

Neutral Citation Number: [2009] EWHC 3095 (Admin)

CO/11184/2008

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

Royal Courts of Justice  
Strand  
London WC2A 2LL

Thursday, 5 November 2009

**B e f o r e :**

**MR JUSTICE SALES**

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**Between:**

**THE QUEEN ON THE APPLICATION OF PRINCELY**

**Claimant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

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**MS S JEGARAJAH** (instructed by **K RAVI**) appeared on behalf of the **Claimant**  
**MR C BANNER** (instructed by **THE TREASURY SOLICITOR**) appeared on behalf of the  
**Defendant**

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**J U D G M E N T**

## 1.1. MR JUSTICE SALES:

- 1.2. 1. This is an application for judicial review against a decision of the Secretary of State set out in a decision letter dated 16 June 2009. That decision was to the effect that the claimant's claim to be protected against deportation to Sri Lanka on grounds of his Convention rights under the Human Rights Act 1998 was to be regarded as clearly unfounded under section 94(2) of the Nationality Immigration and Asylum Act 2002.
- 1.3. 2. The background to the decision is this. The claimant arrived in the United Kingdom at Heathrow airport on 25 February 2001, undocumented, and claimed asylum. He was given temporary admission into the United Kingdom to await the consideration of his asylum application. His asylum application was refused on 27 March 2001. His appeal against the asylum refusal was dismissed on 20 December 2002. His application to appeal to the immigration appeal tribunal was rejected on 14 February 2003. He failed, however, to leave the UK after his asylum refusal and remained here after his temporary admission expired on 12 May 2003.
- 1.4. 3. In February 2004 his solicitors made representations to appeal to the Home Office to withdraw the removal decision. Thereafter, nothing seems to have happened, until on 15 October 2005 the claimant was arrested at Heathrow airport, following his attempt to board a flight to Toronto using a forged Canadian passport. On 17 October 2005, at Hillingdon Magistrates' Court, the claimant was convicted of possession and use of a false instrument. He was sentenced on 18 November 2005 at Isleworth Crown Court to 12 months imprisonment and the court recommended his deportation.
- 1.5. 4. On 28 March 2006, the Secretary of State issued a decision that he proposed to make a deportation order in respect of the claimant. The claimant appealed against that decision to make a deportation order to the Asylum and Immigration Tribunal. On 8 November 2006, the Tribunal promulgated a decision dismissing that appeal. The Tribunal's decision had regard to the earlier determination of the tribunal in its decision of 20 December 2002, when the claimant's earlier appeal had been dismissed. In the decision of December 2002, claims that the claimant made as to a relatively high profile degree of involvement with the LTTE when he had been in Sri Lanka were dismissed on the grounds that the claimant was not found to be credible. However, in that decision the adjudicator found that it was possible that the appellant may have been involved in fighting against the Sri Lankan army on the side of the LTTE. In reaching that conclusion took into account the claimant's detailed answers in respect of the LTTE and recent fighting, as well as scarring on his body.
- 1.6. 5. The Tribunal hearing the second appeal, in November 2006, considered the claimant's claims to have had a greater degree of involvement with the LTTE, but again rejected them. However, the Tribunal did find that he had been a combatant with the LTTE. At paragraph 55 of its decision, the Tribunal said:

"We start from the stand point of the adjudicator's determination and we accept the appellant was a combatant with the LTTE and had received some training ... we do not accept that he ever received more than the basic 3-months training ..."

1.7. 6. The Tribunal rejected the claimant's claim that he had been a member of an elite regiment and his claim that he had been involved in intelligence work for the LTTE.

1.8. 7. At paragraph 64 of its decision, the Tribunal said this:

"As to the position on return at the airport, the current evidence is that the appellant would be questioned about his identity and it would become apparent that he had fought for the LTTE. Membership of the LTTE ceased to be a criminal offence in Sri Lanka with the ceasefire [this was a reference to the ceasefire between Sri Lankan government and LTTE in February 2002]. We have not been taken to any evidence that suggests that the situation has been reserved. The appellant has been out of Sri Lanka for a number of years, there is no satisfactory evidence that he was wanted or that there was a warrant for his arrest prior to his departure. There is nothing to suggest that anyone in the Sri Lankan authorities would know anything about him. We find there is nothing that would cause the appellant to be at real risk of being referred to the CID for prolonged questioning, although we do accept, in view of the objective evidence about the continuing human rights abuses and the impunity with which the Sri Lankan authorities operate, that if that were to happen there is a reasonable likelihood that he would be seriously mistreated."

