Neutral Citation Number: [2008] EWHC 1146 (Admin)

Case No: CO/8998/2007

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

Royal Courts of Justice
Strand,
London, WC2A 2LL

Date: 22nd May 2008

Before :

SIR GEORGE NEWMAN

- -

Between :

The Queen on the application of SIVARAJAH SIVANESAN	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Roxanne Frantzis (instructed by Raja & Co) for the claimant
Rory Dunlop (instructed by Treasury Solicitor) for the defendant

Hearing date: 8th April 2008

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Judgment

Sir George Newman :

Introduction

1. The claimant is a Tamil of Sri Lankan nationality. He challenges the decision of the defendant to refuse to treat his further representations, based on a change in country conditions, as a fresh claim. Permission was granted by Collins J. on the papers on 20th November 2007. It is not disputed that the conditions in Sri Lanka have deteriorated since the claimant's original claim and the exhaustion of his rights to remain in the United Kingdom on 30th August 2003. But he, like hundreds of other failed asylum seekers from Sri Lanka, was not removed after his rights to remain here were exhausted. The changed conditions have given rise to hundreds of claims to the defendant and she has sought guidance from the Court on the approach which might enable her to deal fairly with these cases. It has to be emphasised that there can be no "blue print" in matters such as this but the argument has thrown up some clear pointers which may have general application.

Background Facts

2. The claimant was born on 6th December 1971. He arrived in the United Kingdom on 11th June 1999. On 12th June 1999 he claimed asylum. On 15th August 2001 his asylum claim was refused. On 29th August 2001 he lodged an appeal.

3. On 29th May 2003 the claimant's appeal was dismissed. The adjudicator's findings were as follows:-

> "12. The Appellant's principal claim involves an incident in 1999, and he claims he is additionally at risk because be comes from a known family of LTTE supporters. He claims that his elder brother has been granted indefinite leave to remain in this country, and also his younger sister, who arrived after he did has also been granted indefinite leave to remain. He also produces a death certificate in relation to his father, and a note from the Sri Lanka Red Cross confirming that the person (named by the Appellant as his brother) was shot on 12 May 1988. Despite these family connections, he apparently went without any serious involvement with the security forces until January 1999, when he was twenty eight years old. He reports some slight harassment from them in earlier years when he was probably still at school, in relation to his elder brother.
>
> 13. The Appellant reports that after their house was shelled, his family was displaced, but they were dispersed to different parts. The Appellant himself, as he was not at home, went to an uncle, and then decided to go to Vavuniya in search of other members of his family. He reports that he was arrested at the checkpoint. I see no reason to disbelieve him in this regard, and I accept that that was the first time he was arrested. I accept that he was released after his uncle paid a bribe. It was clear that he was released from their custody, as he was formally placed on reporting conditions to report daily. He

says that he lived in the refugee centre, which was quite close to the army camp. He gives no reason for his arrest, though he thinks he was interrogated because his brother fought and died for the LTTE.

14. The Appellant produced some documents at the hearing, stating that his sister had sent them to him in 2001. I am unaware whether this is the same sister who followed him to the United Kingdom, or not. The copy of the passport within the Appellant's bundle claims to be a copy of the sister's passport, showing that indefinite leave to remain was granted on 4 July 2002. Amongst these was a copy of a birth certificate with an English translation. However, the English translation does not show the same serial number or application as the original. I am therefore not satisfied that the copy and the translation are genuine. The Appellant was able to produce the original of a letter from a parish priest, and I am prepared to accept that as genuine. However, it does no more than confirm what the Appellant has told me in his evidence. The other document was a letter from the Sri Lanka Red Cross Society, Mannar Branch, this is dated 2 October 2001, and purports to show that three people (identified by the Appellant as his mother and two of his brothers) were abducted by unknown people in a white van on 28 September 2001. It is far from clear why the Red Cross Society would provide a letter in such terms, and the author of the letter does not disclose the source of his information. I notice that the document produced by the Appellant at the hearing was not the original of the letter, and I strongly suspect that the letter is not genuine. I am not prepared to accept it as supporting his case.

16. Whatever the truth of the matter concerning the Appellant's mother and two brothers, I do not find that this would necessarily make any difference to the Appellant's own situation. He was arrested and questioned, and then released, by the army in Vavuniya. Whilst he was mistreated in detention, this unfortunately is a situation which not infrequently arises in Sri Lanka, and it is normally conceded that anyone that is arrested on suspicion of an offence is at risk of being mistreated. This was on one occasion only, and the allegations made by the Appellant do not disclose anything so serious that would cross the threshold into persecution. I note that during the latter part of his detention he was actually put to work by the army. The crucial issue for me to decide is what the Appellant might face on being returned to Sri Lanka.

