

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 04/03/2010

**Before:**

**HIS HONOUR JUDGE THORNTON QC**

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**Between:**

<b>The queen on the application of</b>	<b><u>Claimant</u></b>
<b>SUSIYENTHIRAN VELLAOKUDDI</b>	
<b>- and -</b>	
<b>SECRETARY OF STATE FOR THE HOME</b>	<b><u>Defendant</u></b>
<b>DEPARTMENT</b>	

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**Ms Charlotte Bayati** (instructed by **S Satha & Co**) for the Claimant  
**Mr Charles Banner** (instructed by **the Treasury Solicitor**) for the Defendant

Hearing date: 4 February 2010  
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**Judgment**

## **Judge Anthony Thornton QC:**

### **Introduction**

1. The claimant, Susiyenthiran Vellokuddi is a Tamil citizen of Sri Lanka who is now aged 38. His relevant history, which was accepted as credible by an Immigration Adjudicator in his decision when dismissing the claimant's original appeal against the refusal of leave to enter, is as follows:
2. The claimant was born in Batticaloa in the East of Sri Lanka. His brother was killed by the army in 1990. Between 1997 and 1999, the claimant assisted the LTTE. On about 7 December 1999, the claimant was arrested and detained by the STF. In detention, he was severely ill-treated and has scars resulting from that ill-treatment. He was subsequently released on 9 February 2000 on condition that he report to the Sangarapuram camp daily. He signed on for four days and then fled from the area. The authorities visited his home shortly after he had left Sri Lanka to find out why he had not signed on. The adjudicator found that if the arrest and detention were recorded, these matters would only have been recorded locally.
3. The adjudicator dismissed his asylum and human rights claims because of his finding that he was not a wanted person and hence, following Country Guidance authority current in February 2004, "a failure to comply with reporting conditions would not entail a continuing interest in the changed circumstances in Sri Lanka".
4. On 7 July 2005 and 3 March 2009, the claimant made further detailed submissions in support of his fresh claim. These relied on the deterioration of the conditions in Sri Lanka with reference to the Country Guidance in **LP** and the ECHR decision in **NA**. The defendant, in a decision dated 30 June 2009, informed the claimant that the further submissions were not to be treated as a fresh claim. The claimant's solicitors responded with detailed further submissions as to why the earlier submissions should be treated as a fresh claim, in a letter dated 8 July 2009 which was responded to and rejected by the defendant in a letter dated 14 August 2009. The claimant issued these judicial review proceedings with grounds dated 5 August 2009. The claimant issued amended grounds dated 13 September 2009 and the defendant served summary grounds of defence on 2 October 2009 which were responded to in a reply document dated 14 October 2009. On 20 November 2009, Dobbs J decided on paper that the application for permission was unarguable for the reasons set out in the summary grounds of defence. The claimant renewed his application for permission in detailed grounds for renewal document dated 30 November 2009.
5. This plethora of documentation provides the basis upon which the claimant's judicial review claim must be considered. In essence, the claimant claims that the decision of the defendant dated 8 July 2009 and 14 August 2009 was *Wednesbury* unreasonable in refusing to treat his further submissions dated 7 July 2005, 3 March 2009 and 8 July 2009 as amounting to a fresh claim within the framework of paragraph 353 of the IR. The reason why it is contended that this decision was unreasonable is that:
  - i) In concluding that the claimant did not have reasonable grounds for fearing persecution if returned to Sri Lanka, the defendant failed to give any, or any sufficient weight to his contention that he reasonably feared that he would be of interest to the Sri Lankan authorities on his return and would be arrested or detained on or soon after his arrival in Sri Lanka. This reasonable fear was based on the matters set out in paragraph 1.

- ii) The defendant, in reaching his decision, and purportedly applying the appropriate test set in Paragraph 353:
  - a) Did not give any, or any sufficient weight to the accepted facts that he was a Tamil from Batticaloa whose brother had been killed by the army, who had assisted the LTTE between 1997 and 1999, who had been detained and ill-treated in 1999 – 2000, who had been released with a requirement for daily reporting, who had absconded and left Sri Lanka in fear and whose family was visited on two subsequent occasions by the authorities who wished to ascertain why he had failed to report;
  - b) Had considered, erroneously, that there was no reasonable prospect of the claimant upsetting the adjudicator's findings that the claimant's detention was only reported locally and that he was not of interest to the authorities; and
  - c) Had misapplied the two most recent and relevant authorities.
- 6. The two recent authorities referred to are the recent decision of the House of Lords in **ZT**, which considered and issued further guidance as to how the defendant and the court in subsequent judicial review proceedings should apply and give effect to Paragraph 353 of the Immigration Rules that relates to fresh claim applications, and **TK**, in which the AIT has issued fresh Country Guidance relating to Sri Lanka.
- 7. In this application for permission, I must do no more than decide:
  - i) Does the claimant have a reasonable prospect of success in showing to the judge deciding the judicial review that the decision of the defendant was Wednesbury unreasonable?
  - ii) In reaching that decision, I must first decide whether I consider that there is a reasonable prospect of the Administrative Court judge hearing the judicial review application deciding that the claimant's asylum claim, as it now stands, has a reasonable prospect of success before an Immigration judge hearing an AIT appeal from an adverse decision of the defendant. This is the anxious scrutiny test that the Administrative Court must apply (see **ZT**).
  - iii) In applying my freshhold scrutiny test to the anxious scrutiny test that the Administrative Court must apply, I must give weight to the relevant findings of the Adjudicator in the 2004 and accept them unless shown to be undermined by the new materials submitted as part of the suggested fresh claim and I must also give appropriate weight to the most recent Country Guidance set out in **TK**.
  - iv) If I conclude that, notwithstanding the defendant's decision and its reasoning and the defendant's grounds and the submissions of the defendant's counsel, I consider that the current claim for asylum on human rights or convention grounds has reasonable prospect of persuading the Administrative Court judge that it has a realistic prospect of success, and hence of persuading that judge that the adverse decision of the defendant is judicially reviewable, I should grant permission.

