Neutral Citation Number: [2009] EWHC 1169 (Admin)

Case No. CO/8858/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Thursday, 30 April 2009

B e f o r e:

MR JUSTICE DAVIS

- -

Between:
THE QUEEN ON THE APPLICATION OF NIRMALAKUMARAN

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

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(Official Shorthand Writers to the Court)

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Mr James Khaled (instructed by Van-Arkadie & Co of Middlesex) appeared on behalf of the Claimant
Mr Rory Dunlop (instructed by Treasury Solicitor) appeared on behalf of the Defendant

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J U D G M E N T

1. MR JUSTICE DAVIS: These proceedings are a challenge to the Secretary of State's decision, dated 24 November 2007, refusing to regard fresh representations made by the claimant as sufficient to amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules.

2. The proceedings have a rather long history. It is regrettable that they only come on for final disposal before the court today. At all events, permission was granted by Mr Justice Stadlen on the papers as long ago as 24 April 2008. The observations he made in granting permission were to this effect:

> "I am satisfied that the Secretary of State for the Home Department may have erred in law in failing to give sufficient weight to the cumulative effect of the LP factors applicable to the applicant when considering that theere is no reasonable prospect of a different outcome on a reconsideration."

3. After that grant of permission by Mr Justice Stadlen the Secretary of State then - in circumstances which are not altogether explained - issued a further letter dated 6 January 2009 seeking to uphold and support the previous decision letter. This letter of 6 January 2009 was not in response to any further representations made by the claimant or the claimant's then legal advisers. It would appear that the purpose of that further letter was, first, to anticipate certain legal arguments that could arise by reference to recent authorities and, secondly, it may well be, to seek to deal with the observations made by Mr Justice Stadlen in granting permission. I will have to come back to the terms of that letter and its predecessor in due course.

4. The general approach with regard to such matters has been considered in the past by the courts on a number of occasions. Paragraph 353 is reasonably clear on its own wording. It has been considered in cases such as WM. What the court has to consider, amongst other things, is whether there is a reasonable prospect of another immigration judge reaching a different conclusion in the light of the fresh points sought to be made.

5. At the same time, Mr Dunlop, who has appeared on behalf of the Secretary of State today, says nevertheless that if the Secretary of State has, on the face of it, considered the matter properly and asked the right question, in effect, the challenge is one of irrationality. He says the test for challenging the decision on the ground of irrationality is necessarily high. That, in a purist sense, may be right. At the same time, the test for the purposes of applying paragraph 353 is, as Lord Justice Buxton has said in WM, relatively modest. It is possible therefore, on a purist approach, to see some tension between setting a high threshold of according respect to a deision maker on what then falls to have a modest threshold applied to the subject matter of the decision.

6. Some extremely interesting observations on this whole point are raised by Lord Justice Sedley in TR [2008] EWHC 2698 Admin, paragraphs 32 to 34 of his judgment. I do not think it appropriate today to go into detail on this whole point. Suffice to say, it is important that there be anxious scrutiny not only in point of form but also in point of action.

7. So far as this particular claimant is concerned, she is from Sri Lanka. Having come to the United Kingdom, she made an application for asylum. The matter in due course came before an adjudicator. By a determination promulgated on 19 March 2003 the adjudicator dismissed her claim on asylum grounds and also on advanced human rights grounds.

8. The background is that the claimant was born on 16 November 1979 in Jaffna, being a Sri Lankan Tamil and a Roman Catholic by religion. She was an only child, and her father is now presumed dead. Through the services of an agent she left Sri Lanka on 19 June 2000 and eventually ended up in the United Kingdom on 4 July 2000 when she claimed asylum, claiming to be in fear of her life.

9. The claimant in the hearing before the adjudicator explained how at a young age she had become involved with the LTTE as a helper, that her father - who was alive at that time - had been a prominent supporter of the LTTE and was well known in the village where they lived. In November 1994 he was arrested by a rival militant group and was taken away and is presumed to be dead. The applicant continued with her education and continued, while still young, to help the LTTE in a number of ways.