17. I have considered the matter carefully. The Appellant has now been in this country for nearly four years. During that time the situation in Sri Lanka has changed significantly, in that the ceasefire has held since February 2002. I have considered

the authorities such as *Brinston* [2002] UKIAT 01547, *Jeyachandran* [2002] UKIAT 01869, and the recent decision of the Court of Appeal in *Selvaratnam* [2003] EWCA Civ 121. I do not believe the Appellant will be in danger from the fact that he has not reported for four years. He will be returning as an asylum seeker and with emergency travel documents. The records will show that he was released, and there is nothing further to indicate that he will be wanted by the authorities in relation to anything different. Thus I conclude that he is not one of those exceptional cases, who can show that he is wanted. It has not been demonstrated that he has a record, or has committed an offence. For those reasons I find that the appellant has not discharged the burden of proof in showing that he is at real risk of being detained, and it follows that there is no real risk that he will be mistreated. For the same reasons I find that he does not satisfy the burden of proof in relation to the risk of inhuman or degrading treatment, contrary to article 3 of the ECHR.

18. Despite Ms Laughton's best efforts in saying all she could possibly say on behalf of the Appellant, I am not satisfied that the Appellant can demonstrate a well founded fear of persecution on return. Counsel's best point was argued in relation to article 8 of the ECHR. She pointed out that the Appellant has been here for four years, that his elder brother and his sister are here, and both apparently have been granted indefinite leave to return. However, I have to view each case on its own particular merits, and I have found that this Appellant does not show objectively that degree of fear which would bring him within the Refugee Convention. It may well be that during his time here he has been able to enjoy a private and family life with his relatives, although his sister only arrived in late 2001 (since she allegedly sent him the copy documents). The Appellant claims not to have any family in Sri Lanka, though he clearly has at least one uncle. He also has his mother and brothers, though he claims they have been abducted. The Appellant has only enjoyed any family life here on the understanding that he is here temporarily whilst his asylum claim is processed, and he will always have been aware of the fact that he could be removed. He stated to me at the end of the hearing that he did not wish to have to live on his own in Sri Lanka, and he wanted to have more of a life. I do not accept that he would be living on his own in Sri Lanka. I do not accept that he has established such a family life that it would be an interruption to return him there. If there is a family life, and it would be interrupted, then I believe that such interruption would be justifiable in order to preserve a fair and effective immigration policy on the part of this country."

4. Permission to appeal was refused on 21st July 2003, the decision being communicated by a letter dated 13th August 2003.

5. In November 2003 the claimant made further representations against his removal, relying on the alleged change in country conditions. There was no response to these representations before the 8th October 2007 when removal directions were set.

6. The claimant's removal was set for the 11th October 2007 and on that date the claimant brought these proceedings. The removal directions were cancelled as a result.

7. In a letter dated 23rd October 2007 (attached as Appendix A to the Summary Grounds) the defendant refused to treat the claimant's representations as a fresh claim stating:

> "Although your client may be stopped and questioned upon arrival in Sri Lanka, the Adjudicator did not accept that your client had a record or has committed an offence. It is therefore highly unlikely that your client on his return would be of any adverse interest to any governing authorities in Sri Lanka …
>
> With regard to your client's detention, the Adjudicator concluded that your client was released and that there was nothing further to indicate that he will be wanted by the authorities in relation to anything different. It is considered your client has not further discharged the burden of proof that he will be wanted on his return."

8. On 20th November 2007 Collins J. granted permission, stating as follows:

> "Although on the adjudicator's findings, the claimant had embellished his claim (particularly in relation to what had allegedly happened to his mother and sister), it was accepted that his brother had been an active LTTE fighter and his father had been killed. That coupled with his release on reporting conditions makes it arguable that the present situation creates a real risk that he may be detained and so subjected to torture. In addition, the adjudicator thought the length of time here plus family presence lent support to an Article 8 claim. 4 years have passed and the Home Office has failed to remove until this autumn. This too persuades me to grant permission since it is arguable that the claimant deserves a right of appeal."

Legal Framework

9. Paragraph 353 of the Immigration Rules provides:

> "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are

> significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas."

10. This seeks to reflect the test laid down by Sir Thomas Bingham MR (as he then was) in his judgment in *R v Secretary of State for the Home Department ex parte Onibiyo* [1996] QC 768 at 783 to 286:

> "The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim".

11. Sir Thomas Bingham MR further held that any decision reached on whether a claim is a fresh claim could only be challenged on traditional *Wednesbury* grounds.

12. In *WM (DRC) v Secretary of State for the Home Department and Secretary of State for the Home Department v AR (Afghanistan)* [2006] EWCA Civ 1495 the Court of Appeal considered the task of the Secretary of State when considering further submissions and the task of the court when reviewing a decision of the Secretary of State that further submissions do not amount to a fresh claim.

13. In relation to the task of the Secretary of State and, in particular, the second limb of the paragraph 353 test (i.e. whether the content of the submissions, taken together with the previously considered material, creates a realistic prospect of success notwithstanding its rejection), at paragraph 7 Buxton LJ found that the threshold was 'somewhat modest'. The question for the Secretary of State is whether there is a realistic prospect of success in an application before an immigration judge, but not more than that.

