

CO/9855/2012

**Neutral Citation Number: [2012] EWHC 3052 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

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Tuesday, 18 September 2012

**B e f o r e :**

**MR JUSTICE WILKIE**

**Between:**

**THE QUEEN ON THE APPLICATION OF QUBERT  
and others\_**

**Claimant**

v

**SECRETARY OF STATE FOR HOME DEPARTMENT\_**

**Defendant**

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(Official Shorthand Writers to the Court)

**Mr C Jacobs** (instructed by Duncan Lewis) appeared on behalf of the **Claimant**

**Mr C Bourne** (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

**J U D G M E N T**  
(As Approved by the Court)

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1. MR JUSTICE WILKIE: I have before me seven applications for interim relief which have been listed for oral argument because it is convenient to do so as all seven involve the same firm of solicitors instructed by the claimants. An organisation known as Freedom From Torture has applied, in respect of five specific ones of the seven, to intervene.
2. These are, however, by no means the only claims made in respect of the same set of circumstances because in each case in relation to the seven and a significant number of others that are being made in the course of today and no doubt tomorrow, the same decisions are sought to be challenged in judicial review proceedings and the same interim relief is being sought.
3. The decisions sought to be reviewed are decisions to remove each of the individuals to Sri Lanka on a charter flight leaving on 19 September at 3.30 pm. In each case the interim relief sought is to remove the individual from that flight on the basis that, since the Secretary of State took the decision to remove each of the individual claimants, there has come to light significant new material, specifically in the form of a number of reports, but also particularly in the form of a report from Freedom From Torture, dated 13 September, which it is said on behalf of the claimants, makes it clear that there is a sufficient risk that any Tamil being removed from the UK and being returned to Sri Lanka would be at risk of torture.
4. In those circumstances it is said that each of the claimants should be removed from the flight and, indeed, the flight itself should be abandoned pending consideration by a single judge on the papers of the individual claims for judicial review of the decision to remove and, on a different level, consideration by the Secretary of State of the policy of continuing forced returns to Sri Lanka in the light of what is now said to be the risks faced by those returning in those circumstances from the UK.
5. I first have to consider whether to adopt an approach which has, in the course of argument, been described as a generic approach which, in effect, would be to grant the relief sought by the seven individuals, regardless of the individual facts of the case and, by implication, insofar as I were dealing with any of the applications of others, similarly to grant interim relief.
6. In my judgment there is a default position which is that individual cases brought by individual claimants ought to be considered on the merits of each individual claim. It is only in the face of compelling evidence that the court should accede to an invitation to approach the policy of removal to a particular country on a generic basis. It has rightly been pointed out that such an approach is not unprecedented and that the Courts:

"Have been persuaded in the past to take such an approach in respect of returns to other specific countries."

