

CO/9866/2007

Neutral Citation Number: [2008] EWHC 3211 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 23rd September 2008

B e f o r e:

MR JUSTICE BLAKE

Between:

THE QUEEN ON THE APPLICATION OF THANGARAJAH JEGARAJAH
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Ms S Jegarajah (instructed by Messrs K Ravi Solicitors) appeared on behalf of the
Claimant

Ms A Strugo (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 BLAKE:** This is a renewed application for permission to bring judicial review in respect of a sequence of decisions of the Secretary of State, maintained over a number of months, all of which have the common feature that she has concluded that this applicant has not presented a fresh claim for asylum within the meaning of the rules and the relevant law essentially because, although there has been a change of circumstance since his asylum appeal was considered at two levels in 2003, the facts relating to him, taken against the background of those changed and deteriorating circumstances give no reasonable prospect of success of his appeal succeeding.

2. Ms Jegarajah submits that it is sufficiently arguable for the purposes of this permission hearing that that is false and that there are reasonable prospects of success if such an appeal were to be redetermined by the appellate authority.
3. The central issue is as follows. This claimant is a Tamil from the north of Sri Lanka who left his country in late 2000 and has been seeking to establish status here ever since. When his case came before the immigration judge, I think probably then an adjudicator, in 2003, despite the terms of a refusal decision which did not accept part of the important primary facts that he alleged, the Adjudicator found in his favour and concluded in a decision of 17th April 2003, first, that the trigger event of August 2000 which had caused him to flee had occurred; secondly, as a result of that event, against the background of his profile, he considered that he was at risk of ill treatment.
4. The trigger event was described as follows:

"The appellant further claims that in August 2000 the LTTE members came to his house and asked to borrow his engine boat for their use and the appellant, fearing them, gave the boat to them. He claims that the army and pro-government Razik group had come to know about this and informed the Special Task force, who then came to his house to search for him. The appellant was not at home but the special task force beat his wife and sister and shot dead his dog when he went to bite them. The appellant claims to have heard about this incident and did not return home. He left for another area, eventually being secured from Sri Lanka."

5. In the light of the Home Office's refusal of the case, the Adjudicator enquired in particular as to why it was that the authorities would have known that the appellant had lent his boat to the Tamils, used no doubt for the purposes of their insurgency, and he gave answers to that that other groups in the village had been told by the authorities to inform on people who assisted the Tamils. He said this:

"The appellant told me that the Tamil Tigers had taken his boat during the day time and the area was under army command. However, the Tigers came and went. The appellant said that Tamil people sympathetic towards the army passed the information on or about him lending the boat. The army had told people in the village that the Tigers had come to the area and they ought to inform upon him. The appellant could not say how often the Tigers came to the village, although they came and went."

6. The Secretary of State in his decision letter refusing the claim did so, as so often, on two bases. First, that, since the Tamil's use of villagers' fishing boats for insurgent purposes would have been kept secret, it is incredible that the army would have got to know about it and therefore the incident cannot have happened. That was rejected because the Adjudicator found the appellant's claim plausible and credible and he has been consistent throughout and did not exaggerate and add to his problems. Secondly, however, one notes this in paragraph 15 of the Adjudicator's decision:

"In paragraph 7 of the refusal letter, the Secretary of State said the appellant claimed he left as the army were looking for him and he leant his boat to the LTTE. The Secretary of State therefore considered that the appellant had expressed fear or prosecution and not persecution. He said that even if the appellant's account is true that he had leant his boat to the LTTE and the army found out then he would receive a fair trial from Sri Lanka's independent and properly constituted judiciary."

7. The Adjudicator goes back and expresses the importance of the 2000 incident. Although he had been detained in 1993, that really is not suggested now to be decisive of itself of any current fear of risk and, after a lengthy judgment, noting, for example, that the claimant does have visible scars to his body, he concluded that:

"Viewed cumulatively with the appellant's prior involvement with the LTTE and/or perceived involvement by the authorities, I hold that the scarring does put him in an additional risk category. If it was just the scarring by itself and then no indication he had been the interest of the authorities as a result of the 2000 incident, I would not have allowed the appeal."

8. But he did allow the appeal. The Home Office then sought permission to appeal, as they were entitled to do in those days, upon the factual basis and permission was granted and the case comes before the AIT on 11th December 2003. The burden, it seems, of the Home Office appeal was, whatever may have been the facts at the time of 2000, there was now an incipient peace process and therefore risk factors were reduced and the profile was not such as to make him a risk. It was the incident which had led to the applicant fleeing and the passage of time that was the focus of those submissions.
9. The Tribunal, having recited the submissions, reached their conclusion quite briefly. At paragraph 10 they said the following:

"In the light of the changed circumstances the Tribunal are not satisfied that the applicant would be of any adverse interest to the authorities because on one occasion in August 2000 he let the LTTE use his boat. This is no reason to believe that this incident would have been recorded and be on record so that there would be a risk of the applicant being detained at the airport on return when enquiries were made as to his identity. The applicant's involvement with the LTTE was so limited and so insignificant compared with the involvement of many other Tamils, that in our view there is no reason at all why the authorities would be interested in him. There is no reason to believe that they have kept any record of the incident or even if they had that they would now wish to pursue the applicant."

They then go on and dismiss the case in the light of those circumstances and that the scarring was not sufficient.

