

CO/10291/2006

Neutral Citation Number: [2008] EWHC 2836 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 3rd November 2008

B e f o r e:

HIS HONOUR JUDGE MACKIE QC

Between:

THE QUEEN ON THE APPLICATION OF RATNAYAKE

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Frans Khan (instructed by Ellis Taylor) **appeared on behalf of the Claimant**
Parishil Patel (instructed by Treasury Solicitor) **appeared on behalf of the Defendant**

J U D G M E N T
(Approved by the court)

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1. JUDGE MACKIE: By this application, the claimant, Mr Ratnayake, challenges a decision of the Secretary of State dated 2nd December 2006 to certify his asylum and human rights claim as clearly unfounded. He also challenges the updating decision which she issued on 15th October 2008, essentially updating her decision in the light of case law, as it has developed since this matter first arose. The action was brought in December 2006, it was refused on paper by Forbes J in January 2007, but granted, following a hearing by Crane J, in March 2007.
2. The court has been assisted by submissions from Mr Khan for the claimant and Mr Patel for the defendant. I emphasise that both of them had submitted very helpful and detailed written submissions before the case was heard, which is why I have had an opportunity to consider the matter fully, despite the fact that oral submissions were brief.
3. Some of the facts are agreed or not in serious dispute. The claimant is a Sri Lankan. He is 52 years of age. He is Sinhalese not Tamil. He arrived in this country in December 2002. He was detained as an overstayer following an immigration raid on a restaurant. Immediately after his apprehension, he said he would return, but on 17th November 2006, as was his right, he said he wanted to claim asylum and assert his human rights. That claim was refused on 2nd December 2006, hence this application.
4. There are other facts not in dispute, because at this point there is no challenge by the defendant to the credibility of what the claimant says. What the claimant says, in essence, is that he claimed asylum on the basis that he was a member of the JVP between 1978 and 1980, a party that was illegal at the time, and on account of the social problems he has experienced since marrying his wife in 1981, his wife being Tamil, he being Sinhalese.
5. There are two children. One was born in 1982 and the other 1995. He says that ever since his marriage, he and his family have been subject to verbal abuse. This was spasmodic and was not reported to the police, as he considered that he would be treated poorly due to his wife's Tamil ethnicity. After 21 years of abuse, he says, he left Sri Lanka. He had remained living in Colombo with his wife and children, apart from some periods in the Middle East.
6. On his return to Sri Lanka in 2002 he was able to secure work. He says that the events that led eventually to his departure in December 2002 arose on an evening between 20th and 25th August when he was detained by men, who he suspected of acting on behalf of the authorities, and tortured. The same evening he was released and left in a station half a mile from his home. He believes that he was released because the men did not get any information from him. He believes that he was targeted because his wife is a Tamil, her relations would visit his house, and as a result the men might have thought that he was an informant for the LTTE. Neither he, his wife nor her relations have any connections with or have supported the LTTE. The couple separated in 2003.
7. The facts as summarised by Mr Khan for the defendant are put somewhat differently, but they do not alter the picture that much. Mr Khan submits that his client fled his

native land on account of the discrimination, harassment and violence that has been meted out to him and his family on account of the fact that his wife is Tamil, he is Sinhalese and his children are consequently of mixed ethnicity.

8. The family suffered continuous harassment while living in Colombo, even when he was absent in the Middle East. Matters took a turn for the worse in August 2002, when he was abducted and ill-treated. He felt unable to complain to the police and it was that latest act of violence and intimidation which caused the claimant to flee to the UK in December 2002.
9. He says that the reason why he remained for 4 years without claiming asylum in this country was that he instructed a lawyer in 2003 to deal with his problems but the lawyer failed to get on with it.
10. The letters issued by the Secretary of State considered these matters. I will not read out the latest letter of 15th October 2008 at length, but essentially the Secretary of State stated that she had considered his case in line with the AIT's conclusions in recent cases and concluded that the claimant would not be at risk if returned to Sri Lanka. She says that he would not be considered of "any interest to the LTTE or the authorities as, if he were, it is considered that he would have been unable to remain in Colombo in the family home after August 2002 without problems and then leave Sri Lanka from an international airport". She goes on to say:

