Case No: CO/4576/2007

Neutral Citation Number: [2008] EWHC 3199 (Admin)

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 18 November 2008

BEFORE:

MR JUSTICE PLENDER

BETWEEN:

THE QUEEN ON THE APPLICATION OF ANPALAGAN

Applicant/
Claimant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/
Defendant

MR N PARAMJORTHY (instructed by S.Satha & Co) appeared on behalf of the Applicant.

MISS K SMITH (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Judgment

(As Approved by the Court)

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Mr Justice Plender:

1. This application for judicial review requires consideration of paragraph 353 of the Statement of Changes in Immigration Rules HC 359 as amended by the Statement of Changes in Immigration Rules HC 1116. That paragraph as so amended provides as follows:

> "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material which has previously been considered. The submissions will only be significantly different if the content:
>
> had not already been considered; and
> taken together with the previously considered material, created a reasonable prospect of success, notwithstanding its rejection."

2. The focus of the present proceedings is upon the final two sentences of that paragraph. I am required to determine whether fresh submissions raise matters which have already been considered or which, taken together with the previously considered material, create a reasonable prospect of success.

3. The essential facts of the case are as follows. The applicant is a Tamil citizen of Sri Lanka born in that island on 21 March 1981. He arrived in the United Kingdom on 14 June 2002 when he was just 21 years old. He claimed asylum on arrival and was granted temporary admission to the United Kingdom. On 22 March 2003 the Secretary of State for the Home Department refused the applicant's application for asylum. He appealed against the Secretary of State's decision, citing Article 3 of the European Convention on Human Rights. An adjudicator dismissed his appeal on 23 July 2003. Permission to appeal to the Immigration Appeal Tribunal was refused three months later.

4. In July 2005 the Secretary of State lost contact with the applicant when he ceased to comply with his weekly reporting conditions. However, on 15 March 2006 he applied for a residence card as a dependent of a national of a member state of the European Economic Area. The Secretary of State for the Home Department refused his application for an EEA residence card. The Immigration Judge dismissed his appeal against the Secretary of State's decision on 8 December 2006. He was detained on 27 May 2007.

5. He submitted a fresh claim based on the changed situation in Sri Lanka on 30 May 2007. The Secretary of State refused that fresh claim and set

removal directions for 18 June 2007. He was, however, released from detention six days before that date to allow for consideration of an application for judicial review. The Secretary of State then issued a supplementary decision letter following further review of his case. That was on 2 August 2007. On 5 October 2007 Lloyd J granted the claimant, as he was then called, permission to apply for a judicial review of the decision of 2 August 2007.

6. By letter dated 29 April 2008 solicitors acting for the claimant wrote to the Secretary of State a letter, referring in particular to the country guidance case LP (LTTE area -- Tamils -- Colombo -- risk?) Sri Lanka CG [2007] UKIAT 00076. It is this application for judicial review which I have to consider in the present proceedings.

7. By the application for judicial review the claimant contends that the Secretary of State has acted irrationally by finding that the claimant does not fall within certain categories of risk within the case of LP (Sri Lanka) at paragraph 238. The categories of risk there identified are:
(1) Tamil ethnicity. There is no doubt that the present claimant is a Tamil and is of Tamil ethnicity.

(2) His previous record as a suspected or actual LTTE supporter. Here the claimant relies upon his account of being arrested in February 2001.

(3) Presence of scarring. The claimant, it is said, has extensive scarring although I have not seen it from the bench in the court, nor have I asked to inspect it.

Next it is said that he has returned from London or another centre of LTTE activity and has no identity documents and then it is also said he has made a claim for asylum abroad. By letter dated 29 September 2008 the Secretary of State referred to the Court of Appeal judgment in WM (DRC) v SSHD and SSHD v AR (Afghanistan) [2006] EWCA Civ 1495. The Secretary of State deduced from those judgments that it is her duty to give anxious scrutiny to the question whether further submissions would create a realistic prospect of success before an immigration judge. First, she said the Secretary of State had to consider whether the material submitted is significantly different from that which has already been considered and upon the basis of which the asylum claim had failed; the point whether the content of the material has already been considered. Second, if the material is significantly different the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. In other words the Secretary of State will ask herself whether there is a realistic prospect of an immigration judge applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return. That summary of the law appears to me to be correct, and indeed much of it is a recitation of the language of paragraph 353 of the Immigration Rules with which I began this judgment.

8. In the letter of 29 April the Secretary of State then went on to consider separately the fresh evidence (she put that term in inverted commas) on which the claimant relies, namely the report of Professor Good of April 2006, the letters from the British High Commission dated September 2005, February 2006 and August 2006, a news report in *Veerakesary* of 11 September 2006, recent news reports, family photographs of the applicant and his sister, a fact-finding report from the Home Office and the Central Office of Information of September 2005, a report of the United Nations High Commissioner for Refugees dated December 2005 and a report of the Immigration and Refugee Board of Canada dated 22 September 2006, together with the Country Guidance in the determination of the LP (Sri Lanka) case to which I have referred earlier.