1.9. 8. On the basis of that finding, and the observation that the claimant was no more than an ordinary combatant for the LTTE, the Tribunal considered that there was no real risk of persecution or ill-treatment of the claimant if he were returned to Sri Lanka.

1.10. 9. On 20 June 2007, the Secretary of State made a final deportation order in respect of the claimant, giving effect to his previous decision that such an order should be made.

1.11. 10. On 25 June 2007, solicitors for the claimant made additional representations on his behalf. On 5 July 2008, further representations on the claimant's behalf were made. It was contended that these representations constituted a fresh claim for protection.

1.12. 11. On 31 October 2008, the Secretary of State issued a decision refusing to revoke the deportation order that had been made against the claimant. The same day, he also issued a decision letter refusing to treat the claimant's latest representations as a fresh claim. The claimant sought to bring judicial review proceedings in respect of the latter decision. On 13 May 2009, Staden J granted permission for that claim. He gave these reasons:

"In my view it is arguable that, in the light of the finding that the claimant had been an LTTE combatant who had received military training, and that on return it would be apparent that he had fought for the LTTE, the defendant erred in failing to hold that he satisfied the test in Thangeswarajah and NA v United Kingdom."

- 1.13. 12. At the end of February 2009, the Court of Appeal in R (BA (Nigeria)) v Secretary of State for the Home Department [2009] EWCA Civ 119 held that a decision to refuse to revoke a deportation order is an immigration decision which carries with it a statutory right of appeal, unless the Secretary of State certifies that a claim inviting the revocation of a decision to deport is clearly unfounded, under section 94(2) of the 2002 Act. Accordingly, in light of that judgment, the Secretary of State revisited his earlier decision in the claimant's case and produced a new decision letter dated 16 June 2009. In that letter he reviewed the claimant's case in detail and concluded that the deportation order should stand and that the claimant's arguments to the contrary constituted a clearly unfounded human rights claim under section 94(2).
- 1.14. 13. The claim for judicial review, as it has been put before me, has proceeded not on the basis of an attempt to seek judicial review of the earlier decision letter of 31 October 2008 (deciding that there was no fresh claim), but as a judicial review of the later decision letter of 16 June 2009 (certifying the claimant's case under section 94(2)). The test in judicial review in respect of a certification under section 94(2) is practically the same, if not slightly more generous to a claimant, than it would be in respect of a judicial review of a decision that no fresh claim had been made. Accordingly, in light of BA (Nigeria), the claimant needs only to succeed in relation to quashing the latest decision in order to obtain what he seeks, namely a right of appeal to the Asylum and Immigration Tribunal on the underlying merits of his case. Therefore, I focus in this judgment on the judicial review in respect of the decision letter of 16 June 2009.
- 1.15. 14. So far as concerns the legal test that I have to apply, it is common ground between the parties that it is as indicated by the House of Lords in ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6 at paragraphs [22]-[23]. The test of whether a claim is clearly unfounded is a black and white test. At paragraph [23] it was observed that where there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed, then it is not clearly unfounded.
- 1.16. 15. In approaching the question whether to certify a claim as clearly unfounded, the Secretary of State and the court have to have regard to the possibility that, on an appeal to the Asylum and Immigration Tribunal, a different conclusion might be reached upon the merits. In R (AK (Sri Lanka)) v Secretary of State for the Home Department [2009] EWCA Civ 447, the Court of Appeal addressed the relevant threshold for the prospect of success which has to be crossed: see in particular paragraphs [33] to [35]. As emphasised there, a case which is clearly unfounded is one with no prospect of success. The question for me, therefore, is whether in light of developments since the Tribunal decision in November 2006 there may be some prospect of success for the claimant.
- 1.17. 16. Since November 2006 there have been a number of developments in the situation in Sri Lanka. It is common ground that in applying the black and white test indicated in ZT (Kosovo) it is appropriate for the court to review all material which is available today. The relevant question is not to be answered solely by reference to the

material available to the Secretary of State as at the date of the decision letter of 16 June 2009.