10. As recorded in her evidence before the adjudicator, she said she had been arrested by the Sri Lankan army on four occasions: (1) When returning from college in May 1996 she was stopped by army soldiers and interrogated on suspicion of helping the LTTE; she was detained for three days in circumstances where she was tortured. (2) Again she was arrested by the army in due course, and again was maltreated whilst in detention; that period of detention was nine days. (3) A third arrest followed in 1997, and this was part of a general round-up; the period of detention was apparently for some time. (4) In November 1999 she and her mother were arrested - this being her fourth incident of detention - and was detained for two days.

11. In addition, there was some evidence adduced before the adjudicator of scarring.

12. In many of these cases of fresh representation the court is, entirely properly, likely, to a greater or lesser extent, to be influenced by whether or not a particular applicant has been found to be lying and fabricating a story when his or her evidence is heard before an adjudicator or an immigration judge. That of course can never be determinative in cases of this kind but, at the same time, it is almost invariably relevant. In this particular case the immigration judge who had heard the applicant's evidence accepted it. He said he had no reason to disbelieve her story.

13. The immigration judge went on to say:

> "What I am unable to accept however is that she would be of any interest to authorities were now she to be returned to Sri Lanka. Two of her arrests and detentions were as the result of general round-ups. Others were similarly [e]ffected. She was not charged with any offence and her LTTE involvement as a child and then through teenage years was that of a helper in the way already described. She has not been regarded as a terrorist when detained and it is impossible to accept that the authorities

> now would so regard her if she returned to Sri Lanka with a peace process that may still be fraught with difficulties but is ongoing and which has resulted in a different climate between the Sinhalese and the Tamils from the north. I can find no reason why this appellant should not return to her mother. Her scarring, namely cigarette burns, is insignificant. It was her mother who was required to sign on and did so for four months and stopped. I do not think it reasonably likely that she is in any danger because of that from the authorities and if that is the case, the appellant certainly herself is not either. The overwhelming likelihood is that if returned she would be waved through at Colombo Airport as the background evidence suggests occurs with those who do not arouse suspicion. I do not find it likely that this appellant would arouse the suspicion of the authorities. Any reputation that her father had as a known activist for the LTTE can have no bearing as a matter of commonsense on the appellant's now position."

14. Those conclusions of the adjudicator in 2003 were of course made in the context of the then situation in Sri Lanka, being one of the ceasefire. The circumstances of course - and as is well known - have radically changed since.

15. The primary argument raised by the applicant in her fresh representations was that based on the change of country situation in Sri Lanka. Those were set out at some length. They were answered at considerable length by the Secretary of State in the letter of 14 November 2007, to which I have already made reference. After setting out the background and the relevant rules, at paragraph 10 this, amongst other things, is stated:

> "In regards to your client's fear of persecution ..... it is our opinion that your client upon her return to Sri Lanka will not come tot he adverse attention of the Sri Lankan [authorities] because of her scars, her own past low level involvement with the LTTE and her father's involvement with the LTTE."

It goes on to refer to the findings of the adjudicator.

16. Further reference is made in this letter of 14 November 2007 to various in-country reports and to other objective evidence. In addition, reference is made to the case of LP and to the various factors set out there as being relevant to the question of risk in cases of proposed return to Sri Lanka. The letter goes on to deal with each of those factors by reference to the position of the claimant. At paragraph 33 it is stated in the letter:

> "Having examined all the risk factors raised in LP we have considered those applicable to your client's case. It is considered unlikely that your client will be apprehended either at the airport or subsequently within Colombo. In LP the tribunal decided ' ..... the strong preponderance of the evidence is that the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment."

The letter then went on to deal with claims mounted by reference to private life and family life; those particular aspects of the matter are not pursued before me today.

17. In the event, the judicial review proceedings were commenced and permission was granted on the papers by Mr Justice Stadlen in the terms I have recounted.

