

Neutral Citation Number: [2008] EWHC 3044 (Admin)

Case No: CO/134/07

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2008

Before :

THE HON. MR JUSTICE BLAKE

Between :

Veerasingam

Claimant

- and -

SSHD

Defendant

Upali Cooray (instructed by **Lawrence and Co**) for the **Claimant**
Robert Kellar (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 1 December 2008

Judgment

The Hon Mr. Justice Blake :

1. This is an application for judicial review challenging a sequence of decisions made by the defendant between 4th January 2007 and the 31st October 2008 all of which conclude that fresh representations made on behalf of the claimant did not amount to a fresh application for asylum within the meaning of paragraph 353 of the Immigration Rules HC 395.
2. The claimant is a Sri Lankan Tamil originating from the north of that island who arrived in the United Kingdom on the 31st October 1998 and claimed asylum here.
3. The claimant's claim was refused by the Secretary of State in February 2005 and an appeal to the immigration judge was dismissed on the 8th June 2005. Further reference will be made to the factual basis of the claim as recorded in the claimant's witness statements and the immigration judge's adjudication. It should be noted however at the time of both the Secretary of State's and the immigration judge's determinations there was optimism that the scale of violence that has long plagued Sri Lanka as a result of the conflict between the LTTE and the Sri Lankan government was diminishing as a result of the peace process then in train. It is common ground that the peace process eroded and broke down and the position since 2007 is very different from the state of affairs that prevailed in 2005. It would appear that matters have continued to deteriorate.
4. The Secretary of State rejected the representations as amounting to a fresh claim in January 2007. That then led to an application for judicial review being lodged. That application was refused after an oral hearing by Mr Justice Crane on the 12th March 2007. The claimant thereafter appealed to the Court of Appeal and obtained permission to apply for judicial review following an oral hearing on the 16th August 2007. At this hearing the claimant relied upon new material in particular the Country Guidance Case of the AIT in the case of *LP (Sri Lanka)* [2007] UK AIT 00076, a judgment delivered on the 8th August 2007. The claimant also relied on reports of the well known expert on Sri Lankan Tamil affairs, Professor Goode whose reports on this case were dated the 12th April 2006 and the 20th March 2007.
5. Following the grant of permission the basis of the application for judicial review was amended. Further representations were made and this led to the substantive refusal of the application on the 24th October 2007 and a very recent further refusal dated the 31st October 2008.
6. To complete the chronology of relevant events it can be pointed out that the AIT gave a further country guidelines case in the case of *AN and SS (Tamils-Colombo-Risk?) Sri Lanka CG* [2008] UKAIT 00063, a case where the hearing was conducted in February 2008 but the judgment was drawn up on the 10th June 2008. Although there is reference in the head note of that decision to a recent decision of the European Court of Human Rights in the case of *NA v United Kingdom* it would appear that that headnote was inserted later because the decision of the Strasbourg Court was delivered on the 17th July 2008 and the text made final on the 6th August 2008. There is no reference in the body of the

AIT decision to the Strasbourg decision where the European Court concluded that removal of a young male Tamil who had been a failed asylum seeker to Sri Lanka would constitute a violation of Article 3 of the European Convention on Human Rights. Further reference will be made to that case in due course.

7. The test for whether fresh representations do indeed amount to a new claim is well known and has been stated in the case of *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA 1495. In essence there must be an assessment first of whether there is a change of circumstances by reason of fresh material that was not before the original determining body and secondly whether there is a realistic prospect of success if the claim were to be ventilated on further appeal before an immigration judge. Those are questions for the Secretary of State to ask and the decision is reviewed by this court in appropriate cases applying the principles of anxious scrutiny and recognising that the test for establishing a fresh claim is a somewhat modest one. It is not whether the Secretary of State considers that the claimant is entitled to refugee status but whether the case as now advanced presents a realistic prospect of success in front of an adjudicator, success being defined in terms of the Refugee Convention as whether there is a real risk of Convention persecution if the claimant is returned to the place where it is proposed he be sent. So, in essence, the question for the Secretary of State which is anxiously scrutinised by this court on judicial review is whether there is a realistic prospect of a real risk of Convention persecution being established before the appellate authorities.
8. The starting point must be the factual foundation of the case as assessed by the original immigration judge in 2005. He said this at paragraph 22-25 of his decision:

“22. I am prepared to accept the majority of the appellant’s account of what happened to him in the past in Sri Lanka. His account ties in with the objective material and I consider it to be inherently plausible. According to the appellant his brother joined the LTTE in 1995. He, the appellant helped the LTTE by digging bunkers, supplying food and looking after the injured. I am prepared to accept that.

