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Heard at Field House
On 8 July 2002

APPEAL NO CC51653-1999
IS (Risk-Conviction-Fine Paid-Release) Sri Lanka CG [2002] UKIAT 04230

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

.18 September 2002

Before:

PROFESSOR D C JACKSON (CHAIRMAN)
MR C A N EDINBORO

Between

IYATHURAI SHELVARAAJAH

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant, a citizen of Sri Lanka, appeals against the decision of an Adjudicator (Mr L V Waumsley), dismissing his appeal against removal directions following the refusal of an application for asylum. As the decision was taken on 30 May 1999, there is no human rights issue in this appeal.

2. Before us, the Appellant was represented by Mr A Morgan of Counsel, instructed by Theva & Co. Solicitors of London, and the Secretary of State by Mr M Pichamuthu.

3. The case had been in the appellate process for some time. An appeal from a decision was dismissed on 21 September 1999, leave to appeal to the Tribunal being refused. That refusal was quashed by the High Court in a consent order and the Appellant was then granted leave to appeal to the Tribunal on 16 August 2001. By determination notified on 14 November 2001, the appeal was allowed to the extent that the matter was remitted for rehearing. It is from that rehearing that the appeal before us is brought.

The Appellant's Case

4. The Appellant was born on 23 February 1966. He is a Tamil from Jaffna and his case is based on the fear of actions of the authorities in the light of his connections and perceived connections with the LTTE.

5. The Appellant assisted the LTTE from 1987 until 1992 – digging bunkers, putting up posters and transporting food and weapons. In 1988 he was detained by the Indian peacekeeping force on three occasions, questioned and ill-treated during the questioning. He denied any connection with the LTTE and on the three occasions was released without charge. After the Indian force left Sri Lanka, the Appellant's involvement with the LTTE became less.

6. In August 1993 he was sent by his father to Colombo to buy supplies for the family farm. While there, he was taken with others for questioning after a routine security roundup. A hooded informer, whom the Appellant believed to be a man called Jacob from his home village, identified him and two other Tamils as being involved with the LTTE. After ill-treatment he confessed to having assisted the LTTE and he was held in detention for some eleven months. On 27 June 1994 he was convicted by the High Court in Colombo of having assisted the LTTE and sentenced to two years rigorous imprisonment suspended for five years and a fine of 1,000 rupees. On payment of the fine on 15 July 1994 he was released from detention. He returned to his father's farm and, when asked by the LTTE to assist them, refused to do so.

7. In 1995 when the Sri Lankan army launched a major offensive in his home area, the Appellant's family (save for his father) moved to Puthukuddyiruppu. There he started a business selling foodstuffs in partnership with a friend called Maniam from his home village. The Appellant remained in the shop to sell the goods and Maniam travelled to Mannar and Vavuniya to buy stock.

8. No event of significance happened until April 1998. At that time, Mannar was under the control of the Sri Lankan army and Puthukuddyiruppu was still in an area under the control of the LTTE. When Maniam went to Mannar to buy stock he was arrested by members of the security forces and accused of buying supplies for the LTTE. When the Appellant heard of this, he was worried that Maniam might say he was LTTE and might even make up stories to secure his (Maniam's) release.

9. In his witness statement, the Appellant said that Maniam's wife went to see him in Mannar. On return to the village she said that if the Appellant handed himself over to the Sri Lankan army they would release her husband. He felt under pressure and, acting on his father's idea, he fled the country. With the advice and aid of an agent he went by air, ship and road to the United Kingdom.

10. In his asylum interview the Appellant said that Maniam was arrested en route to Mannar, but in his witness statement he said that the army arrested him in a store. Further, in the interview, there was no mention of Maniam's wife and her conversation with the Appellant.

11. In his oral evidence the Appellant confirmed that he did not know what had happened to Maniam or whether the Sri Lankan authorities came looking for him after he left Puthukuddyiruppu in May 1998. He feared that if returned to Sri Lanka he would be questioned by the authorities and ill-treated and might be killed.

The Adjudicator's Approach

12. At the hearing, the Appellant showed the Adjudicator a number of scars which he said were the result of ill-treatment in 1988 and 1993. The written evidence included a medical report concerning the scars and also a "substantial amount of background material".