18. That then led on to the further letter from the UK Border Agency, dated 6 January 2009. That letter is highly legalistic in form. It clearly incorporates an amount of legal advice which presumably had been tendered, and almost reads as though it were some kind of preparatory skeleton argument to deal with the argument anticipated to be raised. Mr Dunlop said that this letter - even though it is not sent in response to any further letter from the claimant's solicitors - shows that indeed careful scrutiny was being given to the case of the claimant. The letter to a great extent deals with recent judgments, one being of the European Court of Human Rights in NA, and also recent cases of AN and SS, Veerasingam and Lenin.

19. The letter of 6 January 2009 goes on to subject each of those cases to minute analysis and to show variously how they can be distinguished or applied, as the case may be, to what was said to be the position so far as each claimant in each such case was concerned. The letter, having done that, in paragraph 15 states:

> "Assessing your client's case in line with the Asylum and Immigration Tribunal's conclusions set out above ..... [those being conclusions in AN and SS], it is considered that your client would not have a real prospect of persuading the immigration judge that she would be at risk of persecution or Article 3 mistreatment if returned to Sri Lanka."

20. The letter goes on to deal with Lenin, a decision of Mr Justice Wyn Williams, which upheld the Secretary of State's decision, on the facts of that case, not to treat representations as constituting a fresh claim and to distinguish the decision of Mr Justice Blake in Veerasingam, where Mr Justice Blake had quashed the decision of the Secretary of State on the ground that fresh representations did constitute a fresh claim. Having done that, at paragraph 27 of the letter of January 2009, this is stated:

> "For the reasons set out above, it is considered that there is no realistic prospect that your client, when taken together [with] all the previously considered material and cases of NA, AN and SS, Lenin and Veerasingam would persuade an immigration judge that there is a real risk that your client's return to Sri Lanka would breach her human rights."

21. On the face of it, one possible loophole left open by the letter of November 2007 has been closed: because, on the face of the November 2007 letter, the Secretary of State, at least as a matter of form, had simply been expressing her own view as to whether a particular viewpoint had reasonable prospects of success. Whereas in the letter of January 2009 - consistent with the WM decision - the focus is, on the face of it, now being assessed as to whether the fresh material might persuade an immigration judge that there is a real risk that return would breach her rights.

22. It would not be right for me to discount the letter of 6 January 2009; but, I think, for present purposes, I cannot ignore the fact that in a sense it is a tactical letter seeking to reinforce a decision which, in substance, had already been made in November 2007. I have today been referred to a number of the authorities which are dealt with extensively in the correspondence: those are the cases of LP, NA, AN and SS, Veerasingam and Lenin. I do not regard it as necessary to go through the detail of all those.

23. Mr Khaled first submitted that the Secretary of State had failed to ask the right question. I can see in point of form what he means by that if one considers the way in which the letter of November 2007 is framed. I think that - if form is important here - in point of form the letter of January 2009 corrects the position.

24. The real challenge of Mr Khaled, as I see it, is whether the conclusion reached by the Secretary of State was one properly open to her. The decision in LP identifies a number of factors which need to be taken into account in this context. As has been explained by subsequent authority - particularly perhaps in AN and SS - these factors are not all necessarily to be described as "risk factors"; some, at least, are more in the way of background factors. The factors, as identified, include these: (1) Tamil ethnicity; (2) previous record of suspected LTTE member or supporter; (3) previous criminal record and/or outstanding arrest warrant; (4) bail jumping or escaping from custody; (5) having signed a confession or similar document; (6) having been asked by the security forces to become an informer; (7) the presence of scarring; (8) return from London or other centre of LTTE activity or fund raising; (9) illegal departure from Sri Lanka; (10) lack of ID card or other documentation; (11) having made an asylum claim abroad; (12) having relatives in the LTTE.

25. Emphatically, cases of this kind are not to be decided by the number of boxes that can be ticked. Simply one of the risk factors may - perhaps in an appropriate case and leaving aside the background factors - be enough to justify an assertion that fresh representations as giving rise to a fresh claim. Conversely a number of those factors - be they background factors or purported risk factors - even if capable of being satisfied in a case may not necessarily suffice.