23. The appellant claims to have been arrested in July 1997 and January 1998 during army roundups. The objective material is clear that army roundups did take place and I am prepared to accept that that happened and the appellant was released.

24. He claimed that he was arrested again in April 1998. The army were told that the appellant and his brother were LTTE members. He was arrested, detained and eventually released in July 1998 on payment of a bribe. According to the appellant he required to sign on weekly after his release. I do not consider the army at that stage had any continuing interest in the appellant since he was released on signing conditions. The appellant claims that during his detention he pointed out a number of people without knowing who they were, however,

he had a mask on at the time and therefore they would not know who he was either.

25. After the appellant's release in July 1998 he went to Colombo. He travelled on a false name. He was arrested during a round up of people staying in the lodges and was detained and his fingerprints were taken. He was released on payment of a bribe by the lodge owner. That was arranged by his uncle. I don't believe that aspect of the appellant's case. I don't believe that the lodge owner would be paying for a bribe even if that was done through his uncle. That would indicate that the lodge owner had some involvement with the appellant. The appellant's uncle had been arrested with him but had been released. There would therefore be no reason why the appellant's uncle would not have arranged for the payment of the bribe. In my opinion it is much more likely that the appellant was simply released."

9. The immigration judge records that the appellant had come to the United Kingdom through a land route in Europe thereafter. He did not accept precisely how long after his last detention in Colombo the appellant had left and did not accept an account that he had received information that the LTTE were looking for him and his brother. However, the core account of repeated detention by the Sri Lankan authorities was accepted. That account was set out in the claimant's interview with the immigration authorities, witness statements, amended witness statements and a chronology that he supplied. Shortly before the hearing of this application the claimant obtained from Professor Goode a yet further report dated the 23rd November amounting to some 76 pages and at paragraphs 10-21 he accurately summarises the appellant's account as given in the statements and other documents he lists in his report (all of which were documents that were before the immigration judge in 2005 with the exception of the Secretary of State's subsequent decision letters). The claimant's account in his appeal witness statement adds the following details to the incidents expressly recorded by the adjudicator as being accepted:-
 - i) His younger brother Vijikaran had joined the LTTE as a fighting cadre.
 - ii) The family regularly supplied food to the LTTE members including Vijikaran.
 - iii) The claimant also dug bunkers and attended wounded LTTE members.
 - iv) His April 1998 detention following a tip-off from an informer. He was detained at the Chankanai camp then transferred one day later to Jaffna camp where he was held for 2 weeks. He was interrogated and tortured there, hung upside down from a metal bar and a plastic bag holding chilli powder was placed over his head.
 - v) The claimant was then transferred to Kopay prison where he was again interrogated and tortured. He was compelled to act as a masked informer to pick out LTTE members at a local check point.

- vi) In July 1998 after managing to communicate his whereabouts to his family the claimant was released upon payment by his uncle of a bribe of 50,000 rupees. He was required to sign on every week which he did for two weeks. However, two others also ordered to sign on were taken into custody and disappeared when they presented themselves to sign.
 - vii) His account of his detention at Colombo police station also included the particulars that he was finger printed, interrogated and beaten.
10. For twenty-odd years the courts and tribunals of the United Kingdom have been anxiously concerned with adjudication on claims for political asylum by young male Tamils who originate from the north of the island of Sri Lanka. The learning has tended to indicate that Tamil ethnicity by itself does not found a claim for a well-founded fear of persecution; neither does being a young male Tamil originating from the north of the island. However those additional factors may undoubtedly increase the risk profile having regard to the evidence that those considered by the security authorities in Sri Lanka to be suspected of membership or active support of the LTTE face, at certain times and places a real risk of incommunicado detention and ill-treatment in detention of a severity that would amount to persecution on the basis of their race, or perceived political opinions.
11. The problem has always been what degree of profile over and above those background risk factors will lead the properly self-directing immigration judge applying the real risk standard to conclude that a claim for protection and recognition as a refugee is made out?
12. In the Country Guidance case of *LP* the AIT accepted submissions made on behalf of the appellants in that case that there had been a material change of circumstances since 2005 and earlier and that Country Guideline cases dating from that period needed to be revised in the light of the deteriorating political and security situation in Sri Lanka. It identified twelve factors that should be considered both individually and cumulatively. Although it stressed that the list was not a check list and it was not intended to be exhaustive. The twelve factors were (not in any order of priority)
- i) Tamil ethnicity.
 - ii) Previous record as a suspected or actual LTTE member or supporter.
 - iii) Previous criminal record and or outstanding arrest warrant.
 - iv) Bail jumping and/or escaping from custody.
 - v) Having signed a confession or similar document.
 - vi) Having been asked by the security services to become an informer.
 - vii) The presence of scarring.
 - viii) Returned from London or other centre of LTTE activity or fund raising.