"15... your client is not considered to be a high profile individual likely to be the object of reprisals. Your client is not Tamil and it is noted that his wife, who is Tamil, and his children remain in Sri Lanka and have not fled as a result of the... abuse... over... twenty years. [It is considered that on] returning to Sri Lanka... your client could return to the family home or, as the option appears to be no longer available as your client separated from his wife in 2003, your client could contact his sisters who also remain in Sri Lanka or he could avail himself of the assistance of the International Organisation for Migration or other NGOs that also offer support. Your client arrived in the United Kingdom using his own passport which he stated to have misplaced when he claimed asylum: your client should be able to get a new National Identity Card in Sri Lanka and if questioned should be able to establish that he has recently come from abroad."

11. The Secretary of State also considers the Article 8 human rights of the claimant. The Secretary of State concludes as follows:

"21... your client has not established a family life in the United Kingdom for the purposes of Article 8 [that is on account of the fact that his wife, children and sisters are in Sri Lanka]...

22. In addition to considering your client's family life, his rights under Article 8 to private life have also been considered."

12. She then goes on to determine that the claimant's private life has been established while he has been in this country unlawfully in the knowledge that he had no right to be here and might be removed at any time. Therefore, it is considered that any interference is necessary and proportionate to the wider interests of the maintenance of an effective immigration policy.
13. What, then, is the legal basis for the defendant's decision and for a challenge to it by the claimant? Section 94 of the 2002 Act provides in effect that a person may not bring an appeal under section 82 against an asylum or human rights claim if the Secretary of State certifies that the claim, or claims, mentioned are clearly unfounded. If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a state in the relevant list, she must certify the claim unless satisfied that it is not clearly unfounded.
14. The "clearly unfounded" test is not in dispute on this application. It is accepted by both sides that the relevant guidance is found in the decisions of the Court of Appeal in **R (ZL and VN) v Secretary of State for the Home Department** [2003] 1 WLR 1230 and of the House of Lords in **R (Yogathas and Thangarasa) v Secretary of State for the Home Department** [2003] 1 AC 920. In **ZL** the Court of Appeal says that it is useful to the start with an ordinary process as follows:

"57... (i) consider the factual substance and detail of the claim, (ii) consider how it stands with the known background data, (iii) consider whether in the round it is capable of belief, (iv) if not, consider whether some part of it is capable of belief, (v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not..."

In order to decide whether they are satisfied that the claim is not clearly unfounded, [the decision-takers] will need to consider the same questions. If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded. If that point is reached, the decision-maker cannot conclude otherwise. He or she will by definition be satisfied that the claim is not clearly unfounded."

15. I bear that in mind, together with the guidance of the House of Lords, which is in the bundle of authorities put before the court. It is useful to draw from **Yogathas** the questions identified by Lord Hope and by Lord Hutton respectively. Lord Hope puts it at paragraph 34 in terms of the question:

"... whether the allegation is so clearly without substance that the appeal would be bound to fail."

And Lord Hutton emphasised that the court should, in deciding whether the Secretary of State has adequately considered and resolved the issue of whether the applicant's claim that his human rights have been breached is manifestly unfounded, have regard to the onus which rests on the applicant to show that there are substantial grounds for

believing that if he were removed from the United Kingdom he would face a real risk that he would be subjected to treatment contrary to Article 3.

