fact that the "situation in Sri Lanka may have deteriorated in recent months" and that "there continue to be incidents of violence between the LTTE and the authorities", and then assessed the effect of that deterioration on the Claimant's case, in the light of the Adjudicator's Determination. The Defendant's

approach contained no error on the basis suggested in these two grounds. Rather the error lay in the assessment of the *LP* factors, in the light of *NA.*

Conclusion

68. For these reasons, I conclude that it was not open to a reasonable Secretary of State, properly applying *LP* and *NA*, and addressing matters with the requisite anxious scrutiny, to have concluded there was no realistic prospect of the Claimant establishing before an immigration judge that there is a real risk of persecution and/or ill-treatment upon his return to Sri Lanka. The Secretary of State's decisions that the Claimant's further representations did not amount to a fresh claim under paragraph 353 of the Immigration Rules were therefore unreasonable. Accordingly I quash the Defendant's decisions of 22 January and 17 November 2008.

69. I will hear further submissions on the need for any further relief, if there is no agreement as to how matters are now to proceed. I propose dealing with this and other consequential matters, including costs, immediately following the handing down of this judgment. In the meantime, I am grateful to both Mr. Fletcher and Mr. Blundell for the assistance they have provided to the Court.