Case No: C4/2008/2954

Neutral Citation Number: [2009] EWCA Civ 1435
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR IAN DOVE QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 8th December 2009

Before:

LORD JUSTICE LLOYD
LORD JUSTICE WARD
and
LORD JUSTICE LONGMORE

- -

Between:

THE QUEEN ON THE APPLICATION OF VK

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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

- -

Ms Shivani Jegarajah (instructed by Messrs K Ravi) appeared on behalf of the **Appellant**.
Mr Neil Sheridan (instructed by Treasury Solicitor) appeared on behalf of the **Respondent**.

- -

Judgment

Lord Justice Lloyd:

1. The appellant, VK, appeals against the rejection by Mr Ian Dove QC, sitting as a deputy judge in the Queen's Bench Division, Administrative Court, of his judicial review claim challenging the refusal of the Secretary of State for the Home Department, the respondent, to treat representations made on his behalf in 2006 as a fresh claim to asylum within Rule 353 of the Immigration Rules.

2. The appellant arrived in this country on 11 December 2001, indirectly from Sri Lanka. He claimed asylum, which was refused on 30 January 2002. He appealed and the adjudicator allowed the appeal in a determination published on 18 September 2002. In the course of his determination the adjudicator made a number of findings which were relied on at the present, much later stage in the history, to which I will refer later. The Secretary of State appealed successfully to the Immigration Appeal Tribunal. The appellant then appealed unsuccessfully to the Court of Appeal, his appeal being dismissed on 17 March 2004. However, he remained in the United Kingdom.

3. On 17 July 2006 further representations were made on his behalf by reference to the worsened circumstances in Sri Lanka, arguing that he had a valid new claim to be allowed to remain. Those representations were rejected as not amounting to a fresh claim. Judicial review proceedings were then begun. Permission to apply for judicial review was initially refused on paper and at an oral hearing, but was granted by Keene LJ. That led to an effective hearing of the application before Mr Dove, who gave judgment on 25 November 2008. Very shortly before that hearing a further decision letter had been issued on behalf of the Secretary of State, dated 19 November 2008.

4. I turn to the material history which gave rise to the asylum claim. The appellant was born in 1978. He is a national of Sri Lanka, coming from the Jaffna peninsula and of Tamil ethnicity. He supported the LTTE but mostly only passively. He did some limited work for them when he was obliged to, but in 2001 he decided to move to Colombo in order to avoid further involvement. On the way he was found and arrested by the Sri Lankan army. He was detained and during three weeks of interrogation he was tortured. After that he was set to work by the army in a situation which, although it amounted to detention, was of much more loose security and from this he was able to escape. In this way he was able to get to Colombo, where an uncle of his lived, towards the end of October 2001. At the end of October 2001 his uncle arranged for him to leave Sri Lanka with a view to getting to the United Kingdom. He went first via a country in Africa, then another country (not identified) and ultimately by car and then lorry to the United Kingdom, where he was arrested at the port checkpoint. He claimed asylum, as I have mentioned, and contended at that stage and in 2002 that if he were returned to Sri Lanka he would be shot for having escaped from custody.

5. The hearing of his first appeal against the rejection of his asylum claim was before Mr Kealy as adjudicator on 6 September 2002. Mr Kealy gave a

decision running to some 11 pages explaining why he allowed the appeal. He found the appellant's evidence to be, with one reservation, credible and his account of the events to be by and large true. He accepted the evidence given as regards the appellant's limited involvement with the LTTE and the circumstances in which he was picked up by the army in July 2001 and accepted his account of what happened thereafter, that is to say, both the ill treatment amounting to torture and persecution and then the rather less formal and vigorous detention, from which, he accepted, he had escaped, and he also accepted the rest of his story as I have summarised it.

6. At paragraph 9.8 of his determination Mr Kealy said this:

> "If he is returned to Colombo in October 2002, ignoring for the moment any changes consequent on the current peace process, he will be another young Tamil with a temporary travel document. With that as his only characteristic he could be safely returned. However, he has been in the hands of the army as an LTTE suspect of some kind and has escaped and there is a measurable risk that those facts are recorded and that they will lead to his return to captivity and probable ill treatment. The checks will be made and may well throw up his history, a history which might be enough to get him again tortured. I am not so convinced that the passage of over a year would be enough to save him that I am prepared to take the risk."