1.18. 17. There are three matters which I regard as potentially significant which have changed since the decision of the Tribunal in November 2006. First, in December 2006 the Sri Lankan government promulgated a new and tougher set of criminal regulations directed against the LTTE. That is a matter which, in my view, since it tends to change the circumstances for assessment of possible risk to the claimant from those which were identified by the Tribunal in paragraph [64] of its decision, where it called attention to the fact that membership of the LTTE ceased to be a criminal offence in Sri Lanka with the previous ceasefire. The fact that on 6 December 2006 the Sri Lankan government announced the introduction of the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations Number 7, 2006, which had the practical effect of criminalising membership of the LTTE once more, was, in my view, arguably capable of indicating a stricter approach on the part of the Sri Lankan authorities to investigation of persons involved with the LTTE.

1.19. 18. Secondly, there have been two important developments in the case law. First of all, in the case of LP (Sri Lanka) [2007] UK AIT 00076, promulgated in August 2007, the Asylum and Immigration Tribunal gave important guidance as to the assessment of risk for returning Tamils to Sri Lanka. At paragraph [130] the Tribunal recorded that the Secretary of State "acknowledged that during 2005 to 2007 the situation in Sri Lanka has worsened, with violent clashes between the LTTE and the Sri Lankan army, and a number of civilian deaths and disappearances, and significant ceasefire violations". It should be observed that the deterioration identified in that case is one that continued after the Tribunal decision in this case in November 2006.

1.20. 19. The Tribunal in LP gave important guidance as to the assessment of risk to persons being returned to Sri Lanka. In paragraph [235] the Tribunal said this:

"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."

1.21. 20. Two points are of significance derived from that paragraph. First, Miss Jegarajah for the claimant submits that the Tribunal there, in its leading guidance case, sets out a spectrum of involvement where being a full time fighting member of the LTTE is at the more significant end of involvement. I think that is right. Reading the decision in LP, it seems clear that membership of the LTTE on a fighting basis is to be regarded as something of considerable significance. Secondly, reference is made to the extent to which an individual's involvement may be known by the Sri Lankan authorities. In the present case, the Tribunal, at paragraph [64] of its decision of 8

November 2006, specifically found that it was likely that it would become apparent to the Sri Lankan authorities if the claimant was returned there that he had fought for the LTTE, even if only as an ordinary combatant.

1.22. 21. At paragraph [238] of the decision in LP, the Tribunal set out a list of factors relevant to the assessment of risk as follows:

"During the course of the determination we have considered a list of factors which may make a person's return to Sri Lanka a matter which would cause the United Kingdom to be in breach of the Conventions. As in previous country guidance cases, this list is not a checklist nor is it intended to be exhaustive. The factors should be considered both individually and cumulatively. Reference should be made to the earlier parts of this determination where the factors are considered in more detail but for ease of reference they are set out here. There are twelve and they are not in any order of priority:-

- (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) 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;
- (xi) Having made an asylum claim abroad;
- (xii) Having relatives in the LTTE."

1.23. The guidance in LP was, in substance, endorsed by the European Court of Human Rights in NA v United Kingdom, judgment of 17 July 2008. I refer in particular to paragraphs [123] to [137] in that judgment. A number of these risk factors are present in the claimant's case, in particular (i), (ii) and (vii). In light of the guidance in LP, involvement as an LTTE fighter is capable of being regarded as a matter of significance in relation to the risk to the claimant if returned to Sri Lanka.