9. The Secretary of State set out the risk factors listed in LP (Sri Lanka) and added that although these had been set out by way of a list, they varied in significance quite considerably. Then, in the letter, the Secretary of State considered separately under headings the risk factors of Tamil ethnicity, previous record as a suspected or actual LTTE member, bail-jumping or escape from custody, presence of scarring, return from London or another LTTE centre after fundraising, illegal departure from Sri Lanka, lack of identity card, having made an asylum application abroad, and general evidence of (inaudible) in Sri Lanka. The other headings of the letter included fear of the LTTE, internal flight and state protection, and Article 8 of the European Convention on Human Rights.

10. In response, solicitors for the claimant wrote their letter of 30 May already mentioned in this judgment, with which they enclosed the report of Professor Good, letters from the High Commission, a news report from *Veerakesary*, recent reports relating to the general situation in Sri Lanka, particularly in the north and in Colombo, and they identified a number of risk factors which they said were relevant to the claimant's case. First they said his sister joined the LTTE in 1995 and rose to a considerably high rank. There were enclosed with the letter photographs showing her in LTTE uniform and showing that the claimant was with her, from which it was to be inferred that he is her brother. Second, they identified as a risk factor the arrest and detention of the claimant at a time when he was severely tortured, say the instructing solicitors, and he has scarring as a result. Thirdly, the solicitors say that it had been found by an adjudicator that, even if the claimant was involved in the LTTE, he would not be at risk from the authorities because of changes and improvements in the objective situation in Sri Lanka. By way of response the solicitors say that the fact-finding report of the Home Office shows otherwise. It shows further that records in Sri Lanka are centralised and computerised in the south and the north and there would therefore, say the instructing solicitors, be a record of the claimant's detention, details of his irregular release and records relating to his sister's link. The solicitors also refer to the COIS report of September 2005, confirming details of all returnees are forwarded to the immigration authorities in Sri Lanka who pass them on to the CIT (?), and they also refer to the COIS report of September 2005 confirming that the UNHCR's position in relation to scarring is that Sri Lankans are at risk of adverse treatment if they have scars.

11. The case for the Secretary of State has been put to me this morning by Ms Kassie Smith of junior counsel who contends as follows. Firstly, as regards Tamil ethnicity, the Secretary of State had said in her letter of 29 April, in the final sentence of paragraph 18, that ethnicity of a Tamil is a relevant consideration which needs to be taken into account in considering other risk factors. Indeed I do not understand this point to be seriously in dispute. It is a point that I put expressly to Nishan Paramjorthy for the claimant, from whom I understood the claimant's contention to be that Tamil ethnicity is indeed a relevant consideration which needs to be taken into account with others cumulatively, but it is not a factor which is liable to give rise to a well-founded fear of persecution when taken alone.

12. Turning to the applicant's background as a suspected LTTE member, Miss Smith referred me to paragraphs 20 to 26 of the letter of 29 April, which is organised under the heading "Previous record as a suspected or actual LTTE member". There the Secretary of State points out that the Tribunal had held:

> "from our assessment of the background evidence, we find that it is of vital importance in the assessment of each Sri Lankan Tamil case, to establish an applicant's profile, and the credibility of his background in some depth"

13. The Tribunal said that, in her determination of 23 July (as is the case), the Adjudicator had held that there was:

> "considerable doubt in my mind about the credibility of the Appellant's account."

The Adjudicator did not accept that there was a real risk that the authorities had any record of the claimant is being a suspected LTTE member. However, assuming in the claimant's favour that there was such record, the Secretary of State concluded as follows, in paragraph 26 of her letter:

> "Considering your client's evidence as to his minimal involvement with the LTTE 6-7 years ago, coupled with the absence of any evidence suggesting that the authorities would have a record of your client, the Secretary of State did not consider that there was a realistic prospect of an Immigration Judge so concluding that this factor applies to your client."

Those words, though appearing in the Secretary of State's letter, appear to be a quotation from the Adjudicator.

14. It is perhaps in the light of that wording that particular importance has been attached to this case by Mr Paramjorthy to "new objective evidence", as he says it is, of a database which is liable to connect the applicant to his activities in Sri Lanka if he were returned there. The question of the records available in Sri Lanka has been considered by the authorities on several occasions, first

and notably by the United Kingdom's authorities in the case of AN & SS Sri Lanka CG [2008] UKAIT 00063. I refer to a determination by Senior Immigration Judge Gleeson and others in the Asylum and Immigration Tribunal. At paragraphs 106 to 107 of that determination, the Tribunal states as follows:

> "The background evidence clearly supports the existence of a centralized national database accessible by the security services. The National Intelligence Bureau is said to have records going back ten years or even longer, and to have had a central database since 2004. Although there is a lack of computer facilities in the north of the island, paper records are sent south and are transferred onto the computer database. The question for us then is not whether, as in the case of the LTTE, the database exists at all, but who would be on the database… We think it intrinsically unlikely that everyone who has ever been detained by the authorities in the course of the Sri Lankan conflict, or at least in the last 10-15 years, is now on a computer database which is checked by the Immigration Service when failed asylum seekers arrive at the airport, and is checked by the police or army when people are picked up at road-blocks or in cordon-and-search operations.

