

Neutral Citation Number: [2008] EWHC 3075 (Admin)

CO/4607/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 12th November 2008

B e f o r e:

MR JUSTICE BLAIR

Between:

THE QUEEN ON THE APPLICATION OF KOKULAN

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Mr J Gillespie (instructed by K Ravi Solicitors) appeared on behalf of the **Claimant**
Mr S Singh (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE BLAIR: This is an application for judicial review, permission having been refused on paper and granted on a renewal application by Wyn Williams J on 31st October 2007. The claimant is a Sri Lankan of Tamil origin. His position has reflected the unhappy ups and downs of the peace process on that island between the Sri Lankan Government and the LTTE.
2. He arrived in the United Kingdom aged 17 on 30th June 2001 and immediately claimed asylum which was refused. On 7th August 2002 his appeal was allowed by the Adjudicator, who accepted his claim to have a well-founded fear of persecution on return. On 10th April 2003 the Secretary of State for the Home Department ("SSHD") appealed to the Immigration Appeal Tribunal, and that appeal was allowed on the basis that the security position had much improved and the claimant was no longer at risk, nor was there any separate Article 3 claim on medical grounds. I should perhaps interpose here to say that that remains the position. There is no separate point taken in relation to any medical condition from which the claimant may suffer.
3. On 8th May 2003 the claimant's application for permission to appeal to the Court of Appeal was refused. Then on 11th July 2003 the claimant made further representations on the basis that he was making a fresh claim. On 19th April 2007 the SSHD determined that these further representations did not amount to a new claim. On 5th June 2007 these judicial review proceedings were begun. However, by the time the judicial review proceedings had begun, both the law and the factual background had moved on. Further consideration was therefore given by the SSHD to the claimant's case in the light of the decision in **LP (Sri Lanka)** [2007] UKAIT 00076, which took account of the deteriorating security situation in Sri Lanka. A letter of 25th February 2008 from the Border and Immigration Agency confirmed the previous decision, having considered the various factors identified in **LP** as they applied to the claimant's case.
4. On 10th November (that is, two days before this hearing), amended grounds were filed by the claimant in response to the letter of 25th February 2008. They did not reach the court until the commencement of hearing. Mr Gillespie, who has appeared for the claimant, does not suggest that there was a reason for the delay which would appropriately explain it. Mr Singh, who has appeared for the Secretary of State, submits that it is much too late for the court to accept these further grounds. Leaving aside the proximity of their submission to the hearing, he points out that the challenge to the letter of 25th February comes eight and a half months after the letter itself. However, though the document is a lengthy one, both counsel agree that it raises no new factual matter. Indeed, a feature of this case is that there are no new factual matters relating to the claimant which were not considered by the Adjudicator and the Immigration Appeal Tribunal. I say no new factual matters, though of course what has changed is the security situation in Sri Lanka.
5. At all events, on this point I agree with Mr Gillespie. As he puts it, a great deal is at stake for the claimant and no-one who has read his story can fail to have sympathy with him. Despite the lateness of the challenge, therefore, I do intend to admit it. The result is that, in effect, it is the second decision letter, dated 25th February 2008 which is the

decision under challenge: see the judgment of Schiemann J in **Turgut v Secretary of State for the Home Department** [2000] Imm AR 306. The question therefore, in summary, is whether the Secretary of State was entitled in the letter of 25th February to refuse to treat the claimant's application as a fresh claim.

6. The contentions of the claimant have been attractively put by Mr Gillespie. His fundamental point is as follows. The Secretary of State's appeal to the Appeal Tribunal in 2003 was allowed on the basis that, whatever the claimant's history, the objective situation in Sri Lanka was such that the situation had moved on, with the result that he was no longer at risk. In the years since then, however, the situation has again moved on, to the extent that there is at least a realistic prospect of an Immigration Judge now taking the view that, given the prevailing situation, the claimant, with his history, is someone who would indeed be at risk of persecution and/or violation of Article 3 ECHR.
7. The Adjudicator's decision is dated 7th August 2002. The Adjudicator said as follows:

"Having had the opportunity to hear, see and assess the applicant, I found him to be an impressive witness who to the lower standard I believed on material matters. His accounts, oral and written, were detailed and consistent. They were also consistent with the sort of events which the background material states was common. I note that there was no attack on the material aspects of the account in the refusal letter. I accept that he was badly treated, particularly sexually, during the detention. He did not claim that such had happened all the time, but occasionally

In summary, I accept that he was detained for eight months and seriously ill-treated. I believe his clearly detailed evidence about being taken to the camp fence and told to run, that he feared he would be shot but did so, and that he learned that the release had been arranged by his uncle who had paid money. That corruption is commonplace amongst the authorities is well documented. I accept that following these incidents he did not feel it safe to remain in the North or anywhere in Sri Lanka and that such was the reason he left Sri Lanka. I see no reason to doubt that he fears to return."