10. Tamil cases have caused understandable difficulty to the court and the Secretary of State over the years and, with the breakdown of the situation in Sri Lanka, in 2006 the AIT gave a helpful guidance case called LP which identified certain factors about historic background in which a person could be said to still be at risk today even though they may not have been in 2003. That approach has been upheld as recently as July 2008 by the European Court of Human Rights. The very fact that that was a contested appeal demonstrates that there are still unresolved issues between the Secretary of State and Tamil asylum seekers upon the application of general guidance to particular cases and, of course, at the end of the day in terms of ECHR, at least, the issue is whether there are substantial grounds for a real risk of fearing ill treatment.
11. This case certainly has not met with success to date by the claimants and successive judges have thought, well, the Tribunal's conclusions about there is no reason to believe that there would have been a record have been sufficient to have eliminated the single risk factor in this case. I have to say that it seems to me that, although in many of the LP and Strasbourg cases, the particular context for record keeping was detention and being released on bail, there is no reason to exclude any other form of record that might exist that would have shown that a person had a particular profile in terms of assisting the Tamil Tigers and it is well-known from the background evidence of the importance that naval and vessel activity in the north of the island has played in the insurgency.
12. I therefore come to the view whether it is arguable that this appeal might succeed on the basis that, putting the findings on fact made by the courts below in 2003 against the circumstances of heightened risk in 2008, there is a chance or a realistic chance that an adjudicator might consider that this applicant was of sufficiently high profile, by reason of ethnicity, past profile with the security services in Sri Lanka, visible scarring, return as a failed asylum seeker from London, to meet something of other than mere background risk which would not suffice to give him a credible protection claim and I have to say that I am troubled by the Secretary of State's reliance in 2008 upon the passage from the Tribunal that I have cited in which the Tribunal concluded in the 2003 decisions that there is no reason to believe that the incident would have been recorded.
13. If the Tribunal had reminded themselves of what the submission was of the Secretary of State, that if this had happened then he would be facing prosecution, I simply cannot see how they can conclude that there was no reason to believe that this incident could not have been recorded. The incident must have been recorded in order to have led to the identification of the appellant's home with information received that he was supporting the Tigers with loaning of his boat, otherwise the Security Service would never have got there. It may well be that there are real issues as to whether that kind of information would have been kept and ventilated in 2008 but the approach so far as has been because it was not recorded at all he was now at no risk. Because I consider there is a very real risk that he would have been noted in 2000 as being a suspect supporter of the LTTE and the question that the Secretary of State has to ask when assessing what a properly self directing tribunal would have made of the evidence if this matter was ever appealed would be what are the risks, is there a real risk that he would still recorded or noted as of being a historic suspect from 2000. That is a very different issue to whether he would be a risk because of a detention in 1993, which can play no real impact upon this case. In 2000, shortly after which he left the island, it still seems to me potentially

an issue that would engage a credible asylum appeal and I therefore conclude that it is certainly arguable at this stage that there has been a misdirection by the Secretary of State in assessing the outcome question, namely could a reasonable adjudicator allow this appeal.

14. I appreciate that this court is not concerned with revisiting on review or appeal any factual conclusions that the Tribunal made in 2003. Equally, it is not possible to say that these courts in refusing review have been satisfied in the past with every aspect of the Tribunal's reasoning. What is being done on permissions to appeal or further appeal is an overall looking at the prospects of success in the round. An asylum claim is refused in 2003 and refused again in a very different factual context in 2008. It seems to me that the claimant may be able to deploy, although he no doubt faces some difficulties as well, the proposition that upon the simple facts that the Adjudicator found recorded as happening that alone gives rise to the relevant risk in 2008 because it is a risk of material support to an insurgent group who are clearly of major concern to the Sri Lankan government in 2008. Beyond that it is not necessary to go but I am satisfied that, despite the unpromising history of this application, there is an arguable case.
15. I understand also that, following the refusal of permission, the Strasbourg Court did give a rule 36 indication that the claimant should not be removed. They do not give such indications lightly and it is a requirement of the United Kingdom to obey those indications as a substantive part of its obligations under the Convention, as the court has subsequently clarified. Quite what the impact of all that is on a future of application of this case, whether the matter should now proceed to an appeal or proceed to a contested judicial review of these issues, will be for the Secretary of State to decide but in any event what is required is a fuller consideration of this case at another hearing.
16. I thank counsel for their assistance. Your persistence on this occasion has been rewarded.
17. MS JEGARAJAH: Thank you, my Lord. My Lord, I know this is an exceptional application but I wonder if you might give permission for your judgment to be reported -- to be cited rather. It is one of the first detailed judgments that deals with LP and NA
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18. MR JUSTICE BLAKE: I am not sure I am really dealing with any issue of law, I am dealing with a piece of factual reasoning in your case. I mean, these cases are littered with guidance stretched from one case to the other and what I have been trying to do is to apply the guidance to a particular factual context. I cannot believe that it is going to be of importance. It will be of interest no doubt to your client but I am not sure it is going to be of any interest generally. I am aware that this is a permission hearing which I have taken some time about, it may well be that what I have said turns out not to be sustained on detailed examination. This is not a suitable case to be reported.
19. MS JEGARAJAH: I appreciate that. The only reason I considered it to be important was because of what your Lordship had said about non-detention cases.

20. MR JUSTICE BLAKE: Yes. Well, I am sure someone can make that point.
21. MS JEGARAJAH: I am obliged, my Lord.
22. MR JUSTICE BLAKE: I am not purporting to give a gloss upon a gloss upon a gloss, but thank you.
23. MS STRUGO: My Lord, I do not know if we need directions at this stage.
24. MR JUSTICE BLAKE: No. I think probably the ball is in your client's court. I appreciate she has spent a year arguing about whether she should have an appeal but it will probably take a few months to reach an appeal.
25. MS STRUGO: Usual directions?
26. MR JUSTICE BLAKE: You will need to think about it and I am not telling what to do you. Thank you.
27. MS STRUGO: I am grateful, my Lord.