26. In point of fact here, this particular applicant does come within the ambit of various of these risk factors or background factors. She is of Tamil ethnicity, by way of background, which in sum does not take it very far; she does have a previous record as a suspected or actual LTTE member or supporter. Mr Khaled suggested that she also has a previous record; that seems hard to make out from the materials before me. There is presence of scarring; she will be returned from London; there was illegal departure from Sri Lanka; there would have been a lack of identity card or other documentation; there would have been the fact of having made an asylum claim abroad; and she would have had relatives in the LTTE.

27. Mr Dunlop says that whether one looks at these matters individually or cumulatively, they do not suffice to show a reasonable prospect of success before another immigration judge. He referred to the decision of the adjudicator in 2003 and said that the findings there show that her involvement with the activities of the LTTE was when

she was a child and furthermore was at relatively low level. Mr Dunlop accepts that her father did have a fairly high profile involvement in the LTTE but - he says - that was only in the context of the particular village where he lived. Furthermore he makes the point - as did the adjudicator - that the father had not been seen since the mid-1990s and memories of his involvement would have faded.

28. So far as the detentions are concerned, Mr Dunlop said that none of the four detentions was for any particularly long period of time. He said that although two of them were perhaps not by way of general round-up, there is nothing to show that they were detentions of the applicant in terms where she had been specifically sought out before being detained. He submits - having regard to authorities - that there is no likelihood of there having been any record of detentions, a point which was considered of great significance in NA.

29. Overall he submitted that there was nothing here to show that if returned to Colombo she would come to the attention of the authorities at Colombo Airport. He said that the decision in Veerasingam can readily be distinguished, and certainly it can be distinguished, because, for example, in Veerasingam the detention in that case had been prolonged and Mr Justice Blake had concluded that that would well indicate that either a record would have been kept or the length of detention would be the more likely to draw the authority's attention to the applicant in that case if returned.

30. I have found this a somewhat troubling case. I share the concerns, expressed admittedly without the benefit of oral argument, which the single judge had in granting permission on the papers. The approach of the Secretary of State in the letter of November 2007 seems to have been to have worked through a list of background factors or risk factors as set out in LP and dispose of them individually and then express a personal view as to whether there was a realistic prospect of success. The legalistic letter of January 2009, in point of form, corrected that approach but did not on the face of it, as I see it, truly get to grips with the cumulative effect of these various points.

31. I understand well the reliance that was made on the comments of the adjudicator in 2003, but it is to be borne in mind that the adjudicator had said this:

> "She has not been regarded as a terrorist when detained and it is impossible to expect that the authorities would now so regard her if she returned to Sri Lanka with a peace process that may still be fraught with difficulties but is ongoing ..... "

That is a country situation which subsequently has changed so dramatically and that is what subsequent authorities have had to deal with.

32. There are those who take the view that no one at all should be returned to Sri Lanka against his or her will in the current climate as a failed asylum seeker. That is not the way the authorities go at all, as the cases cited show. But anxious scrutiny is called for in all these cases, Sri Lankan cases no less than other cases.

33. It seems to me, looking at the matter overall, that in the particular circumstances of this case there has not been given sufficient assessment by the Secretary of State of the various points relative to this applicant on a cumulative basis. It seems to me that there is some reasonable prospect of success so far as this applicant is concerned if her case is remitted to an immigration judge in 2009. (I emphasise that that is by no means to indicated that her claim will necessarily succeed.) I appreciate that this involves, in effect, concluding that the Secretary of State has reached a decision not properly open to her. This court should not shy away from that if that is the view that the court has reached. The underpinning point remains that the threshold in terms of assessing the prospects of success is a modest one. Applying anxious scrutiny to this case and taking the view that I do - with respect - that insufficient anxious scrutiny "in action" has been given thus far, I conclude that the decision should be quashed.

34. Mr Khaled, can the order be drawn up on that basis?

35. MR KHALED: Yes. I am grateful.

36. MR JUSTICE DAVIS: Is your client legally aided today?

37. MR KHALED: She is not. Perhaps I could apply for the claimant's costs to be subject to detailed assessment if not agreed.