16. The other aspect of law which arises is, this being a Sri Lankan case, that there are well-known country guidance cases. Those would bind an Immigration Judge, in the sense that he or she would be obliged to apply that guidance unless it was shown that there was a good reason not to do so, most obviously some change in the facts on which a case was based.
17. The relevant country guidance case law is principally that of **LP (LTTE Area - Tamils - Colombo - Risk?) Sri Lanka** CG [2007] UKAIT 00076, together with that of **AN & SS (Tamils - Colombo - risk?)** CG [2008] UKAIT 0063. **LP** is a 2007 case, but **AN & SS** is a case which was issued as recently as 10th June 2008.
18. I will not rehearse in this judgment all the considerations which are identified in **LP**, because it is an authority that needs to be considered as a whole and at some length, but essentially the AIT concluded that:

"The figures certainly do not indicate a picture of anything beyond a small or remote level of detention and/or maltreatment, risks for the generality of Sri Lankan Tamils in Colombo."

19. The AIT, however, provided a list of factors which are not exhaustive, which have to be considered individually and cumulatively. As is well known, there are 12 of them. Each case must be decided on its own facts:

"It may be that in some credible cases one of these individual risk factors on its own will establish a real risk of persecution or serious harm on return by the Sri Lankan authorities for Sri Lankan Tamils who are failed asylum seekers from the United Kingdom."

I bear all that guidance carefully in mind, in particular the formulation by Collins J in **R v Secretary of State for the Home Department ex parte Nishantban & Ors** [2007] EWHC 3288 case as follows:

"The test therefore, as I see it, is whether there are factors in an individual case, one or more, which might indicate that authorities would regard the individual as someone who may well have been involved with the LTTE in a sufficiently significant fashion to warrant his detention or interrogation. If the interrogation and detention are likely, then, in the context of the approach of the authorities in Sri Lanka, torture would be a real risk and thus a breach of Article 3 might occur."

I also bear in mind all the particular aspects of guidance contained in that and the subsequent cases.

20. It is against that background that Mr Khan makes submissions on behalf of the claimant. What he says is that the Secretary of State has to satisfy herself that, on the facts this case it is clearly unfounded, and not merely conclude that because an

individual comes from a country on the list that the claim is necessarily without merit. The Secretary of State has to satisfy herself on the face of the claim that it is clearly unfounded.

21. He says that when one applies that test, the claimant's fear is clear and should be recognised. It is a fear of persecution and human rights, because he and his family have suffered persecution and racial harassment in the past and would be caught in between the various factions in Sri Lanka because of being an ethnically mixed family. He says, on the face of the claim, it cannot be said to be without merit, given the breakdown of the peace accord between the LTTE and SLA for certain categories of individuals. The claimant contends that, based on the contents of his claim and the objective country information, it cannot be said that the claim is manifestly or clearly unfounded, and the Secretary of State has therefore acted unreasonably.
22. He submits that the Secretary of State does not appear to have considered the objective information on Sri Lanka, which indicates that the security situation has deteriorated to such an extent that international observers state that the hostilities and human rights violations are as severe as they have ever been. So the claimant is at risk on return.
23. In support of that submission, Mr Khan has drawn the court's attention to a number of passages in the Human Rights Watch document issued in the spring of this year, entitled "Recurring Nightmare: State Responsibility for 'Disappearances' and Abductions in Sri Lanka" and he points to a series of passages in that report that show an alarming and distressing situation in certain respects.
24. He submits that, to the extent to which the information contained in that report has been overtaken by the decision of the AIT in the country guidance case **AN & SS**, that case can and should be distinguished as being in a sense obiter. He submits that it applies only to danger from the LTTE, and not to danger from the authorities. However, if one looks more closely at that decision, it is clear that the country guidance applies to both cases of danger. It is also clear, albeit it was not identified until just before I began to give judgment, that on that occasion the AIT had the benefit of the comprehensive material contained in the Human Rights Watch report. So, on analysis, there is really nothing in the suggestion that the Human Rights Watch report would, or could, be a justification for an Immigration Judge departing from the country guidance, otherwise binding (in the sense I have mentioned) on him or her.
25. Mr Khan also submits that the Secretary of State should have had regard to what he calls "the climate of impunity" in Sri Lanka. His client has been picked up before, and may be picked up again. He cannot turn to the authorities. The last time he was picked up, was during a ceasefire. Things will now be worse for him if he is returned.
26. The Secretary of State, through the submissions of Mr Patel, submits that she is entitled and right to maintain the certification. The starting point is that the claimant has to establish that he is at real risk of being persecuted or ill-treated. The Secretary of State submits that there is no indication that the authorities would be interested in the claimant on his return: there is no evidence that he was detained by the authorities; he is not a Tamil (his wife is, but they are separated); he is not, therefore, as a Singhalese