- ix) Illegal departure from Sri Lanka.
 - x) Lack of an ID card or other documentation.
 - xi) Having made an asylum claim abroad.
 - xii) Having relatives in the LTTE.
13. Those are the factors that the Secretary of State has considered in his various decision letters and reached the adverse conclusion that on the fact of his case there is no reasonable prospect of success before the IJ. By way of background factors, it is apparent that this claimant has Tamil ethnicity; he departed illegally from Sri Lanka; he would be returned from London, which is a well known centre of LTTE activity or fund raising; although he would have no current ID card he would have a travel document obtained through the Sri Lankan High Commission in London but the very process of obtaining such a document is likely to lead to a suspicion that his presence in the United Kingdom was pursuant to an asylum claim. The presence of scarring is not a particularly significant issue in this case as although, the claimant told the immigration judge that he did have scars he said that they had faded with time. The critical question is the likely profile to be attributed to the claimant in terms of support of the LTTE.
14. It is clear from the many cases considered by the courts and tribunals that people of Tamil ethnicity originating from the north of the island who are returned to and reside in Colombo run the risk of regularly being rounded up in security searches and detained for short periods. That in itself does not amount to persecution and a fear of being rounded up in such circumstances is not a well-founded fear of persecution. However, the claimant's case as presented to the immigration judge and broadly accepted by him as regards detention and ill-treatment was of detention both by the military authorities operating in the north of the country and by the police in Colombo. Four detentions overall were accepted. The longest and in my judgment the most significant was the detention from April 1998 to July 1998.
15. During that period it appears he was held in two army bases and then transferred to a prison. As the claimant's case make plain, that was not a mere random detention because he happened to come across a security operation. He was arrested as a result of information provided to the military that he was a LTTE supporter as was his brother. There is no dispute that his brother was an active member of the LTTE and engaged in military activities and the claimant meets the twelfth risk factor having a relative in the LTTE as this is likely to have been known to the army when he was detained. Whilst he was not asked by the security forces to become an informer after his release he was asked to identify LTTE members when in disguise at a check point. This last fact presumes that the army would rely on his knowledge of who LTTE members were and in turn suggests a suspicion of at least of supporting the organisation as indeed he appears to have done by his non-military activities in furtherance of its aims. It is obscure from the statement how much the claimant confessed to and whether that confession was taken in writing. But it is apparent that he was being

interrogated over the three month period and force was used to abstract information from him.

16. Although he has never been charged with a criminal offence and has not jumped bail set by a court or otherwise escaped from lawful custody, his account was that he was required to report to the military authorities regularly upon his release from detention and having done so for two months he then left the area in breach of such requirements in order to depart the country. As the Secretary of State notes in his decision letter this was not a short informal detention. In the absence of cogent evidence clearly establishing the contrary I would have great difficulty accepting the submission that it was unlikely to be recorded at the time. The Sri Lankan security forces have been engaged in a long struggle against terrorist insurgency in their country and there is no reason to believe that they would have completely failed to adopt what any similar security force would be likely to do in such circumstances which is to gather information and record it for future use in making assessments of those who may be members or supporters. There may be subordinate issues as to the form in which any such information would have been recorded whether on computer or manually, whether it was still retained ten years after the events described and whether as a result of the reasons for that detention or the information gleaned during it he would still be regarded as of interest to the authorities if returned in 2008.
17. The Secretary of State's case is that having regard to his low level of support for the LTTE, the passage of time and the fact that there was never any criminal charge or arrest or court process that would make him a likely candidate for measures positively searching for him and singling him out for interrogation and further charge, the risk profile of this claimant is not sufficient to establish that there is a reasonable prospect of success before an immigration judge that there is a real risk of persecution if returned to Colombo.
18. When this case came on for argument before me it was at the end of the day and there was very limited time for counsel to deploy all the submissions they intended to with full effect. I am grateful to counsel for focusing upon the core issues that I invited submissions on. I am particularly grateful to Mr Kellar who appears for the Secretary for State for his detailed skeleton argument and his concise submissions going to the heart of what appeared to me to be the issues. At that hearing Mr Cooray sought to place before me very late in the day, further voluminous material namely Professor Goode's report to which reference has been made and a recent Country of Information report published in October 2008 with an extensive survey of reports of present conditions. I was invited by Mr Kellar to take account of those documents in order that there be no room for further applications based upon them. I indicated I would read this material and would invite supplementary written submissions. Both counsel have provided them along with further materials. I am grateful for those submissions that I have carefully considered before reaching the conclusions that I have.

