Appeal No: HX-87236-1998

CB (Detailed Appraisal) Sri Lanka CG [2002] UKIAT 01547...

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 1st May 2002
Date Determination notified:
16-05-2002.....

Before:

Mr C M G Ockelton (Deputy President)
Mr C A N Edinboro
Mr N Kumar JP

Between:

CAIUS FELDON BRINSTON

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant, a citizen of Sri Lanka, appeals, with leave, against the determination of an Adjudicator, Mr P D King, dismissing his appeal against the decision of the Respondent on 8th June 1998 to give directions for his removal as an illegal entrant after refusal of asylum. Before us today he has been represented by Ms P Gandhi, instructed by Ratna & Co, and the Respondent has been represented by Mr Sheikh.

2. As will have been observed from the date of the decision, this appeal has a considerable history. There was a hearing before an Adjudicator soon after the decision. Following an appeal to the Tribunal, the appeal was remitted to be heard by another Adjudicator and it was thus that it came before Mr King as long ago as November 1999. His determination was sent to the parties on 7th February 2000. There was

an application for leave to appeal to the Tribunal and leave was granted in a determination notified to the parties on 29th February 2000. We observe that, despite the fact that it is argued eloquently before us today by Ms Gandhi that the Appellant is indeed a refugee, nothing very much appears to have been done by those who purport to represent him in this matter, Ratna & Co, in the succeeding two years. Indeed, Ratna & Co's preparation for the hearing today was, so far as we can see, extremely limited. A bundle of documents, many of which are old, was submitted late: and Ms Gandhi has told us that she was not provided with a copy either of the Adjudicator's determination or of the grounds of appeal and had to seek them elsewhere hastily in order to make the representations which she has made. The Appellant owes everything to her in terms of what has been said on his behalf in this appeal and, it seems to us, nothing at all to his solicitors.

3. So far as the merits of this appeal are concerned, there are extensive grounds which raise a number of issues. We may say at once we regard the grounds as soundly based on two issues in particular. First, that the Adjudicator erred in relying on the decision of the House of Lords in Adan, in applying the dicta relating to the existence of a civil war and the total breakdown of the governmental control in Somalia in that case to the situation in Sri Lanka in this case. As has now, we think, been satisfactorily established and demonstrated in a number of decisions, the dicta in Adan are intended to apply to cases where there is no operative government in control, not to cases where there is, if we may so put it, merely a civil war.

4. Secondly, the Adjudicator appears, to an extent, to have based his determination partly on the Appellant's evidence that his father was and indeed is a judge in Sri Lanka. The Adjudicator appears to have thought that the father's position would enable him to protect the Appellant. It may be that there was some material upon which some conclusion of the sort could have been based, but we agree with what has been said in the grounds that the Adjudicator relied too heavily on the possibility of the Appellant's father being able to protect him.

5. We turn then to the situation of the Appellant himself. He has claimed that he was arrested by the Sri Lankan authorities on the 10th June 1997 and that he was subsequently released. There was then a warrant, or letter, or summons, issued against him in the following terms:

> "An inquiry is underway against you under the Prevention of Terrorism Act.
>
> By virtue of Section 109(6) Part 16 1979, an order to attend for an inquiry at the Investigation Division on 15-07-1997 at 10.00 hrs, is hereby made by the Controller of the Mannar CID branch.

> We hereby inform you that failure to comply with this will give rise to a right to arrest and punish you."

That was dated the 8th July 1997 and there is a signature which is identified as that of the Controller of the CID branch. Subsequently, it appears, there was a second letter which is dated 19th April 1998 and is in these terms:

> "It is being observed that you have failed to appear at this station in spite of earlier notices.
>
> Your failure to appear at this station on or before 03-05-1998 would entail warrant being taken out for your arrest and detention till completion of inquiries and thereafter if necessary."

That has a signature which is identified as the Headquarters Inspector at the Police Station in Mannar.