14. In *AK (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 535 the Court of Appeal affirmed that the question which the Secretary of State must ask himself is "whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim, on considering the new material together with the material previously considered?".

15. Buxton LJ, in *WM (DRC)*, said that in answering that question the Secretary of State must be informed by anxious scrutiny of the material. In other words, he must give proper weight to the issues and consider the evidence in the round.

16. In relation to the task of the court Buxton LJ confirmed that the decision remains that of the Secretary of State and the determination of the Secretary of State is only capable of being impugned on *Wednesbury* grounds (irrationality). Buxton LJ, at paragraph 11, said that, when reviewing a decision of the Secretary of State, the court will ask two questions: first, has the Secretary of State asked himself the correct question? As stated, the question is, in an asylum case, whether there is a realistic prospect of an immigration judge, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return. Secondly, in addressing that question, has the Secretary of State satisfied the requirement of anxious scrutiny? Buxton LJ concluded that if the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision.

17. The starting point of an immigration judge on a further appeal will be the findings of the previous adjudicator (*Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804 at 32 and 40). The immigration judge will also be required to apply the country guidance cases to those facts unless there were good reason not to (*R (Iran) (2) A (Afghanistan) (3) T (Afghanistan) (4) M (Afghanistan) (5) T (Eritrea) v Secretary of State for the Home Department (2005)* [2005] EWCA Civ 982 at 27).

Country Guidance

18. In the present case it is agreed that the relevant country guidance decision is *LP (LTTE area, Tamils, Colombo, risk?) Sri Lanka CG* [2007] UKAIT 00076 where the Asylum and Immigration Tribunal gave the following guidance:

> "Previous Record as a Suspected or Actual LTTE Member or Supporter
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> .....
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> 210. From our assessment of the background evidence, we find that it is of vital importance, in the assessment of each Sri Lankan Tamil case, to establish an applicant's profile, and the credibility of his background, in some depth. For example if the appellant was not credible as to his background from the north or the east, which left a situation where he could be a Tamil from Colombo who had little or no involvement with the LTTE, there could be, based on the reality of the assessment of his predicament, little risk (or almost certainly not risk at the level of engaging either Convention).
>
> …..
>
> Bail Jumping and/or Escape from Custody
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> …..
>
> 213. We agree with the logic that those who have been released after going to court and released from custody on formal bail are reasonably likely, on the evidence, to be not

only recorded on the police records as bail jumpers but obviously on the court records as well. Thus we would identify those in the situation such as this appellant who have been found to have been to court in Colombo, and subsequently released on formal bail, as having a profile that could place them at a higher level of risk of being identified from police computers at the airport. Their treatment thereafter will of course depend upon the basis that they were detained in the first place. It is important to note that we did not have before us any information as to the treatment of bail jumpers from the ordinary criminal justice system, and there may be many of them, when they again come to the attention of the authorities, be they Tamil or Singhalese. We had no evidence that Tamil bail jumpers are treated differently from Singhalese ones. Clearly punishment for jumping bail will not make someone a refugee. As we have said, the risk of detention and maltreatment will depend on the profile of the individual applicant.

The situation however, in respect of those who have not been to court and may have been released after the payment of a bribe we do not consider falls into the same category. Much will depend on the evidence relating to the formality of the detention (or lack of it) and the manner in which the bribe was taken and the credibility of the total story. If the detention is an informal one, or it is highly unlikely that the bribe or "bail" has been officially recorded, then the risk level to the applicant is likely to be below that of a real risk…..

Return from London or Other Centre of LTTE Activity or Fund-Raising

218. We consider that this is a factor that will be highly case-specific. While it is valid to take into account that Dr Smith and Detective Inspector Hibberd assert that London is a centre for Tamil fund-raising, (indeed it is now alleged/rumoured that the LTTE may be involved in a "skimming" operation with credit cards in a number of petrol stations in the UK), we consider that this would be a factor that would have to be credibly established, by reference to an appellant's evidence or perhaps that of a close associate. He would need to show the extent to which the Sri Lankan Embassy in the UK was aware of his activities and was thus likely to have passed the information on to Colombo when the applicant was being deported or removed.

Illegal Departure from Sri Lanka

219. We agree that illegal departure does not of necessity establish a well founded fear of persecution or serious harm on its own. However, it does appear that there is some evidence in

the Hotham report, in the evidence of Dr Smith, and the IRB that it may now, in the heightened level of insecurity in Sri Lanka, add to the profile. Again, it is a factor that will be very much case-specific and is likely to become relevant as one factor in a plethora of possible factors leading to real risk of serious harm.