The Adjudicator then went on to consider whether that fear was well-founded, saying as follows:

"The main issue is that of his return to Colombo. He said he had been photographed and fingerprinted. I find it likely that at the airport and at subsequent security checks in Colombo or elsewhere he would be identified and his long detention will be on record. It seems to me likely that he will not be on record as having escaped, as the officer accepting the bribe would not wish to take the risk of that being exposed. However, the long detention is likely to indicate to the authorities that recently the appellant was of serious interest to them. It seems to me in the appellant's circumstances that there is a reasonable likelihood, on the basis of his

history, that the authorities would take particular interest in the appellant, an interest which can be distinguished from that which the authorities might take in a male Tamil stopped, for example, in the course of an identity check round up."

8. The Immigration Appeal Tribunal's decision is dated 10th April 2003. It is convenient to take the summary of facts as found at paragraph 3 of that determination. They are that the claimant:

" . . . lived in the North and supplied low level non-military help to the LTTE such as cooking, digging bunkers and helping the wounded. However he resisted attempts from the LTTE to make him undergo military training. Because of the continuing pressure from the LTTE, he moved to Vavuniya and registered with the army. Some weeks later when he signed on at a police office as required, he was detained, due to information supplied by an informer. He was detained for eight months and seriously ill-treated. Then his uncle paid a bribe to procure his escape. He was taken to the edge of the camp by soldiers and told to run. He thought he would be shot but ran anyway, and found his uncle waiting for him. He then left Sri Lanka, arriving in the UK on 30th June 2001."

The Immigration Appeal Tribunal goes on in paragraph 9 to describe how the situation had, since the earlier decision, developed further and for the better. It mentions the confidence building measures introduced by the Government, including the suspension of the Prevention of Terrorism Act. It noted that there had been a dramatic change in the security situation. Finally, in paragraph 14 the Tribunal sets out its conclusion which is as follows:

"The Tribunal is able to reach its own conclusion on these matters. We accept that the respondent is a young Tamil from the North who underwent a traumatic experience during his detention. The sad reality is that many young Tamils faced similar experiences. He was never involved with the LTTE other than in the most low level capacity. He is not now wanted by the authorities. His profile is such that there would be no real risk to him on return to Sri Lanka, even were his record to be inspected, either at the airport or subsequently. Accordingly his asylum and associated Article 3 claim must be dismissed."

9. The parties have helpfully cited some of the recent case law to me. The factual background is, of course, the deteriorating relations between the Sri Lankan Government and the LTTE. I was told that the ceasefire was formally abandoned in January 2008, but that this merely recognised what was already the case on the ground.
10. **LP** was considered by Collins J in **R v Thangeswarajah** [2007] EWHC 3288. At paragraph 9, Collins J refers to the risk factors identified by the Tribunal in **LP**, going on to say at paragraph 10:

"Although those have been described as risk factors, they obviously vary

in their significance. For example, Tamil ethnicity is obviously a highly relevant consideration, since the LTTE is a Tamil organisation and the battle is by the LTTE on behalf of the Tamils who seek specific objectives as Tamils. However, Tamil ethnicity by itself does not create a real risk of relevant ill-treatment. Accordingly some of these so-called risk factors are in reality, as it seems to me, background (as it has been described) factors; that is to say they do not in themselves indicate a real risk, but they are matters which, if there is a factor which does give rise to a real risk that the individual will be suspected of involvement in the LTTE, adds to the significance of that. Thus Tamil ethnicity, return from London, illegal departure from Sri Lanka, lack of ID card or other documentation (unless it is such a lack beyond the period that the individual would be expected to take to obtain an ID card after return) and having made an asylum claim abroad, all are no doubt factors which may be held against an individual, but none of them, as far as I can see in themselves, or even cumulatively, would create a real risk."

Collins J then went on to say as follows:

"However, it is obvious that a previous record as a suspected or actual member or supporter, provided that it was at a level which would mean that the authorities would retain an interest would be likely to create a risk. I say that because it was made clear in **LP** itself that an individual who had a past low-level involvement which might have led to some detention, would not necessarily be regarded still as a real risk so far as any ill-treatment was concerned, although clearly the circumstances of the previous record might point in a different direction. A previous criminal record and an outstanding arrest warrant clearly are highly material and clearly capable, I would have thought, of producing a real risk."