One particular point which arises on the first of those documents is this. As we have said, the Appellant's father is a judge and it is, to say the least, surprising that it is said that the Appellant misunderstood the effect of the first document to such an extent that he thought that he was wanted as a terrorist. The Appellant's evidence on this issue was that the document arrived by post to the Appellant's home and that it had come through the proper channels. We say no more than that, given his father's status (not as a provider of protection but as a provider of information) it is surprising that the Appellant should have been so readily mistaken as to the effect of that document. That is not, however, a matter which motivates us to any decision we make about the document.

6. On the documents, the Adjudicator wrote as follows:

> "Given the late service of the documents themselves, it has not been possible for the Home Office to verify those documents. It is left for me to evaluate them within the context of the Appellant's evidence as a whole.
>
> I remind myself that I have to consider the evidence of the Appellant within the context of life in Sri Lanka as demonstrated by the country reports. In that connection I have been handed a great number of such reports and do not repeat all that is set out therein. I indicate that I have considered those passages to which my attention was specifically invited."

The Adjudicator then goes on to consider the evidence before him in some detail. He concludes that that he does not believe the Appellant's account of what happened to him before he left Sri Lanka and he gives reasons for his conclusion, extending over two pages of a closely typed determination. So far as the documents are concerned, he records that he has some reservations about their genuineness and he records also some reasons for his final conclusion on them. He notes that they bore

no stamps of authentication and that they are hand-written on forms. As Ms Gandhi pointed out, there is evidence before us that the normal form of such documents would be hand-written on a typed or written form. It does not appear to us that the Adjudicator was *requiring* any stamp or authentication of the documents. Reading the determination as a whole, it appears to us that the position is that the Adjudicator was taking into account all the evidence, including all his reservations about all of it, and was noting that the hand-written forms did not assist the Appellant in satisfying him because they were documents of a type which had no authentication. The position is that they did not assist the Appellant one way or another, in the Adjudicator's view.

7. Despite the grant of leave, which was in terms which have essentially superseded by the determination of the Tribunal in Tanveer Ahmed and the judgements of the Court of Appeal in Davila-Puga and Zarandy, we have concluded that the Adjudicator dealt with the documents in a manner which cannot be criticised. He looked at them as part of the evidence as a whole. He noted their contents, and the features and their physical features, and the conclusion that they did not assist the Appellant was, in our view, amply open to him.

8. The Adjudicator's conclusion as a whole was that the Appellant's story was not true, but we are content to proceed for the sake of argument to consider what the position would be if the Appellant's story were taken to be the truth. In that case, he is a person who some five years ago was arrested, was released, was the subject of a warrant under the Prevention of Terrorism Act for a purpose as yet unknown and was the subject also of the letter of the 19th April 1998.

9. For these purposes, we also accept, as we must, that the Appellant bears some scars. There is medical evidence which describes the scars. There are scars on the Appellant's arms which are consistent with scratching. They are described in the report as numerous. On his legs there are also numerous de-pigmented scars which are approximately circular and there is another scar which is said to have been the result of a metal-tipped boot being ground into the leg. The author of the medical report indicates that those scars are consistent with the Appellant's account of the treatment that he says he received from the authorities. The Adjudicator's conclusion on the scars was as follows (we remind ourselves that this was in the context of a determination made some years ago and as a result, the Adjudicator cannot be criticised for failing to refer to subsequent judicial authorities on scars):

> "There is clear evidence emerging from the findings of the Tribunal that security forces noticing scarring will detain young Tamils for longer periods and subject them to severe treatment. There is nothing, however, to indicate that the scarring on the body of the Appellant as described would be so

> significant as to cause the authorities to believe that he had been involved in violence or conflict."

Again, it appears to us that that conclusion was amply open to the Adjudicator. He took account of the medical evidence before him: we do not accept any allegation that he did not bear it fully in mind. His conclusion was that whatever be the cause of the scars, their effect would not be such as to raise suspicion as to their origin.