Lack of ID Card or Other Documentation

220. The evidence of Professor Goode was that carrying a national identity card has become a must. It would appear a reasonable inference that in the current situation, where a number of cordon and search activities take place in Colombo and elsewhere, that the lack of valid identity could lead to a higher risk. Obviously it would need to be coupled with other risk factors for those of Tamil ethnicity, but we view it as being a contributing factor. An appellant would need to show why he would be at continuing risk, and that he cannot reasonably be expected, or able, to acquire a new identity card.

Having Made an Asylum Claim Abroad

221. Again there was accepted evidence, including that from the BHC, that there are lists of failed asylum seekers which could form part of search operations in Tamil areas of Colombo. It is again a reasonable inference that the application forms for replacement passports and travel documents may alert the Sri Lankan High Commission in London and that that information could be passed on. We do not consider this to be an issue that alone would place any returning failed asylum seeker at a real risk of persecution or serious harm on return. Again, it would make but a contributing factor that would need other, perhaps more compelling, factors added to it before a real risk of persecution or serious harm could be established.

Having Relatives in the LTTE

222. This factor we consider is again a highly logical one but again needs to be taken into account along with the totality of other evidence and the profile of the other family members. On its own, without established and credible evidence of the details of the other family members and their known role or involvement with the LTTE, it will be of limited weight.

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Risk Profiles for Tamils

227. Our assessment of the various risk factors above has highlighted that each case must be determined on its own facts. It may be that in some credible cases one of these individual

risk factors on its own will establish a real risk of persecution or serious harm on return by the Sri Lankan authorities for Sri Lankan Tamils who are failed asylum seekers from the United Kingdom. For those with a lower profile, assessed on one or a combination of the risk factors we have noted however, such as this appellant, their specific profiles must be assessed in each situation and set against the above non-exhaustive and non-conclusive, set of risk factors and the volatile country situation. As can be noted, several factors, such as being subject to an outstanding arrest warrant, or a proven bail jumper from a formal bail hearing may establish a much higher level of propensity to risk than various other factors. In this situation therefore, the assessment exercise is a much larger and more detailed one than may have been the situation up to 2002 and certainly during the period of the cease fire agreement ("CFA"). The current worsening situation in Sri Lanka requires serious consideration of all of the above factors, a review of up to date country of origin information set against the very carefully assessed profile of the appellant.

230. The following will retain country guidance status but, as always, should be looked at in the context of the developing situation and in the light of any more up-to-date evidence.

PT (Risk – bribery – release) Sri Lanka CG [2002] UKIAT 03444. Although this case concerned the position in mid-2002, paragraphs 28 and 29 of the determination (which deal with scarring) are not inconsistent with the evidence that was before us and paragraphs 19 to 27 (which deal with the issue of bribery) remain consistent with the evidence we have heard, the submissions made and contains what continues to be a common sense approach to the issue of bribery-related releases.

Summary of Conclusions

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234. Tamils make up over 10% of the population of Colombo. Despite evidence of some forms of discrimination, the evidence does not show they face serious hardships merely because they are Tamils. As a result, other considerations apart and subject to individual assessment of each applicant's specific case, it cannot be argued that, even if he faces serious harm in his home area, as a general presumption it is unduly harsh to expect a Tamil to relocate to Colombo, or that it would be a breach of Article 3 to expect him or her to do so, or that doing so would put him or her at real risk of serious harm entitling them to humanitarian protection.

…..

236. Other issues which require careful evaluation involve the previous attention paid to the appellant by the Sri Lankan authorities. Questions of whether the appellant has been previously detained and for how long will be significant, as will the reasons for the detention. A short detention following a round-up may be of little significance; a longer detention as a result of a targeted operation will be much more significant. The question of release and how that came about may be important. It should be recognised that the procurement of bribes is a common occurrence in Sri Lanka and that the release following payment of a bribe is not necessarily evidence of any continuing interest. Care should be taken to distinguish between release following the payment of a bribe and release following the grant of bail. Care should be taken in the use of language here. Release on payment of a bribe, and release on bail with a surety could be confused. Both forms of release follow discussions about, and possibly payment of, money. The evidence is that the police in Sri Lanka do, in appropriate circumstances, grant bail. In this particular case bail was granted by a court. If the Tribunal is satisfied that the appellant has jumped bail (and that would include failing to report under a reporting condition), it is necessary to assess the reason for which bail was granted in the first place…..

…..

238. During the course of the determination we have considered a list of factors which may make a person's return to Sri Lanka a matter which would cause the United Kingdom to be in breach of the Conventions. As in previous country guidance cases, this list is not a checklist nor is it intended to be exhaustive. The factors should be considered both individually and cumulatively. Reference should be made to the earlier parts of this determination where the factors are considered in more detail but for ease of reference they are set out here. There are twelve and they are 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 forces 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 ID card or other documentation.

(xi) Having made an asylum claim abroad.

(xii) Having relatives in the LTTE.'

239. When examining the risk factors it is of course necessary to also consider the likelihood of an appellant being either apprehended at the airport or subsequently within Colombo. We have referred earlier to the Wanted and Watched lists held at the airport and concluded that those who are actively wanted by the police or who are on a watch list for a significant offence may be at risk of being detained at the airport. Otherwise 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."