person, likely to be targeted by the authorities, particularly when he has never been connected with the LTTE, given the detailed guidance which one finds in those two cases; there is no evidence that the authorities were ever interested in the claimant's wife; and there is nothing to suggest that the authorities would ever make the link between the claimant and the wife, from whom he is separated.

27. Mr Patel submits that there is sufficient protection available to the claimant from the police, if the claimant sought that help. She discounts what he says about that, and it is pointed out that he would be able to relocate in Sri Lanka to some place where his connection with his wife is not known.
28. Reliance is placed on the fact that, despite having been detained, ostensibly by the authorities, the claimant was able to remain in Colombo, albeit in hiding, for some 3-4 months, and leave Sri Lanka on his own passport, having obtained a valid visa. If that were the case, it seems unlikely that he would now be of interest to the authorities.
29. The Secretary of State also relies upon the country guidance cases and submits that overall the claimant is not someone who, on any legitimate view, could, or should, be seen to be at risk.
30. In my judgment, the allegations made by the claimant are so clearly without legal substance that the appeal would be bound to fail. I say that, borrowing the words of Lord Hope. As has been pointed out, the claimant is not a Tamil; he has been separated for some years from his Tamil wife; there is no evidence of any LTTE connection or involvement; it is not conceivable that an Immigration Judge could find otherwise; he is well able to relocate, should he be returned; and he is not at risk at the airport, if one considers the country guidance cases.
31. I have been taken, both in writing, and briefly in oral submissions, to a mass of material showing persecution of the Tamil community, but the fact remains that none of this is specific to the claimant who, after all, is not himself a Tamil. As I have already pointed out, the able efforts of Mr Khan to undermine the country guidance case do not, and cannot, succeed, bearing in mind that the latest case pays specific regard, both to perils from the authorities, as well as those from the LTTE, and the very document upon which he relies was specifically considered as recently as June in that case.
32. Sri Lankan cases in a variety of categories come before this court. There is an inner ring of cases where most careful consideration has to be given as to whether the claimant or the defendant are to succeed; there is then a series of rings of diminishing degrees of arguability, where it is pretty clear, as one moves outwards, that the claimant or the defendant is going to succeed. The features of this case take it right outside the usual rings of potentially plausible cases that come before the court.
33. I am grateful to Mr Khan for his admirable submissions, and, from a personal point of view, I respect the legitimate concerns and disappointments for the claimant. But the fact is that this claim is utterly hopeless and is bound to fail. It therefore follows that the Secretary of State was acting within her legal powers, and also right to certify it in the way that she did. This claim fails.

34. MR PATEL: My Lord, I ask for the defendant's costs. It follows, I think, from your Lord's judgment.
35. JUDGE MACKIE: It follows, but --
36. MR KHAN: Clearly, my Lord, I cannot resist my friend. This is a privately-funded matter. So it is obviously subject to the normal taxation.
37. JUDGE MACKIE: It is privately funded, is it? Yes, costs.
38. MR PATEL: Thank you, my Lord. Detailed assessment.
39. JUDGE MACKIE: Yes. There are not schedules here, are there?
40. MR PATEL: No, there are not.
41. JUDGE MACKIE: Is there any reason why it is not done on a summary basis?
42. MR PATEL: I think "no" is the answer to that.
43. JUDGE MACKIE: Sometimes it is not realistic, I suppose, to incur the expense of doing it.
44. MR PATEL: My Lord, yes.
45. JUDGE MACKIE: Thank you all very much for your help.