10. The Appellant then might be returned and we assume, for the purposes of this determination, that he might be returned today to Colombo Airport as a rejected asylum seeker, a person with a history that he claims to have, and one detention, the subsequent documents, a person who bears on his body the scars that we have described. He left Sri Lanka on his own passport, or at any rate a passport issued in his own name. Mr Sheikh has submitted that if the Appellant had genuinely been wanted for anything very serious under the Prevention of Terrorism Act he would not have been able to go through Colombo Airport in leaving Sri Lanka by using normal channels and his own passport. Ms Gandhi has pointed out that there do appear to have been some changes in the system of emigration through Colombo in 2000 and that before that time, indeed at the time when the Appellant left Colombo, it would have been much less difficult to do so. We accept her submissions. We also note, however, that the Appellant's passport is said to have been issued in his own name at the time when he was instructing the agent, and that was of course after the time when he thought that he was at risk as a result of the warrant. It follows that although Mr Sheikh's submissions have no operative force with relation to leaving Colombo, it seems to us that an equivalent argument has force in relation to the obtaining of the passport. It is not disputed that the Appellant had a passport of his own, and it seems to us that the fact that he was able to obtain it at the time he did, or rather that a passport in that name was issued by the Sri Lankan authorities at that time, adds some force to Mr Sheikh's submission that the Appellant was never of any real interest to the authorities.

11. If the Appellant is returned today, he is returned to a Sri Lanka which is very different from the country he left. Ms Gandhi reminds us that there have been many cease-fires which have broken down. It does appear to us that the present peace process is operating at a more substantial level than any of which we have heard previously. We accept Mr Sheikh's submission that it would be wrong not to take any account at all in the improvements in the security situation and in the situation for many citizens of Sri Lanka trying to live ordinary lives in their own country. Nevertheless, of course, we bear in mind that there may still be difficulties, the process may break down entirely and we

do not embrace the evidence of improvements without reservation as to the future.

12. There is before us evidence from three sources relating to the return of individuals such as the Appellant to Sri Lanka at the present time. There is a report of a fact-finding mission conducted on behalf of the Respondent in Sri Lanka from 14th to 23rd March 2002. There is also a report of a meeting of that delegation with Michael Lindenbauer, the Senior Protection Officer of UNHCR, in Sri Lanka. There are two letters, of which we think we only need to refer to the more recent from Michael Kingsley-Nyinah, who is the Deputy Representative of the UNHCR in London.

13. Beginning with the report of the fact-finding mission, we think it would be helpful to set out at length part of paragraph 6 of that report which records statements made by the Senior Superintendent of the Criminal Investigation Department in Sri Lanka on 21st March 2002.

> "6.1 The Director explained that if a returnee were not wanted they would not be stopped at the airport. However, when the CID are certain that the individual has committed or been convicted of an offence then they would be stopped. A computer holds the name, address and age of a wanted person. The police purely go on records – scars would not make a difference and the authorities would not make a decision on this basis.
>
> 6.2 We were told that there had been no round-ups of Tamils on Colombo in the last six months.
>
> 6.3 The Director thought that the Human Rights Commission (HRC) was very effective. The HRC are able to visit and make enquiries. Therefore the procedures are open and investigated and the police are not able to do anything untoward.
>
> 6.4 The Prevention of Terrorism Act (PTA) is still in force. The government are seriously considering repealing the Act, and there has been an order not to make any arrests under the PTA, only under common law. [This is part of the text of the cease-fire agreement]. The CID is now allied with the Ministry of the Interior and the Director felt that this was a positive move as the police were now more closely linked to the public.
>
> 6.5 Failure to comply with reporting restrictions would not warrant reporting or recording."

We do not need to set out any more of that document.

14. The record of the meeting of the delegation with Michael Lindenbauer is specifically stated to have been approved by Mr Lindenbauer and that he is content for the contents of it to be disclosed. Paragraph 2 of the note reads as follows:

> "Checks on returnees at the Colombo Airport have been eased with many returned rejected asylum seekers simply being waived [sic] through since December 2001. This is in sharp contrast to what happened previously where basically every returnee was referred to CID and thereafter referred to the magistrate in Negombo in order to carry out relevant checks, where they were necessary. Most returnee cases that underwent this process were released on the same day. Scarring is not seen to be a significant issue, although obvious scarring could draw attention and result in further enquiries and detention by the authorities."