7. It is also pointed out that, in December of last year, this court, Mitting J presiding, was invited, in the context of an earlier report from Freedom From Torture and others, to adopt a generic approach and he very firmly declined to do so.
8. The argument on this issue essentially comes down to a disagreement over what should be read into the report and the organisation which produced it. On the one hand it is argued on behalf of that organisation and the claimants that its terms make it sufficiently clear that the view of Freedom From Torture is that such flights should be suspended pending reconsideration of the policy in the light of what is revealed from that report and the report of other similar organisations.
9. The Secretary of State on the other hand, whilst acknowledging that for the purpose of this exercise the Freedom From Torture report does go wider in describing the categories of person who may be at risk on return to Sri Lanka than is set out in a series of country guidance cases and decisions of the European Court of Human Rights, nonetheless argues that the briefing document does not identify a certain category or categories of person with sufficient precision so that it is not susceptible of being read as a report to the effect that anyone being forcibly returned to Sri Lanka from the United Kingdom is within a category of risk.
10. In judgment, the Secretary of State is right to give due deference to the briefing document of 13 September which is carefully drafted and, to the extent that that organisation thinks it permissible, provides a detailed and comprehensive account of the 24 cases, in three different groups which has informed the view of that organisation. When taken cumulatively with the cases described in its previous documentation. In my judgment, the report is very careful not to say that everyone being returned from the UK to Sri Lanka is at risk, but it describes those who are at risk as being, specifically: Sri Lankan Tamils who in the past had an actual or perceived association at any level with the LTTE, but were able to leave Sri Lanka safely. It is the combination, both of residence in the UK and an actual or perceived association on any level with the LTTE which places individuals at risk of torture and inhuman and degrading treatment in Sri Lanka. That is, in headlines, the conclusion which the report draws in two specific places, at the beginning of the report, page 2, and at page 15.
11. In my judgment, therefore, this report is insufficient as a basis for adopting a generic approach and, therefore, granting claims for interim relief across the board so as effectively to cause this flight to be abandoned. But it does require the individual claims to be looked at on an individual basis in order to see what evidence there is which reveals that any or all of the individuals may fall within that category which puts them at risk.
12. I turn to deal, fairly briefly, with the individual claims. The Secretary of State has effectively conceded one of the them. The case of Qubert, CO/9885/2012, is one where there is a freestanding point, namely, that the chronology of events is such that an asylum claim was refused before 2 October 2000, the date when the Human Rights Act came into force. Accordingly, the very recent claim that removal would infringe, unlawfully, Mr Qubert's human rights, which has been rejected by the Secretary of State, is one which, on the face of it, carries an in-country right of appeal. Therefore a

removal, whilst that is pending, might well be arguably unlawful. In those circumstances I am satisfied that interim relief should be granted deferring that person's removal pending consideration by the single judge on the question of permission on the papers.

13. The case of Vellupillai, CO/9887/2012, is a case in which the grounds of claim, though to a large extent in common form addressing exclusively the impact of the various recent reports and the previous legal authorities which it is said are affected by those reports, does, towards the end of the statement of grounds, go into the background facts. It says -- and these grounds have been settled by counsel -- it says at paragraph 21(4), that when the asylum claim was originally refused and the appeal against that refusal was rejected, nonetheless, the immigration judge at paragraph 23 of the determination of that appeal accepted that the claimant had been detained in 1997 as an LTTE suspect.
14. In my judgment, that finding, as recorded in the grounds, plainly places that claimant within the risk category identified in the Freedom From Torture briefing paper, as a person who in the past had an actual or perceived association at any level with the LTTE. Accordingly, in my judgment, there is sufficient there for the purposes of this application for the interim relief to be granted, deferring removal, pending consideration by a single judge on the papers on the question of permission.
15. It is right to say that, in respect of three of the remaining four cases, the grounds for the claim are very thin. For the most part they limit themselves to setting out, in the briefest of terms, the immigration history.
16. In one of the cases, in the case of Molana(As Heard), case CO/9885/2012, at paragraph 20, the background facts are rehearsed in a little more detail. In particular, it says that that claimant had left Sri Lanka in 2004 and arrived in the UK in 2006, had visited Sri Lanka on four occasions, on the last of which, in October 2010, the claimant says he was tortured and raped by Sri Lankan police. He claimed asylum in the UK. His appeal against that refusal was dismissed. It is recorded that the immigration judge found that the claimant, although a native Tamil speaker, was not an ethnic Tamil.
17. Other than that, there is nothing as to whether or not that individual falls within the category identified in the Freedom From Torture briefing. In those circumstances it is frankly accepted by Miss Jegarajah on his behalf that this is simply a generic case and on that basis I do not grant interim relief.
18. In the case of Kanasatha(As heard), it is accepted that there is nothing in the rehearsal of facts which would place him in the category identified in the Freedom From Torture briefing. Subject to certain matters, to which I will return in a moment, it is accepted that it should be approached as a generic claim. It is right to say that, in the statement of facts, there is a brief history as to when the asylum claim was made, when the decision to refuse was made and when the dismissal of the appeal was made, those are by reference to specific days. On that basis it seems to me that this is not a case where the interim relief sought should be granted at this stage.