1.24. 23. The third development since November 2006 is that, after sustained fighting in Sri Lanka, the LTTE was defeated by the Sri Lankan government in May 2009. Since that time there have been a number of government assessments of the situation on the ground in Sri Lanka. I refer in particular to the "Report of Information Gathering Visit to Colombo, Sri Lanka, 23 August to 29 August 2009". UK government officials visited Sri Lanka and asked a range of people for information bearing on the question of treatment of Tamils who might be returned to Sri Lanka. The report included the following observations in the Executive Summary:

"Those with a criminal record or LTTE connections would face additional questioning and may be detained. In general, non-government and international sources agreed that Tamils from the North and East of the country were likely to receive greater scrutiny than others, and that the presence of the factors below would increase the risk that an individual could encounter difficulties with the authorities, including possible detention:

Outstanding arrest warrant;

Criminal record;

Connection with LTTE;

Illegal departure from Sri Lanka;

Involvement with media or NGOs;

Lack of ID cards or other documentation."

1.25. In the context of the full text of the report, "connection with LTTE" would include someone who had fought for the LTTE, albeit as a low level soldier.

1.26. 24. At paragraph 1.12 of the report it is said:

"High profile cases such as those suspected of having involvement with the LTTE would be taken away for further questioning, usually by the police."

Again, this would appear capable of including as a "high profile case" someone who had fought for the LTTE, albeit as a low level soldier.

25. Paragraphs 1.34, 1.36, 1.39, 1.47 and 1.48 of the report stated:

"1.34 The Swiss Embassy representative added that those most likely to be targeted were those suspected of having affiliations with the LTTE and those who might be [internal displaced persons] who had escaped from camps. The usual suspects were young Tamils with ID cards from Jaffna, Vanni etc. ...

1.36 Deputy Solicitor General, Kapila Waidyaratne, stated that someone found to have criminal records or connections with the LTTE would be investigated by CID and TID. However, in his opinion, they would not necessarily be arrested. Someone with a warrant of arrest or who had jumped bail or escaped from detention would be arrested. ...

1.39 The UNHCR protection officer said that 'high profile' cases such as those suspected of having involvement with LTTE would be taken away for further questioning, usually by the police. ...

1.47 The senior intelligence official said that the State Intelligence Service (SIS) would investigate all LTTE cadres and question them.

1.48 The Superintendent Police, Criminal Investigations Department (CID) at Bandaranaike International Airport said that if a person was suspected of being associated with LTTE, SIS would hand them over to the Terrorist Investigation Department (TID). Sometimes they were referred to Colombo Detection Bureau headquarters, or sometimes CID. In such cases a detention order for 90 days could be issued".

1.27. These references again appear capable of including the case of someone who had fought for the LTTE, even as a low level soldier, as a person having connections or affiliations with the LTTE, and potentially also as a "high profile case".

1.28. 26. In my view, these three developments since November 2006, taken together, are sufficient to indicate that the comparatively low threshold indicated by the authorities to which I have referred (in particular AK) is crossed in this case. In my view, it cannot be concluded that there is no prospect that the Asylum and Immigration Tribunal, looking at matters as they stand now, in light of current information which has moved on in these respects since November 2006, would inevitably conclude that the claimant faces no real risk of ill-treatment if returned to Sri Lanka.

1.29. 27. I therefore consider that the case for judicial review of the Secretary of State's decision letter of 16 June 2009 is properly made out and that the certification of the claimant's human rights claim in that letter under section 94(2) of the 2002 Act should be quashed.

**1.30. MS JEGARAJAH:** My Lord, can I ask that the Secretary of State pay our costs, even though we are publicly funded, that the LSC gets reimbursed. Also can I have an order for a detailed cost assessment as well.

**1.31. MR BANNER:** I cannot oppose that.

**1.32. MR JUSTICE SALES:** Very well. The defendant should pay the claimant's costs, public funding assessment is directed as well.

**1.33. MS JEGARAJAH:** My Lord, could I make one slight correction to the judgment: LP was not promulgated on 12 April, that was the date of the hearing. Just a small point, it



was actually promulgated on 8 August 2007 but do you not have that date on the determination.

**1.34. MR JUSTICE SALES:** Right. Thank you, I will look to correct that in the transcript. Very well, thank you to both of you.