19. Paragraphs 19 to 27 of *PT*, approved in para 230 of *LP*, give the following guidance:

"21. When someone has been in custody for a significant period of time it is reasonable to presume that some record was made of the detention and this record may still exist and be available for inspection by the authorities. If the record does still exist one may also reasonably presume that it includes a reference to the individual's current status. By this we mean whether he is currently wanted by the authorities, or whether his release concluded the authorities' adverse interest in him. These presumptions are supported by the statement from the CID superintendent, set out above, that their computer only holds the name and address and age of wanted people. We also note in passing that this record kept by the CID does not include people who failed to comply with reporting restrictions after a release.

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24. This evidence is not wholly unequivocal in its terms but it reinforces the view taken by the Tribunal on common sense grounds in *Amalathaasen* that:

'It seems to us that it is highly improbable to say the least that a police officer, releasing a man on payment of a bribe, would record it as an escape. There is certainly no need to do so. If the police wanted to keep

> an interest in him all that was necessary was to note that he might be of interest in the future. Normally if someone is released on payment of a bribe or otherwise it is indeed because the authorities take the view that there is no good reason to detain him even if there is some involvement with the LTTE at a very level.'
>
> 25. We agree and conclude, in the light of the UNHCR observations, that bribery related releases, especially from army custody, would not, in the absence of some special and credible reason, be likely to be treated as escapes, and would not result in the inclusion of the individuals involved on a wanted list".

Collins J's grant of permission and his judgment in *Nishantbar Thangeswarajah & Others* [2007] EWHC 3288 (Admin)

20. This judgment became available for citation only days before the close of argument in this case. The judgment was given on a renewed application for permission on 12th November 2007, eight days before the Judge granted permission in this case. Sri Lankan fresh claim cases must have been particularly fresh in his mind. There were five claimants in the case and three were fresh claim cases.

21. The volume of pending Sri Lankan fresh claim cases had, as Collins J. recited, already caused concern to the European Court of Human Rights which, in turn, requested the UK government to refrain from issuing removal instructions for the time being. On 31st October the Foreign and Commonwealth Office (FCO) declined to do so citing the case of *LP* as a source of guidance and, following the guidance in that case, the FCO stated that it was not prepared to accept that there was a risk of serious harm to Tamils, from the authorities in Columbo, simply because they were Tamils.

22. Collins J. set out the 12 factors listed in *LP* which I have already cited above. In paragraph 10 he observed:

    (1) "… 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 … factors".

    (2) That "… if there is a factor which does give rise to a real risk that the individual will be suspected of involvement in the LTTE" background factors add to the significance of that risk.

    (3) He categorised:

        (a) Tamil ethnicity;

        (b) illegal departure from Sri Lanka;

        (c) lack of ID card or other documentation;

        (d) an asylum claim made abroad;

as factors which neither "in themselves, or even cumulatively, would create a real risk".

(4) He categorised:

(a) a previous record as a suspected or actual member or supporter, "at a level which would mean the authorities" retained an interest as "likely to create a risk".

(b) A previous criminal record and an outstanding arrest warrant as "highly material and clearly capable of … producing a real risk."

(5) In paragraphs 11 and 12 he categorised:

(a) Bail jumping and/or escaping from custody as "… on the face of it highly material".

(b) "Release on payment of a bribe without more would not indicate that there was an ongoing risk because it would be likely to be recorded as a release…" and stated,

(c) "… whether the nature of the release was such as to lead to a risk" would depend upon "the individual circumstances".

(d) "A signed confession or similar document obviously would be an important consideration" (para 12).

(6) He observed that "… Having been asked by the security forces to become an informer can be of some importance …" (para 13).

(7) Scarring was, generally speaking, to be "regarded as a confirmatory rather than as a free-standing risk element".

(8) Having relatives in the LTTE is something "that one can well understand might produce suspicions".

23. Finally (para 16) Collins J. observed the test was:-

> "… whether there are factors in an individual case, or one or more, which might indicate that the authorities would regard the individual as someone who may well have been involved in the LTTE in a significant fashion to warrant his detention or interrogation".

24. Collins J's judgment amounts to clear confirmation of the value to be derived from the case of *LP* and, in the paragraphs to which I have referred, the Judge has provided his own summary of the factors along with his observations on their make up and their significance. I agree entirely with his observations. I recommend his summary as a starting point for the defendant when marshalling the relevant issues which will form part of her decision in these cases. That said, the additional guidance now being sought relates more to an appropriate methodology and process of reasoning which might be adopted when applying the content of the case of *LP* and Collins J's

judgment. An opportunity to expand on this area has arisen because a combined rationality and reasons challenge, advanced on the claimant's behalf, has highlighted obvious shortcomings on the decision letter. In turn, these shortcomings have given rise to the need on the Court's part to review all the relevant material.