15. The letter from the Deputy Representative of the UNHCR in London is dated 15th April 2002. It specifically indicates that it does not seek to be inconsistent with the position taken by Mr Lindenbauer in the note to which we have referred. The letter continues as follows:

> "Although steps towards peace have been taken in Sri Lanka recently, it is still premature to advocate that the situation has reached a satisfactory level of safety to warrant the return of all unsuccessful asylum applicants to Sri Lanka. In this regard, UNHCR has been aware that returning Tamils are potentially open to risk of serious harm similar to those generally encountered by young male Tamils in certain circumstances. This risk may be triggered by suspicions (on the part of the security forces) founded on various factual elements relating to the individual concerned, including the lack of identity documents, the lack of proper authorisation for residence and travel, the fact that the individual concerned is a young Tamil male from an 'uncleared' area or the fact that the person has close family members who are or have been involved with the LTTE.
>
> In UNHCR's view, the presence of torture related scars on the body of a returnee should be a relevant consideration in assessing likelihood of danger upon the return of Sri Lankan Tamil asylum seekers. Where such scars are related to human rights abuses, they would likely be seen as evidence of the security forces previous interest in the particular individual. This could in turn serve to trigger further adverse attention to that individual. While every case should be assessed on its own merits, UNHCR would reiterate its view that special care should be taken in relation to the return of failed asylum seekers to Sri Lanka."

16. We add two further comments. One is that Ms Gandhi has asked us to say that the statement by Mr Lindenbauer that "*many returned rejected asylum seekers have been waived through since December 2001*" is inconsistent with a passage in a report of a fact-finding mission to Sri Lanka made in July 2001, but avowedly updated to March 2002. At paragraph 6.2.2 and 6.2.3 of that document there is a reference to some returning Sri Lankans being questioned in order to ascertain their identity. However, the report indicates that the CID's view on that was that the system in place was very fast and very transparent. It does not appear to us that there is any conflict between the statement that many returned rejected asylum seekers pass through without difficulty and a statement that some are subject to a pause in order to establish their identity. We do not anticipate that, in the present case, there would or

could be any doubt about the identity of the Appellant. The fact-finding mission of 2001 indicates that one method of ascertaining the identity of returnees is by contacting their relatives and the evidence is that the Appellant's father remains in Sri Lanka and remains a judge. If there were any further difficulty there could, of course, be reference to the records of the issuing of the Appellant's passport.

17. The second factor to which we should refer is Mr Sheikh's submission that we should prefer material deriving from Michael Lindenbauer, who is the Protection Officer on the ground, as it were, in Sri Lanka, to that deriving from the office in London. We see the force of that submission, but it does appear to us that the two documents are specifically said to be compatible and we think that they are. One sets out facts: the other advises caution. We accept the facts and we act with caution.

18. Looking at the evidence as a whole, it appears to us that the Appellant, if returned, would be treated in the way that is indicated by the documents deriving from the United Kingdom delegation in March 2002. His identity is not uncertain. He is likely to be able to pass directly through Colombo Airport. The allegation that he was needed or wanted in connection with some enquiry under the Prevention of Terrorism Act could not now be followed up because of the effective suspension of that Act pending its repeal. There is, in any event, no reason to suppose that since 19th April 1998 the security forces have been interested in him at all (that is, of course, if the documents are taken as genuine and effective). So far as his scars are concerned, we note what the UNHCR continues to say about scars but, from the point of view of this Appellant, the position is that the question of scarring was properly dealt with by the Adjudicator and his conclusion, which we see no reason for displacing, is that the Appellant's scarring is not such as would cause anyone to have particular interest in him as a person who was worthy of further investigation.

19. For those reasons, it appears to us that the Appellant, if returned to Colombo, is not at risk of persecution. This appeal is therefore dismissed.

C M G OCKELTON
DEPUTY PRESIDENT