Conclusions

19. I accept two aspects of the Secretary of State's response to the submissions made on behalf of the claimant, namely :-

- i) There are no reasonable prospects of an adjudicator concluding that the claimant would be at risk of LTTE reprisals if returned to Colombo.
 - ii) If the matter were to be judged merely by the risks faced by any young male Tamil from the north of Sri Lanka who was returned from London as a failed asylum seeker and run the prospect of being rounded up and asked about identity documents in response to security measures taken in or around the Colombo area that would not be a fear of persecution and there would be no reasonable prospects of a protection claim succeeding before an immigration judge merely on that basis.
20. However, the real basis of this claimant's fresh claim appears to this court to be that his brother's military activities and membership of the LTTE combined with the level of perceived profile intimated by the events of April to July 1998 would be a sufficiently high risk profile of support of a terrorist organisation that would put him at risk if returned to Colombo in 2008 and such profile came to light either by interrogation at the airport by the security services or subsequent investigation during the course of a round up and enquiries made.
21. In that context it appeared to me that the decision of the European Court of Human Rights in the case of NA v United Kingdom first delivered on 17 July 2008 was of importance. In that case the court noted with approval the 12 risk factors identified by the Tribunal in LP, noted the increasing concerns of the UNHCR and the special *rapporteur* of the Committee Against Torture about the deteriorating Human Rights situation in Sri Lanka for young male Tamils from the north of the island. At paragraph 135 of its conclusions it expressed some scepticism as to a report from the British High Commission to the effect that there were no computerised records available for the Sri Lankan CID at the airport. It seems that scepticism was well founded since the present position identified in the October 2008 country of information report [32.09] and [32.10] to different effect and, in any event, it is plain from that information that the CID officers making checks of the airport are able to telephone colleagues in a central data base for further information if they so wished.
22. The case before the European Court appears to bear many features similar to the present claimant. At [139] of its judgment it says:-

“.....that the government did not appear to have disputed the adjudicator's findings as to the credibility of the applicant's account. These were that the applicant bears scars from ill-treatment during detention, that he was arrested by the army 6 times between 1990 and 1997 on suspicion of his involvement with the LTTE and that on the last occasion he was photographed, fingerprinted and released after his father signed a document. The court also notes that the adjudicator's finding that, following the cease fire agreement, the applicant would be of no interest to the Sri Lankan authorities because he had been held for short periods and released without charge on each occasion.”

23. The court noted at paragraph 143 that the applicant in that case could rely upon the heightened risk factor of six detentions and a record being made of his detention and concluded at paragraph 145:

“the court recognises that it has been over 10 years since the applicant was last detained by the Sri Lankan army, however, the court considers *the greatest possible caution should be taken when, as in the applicant’s case, it is accepted that a returnee has previously been detained and a record made of that detention.* As the IAT found in LP that record may be readily accessible to airport authorities meaning the person in question may become of interest to the authorities during his or her passage through the airport. Where there is a likelihood that this will result in delay in entering the country there is clearly greater risk of detention and interrogation and with it the greater risk of ill-treatment contrary to Article 3. Equally *the court finds the passage of time cannot be determinative of the risk to the present applicant without a corresponding assessment of the current general policies of the Sri Lankan authorities. Their interest in particular categories of returnees is likely to change over time in response to domestic developments and may increase as well as decrease.* In the court’s view, it cannot be excluded that on any given date if there is an increase in the general security situation of violence and the security situation in Sri Lanka will be such as to require additional security at the airport. The court also records its findings that computerised records are available to the airport authorities. *Given that it is undisputed that the applicant was arrested 6 times between 1990 and 1997, that he was ill-treated in detention and it appears a record was made of his detention on at least one occasion the court considers that there is a real risk that the applicant’s record will be available to the authorities at the airport. Furthermore it cannot be excluded that on any given date the security situation in Sri Lanka would be such as to require additional security at the airport and that due to his risk profile the applicant would be at even greater risk of detention and interrogation.*”