7. On the Secretary of State's appeal, which in those days lay on fact and law, the Immigration Appeal Tribunal concluded that the appellant would not be at risk if he were then returned, largely because of the country guidance decision in Jeyachandran [2002] UKIAT 01689, together with later events leading to the reduced degree of conflict and the absence of any evidence that persons who had been returned had been ill treated. The tribunal said that the adjudicator had taken an over-pessimistic view of the likely consequences of return. They said towards the end of paragraph 11 of their decision:

> "It would seem to us that the only difficulty that he might face would arise from the fact of his escape. The adjudicator has taken the view that this escape would be a matter of record and on his return he would be sent back to the army and then ill-treated. We consider that the adjudicator has taken an over pessimistic view of the likely consequences for this Respondent … We consider that if it came to light that he had in fact escaped, and we think that might be very debatable, such a disclosure would not put him at risk. We take the view that there is no reasonable likelihood of him being persecuted or of him having his human rights infringed."

8. The fresh claim made in July 2006 was, as I say, primarily on the grounds of the deterioration of the situation in Sri Lanka. This was met by a first refusal letter of 17 August 2006 in which it was said on behalf of the Secretary of State that, on the basis of the then current situation and in the light of the conclusions of the Immigration Appeal Tribunal, it was not thought that he would be at risk on return. That was followed up by a further letter on 26 September 2006, but that in turn was overtaken, as I have mentioned, by the final letter of 19 November 2008, which was written with the benefit of the law about the approach to a fresh claim set out in WM (DRC) v SSHD [2006] EWCA Civ 1495 and also of the country guidance case LP [2007] UKAIT 00076 about the situation in Sri Lanka, and it also took into account the effect of the decision of the European Court of Human Rights in NA v The United Kingdom (Application 25904/07).

9. It is accepted that the correct legal question was posed in the Secretary of State's latest letter as regards whether the representations amounted to a fresh claim. As regards the factual assessment the letter says this towards the end of paragraph 6:

> "Ultimately the issue is, and always has been, whether there are facts particular to your client's case which indicate that there is a real risk that the authorities will identify him as a member or suspected member of the LTTE of sufficient standing so as to give rise to a real risk of persecution by the authorities"

Going on from that, in general terms, to the circumstances of the appellant in particular, the letter deals with him at paragraph 11, referring to the adjudicator's finding as being that the questioning was routine and that he was not found to be of interest, albeit that he was forced to remain as a useful pair of hands, and despite his escape from the army it was pointed out that it had been held that he would not be at risk in northern Sri Lanka, taken with the passage of time. The letter said:

> "…it is not accepted that there is a real risk that there is a continuing, centralised record of your client's informal detention and escape."

In the light of the country guidance in LP to which I have referred, the letter addressed in particular the escape from custody but came to the conclusion that it was not accepted "that the current country information creates a realistic prospect that your client would succeed in a further appeal".

10. In the Administrative Court the appellant's argument was that the requirement of anxious scrutiny, taken with the adjudicator's finding at paragraph 9.8 which I have read, must show that an immigration judge could now take the view that there was still a real risk of ill treatment in breach of Article 3 if the appellant were returned. The judge rejected that submission and upheld the

reasoning in the latest decision letter, especially that at paragraphs 11 to 13 from which I have taken the relevant passages.

11. Ms Jegarajah, who is now instructed for the appellant, not having appeared below, argues that the starting point for the Immigration Judge on the new appeal would be the decision of the adjudicator on the first appeal taken with, but not in fact relevantly qualified by, the decision of the Immigration Appeal Tribunal on that appeal. She showed us some passages from the Devaseelan guidance (see Devaseelan v SSHD [2003] Imm AR 1) which were upheld by the Court of Appeal in Djebbar v SSHD [2004] EWCA Civ 804. That guidance made it clear that a second determination is to be made on the basis of the facts as they then appear, by reference to the issues then argued, but giving weight to the first determination in a number of respects, in particular in the following first principle set out at paragraph 39 of the Devaseelan case:

> "The first Adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented or whether he gave evidence, are irrelevant to this."