19. The same is true of the case of Johnson, number CO/9849/2012. Once again there is nothing more than a rehearsal of the various dates at which decisions were made going back to 1998 when asylum was claimed and refused on 6 October and then an appeal was dismissed on 2 September 1999. Once again, on that basis I do not grant interim relief.
20. The sixth of the cases, which is the case of Nadasen(As Heard) CO/9884/2012: there is, in the grounds, little more than the same rehearsal of the immigration history to which I have referred in other cases. There is, however, in that case certain additional documentation in the form of two medical reports, one of them undated but seemingly dated around about October 2011 from Dr Shah(As heard) at Colnbrook Immigration Detention Centre, I believe he is a GP. Within that report, he takes a personal history from Mr Nadasen, but comes to a conclusion that Mr Nadasen is experiencing psychological distress as a result of multiple traumatic experiences during his imprisonment and torture in Sri Lanka. He meets the criteria for the diagnosis of PTSD.
21. In addition there is a report, dated 4 July, from a mental health lead at G4S where, no doubt, from what Mr Nadasen has said, the following is recorded:

"As a child and growing up he experienced traumatic and cumulative personal events and witnessed and heard about many combat atrocities. He was also in prison for suspected political activities and experienced torture, both physical and sexual, at the hands of the prison guards. As a result of this he has ongoing features post-traumatic stress disorder with co-morbid moderate depressive illness and personality disorder."
22. Whilst it must be accepted that to the extent that those medical reports are recording a history given by Mr Nadasen, there is a risk that it is untrue and self-serving. However, there is a degree of consistency about what he said over a period of months to those who were engaged to examine him from within the detention system and their findings are that his mental state is consistent with his personal history.
23. In my judgment, in that specific context, there is sufficient evidence for me to be sufficiently concerned that Mr Nadasen may fall within the category identified in the Freedom From Torture briefing for it to be right for me to grant him the interim relief sought, deferring his removal pending consideration of permission by a single judge on the papers.
24. In respect of the two claims to which I have referred previously, namely Kanathasan(As Heard) and Johnson, where I refused interim relief, there is before the court a statement from a solicitor at Duncan Lewis Solicitors, in respect of four claims, including those two. It is a very brief statement and simply confirms that brief instructions were taken on the telephone from the claimants in Tamil, all four of whom, including the two to which I have referred, confirmed having a history of having been detained and tortured by the Sri Lanka authorities on suspicion of involvement with the LTTE. That is dated today's date.

25. In my judgment, where what is being sought by the claimant is a significant decision, and where the basis of it, leaving aside the generic argument, is that there has been a new category or a further category of person at risk revealed by the Freedom From Torture report, namely someone who either was or was perceived to have been associated with the LTTE at that level, one would necessarily have expected that issue to have been addressed in the evidence. Indeed, it was, in the case of Vellupillai to which I have referred. In my judgment, that very brief and very late piece of evidence is not a sufficient basis for me to be persuaded to grant interim relief.
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26. However, the position is that the flight does not leave until 3.30 pm tomorrow. In the case of those two individuals the dates of their having applied for and been refused asylum and their appeals having been refused are identified in the statement of grounds, as indeed they were in the immigration history annexed to the removal decision.
27. The Secretary of State has been at pains to point out, in the course of argument, that she would not wish, conscientiously, someone to be removed who in fact fell within a risk category. It is clear that I have accepted, for the purposes of this interim relief, that Freedom From Torture has established such a risk category as I have described and has been described in their report. I observe that it should not be overly onerous, in the period between now and the point of no return in respect of that flight, for the Secretary of State to seek to identify from its records in respect of those dated decisions the extent to which the asylum claims were based on an assertion that either of these individuals did have an actual or perceived association at any level with the LTTE and the extent to which if at all any such assertion was given credence by the Secretary of State, and/or was given credence by the immigration judge when dealing with the appeal. If and to the extent it appears that such an assertion was being made and was given credence, then in those circumstances, just as it was in the case of Vellupillai, the Secretary of State would, in my judgment, given what she has said, have a heavy onus to review the decision and to take any appropriate decision to remove that person from that flight.
28. I indicated in starting this judgment that there were seven cases. I have dealt with six of them. The seventh is the case of Shahnuganathan. It appears from the course of argument that this case is somewhat different, that an Article 8 point has been raised by way of representation on 18 September. The papers, which no doubt have been issued, have not yet percolated through to me. I have indicated in the course of argument that I am not prepared to deal with an application where I do not have any papers and, indeed, where the Secretary of State appears prepared to respond to those representations in time for the immediate judge tomorrow to consider that claim for interim relief. The Secretary of State has indicated that it should be possible for a response to that letter to be produced by 10.00 am or thereabouts. In my judgment, therefore, the matter should be dealt with on the papers by the immediate judge tomorrow in the light of whatever response there may be from the Secretary of State to the representations raised in the Article 8 point. Therefore, I am not dealing with that application for interim relief. It will be dealt with on the papers without the need for the claimant to renew it or to make any further application for an injunction.
29. I think the outcome of that is that I am granting the interim relief in three cases.