25. Since the close of the argument further submissions in writing have been delivered in connection with two further cases: *R (on the application of Tharmelingham Rathakrishnan) v Secretary of State for the Home Department* [2008] EWHC 724 (Admin), CO/1865/2006 (11th April 2008) and *R (on the application of Baskaran Nadesu) v Secretary of State for the Home Department* [2007] EWHC 3105 (Admin), CO/8328/2005 (28th November 2007). In addition, Counsel for the defendant has identified three specific questions which the Court is invited to answer. Yet further, the defendant has issued another decision letter. I shall have to return to these very latest developments.

Rathakrishnan

26. In *Rathakrishnan* the claimant's case was based on two sources of alleged risk: the Sri Lankan authorities and the LTTE. Munby J. dismissed the claim, finding neither risk made out. His analysis of the risk from the Sri Lankan authorities followed *LP* and the pre-existing case law on fresh claims. He concluded that the Secretary of State's decision was not irrational and commended the decision letter as being a "… careful comparison of the claimant's case with the principles to be extracted from *LP*…". The written submissions on behalf of the claimant in connection with this case view the decision as a source of forensic assistance. For example, comparison is sought to be drawn between a release, without conditions attached, and the alleged absence of a detailed decision letter evidencing anxious scrutiny. This is deployed to highlight the strength of the claimant's case. The latest submissions from Counsel for the defendant also seek to derive assistance from the facts of both cases as illustrating weaknesses in the claimant's case.

Nadesu

27. *Nadesu* is simply an example of the court reaching the conclusion that the rejection of the claim was irrational because the Deputy Judge concluded that two particular features of the case pointed to some realistic prospect of success. It was not held that there had been a lack of "anxious scrutiny". In my judgment, neither of the cases provides real assistance and neither purport to establish any general principle. Further, since guidance is sought, I shall have reason to comment later on the undesirability of using the facts of other cases for comparative purposes.

The decision letter dated 23rd October 2007

28. The decision letter took the Adjudicator's decision on the asylum claim as the starting point. No criticism can be made of that. It will be part of a rational and sensible starting point in the majority (if not all) cases. The Secretary of State's analysis led to the following conclusions:-

    (1) that the Adjudicator had not found that the claimant was "wanted, nor that he" had "a record" or had "committed an offence that would bring him to any attention of the authorities";

(2) that the lack of reporting for four years would not give rise to a risk. That he would be returning as an asylum seeker on emergency travel documents and that the records would show that he was released.

(3) that, applying *LP*, it was accepted that:

(1) the claimant was a Tamil from northern Sri Lanka;

(2) who claimed to have previously been detained; but

(3) following the Adjudicator, that he had no record nor had committed an offence;

(4) it was highly unlikely that he would be of any interest on return;

(5) there was nothing in connection with the release to indicate that he would be wanted by the authorities in connection with anything else.

29. The makings of the irrationality case and for the alleged lack of anxious scrutiny emerged as the case was argued and by reference to the reasons given by Collins J. for granting permission. He had stated:

(1) that it was accepted by the Adjudicator that the claimant's brother had been an active LTTE fighter;

(2) that his father had been killed; and

(3) that he had been released on reporting conditions.

It is likely Collins J. took this from paragraph 2 of the "Emergency Grounds for seeking Judicial Review". In that paragraph it was claimed on the claimant's behalf that the Adjudicator found the claimant "… to be credible in his claim for political asylum in the following material respects":

(a) that he was a Tamil;

(b) that his brother was a "fighting member of the LTTE";

(c) that his brother was a LTTE martyr, having died in battle;

(d) that he was harassed by the army after his brother joined the LTTE;

(e) that he was detained for five weeks, ill treated and released upon payment of a bribe on a daily reporting condition and that, in fleeing, he had breached the conditions.

It is possible that these contentions had not been received in 2003, at the time they were drafted, but they were sent on 10th October 2007, although the decision letter dated 23rd October 2007 disputed that they had been received. At page 19 of the bundle the following claim appears:

"The adjudicator accepted that:

(i) his brother was a fighting member of the LTTE,

(ii) his father was shot by the SLA for assisting the LTTE,

(iii) he was arrested in 1999 in Vavuniya, and ill treated in detention,

(iv) he was released through bribery and daily reporting conditions were imposed."

30. In my judgment, neither the merits of the claims at paragraph 2 of the Grounds nor the merits of the claims at page 19 of the bundle can be considered and assessed without a full and proper reading of the Adjudicator's decision. It seems doubtful that any such reading occurred because the claims were not addressed. The decision letter did not grapple with the alleged LTTE connection, through either brother or father nor, in any detail, with the circumstances of the release and breach of conditions as they were laid out by the previous solicitors for the claimant. It was essential to grapple with them. These factors comprised the critical aspects of the claimant's profile, as it had been advanced in the solicitors' representations, and it was central to a decision that they should be addressed.