13. The Adjudicator found the Appellant to be a "reasonably credible witness" and accepted that any failure to remember events was due to the lapse of time rather than any untruth in his evidence. The Adjudicator commented that the period of the suspended sentence had now ended and that the Appellant, on his own evidence, had no knowledge as to what Maniam may have said during the questioning. Further, he did not know whether Maniam had been charged or released and he did not know whether any authorities came looking for him. The Adjudicator concluded that in these aspects of the case the Appellant's evidence amounted to no more than speculation. Further, on the Appellant's own evidence the authorities were prepared to release Maniam if the Appellant reported to them for questioning and, said the Adjudicator, it was clear from this that the authorities' interest in Maniam was minimal. In the light of these factors, the assessment by the Adjudicator was that there was no likelihood that scars would expose the Appellant to persecution and as it was almost four years since Maniam was detained, there was no real risk that the Appellant would be detained and ill-treated.

14. Leave to appeal was granted on the basis that the Adjudicator did not appear to have taken into account the Appellant's background and the implications from the fact that the business with Maniam was being conducted in an LTTE-controlled area, and that interest was expressed in the Appellant after the detention of his partner to a government-controlled area when assessing the present risk of persecution.

15. At the first hearing before a differently constituted Tribunal, the Appellant was granted leave to give further evidence as to Maniam's arrest, the communication of that arrest to him and the effect of it upon him.

The Appellant's Evidence before Us and Its Effect

16. Mr Morgan produced a witness statement which covered the Appellant's story as a whole but agreed that the focus of the evidence before us was to be as directed at the previous Tribunal hearing, the arrest of Maniam. In relation to that arrest, in his statement the Appellant said that the arrest had been in a store and that he (the Appellant) had learnt of the arrest from other shopkeepers from the village. As he had said earlier he was frightened that Maniam would say that he, the Appellant, was LTTE. After the meeting with Maniam's wife he locked up the shop and handed the keys to her.

17. With one exception, other aspects of the statement were consistent with the evidence considered and assessed by the Adjudicator. There is one statement which did not appear at least in the determination and which is directly relevant to the Appellant's case, i.e. that Maniam and he helped the LTTE. They came looking for money and the Appellant remembered one donation of 10,000 rupees. He did not know if Maniam had paid regularly.

18. In response to the questions in examination in chief, the Appellant said that Maniam knew of the Appellant's arrest and imprisonment and his attitude had been very compassionate. As to the meeting with Maniam's wife the Appellant said that it was at her house. When asked whose idea was it for him to go for Maniam to be freed, the Appellant responded that it could have been Maniam's because he was aware of the Appellant's history.

19. In cross-examination, the Appellant confirmed that he did not know of any other donation to the LTTE made by Maniam save that of the 10,000 rupees. Asked if he knew the authorities would be interested in him if he returned, the Appellant replied that, having been captured once, if he was caught again the authorities would be interested and he would be ill-treated. He said that Maniam's wife had told him that Maniam had briefed the authorities and that it was Maniam's wife who wanted him to turn himself in so that her husband could be freed. He said that he had met Maniam's wife at his house.

20. In response to further questioning and references to other evidence, the Appellant said that he did not know whether Maniam was arrested in the store or not, but that Maniam's wife had told him that he was. In his asylum interview he might have said absent mindedly that he was arrested on the way to the store.

21. When asked why the Sri Lankan army would want to trade Maniam for himself, the Appellant replied that the authorities would know of his record because Maniam told them. He had no informed opinion as to why the authorities would trade Maniam for him when Maniam was accused of buying supplies for the LTTE, save that he (the Appellant) was more committed and connected with helping the LTTE. Further,

the authorities may not have released Maniam even if he surrendered. As to the donation of the LTTE, this had not been mentioned before the witness statement because he had not been asked.

22. In reply to further questions from Mr Morgan and the Tribunal, the Appellant said that when Maniam was arrested he had been accompanied by assistants from their shop and they told him of the arrest in the store. He confirmed that the meeting between Maniam and his wife had been at his house.