## Decision

8. This is an application in which the essential issues of fact and risk assessment have become clouded by the enormous number and length of the applications, letters and decisions that the claimant's claim has generated. However, the court was provided with a very helpful, structured, cogent and persuasive submission by Ms Bayati, the claimant's counsel, which identified the core essentials of the claimant's case and the essential criticisms of the defendant's decision rejecting that case as a fresh claim.
9. Ms Bayati's submissions were in summary these:
  - i) Anyone with the factual background set out in paragraph 2 above must reasonably have, in 2010, a continuing fear of persecution and ill-treatment by the current Sri Lankan authorities.
  - ii) This continuing fear can only be assessed by a risk assessment reliant on the guidance of risk factors set out in **TK**.
  - iii) It is not easy to apply the relevant risk factors to the particular facts of this case since they are, inevitably, general and ill-defined. It is therefore necessary to apply them in a manner which any doubts as to the applicability of a particular risk factor should be resolved in favour of the claimant (an aspect of the anxious scrutiny test).
  - iv) The relevant risk factors are those taken from **TK** as follows:
    - (i) **Records.** The current guidance in paragraphs 79 – 85 helpfully identifies general trends with regard to record keeping, accuracy of records and accessibility of records that have been kept centrally, being those accessible to the immigration and entry officials at the airport on arrival. However, there are inevitable uncertainties as to whether the claimant's LTTE involvement in the years prior to 2000, the area of the country in which he lived, worked with the LTTE and was arrested in, his actual arrest, the reasons for his detention and ill-treatment, his being subject to reporting conditions on release, his failure to report and his absconsion, his being the subject of continuing interest to the authorities as evidenced by the two post-absconsion visits by the authorities to his family home and his history including his asylum claims history are such that he remains of interest to the authorities and that interest is still recorded in accessible records.
    - (ii) **Previous record as a suspected or actual LTTE member or supporter.** This risk factor must be evaluated against the **TK guidance** (paragraphs 134 – 135). Note in particular: "for a returnee, a record noting past membership would very likely lead to detention for a period and we continue to think that in relation to persons detained for any significant period, ill-treatment is a real risk."
    - (iii) **Previous criminal record and/or arrest warrant.** This risk factor should be taken into account since the claimant was arrested.
    - (iv) **Jumping bail and/or escape from custody.** This risk factor is particularly present since the claimant both, in effect, jumped bail and was subsequently being searched for by the authorities.
    - (v) **Presence of scarring.** This risk factor is present.

- (ix) **Illegal departure from Sri Lanka.** This risk factor is present and “would now have greater significance.”
  - (x) **Lack of identity card.** This is present but the new guidance is noted.
  - (xi) **Having made an asylum claim abroad.** Insofar as still a risk factor, it is present.
- v) The adverse findings of the Immigration Adjudicator in 2004 concerned with the records that would have been kept and as to the possible interest (or rather the lack of interest) of the authorities in the claimant are no longer of any, or any significant, weight. Events and the Country Guidance on which these findings were based have now moved on several times since 2004 and the claimant’s claim should be risk assessed afresh using the 2009 Country Guidance with, where relevant, the **LP 2007** Country Guidance where this is still relevant after **TK**.
- vi) The new material is purely evaluative but of great significance. When this new material is used to analyse the claimant’s risk, using the analytical approach set out in **ZT**, it can be seen that the defendant’s decision is fatally flawed since it fails to give appropriate weight to the risk factors relevant to the claimant and to the recent guidance provided for in **ZT** (which was not available to the decision-maker), it does not apply the anxious scrutiny requirement correctly, it places too much emphasis and weight on the adverse findings of the Adjudicator and it does not address the difficult questions relating to what record-keeping about the claimant was made and is now accessible, his location of origin within Sri Lanka and to his other risk factors.
- vii) Applying the **ZT** test, the claimant has a realistic prospect of showing that the defendant’s decision would be set aside and of showing that the submissions are a new claim within Paragraph 353 and, insofar as this need be considered at this stage, of showing that the claimant is entitled to a grant of asylum.
10. The defendant, through his counsel, disputes much of the claimant’s submissions. The defendant’s submissions, put forward succinctly by Mr Banner with great force, did not displace my starting point, namely that the claimant has a reasonable prospect of success in the judicial review. Taking the claimant’s submissions in the round and together, I am satisfied that they present a cogent case for a judicial review to take place. The claimant is, therefore entitled to permission to move for judicial review. I do not therefore propose to address the defendant’s submissions, that will be appropriate at the hearing of the review itself. It is for the judge deciding the judicial review claim to evaluate the rival contentions and decide the application.

## **Conclusion**

11. Permission will be granted. The usual directions for the hearing should be given. The case is suitable for a deputy High Court judge. Time estimate 1 day.
12. The parties will be excused attendance at the handing down of this judgment. They are not requested to submit proposed amendments to this judgment. Its contents may be shown to anyone with a legitimate need to know prior to publication.