30. MR JACOBS: My Lord, yes.
31. MR JUSTICE WILKIE: And refusing it in three.
32. MR JACOBS: I have a submission to make, my Lord, with regard to your judgment. The effect of your judgment is that a risk category has been identified and those who have been able to establish that they fall within that risk category are entitled to relief. In addition to that, those who have not been able to establish the basis upon which their claims remained or dismissed, I am not entitled.
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33. Could I ask that the Secretary of State is directed to locate the determinations and serve those on those who instruct me by 10 o'clock tomorrow morning? Because it may well be that a number of individuals who have not been successful in this application have had findings made in respect of the fact that they were arrested, tortured, but their asylum claims were dismissed because they were not considered to be high enough profile, which of course would change now. While the Secretary of State has said through counsel that she is concerned to return any individual who may face torture, it is within the Secretary of State's power, because OSCU can obtain this information, to satisfy herself and to put before those who instruct me evidence that confirms whether they would, on the basis of your judgment, succeed in an application. It is only because those who have been able to instruct me haven't been able to obtain that information, but we have not been able to meet that threshold.
34. MR JUSTICE WILKIE: Well, first, I am me, and what I am saying is not authority for anything beyond the six cases with which I have dealt. It certainly isn't establishing a new category beyond, for the purposes of the interim relief. I am not going to issue any directions to the Secretary of State, I have noted what the Secretary of State says. Frankly, the onus is on you to produce the material. It has been produced in the cases where Miss Jegarajah seems to have settled the grounds, sufficient at least to enable the court to grapple with what the background facts were, but not in the other cases. Well, that's the way the claimant has chosen to present the case and have I concluded that, as of now there is insufficient material to justify granting the relief sought. But I'm not going to direct the Secretary of State, there's an onus on her. But I have noted what she says and as always expect the Secretary of State to act conscientiously.
35. MR JACOBS: I am grateful my Lord.
36. MISS JEGARAJAH: My Lord, I don't know if it's possible practically to order an expedited transcript so that it's available.
37. MR JUSTICE WILKIE: I think there comes a point at which physical practicalities intervene.
38. MISS JEGARAJAH: It's not going to happen, okay.
39. MR JUSTICE WILKIE: No doubt you have all got a note.
40. MISS JEGARAJAH: No doubt.

41. MR JUSTICE WILKIE: I don't think there are any other orders.
  42. MR JACOBS: These are all legally aided cases. Might I ask for assessments?
  43. MR JUSTICE WILKIE: If it's the appropriate moment. I am not sure whether it is because the claimant continued it. If you want them, I will give you them.
  44. MR JACOBS: If I could have them. If it is not appropriate, then --
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45. MR JUSTICE WILKIE: Yes. Detailed assessment of all six; seventh is still pending.
  46. MR JACOBS: With regard to the seventh case, you have indicated that the Secretary of State is going to produce a response.
  47. MR JUSTICE WILKIE: Yes.
  48. MR JACOBS: In the event of no response coming tomorrow by 11 o'clock, for example, might I ask for an interim order?
  49. MR JUSTICE WILKIE: No because I haven't got the papers and I am simply passing it over to someone else, I am afraid. Right, I think that's all.