Objective Evidence before the Tribunal

23. In addition to the evidence before the Adjudicator, the Tribunal had before it (on behalf of the Secretary of State) the CIPU report on Sri Lanka dated April 2002, a supplementary bundle for Sri Lanka containing the Tribunal determination in Brinston [2002] UKIAT 01547, a report on a visit to Sri Lanka by a Home Office delegation and three news items from the BBC concerning the effect of the ceasefire agreed between the LTTE and the Sri Lankan government in February 2002. There was submitted by and on behalf of the Appellant a number of news items also concerning the effect of the ceasefire and the Tribunal decision in Jeychandran [2002] UKIAT 01869.

Submissions

24. Mr Morgan relied on the Adjudicator's determination and his findings of fact. The donation to the LTTE by Maniam was simply due to the need to coexist. As regards Maniam, the evidence focused on Maniam's wife and the other villagers who were present in the shop at his arrest. On his return, the Appellant would be in possession of a travel document which would be an invitation to be investigated, and would be identified and liable to be detained and therefore ill-treated. The Appellant's fear was of his business partner implicating him in order to achieve freedom. It may well be that the authorities were willing to exchange Maniam for the Appellant, thinking the Appellant to be the real terrorist and might well keep him detained longer than his suspended sentence. The Appellant's evidence was consistent and there was nothing there to say that he was a person looking for a story. As to returnability, Mr Morgan pointed to an item in the report of a fact finding mission of the Home Office to Sri Lanka of July 2001 that the Attorney General had pointed out that leaving Sri Lanka without a valid passport was a serious offence and should be investigated. As to the effect of a ceasefire, Mr Morgan relied on the objective evidence he had adduced and the Tribunal decision in Jeychandran showing that its effect was by no means certain.

25. Mr Pichamutu accepted that the Appellant would be identified as having a record, but only as having a spent conviction. He contended that the Appellant could not get his story straight in his evidence before

us and that there was no sense in the suggested exchange of the Appellant for Maniam.

Conclusions

Credibility of the Appellant's Evidence

26. The Adjudicator accepted the Appellant as a credible witness and we have heard evidence going to only part (although a critical part) of that evidence. We see no reason to divert from the Adjudicator's general view on credibility. Although there are discrepancies as to where Maniam was arrested and possibly as to where the Appellant met Maniam's wife, it seems to us that the story has been broadly consistent. Further, as the Adjudicator said, the Appellant was asked to recall events occurring some time ago.

27. We further broadly agree with the Adjudicator as to the conclusions to be drawn from the evidence. However, the Adjudicator said that it was clear from the willingness of the authorities to release Maniam that their interest in Maniam was minimal. That is, in our view, not necessarily so but in any event it may well go to support the Appellant's case, for his case is that they were interested in him and were using Maniam as a way to obtain his own reporting and possible detention.

28. The further evidence added little to the uncertainties which surround the effect of Maniam's arrest on the Appellant. As the Adjudicator accepted the credibility of the Appellant's evidence, it is implicit that he accepted the Appellant's statement that he was in fear of being rearrested. We see no reason to come to a different conclusion and, indeed, looking at the evidence as a whole, it seems to us that that was precisely the reason why the Appellant fled. But, as the Adjudicator said, this was a fear based on the thought of what may happen or may have happened.

29. The inevitable conclusion from the Appellant's evidence, despite one statement before us that Maniam had told the authorities of the Appellant's history, is that the Appellant was acting on the fear that that had occurred and not on any knowledge that it had. There is further uncertainty as to the knowledge of Maniam's wife and as to the source of the idea that the Appellant should go and be exchanged for Maniam. When he was asked by his Counsel whose idea it was for him to go so that Maniam could be freed he replied that it could have been Maniam's. There is no other evidence that the authorities were seeking the Appellant in any exchange and we agree with Mr Pichamuthu that such an exchange was somewhat unlikely, given the circumstances surrounding Maniam's arrest. So we conclude that the fear of the Appellant of implication was based on possibility rather than any hard evidence that he was about to be sought by the authorities, or indeed had been invited by the authorities to put himself in the place of Maniam.

The Returnability of the Appellant

30. We have not ruled out the possibility that the Appellant's fear of rearrest and possible ill-treatment was founded on fact, but the possibility is low on the scale. It is that possibility which we must bear in mind when considering the factual foundation for the Appellant's expressed fear of returning to Sri Lanka in 2002.