(emphasis supplied)

24. In my judgment, much, if not all, of that reasoning could apply to the apparent facts in the present case. It is a clear application of the real risk standard that is at the heart of both refugee and ECHR case law, although the requirement of substantial grounds for a real risk might if anything be a somewhat more demanding test than that required to make out a well-founded fear of persecution.
25. Since any reconsideration by an immigration judge of the claimant’s case to protection would take into account Article 3 as well as refugee status, and when examining whether there is a violation of Article 3 the adjudicator is required by the terms of the Human Rights Act to take into account the judgments of the

Human Rights Court including this very recent and substantial judgment on a very similar case, I conclude that it is not open to a reasonable Secretary of State properly directing herself to conclude on the facts as the adjudicator assumed them to be in 2005 as set out that there are no reasonable prospects of his protection claim succeeding.

26. I am conscious that in *AN v SSHD* the tribunal reached the conclusion that it was intrinsically unlikely that everyone who has ever been detained by the authorities in Sri Lanka, or at least in the last 10-15 years, is now on a computer data base 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 court and in search operations. That may be right, but in this case the claimant is not merely relying on the random detentions on three occasions to which he has been subject but the prolonged detention to which reference has been made. In the absence of any positive evidence that records have been destroyed in anticipation of a peace process, it is not possible to characterise as fanciful or without substance the claimant's case as to his fears.
27. The task of the IJ is not to make an assessment of certainties or even probabilities but to consider whether there is a real possibility or a real risk that his profile will have continued to be recorded and could in appropriate circumstances be made available to anyone interested. This was precisely the approach and conclusion of the European Court of Human Rights in *NA v UK* and I do not accept the defendant's submission that this application could be dismissed on the basis that in the case of *NA* the account was that the claimant's father had signed a document of uncertain nature.
28. Without seeking to throw any doubt on the decision in *AN* on its own facts, I reject the defendant's submission that it forms a general assessment of the factual background dispositive of the outcome in this case, or that a future tribunal would be bound to apply that case as opposed to the assessment of the European Court of Human Rights. The tribunal in *AN* did not have the benefit of the Strasbourg court's assessment of risk in such circumstances and the continuity of risk properly assessed in the light of the criteria used in adjudicating Article 3 claims. I am unaware of any tribunal decision that has done so since the *AN* decision.
29. Since the matter was adjourned for oral submissions to be supplemented by written submissions Mr Kellar has drawn my attention, helpfully, to the decision of Mr Justice Wynn Williams in *Lenin v Secretary of State* judgment handed down on the 3rd December 2008. Again, this was a Tamil claim where reference is made to the two tribunal decisions already referred to in this judgment and the decision in *NA v United Kingdom*. As is made clear by His Lordship in that case, everything depends on the facts found by the original adjudicator which should then be set against the heightened risk of present day circumstances. I have made plain in this judgment the importance to be attached to the implications of the prolonged detention from April – July 1998 that was occasioned by a report by an informer and that is a distinction from the apparent scenario identified by the adjudicator in the case of *Lenin* and the issue before this court whether the Secretary of State's decision fell to be quashed.

30. I conclude that on the facts of the present case, it cannot be said that there are no reasonable prospects of success before the AIT. I conclude that the AIT will need to examine the case in the light of *NA* and the implications of that judgment, plus, of course, the further expert report of Professor Goode in respect to the risk profile to this applicant on the facts found or assumed by the immigration judge. In my judgment paragraph [70] of that report in no way undermines the claimant's case on reconsideration as outlined above.
31. I would therefore quash the defendant's decisions to the contrary effect in this case. I will hear counsel on the need for further relief if there is no agreement.