15. The second relevant judicial consideration of the question of availability of records is in the judgment of the European Court of Human Rights in the case of NA v the UK Application 25904/07 of 17 July 2008. At paragraph 136 of that judgment:

> "The Court notes the AIT's finding, in light of that evidence, that 'failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment' (see paragraph 44 above) but it considers that at the very least the Sri Lankan authorities have the technological means and procedures in place to identify at the airport failed asylum seekers and those who are wanted by the authorities. The Court further finds that it is a logical inference from these findings that the rigour of the checks at the airport is capable of varying from time to time, depending on the security concerns of the authorities. These considerations must inform the Court's assessment of the risk to the applicant."

At paragraph 143 of its judgment the court concluded that the applicant in that case, who was arrested and detained by the Sri Lankan authorities six times,

photographed and fingerprinted, can rely upon the records as a risk factor particularly because his claim was found credible on this point.

16. The result of examination of this case-law, as might perhaps be expected, is less than fully conclusive. We cannot know what information is contained in the records that are kept by the Sri Lankan authorities and I doubt that the Sri Lankan authorities would welcome inquiries into the records that are kept. Accordingly an assessment must be made as to whether it is a realistic possibility that any records that do exist of the claimant will be such as to expose him to a risk of ill-treatment if he is returned to Sri Lanka. To that question, Miss Smith urges me to say that the answer is that there is no such realistic risk. Here, she says, is a young man who departed from Sri Lanka some six years ago. There is no dispute but that his sister worked for and fought for the LTTE; there is no dispute but that she was injured in the course of that work. It has been determined by an adjudicator that thereafter she engaged in work of a low level. Whether low level means that her work was not of primary importance or merely that, following her injury, she was not able to engage in a significant degree of work remains a point of ambiguity, but, whatever it may be, the Secretary of State submits through counsel that the applicant has failed to show that there is even a realistic possibility of exposure to a risk of persecution by reason either of his relationship to his sister or his own experience in Sri Lanka all those years ago. I cannot conclude that this is an irrational view to take. Whether it is a view that others would take is a matter beyond the proper ambit of a judicial review inquiry

17. It is next said on behalf of the claimant that he will be at risk because of his scarring. Indeed it is submitted that the Secretary of State has dealt irrationally with his claim to be at risk on account of scarring. The Secretary of State did deal with this matter in her letter of 29 April at paragraphs 35 to 48. Quoting LP (Sri Lanka) the Secretary of State said that the scarring issue should be one that only has significance when in conjunction with other factors which would place an applicant in a position of attracting attention, either at the airport or subsequently in Colombo."

18. She says that the applicant's scarring is not visible, and concludes at paragraph 38 as follows:

> "It is therefore considered that, even if your client's scarring were visible to the authorities, this fact alone would not place him at risk".

It is not a factor which independently would cause him difficulties but, as I read the Secretary of State's determination, it is a factor which, when taken into account with others, is capable of producing the cumulative effect of showing that an individual is at risk. That also, I find, is not even arguably an irrational view.

19. Next it is said on behalf of the claimant that he would be at risk because he no longer has an identity card. This matter is expressly addressed at paragraph 43 of the Secretary of State's letter of 29 April. Moreover it is an issue which

was addressed at paragraph 112 of AN and SS. Here the Asylum and Immigration Tribunal poses the following question :

> "What has to be done in order to procure a new National Identity Card in Colombo? The evidence is conflicting, but the item most recently brought to our attention indicates that the Department for the Registration of Persons will issue one to an applicant who produces a birth certificate, even a photocopied one. Registration of births has long been routine in Sri Lanka, unlike other parts of South Asia, and if one's birth has been registered, one should be able to obtain a copy of one's birth certificate in Colombo. If there is no record of one's birth, then one has to ask the headman of one's native village to confirm one's identity, although there is the alternative of bribing an employee at the Registry to issue an 'official' birth certificate, or of buying a forged certificate. If all else fails, the UNHCR will issue an identity document."

I conclude that, even as an item to be taken in conjunction with others so as to establish a risk of persecution, a lack of identity card is a point which, to put matters at the highest, carries little weight.

20. Finally the applicant relies upon the fact that he has a relation in the LTTE and alleges that the Secretary of State had failed properly to consider the risk arising from being the brother of a woman who is a member of the LTTE. This was a factor considered at paragraph 46 to 49 of the decision letter. As I have stated earlier the applicant's sister did indeed work and fight for the LTTE, was injured and engaged in what has been described by an adjudicator as low-level work. The Adjudicator concluded:

> "I do not find that the appellant presents any particular fact or factors which would draw him to the attention of the authorities".

That is a statement which I read as relating to the cumulative effect of the various factors on which the instructing solicitors for the claimant rely.

21. For these reasons I am unable to accept either that the decision taken in respect of this applicant was irrational or that the conditions prescribed by paragraph 353 of the Immigration Rules are satisfied in the present case, and I dismiss this application.

Order: Application refused