38. MR JUSTICE DAVIS: Have you a schedule of costs?

39. MR KHALED: No.

40. MR DUNLOP: I cannot resist any application for costs. There are two small matters. The first matter is what exactly the order should be because, on one reading, your Lordship is quashing the decision which leaves open the possibility of the Secretary of State reconsidering and coming to the same one.

41. MR JUSTICE DAVIS: No.

42. MR DUNLOP: That is what I thought; I wanted to clarify. Is it your intention that there should be effectively a mandatory order that the claimant be given a further appeal?

43. MR JUSTICE DAVIS: Yes. It was not so long ago that once a single granted permission in cases of this kind the Secretary of State would do that. The Secretary of State has toughened its stance, fair enough; she is entitled to do so.

44. MR DUNLOP: I think, in part, that was for pragmatic reasons.

45. MR JUSTICE DAVIS: Once the judge thinks there is some doubt - - I am intending that the claimant has the chance to have her case assessed by a further immigration judge.

46. MR DUNLOP: The other matter is that I would ask for permission to appeal. In my submission this is a case where the only factors that were present were the ones that

have been termed "background factors" in the case law. In my submission the meaning of that phrase is that even, cumulatively, they are not enough to amount to a real risk.

47. MR JUSTICE DAVIS: Mr Dunlop, if ultimately this proves to be right on the evidence you will succeed in front of the immigration judge.

48. MR DUNLOP: I am conscious of the fact that it is normally the case - - - - -

49. MR JUSTICE DAVIS: Mr Khaled will tell his client that the mere fact I said she can have a chance before an immigration judge does not mean she will succeed. Mr Khaled will warn her she may not.

50. MR DUNLOP: It is quite possible that once my client has had the opportunity to consider it, it make take the view that it is better not to pursue an appeal. The general approach is that one asks for permission to appeal from the High Court before going to the Court of Appeal. In my submission there are arguable grounds here because, in effect, the only relevant factors are background factors. With that in mind, it cannot have been irrational for the Secretary of State to conclude - - - - -

51. MR JUSTICE DAVIS: You cannot say that. Scarring is not a background factor alone.

52. MR DUNLOP: In my submission it is.

53. MR JUSTICE DAVIS: In connection with the LTTE? Do you say all the factors are background factors and none are risk factors?

54. MR DUNLOP: I would say that all the ones that are present in this case are background factors. If you are holding that scarring is not a background factor I would make that a ground of appeal.

55. MR JUSTICE DAVIS: These cases are each fact-specific. Can you identify to me a point of principle or a point of law that arises here that should merit my saying the Court of Appeal should hear it?

56. MR DUNLOP: Yes. I should say by way of background the reason is this is subsequently - - because there are so many Sri Lankan Tamil cases. The point of law is the proper construction of LP and cases thereafter and whether or not factors such as the factors in this case can, even cumulatively, amount to enough to create a realistic prospect of success.

57. MR JUSTICE DAVIS: You have had the benefit of Mr Justice Blake in one case and Mr Justice Wyn Williams in another case. You cannot keep on citing cases on decisions on particular facts.

58. MR DUNLOP: With great respect, those cases did set down some principles. This case, in my submission, does not fall within those principles because the relevant factors that made Veerasingam fall on one side of the line and Lenin on the other, this case falls very clearly on the Lenin side. It looks like if one is not going to have - in all the many Sri Lankan judicial reviews that are brought - differing decisions that are

inconsistent, one may need guidance on what exactly counts as a factor that could, added together with other factors, create a realistic prospect of success.

59. MR KHALED: I have nothing to add.

60. MR JUSTICE DAVIS: I refuse the permission. I do take the view that the scarring (Inaudible) and these cases are fact-specific.

61. MR KHALED: I am not sure whether an order has been made in relation to costs.

62. MR JUSTICE DAVIS: Yes. Mr Dunlop, you did not oppose that, did you?

63. MR DUNLOP: I did not.

64. MR JUSTICE DAVIS: Yes.

(After the court rose the associate informed shorthand writer that judge ordered detailed assessment).