31. By way of contrast to the contents of the decision letter, Counsel for the claimant has pointed to the detail contained in the Detailed Grounds of Defence (DGD) and the arguments advanced in connection with the case of *LP*. The DGD make reference to:

(a) Tamil ethnicity (as did the decision letter).

(b) The issue of the claimant's previous record as a suspected or actual LTTE member or supporter. It was submitted that the Adjudicator had dealt with this, so as to dismiss it. The relevant part of the Determination had been set out in the decision letter and that it had been stated by the Adjudicator: "… he claims to have been previously detained by the authorities, there is nothing to suggest that he will be similarly targeted upon return". I take this to be a reference to paragraph 17 of the Determination.

(c) The claim in connection with relatives in the LTTE. Although the decision letter made no reference to this part of the case, oral argument was advanced to the effect that such connections as were in evidence were not weighty and were incapable of giving rise to a real risk of harm. Understandably those acting for the claimant have seen the DGD, the oral submissions, the written submissions and now the new decision letter as an objectionable "salvage operation".

The Court's approach

32. In my judgment paragraphs 12 and 17 of the Determination are crucial to the full and proper consideration to be given to the case. For convenience, I will set out paragraph 12 again:

> "12. The Appellant's principal claim involves an incident in 1999, and he claims he is additionally at risk because be comes

> from a known family of LTTE supporters. He claims that his elder brother has been granted indefinite leave to remain in this country, and also his younger sister, who arrived after he did has also been granted indefinite leave to remain. He also produces a death certificate in relation to his father, and a note from the Sri Lanka Red Cross confirming that the person (named by the Appellant as his brother) was shot on 12 May 1988. Despite these family connections, he apparently went without any serious involvement with the security forces until January 1999, when he was twenty eight years old. He reports some slight harassment from them in earlier years when he was probably still at school, in relation to his elder brother."

The claimant's evidence (see para 5) simply referred to his father being killed in 1987 and his older brother joining the LTTE and being killed in May 1988 fighting for the LTTE (paras 5 and 13).

33. The conclusions of the Adjudicator could have been expressed more precisely and clearly as conclusions on specific fact rather than as a recital of the claims which had been made by the claimant but, in fairness, the claimant's case lacked specificity. That said, the claims were not rejected and because the Adjudicator concluded that the claimant had no serious involvement with the security forces until January 1999, "despite these family connections", it may be inferred that he accepted the "family connections" existed. The Adjudicator added:-

> "He reports some slight harassment from them in earlier years when he was probably still at school, in relation to his elder brother."

On analysis it is possible to find some support for a "brother" being shot as an LTTE supporter, but little to support a conclusion that he was a "martyr" other than that he was shot because he was a LTTE supporter. There is nothing to support a case of serious sustained harassment, simply "slight harassment". There is nothing which details the circumstances of his father's death. His father's death did not feature in the Emergency Grounds for Judicial Review. The claim that he was "shot by the SLA for assisting the LTTE" is not supported by the claimant's evidence recorded by the Adjudicator ("... father was killed in September 1987…" (para 5)) and consequently it cannot be said that the Adjudicator accepted that "his father was shot by the SLA for assisting the LTTE" (page 19). As to the brother being a fighting member of the LTTE, the only evidence appears in paragraph 13, being the record of the claimant's belief that he was interrogated because "… his brother fought and died for the LTTE".

34. The DGD correctly point out the following, not being points contained in the decision letter:

(a) There was no evidence, and no findings, that the claimant's brother or father had any particularly prominent role in the LTTE.

(b) The thrust of the Determination to the effect that, despite "connections", he had not been placed at significant risk.

(c) The circumstances of his arrest in 1999, namely being stopped at a check point and not rounded up.

(d) The passage of time since these events,

and

(e) His release on a bribe.

35. As to the breach of reporting conditions, attention is drawn to paragraph 17 of the Determination, which had been referred to in the decision letter, where it was concluded that the claimant would not be in danger because he had not reported for four years. In argument it was emphasised that "reporting conditions" can be formal and informal and, if the latter, are not likely to be recorded.

Conclusion

36. The decision letter has been clearly demonstrated to be deficient in a number of respects. It did not focus on the fundamental issue which underpins all these cases, namely whether there are any factors present which could lead to suspicion of an involvement by the claimant, at a sufficiently high level, with the LTTE even though the claim was raised. It addressed some of the factors listed in the case of *LP*, but drew no distinction between "real risk factors" and background factors. I have little doubt that the failure to address the issues in connection with the claimant's brother and father is the principal reason why Collins J. granted permission. How, then, does it leave this claim for judicial review?