12. The essence of the appeal as presented by Ms Jegarajah is that, given this approach and given the adjudicator's decision as to the material level of risk, it must be at least possible that an immigration judge on a new appeal would come to the same conclusion as Mr Kealy did in 2002. Mr Dove accepted the first adjudicator's decision as being the starting point in his judgment in the Administrative Court at paragraph 20, at any rate as regards findings of primary fact, but he distinguished those from matters of inference, including those dealt with in paragraph 9.8 of the adjudicator's determination. He said at paragraph 22 of his judgment that such matters would require reconsideration on a new appeal in the light of current country guidance. At paragraph 25 he said that:

> "…the factors which are particularly subjective to the claimant in this case do not give rise to a realistic prospect of the appellant's case being determined differently [that is to say, differently from the Secretary of State's decision] were a right of appeal to be granted…"

He rejected at paragraph 26 the criticism that the Secretary of State had failed to apply the proper level of anxious scrutiny in considering the fresh representations.

13. The judge cannot fairly be criticised for not dealing with an argument which was not put to him, and it does seem that the argument presented, as I say, by other counsel below may have been formulated somewhat differently from that which Ms Jegarajah has addressed to us. However, the point is taken

before us, first, that the judge was wrong to disregard any aspect of the first decision as being a relevant starting point for the second decision and, secondly, that he was in any event wrong to discount the prospect that an immigration judge on a new appeal might come to the same conclusion as the adjudicator did, albeit with the benefit of all the current material.

14. Ms Jegarajah, in her admirably clear and succinct submissions, showed us that country guidance decisions in this area proceed on the basis that records kept by the Sri Lankan government go back at least ten years and maybe more. So she submitted that if there was a record of both the detention of the appellant by the army and his escape from that custody in 2001, it would still exist. As to that see paragraph 106 of the country guidance case AN & SS [2008] UKAIT 00063.

15. Mr Sheldon for the Secretary of State, in likewise helpfully well-focussed submissions, relied on paragraph 107 of that decision as regards the scope of the records, but as Ms Jegarajah pointed out that case did not deal with the circumstances of someone who has been in, but has escaped from, custody, a person to whom, contrary to what appears to be the current parlance, I would refer as an (active) "escaper" rather than a (passive) "escapee".

16. Both counsel also showed us the country guidance case LP, to which I have already referred, at paragraphs 213 to 214 forming part of a passage under the heading "Bail jumping and/or escape from custody". In paragraph 214 several different possible circumstances are addressed. Mr Sheldon stressed the third sentence as follows:

> "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"

17. By contrast Ms Jegarajah relied on a passage towards the end of that paragraph as follows, which I pick up in the middle of the sentence:

> " … we consider it illogical to assume that an escapee, from Sri Lankan government detention, or a bail jumper from the Sri Lankan court system, would be merely 'harassed' given the climate of torture with impunity that is repeatedly confirmed as existent in the background material from all sources. We consider (as we think it does in the appellant's particular case), that the totality of the evidence may point to a real risk, in some cases, of persecution or really serious harm when a recorded escapee or bail jumper is discovered, on return to Sri Lanka."

18. By way of illumination of that we were referred (indirectly) to the decision of Collins J in Thangeswarajah [2007] EWHC 3288 (Admin) where he

distinguished between direct risk factors on the one hand and background factors which may add to the significance of a risk factor on the other. Among the direct risk factors, he described bail jumping and escape from custody as "on the face of it highly material". Ms Jegarajah also cited to us Blake J in Veerasingam [2008] EWHC 3044 (Admin). The applicant in that case had been arrested in 1997 with a relatively high level or high profile involvement and with some evidence to support a positive finding of a record of his detention. The judge considered paragraph 107 of AM and said this at paragraph 26:

> "In the absence of any positive evidence that records have been destroyed in anticipation of a peace process, it is not possible to characterise as fanciful or without substance the claimant's case as to his fears."

19. Counsel also showed us the European Court of Human Rights case NA v The United Kingdom (Application 25904/07), in particular paragraph 145 where there was reference to the risks as regards records and checking of records, but that case was in relation to a person who had been arrested six times in the period up to 1997 (rather than more recently) and on the last of those occasions his detention and his identity (with fingerprints) had undoubtedly been recorded: see paragraph 139. Ms Jegarajah rightly emphasised the low level of the threshold which is to be satisfied in the case of a determination of the appellant's circumstances by way of anxious scrutiny. Even if the possibility is only slightly more than fanciful that an immigration judge would find in favour of the appellant, then, she submitted, the representations must be treated as a fresh claim.