11. Collins J goes on to say that bail jumping and/or escaping from custody, again, on the face of it, are highly material. He says it depends, however, on what is covered by escaping from custody. Generally, he said, release on the payment of a bribe without more would not indicate that there was an ongoing risk, because the release would be likely to be recorded as a release as there was nothing further to be held against the individual. He then goes on to deal with a number of other factors such as a signed confession (which is not in point here), where the person concerned has been asked to become an informer (which is again not a point here), and finally scarring, which is in point and which he treats, in my view rightly, as being an evidential matter. In paragraph 16 he goes on to formulate what he regarded, and I accept, as the relevant test:

"The test therefore, as I see it, is whether there are factors in an individual case, one or more, which might indicate that the authorities would regard the individual as someone who may well have been involved with the LTTE in a sufficiently significant fashion to warrant his detention or interrogation. If interrogation and detention are likely, then, in the context of the approach of the authorities in Sri Lanka, torture would be a

real risk and thus a breach of Article 3 might occur."

12. In the light of that, I come to consider whether the Secretary of State's decision on 25th February 2008 not to treat the claimant's application as a fresh claim is or is not open to challenge on public law grounds. In the first place, I note that in paragraph 21 of the letter the Secretary of State asked herself the correct question:

"Anxious scrutiny has been given to the decision in **LP** and the effect it has on your client's case, but it has been determined that the findings by the Tribunal in **LP** in addition to the most recent country information, when taken together with material previously considered in your client's case, would not create a realistic prospect of success before an Immigration Judge."

This reflects the decision of the Court of Appeal in **WM v SSHD** [2006] EWCA Civ 1495. There is not, I think, any dispute about this. Nevertheless, Mr Gillespie submits that, having set out the correct test, the Secretary of State failed to appreciate, and take into account in particular, that the appeal to the Immigration Appeal Tribunal back in 2003 was allowed on the basis of a situation of ceasefire that no longer pertained.

13. Against that background, he relies on the following factors in particular. Firstly, he points at the lengthy detention to which the claimant was subjected, namely eight months; secondly, he points to the admitted ill-treatment that the claimant was subjected to; thirdly, he points to the allegation that the claimant was a "Black Tiger"; fourthly, he points to the fact that the claimant has been a member of the LTTE; and fifthly, he points to the scarring which supports the claimant's version of events.
14. Of these, particular mention should be made of the reference to a "Black Tiger", the name for a specially trained suicide bomber. As regards this, the claimant's evidence before the Adjudicator was that he had been accused of being such. The Adjudicator did not make a specific finding of fact in that regard, but of course, as Mr Gillespie points out, he accepted the claimant's story generally. On the other hand, as Mr Singh submits to me, if the claimant had been seriously suspected of being a specially trained suicide bomber, it is most unlikely that a bribe would have secured his escape.
15. In this regard both parties accept that records are likely to be an important factor. Mr Singh drew my attention to the most recent country guidance from the AIT in the case of **AM and SS v SSHD** [2008] UKAIT 00063. This decision was handed down on 10th June 2008. The AIT said that checks are run on a computerised database by immigration officers when passengers arrive at Bandaranaike International Airport or by members of the security forces when people are detained. But, he said, there is no good evidence to show that everyone who has in the past been detained and questioned about possible involvement with the LTTE is on that database. On the contrary, according to the Tribunal, it is likely to contain the names only of those who are of serious interest to the authorities. A failed asylum seeker who hails from the north or east of Sri Lanka, and who has no relatives or friends to turn to in Colombo, will generally be able to relocate there in safety and without undue harshness. Those arriving without their national identity card should be able to get a replacement without

too much difficulty, while the great majority of those detained at checkpoints and in cordon and search operations are released within a short time. It goes on to talk about a support package for relocation. In paragraph 107 the Tribunal says as follows:

"The majority of Sri Lankan asylum seekers coming to this country claim to have been detained at some time by the authorities, but there are no reports of any being detained at the airport on return because they were once held for questioning years ago and then released."