37. The position appears to me to be as follows. The claimant has raised a fresh claim which, in its crucial respects, is unsupported by the Adjudicator's decision, but it is not clear whether the lack of specific support stems from the adequacy of the Adjudicator's conclusions or the clarity of the evidence before the Adjudicator or the emphasis of the case at the hearing, or a combination of some or all of the above. It follows that the Adjudicator's Determination and Reasons constitutes an inadequate starting place and foundation for the exercise of the degree of anxious scrutiny which the case requires. Next it is material to note that the decision letter, having failed to address the crucial factors in the claimant's case, cannot stand as a lawful decision. The failure to address the factors is so fundamental that it cannot be regarded as a failure to provide reasons for a lawful decision and, there being no decision on the relevant issues, it is not for the court to substitute itself as the decision-maker, notwithstanding that grounds exist for doubting that the claim could succeed on appeal. Can the dilemma be resolved by a fresh decision?

38. After careful consideration, I have concluded that a fresh decision addressing the crucial issues cannot salvage the position. I am bound to say that the course of conduct which the defendant has adopted since the close of oral argument has caused considerable surprise. Leave was given for further submissions on the judgment of Munby J. which was then expected and on Collins J's judgment which had only just become available. The addition of *Nadesu* was sensible and proper. That cannot be said of the fresh decision. I could regard it as a fresh decision, having the consequence of rendering an outcome in these proceedings irrelevant and surpassed by events and calling for no judgment, because it would be open to the claimant to

challenge the fresh decision. Or I could simply regard the step which has been taken as purely tactical, designed to dissuade the court from granting relief or, yet further, regard it merely as a recital of the argument in the case. In my judgment, it would be wrong and convey an impression of unfairness to delay a hearing to the claimant where the defendant has taken a number of opportunities to advance her case.

39. I have little doubt that had the original decision been in the terms of the fresh decision the chances of obtaining permission would have been significantly reduced because the important point in connection with the Adjudicator's decision has only emerged from detailed argument. The absence of clear findings by the Adjudicator, which the fresh decision itself recognises, goes both ways. The Adjudicator's decision is the starting point. If it is unclear or other material is available the whole position must be weighed. Where there are no clear findings the defendant is at risk of assuming more than a role of determining whether a new judge would realistically reach a decision favourable to the claimant. Uncertainties should be unravelled by evidence or an opportunity for evidence to be adduced. That is a consequence of the obligation of anxious scrutiny. I am left with the uneasy conclusion that the matters now highlighted as significant may have received less attention than is required by reason of the heightened tension and change of circumstances in Sri Lanka.

40. I am satisfied that the claimant is entitled to an opportunity to present his case at an appeal hearing and for clear and specific findings to be reached on the crucial elements of his case. It follows that this claim for judicial review succeeds. I shall hear counsel on the form of relief.

The request for guidance

41. The lesson to be learned from this case is that the central question is whether a real risk exists that the authorities would suspect the claimant of having a sufficiently significant link to the LTTE which could cause him to be detained on his return to Sri Lanka.

42. The question must be answered after a thorough assessment has been made of the findings made by the judge in connection with the original claim. This is required because a fresh judge will take the original conclusion as his starting point. In the cases now pending, depending as they do on changed circumstances in Sri Lanka, the assessment should be directed at the conclusions which have been reached which establish the profile of the claimant. It is likely that the claimant (or his lawyers) will have advanced a profile by reference to a number of risk factors. Each case must be considered on its own facts. The factors in *LP* are not exhaustive but are ones commonly found to have been present in many cases. They may be reflected in any one case in a different manner to that described in *LP*. The requirement that each case should be considered on its own facts means that the formulaic repetition of a conclusion in LP will not be sufficient if differences of detail are present. Where factors capable of showing a connection of significance to the LTTE are relied upon, a careful assessment of the detail will be required. The judgment of Collins J. provides clear guidance on the line between real risk factors and background factors. That said, a combination of factors could materially affect the conclusion. It must always be remembered that the requirement for anxious scrutiny means addressing the relevant representations which have been advanced. A failure to do so will not be saved by repetitive citation of principle from cases or sections of a Determination

which are arguably in point without the reason for referring to the section being stated.

43. An examination of decisions in other cases, apparently similar, should be avoided. The detailed facts of another case can be an unreliable barometer of risk and are likely to lead to a decision being taken in the case under consideration which is driven, not after anxious scrutiny in the case in question, but by the decision of a judge in a different case. That is not to say that a comparative exercise cannot help a decision-maker, but undue weight should not be attached to the result.

44. Counsel for the defendant posed three questions:

(1) What is the overall test for an immigration judge in cases such as this?

(2) Which of the risk factors in *LP* are "weighty" and which cannot individually or cumulatively be sufficient to give rise to a real risk?

(3) Whether a breach of reporting conditions and detention are particular weighty indicators of risk?

45. As to (1), see paragraph 41 above and the judgment of Collins J. in *Thangeswarajah* at paragraph 16.

As to (2), see the paragraphs above approving Collins J's judgment and the judgment itself.

As to (3), the relevance of these factors will depend upon whether the likelihood that the detention or release has been recorded. It is the existence of a record which could give rise to the risk of suspicion on return. The degree of risk will depend upon the case in question and the likely content of the record.