20. Here, given the finding of material risk in 2002 as to the facts both of detention and of escape being recorded, thereby bringing the appellant to the attention of the authorities on return with consequent serious risk of persecution, she submitted that it must be open to an Immigration Judge now to come to the same conclusion, and she argued that none of the intervening country guidance cases show that this possibility does not exist. Accordingly she submitted that the judge was wrong in his treatment of the first decision and the country guidance cases.

21. Mr Sheldon drew our attention to the lack of any analysis or apparent objective basis for the adjudicator's inference as to the existence of the record and also referred to the IAT's doubts, although they did not go so far as to say that the adjudicator's inferential findings were wrong. He also pointed to the low level of the appellant's involvement with the LTTE, the informal nature of his detention and the very lax nature of the custody from which he escaped. All of this, he submitted, showed that he would not be seen as of real interest after his initial detention which was done on the basis that he might have been an LTTE infiltrator.

22. Mr Sheldon argued that even if there had been a record, and even if there is still a record, the question is whether that would show that the appellant was

someone of sufficient interest in himself to be picked up and interrogated. He submitted that there was no reason to suppose that that was the case.

23. On a new appeal the Immigration Judge would have to decide whether the appellant would be at risk of persecution if he were returned now. The issue as to whether such an appeal might succeed is to be determined as at 17 November 2008, the date of the Secretary of State's final rejection. Taking the adjudicator's decision as the starting point, an immigration judge would have to accept the findings in paragraphs 9.1 to 9.4 and 9.6 of the adjudicator's decision as to the basic facts and would also start from the point that the adjudicator had considered there to be a measurable risk that a) there would be a record of both detention and escape and b) that the record would be checked and might well reveal the history in which case a sufficient risk was demonstrated that he would be returned to captivity and tortured.

24. As it seems to me, the adjudicator's reference to the passage of time at the end of paragraph 9.8 refers not to the existence of the record but to the likelihood that the record would be checked, or perhaps more likely as to the probable response of the authorities if the record was checked and seen.

25. The Immigration Judge on a new appeal would however have to address the risk as it stands now, not as it was in 2002. There is no finding of fact as to the record, merely an inference as to the risk of there being one. That is important but it is not conclusive. In the light of the subsequent country guidance cases, it seems to me that the most pertinent of the relevant passages is the third sentence of paragraph 214 in LP, which I have read. The detention of the appellant was informal in the sense that it was not pursuant, for example, to any court order, and after the initial three week period was at a relatively low level of custody and of a relaxed nature. I do not in any way wish to underestimate the significance of the first three weeks and the treatment of the appellant by the army in that first period of detention. It is this that makes Article 3 relevant to the case, but the contrast with the following period seems to me to be very striking and suggests that the army did not regard him as someone of serious interest even then. Ms Jegarajah, relying on the latter part of paragraph 214 in LP and other passages, suggested that the relevance of escape from detention did not depend on how formal or informal the detention was; and it is true that the latter part of paragraph 214 does not address in particular, as one of the relatively large number of possible variables, the case of escape from a relatively relaxed and informal detention.

26. But on balance it seems to me that the judge was right in concluding that LP shows that the risk level to the appellant is below that of a real risk. Similarly it seems to me that paragraph 107 of AM casts substantial doubt on whether there is in fact a record of the appellant's detention and escape. It seems to me that if Mr Kealy had been reaching his determination with the benefit of those country guidance cases, he could not properly have drawn the inference that he did as to the existence of a record of the detention and the escape. Nor could he have come to the conclusion that, even if there was any such record, the appellant would be at a material risk of detention and torture on return.

27. For those reasons I prefer the submissions of Mr Sheldon. Despite Ms Jegarajah's powerful advocacy I conclude that the judge was right to reject the judicial review challenge to the Secretary of State's refusal to treat the new representations on behalf of the appellant as a fresh claim under Rule 353, and I would therefore dismiss this appeal.

Lord Justice Longmore:

28. I agree

Lord Justice Ward:

29. And so do I.

Order: Appeal dismissed