16. So against all that background, I come to the letter of 25th February 2008. The Secretary of State begins by setting out the factors identified in **LP**, and then proceeds to consider the factors particularly relevant to the claimant. So far as Tamil ethnicity is concerned, in accordance with the authority that I have already alluded to, she concludes that this does not show that the Tamil populace in Colombo are at risk of serious harm or that it would be unduly harsh to expect a Tamil to relocate to Colombo.
17. The letter then comes to the question of previous record as a suspected or actual LTTE member or supporter. This is plainly a crucial matter, perhaps the crucial matter. The letter says as follows:

"Your client's involvement with the LTTE was as a low level supporter. At paragraph 4 of the Adjudicator's determination of 7th August 2002 your client's involvement with the LTTE is summarised as: *'He confirmed his non-military help for the LTTE at their camp in Skandapuram near Kilinochchi and their latest attempts to make him do training which he refused and which later resulted in him leaving the LTTE camp for Vavuiya.'* Further, the Immigration Appeals Tribunal in the determination dated 10th April 2003 stated in paragraph 14: *'The sad reality is that many young Tamils faced similar experiences. He was never involved with the LTTE other than in a low level capacity.'*"

I am not sure how far Mr Gillespie accepted this, but I think he did not seek to persuade me otherwise that in essence this is a fair summary of the facts as known, at least in this regard. The crucial point, as I say, is that the claimant's involvement with the LTTE was as a low level supporter.

18. The letter then goes on to consider bail jumping, which is inapplicable, and escape from custody, which is applicable, and points to the fact that a bribe was paid. I have already mentioned the conclusions that Collins J drew from a similar point in the **Thangeswarajah** case.
19. The conclusion is then set out in paragraph 11 of the letter of 25th February as follows:

"Given the above findings of the Adjudicator and the subsequent decision by the Immigration Appeal Tribunal, it is considered that your client will be of little interest to the authorities on his return to Sri Lanka. We believe that your client's position in the LTTE was of insufficient standing for him to now elicit the interest of the authorities. It is further

considered that your client has been away from Sri Lanka for over six years and therefore it is unlikely that he would be of any interest to the authorities on his return. This would be the case even if there remained a record of your client's detention."

20. The letter then goes on to deal with some other matters which it is common ground do not assist the claimant's case. I should briefly refer to them. It is recorded that the claimant's father's involvement with the LTTE was of a low level. It is stated (and this is not a matter that has been disputed) that the claimant has not been involved in any fundraising activities for the LTTE in London. As regards his illegal departure from Sri Lanka, the letter correctly states that this alone does not establish a well-founded fear of persecution, nor does the final factor in relation to the making of a claim for asylum.
21. There then comes the passage where the decision-maker deals with the claimant's central argument, and I should quote that paragraph 19 in full:

"It is accepted that since 2003 the situation in Sri Lanka has deteriorated, with the main incidents of insecurity reported in northern and eastern districts. Having considered the objective country information, including the latest Country of Origin Information reports, it is considered that your client would not be at risk of persecution. Your client is not of a sufficiently high profile to merit any adverse attention from the authorities upon return. There is nothing in the material provided that would lead the Secretary of State to believe that there is any interest in your client from the Sri Lankan authorities. Your client does not fall within the categories at risk and no evidence has been provided to demonstrate that he would be at risk now. In any event, bearing in mind your client's long absence from Sri Lanka it is considered unlikely that he would now be at risk because of his ethnicity or claimed involvement with the LTTE."

22. Each of these cases are difficult ones, and I must say that I have found this one particularly difficult. But, as Mr Singh reminds me, the court's function is a reviewing one, not an appellate one. The Court of Appeal makes it plain in **WM** itself at paragraph 9 that the Secretary of State's determination is only capable of being impugned on **Wednesbury** grounds. In my judgment, the decision of the Secretary of State in the letter of 25th February 2008, having asked the correct question, proceeded to address that question satisfying the requirement of anxious scrutiny. Her conclusion was one to which the Secretary of State was entitled to come. In those circumstances, the claim for judicial review must be dismissed.
23. MR GILLESPIE: Thank you, my Lord.
24. MR SINGH: My Lord, I would just ask for an order that the claimant pays the defendant's costs of the claim. The claimant is legally aided so any order, I understand --
25. MR GILLESPIE: I have been told that it is a privately paying matter.

26. MR JUSTICE BLAIR: Mr Gillespie, in so far as I have picked anything up in that regard, I had picked the same up in relation specifically to funding.
27. MR GILLESPIE: Indeed, my Lord.
28. MR SINGH: In that case I would just ask for a standard order that the claimant pay the defendant's costs of the claim.
29. MR JUSTICE BLAIR: What do you say, Mr Gillespie?
30. MR GILLESPIE: I cannot say anything. I have lost.
31. MR JUSTICE BLAIR: Doubtless in enforcing it, and I hope a note will be taken of this, it will be recalled what I said about this being a difficult case.
32. MR SINGH: Yes, my Lord.
33. MR JUSTICE BLAIR: Is there anything either of you would like to add?
34. MR GILLESPIE: Not for me, my Lord.
35. MR SINGH: No, my Lord.
36. MR JUSTICE BLAIR: Very well. Thank you both for your assistance.