31. In considering whether any such fear is well-founded (i.e. there is a serious possibility of the consequences feared), we take into account, first, that the suspended sentence no longer has any impact, second, that the Appellant has been away from Sri Lanka for some four years and, third, the effect of the ceasefire on the circumstances in which a returnee may meet.

The Effect of the Ceasefire

32. As to the effect of the ceasefire, we entirely accept that the situation remains fluid but, on the other hand, there is positive evidence of some change in the reception which a returnee might meet. These circumstances were considered in some detail in the Tribunal's determinations in Brinston (heard on 1 May) and Jeychandran (heard on 21 May). There is no reference to Brinston in Jeychandran, but the two cases adopt a somewhat different approach. The cases should be taken into account because of the attention paid to the evidence relating to the effect of the ceasefire, but we should bear in mind any developments which were not overtly considered in those cases and that their application to any other particular case depends on the facts of that case.

33. In Brinston, the Tribunal was particularly concerned with the consistency and effect of two views of the UNHCR, the first expressed by the Senior Protection Officer in Sri Lanka and other views expressed on other later occasions by the Deputy Representative of the UNHCR in London. The first view emphasises that many rejected asylum seekers are simply "waved through" when they return in contrast to the situation prior to the first ceasefire in December 2001 when "basically every returnee was referred to CID and thereafter to the Magistrate in Colombo". The second view focuses on the remaining risk to young male Tamils founded on various factual elements relating to the individual concerned such as the lack of identity documents, lack of proper authorisation for residence and travel or close family members who have been involved with the LTTE.

34. In Brinston, the Tribunal took the view that the first view was one of fact and the second simply expressed caution. No doubt, because of the facts of the case the Tribunal did not further analyse the two views. We see the two views (as the Brinston Tribunal said) as compatible and taken together as showing that the change in circumstances affects those whose appearance or documentation or record gives no

cause for any further investigation. Where there is any element in the case which triggers the need for investigation, a further view agreed by the representatives before us to be relevant is that expressed to the Home Office delegation in March 2002 by the Director of the Criminal Investigation Department.

35. The Director is recorded as saying that when the CID was certain that the individual had been committed or been convicted of an offence they would be stopped and that the computer holds the name, address and age of a wanted person. As has been said in other cases, the foundation for such a statement must be an initial check and it would indeed be surprising if such a check were not mounted as regular immigration practice.

36. The Tribunal in Jeychandran took a somewhat different line to that of Brinston, emphasising the early stages of the ceasefire but also saying that in the present situation it was only "the exceptional cases that will not be able to return in safety". It seems to us that if one accepts the views of the UNHCR, the question remains as to whether there is an element in the case which would trigger the suspicion as to which the later views of the UNHCR relate.

Conclusion

37. In this case (as Mr Pichamuthu agreed) there seems no doubt that the Appellant would be identified on return as a person who had been convicted. The question, therefore, is whether that would place him in a category which would attract a risk of detention and further ill-treatment. As regards that, we agree with Mr Pichamuthu that as the record would show that the conviction had been spent, of itself that would not create a serious possibility of further investigation to an extent which would render the Appellant liable to ill-treatment. It follows therefore that the case must turn on whether the record combined with the incident as to Maniam creates such a risk.

38. In our view, the evidence relating to the implication of the Appellant through Maniam's arrest and any effect of such an arrest must have diminished greatly over the four years while the Appellant has been away. We have no evidence of the authorities' continued interest in the Appellant, or of any actions taken against or in relation to any members of the family nor of any enquiries made of them or of what has happened (if anything) to the Appellant's business.

39. It is for the Appellant to show that there is a serious possibility of persecution, should he be returned to Sri Lanka. The lack of evidence that the Appellant's concerns which led to his flight were anything but unfounded fears, the four year absence from Sri Lanka and the limited consequences (as we find) of the record of conviction all militate against such a possibility.

40. In our opinion, none of the circumstances of the Appellant's story, whether taken separately or cumulatively, amount to a foundation for a conclusion that such a possibility exists. The appeal is dismissed.

D C Jackson
Chairman