

KH
Heard at Field House

SN (Scarring– Bribes – LTTE -
Reprisals) Sri Lanka CG [2003]
UKIAT 00150

Date: 12 November 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

19 November 2003

Before:

**Mr N H Goldstein (Chairman)
Mr N Kumar JP**

Between

APPELLANT

And

Secretary of State for the Home Department

RESPONDENT

Appearances

For the appellant: Mr D Coleman, Counsel.

For the respondent: Ms J Sigley, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant, the Secretary of State for the Home Department, has been granted permission to appeal to the Tribunal against the determination of an Adjudicator (Mr David Taylor) who allowed the respondent's appeal on asylum and human rights grounds.

2. The appellant challenges the Adjudicator's findings in relation to the respondent's asylum claim contending that the Adjudicator failed to follow **Ravichandran** [1996] IAR 97, by not giving clear and valid reasons as to why the respondent would be at risk if returned to Sri Lanka at the date of determining the appeal. The appellant contends that the Adjudicator failed to take full account of the current objective material relating to the peace process as outlined by the CIPU April 2003 Report before him and reinforced by case law and the continuing ceasefire.
3. The appellant refers to **Jeyachandran** [2002] UKIAT 01689 in which the Tribunal held that "in the present situation having regard to the present trends it is only exceptional cases that will not be able to return in safety. The example of an exceptional case is someone who must be wanted in a relatively serious fashion".
4. The appellant contends that the respondent does not fall within this category in that there is no evidence of an arrest warrant or any other evidence to suggest that the respondent is wanted in Sri Lanka and that indeed the Adjudicator failed to make any finding that the respondent was wanted by the authorities.
5. The respondent claims that the appellant's last arrest was in November 1999 well before the commencement of the ceasefire.
6. The appellant notes that the respondent was released in relation to both of his detentions by way of the payment of a bribe and as such the continued interest by the authorities would be unlikely.
7. Finally, in relation to the Adjudicator's findings upon risk on return, the appellant contends that in the absence of evidence that the respondent is wanted it is submitted that the scarring which is so heavily relied upon by the Adjudicator at paragraphs 30 and 31 of his determination "is at most of only marginal relevance".
8. There are in fact two parts to the appellant's appeal the other relating to the Adjudicator's findings that Articles 2 and 3 of the ECHR were engaged but more particularly in relation to the Adjudicator's findings that the appellant's situation was such that to return him to Sri Lanka would cause the United Kingdom to be in breach of its obligations under Article 8.
9. The respondent is a Tamil from the North of Sri Lanka. The Adjudicator found his account and claimed history to be entirely credible and in this regard we set out below the Adjudicator's summary of the respondent's claim:

"... His family are supporters and have been involved for some years with the LTTE, One of his older brothers, whom he has not seen for five or six years, holds high rank in the LTTE. Two other older brothers both live in the UK are married and each has one daughter. They live together in one house (owned by one of the brothers) and the appellant lives with them as well. One of the brothers originally had refugee status in the UK and the other came as a student. Both have now obtained British citizenship.

In June 1991 the appellant was badly injured by an exploding bomb. Serious operations were necessary and he has major scars to his stomach. Over the next few years he assisted the LTTE and he says that he was forced to do this.

At the end of 1995 the Sri Lankan Army captured Jaffna from the LTTE and all the civilians relocated in about March 1996 for their safety. Those who remained were killed or tortured as being LTTE supporters. Shortly after relocation, the appellant went home to collect some belongings but he was captured by the authorities. **As a result of his scars he was beaten up and tortured. He was identified as being the brother of a high-ranking officer of the LTTE and was tortured for information about his brother.**

He was released with a bribe from his father. He later contracted malaria severely. In January 1997, despite his weakness, he was asked to help the LTTE and did so under duress.

The appellant's parents were unhappy at his being forced to work and, in November 1999 they arranged for him to go to Vavuniya. **Shortly afterwards he was again detained on suspicion of being an LTTE member. He was beaten and required to identify LTTE members. He received scarring as a result of being tortured for the information.**

In February 2000 the appellant's brother-in-law paid money to obtain his release and, with the assistance of an agent, arranged for him to flee to the UK. **Because of his older brother's senior position in the LTTE as well as because of the numerous scars on his body he believes that he will be detained and persecuted if he returns.** [The typed emphasis is ours].

10. In evaluating the evidence at the hearing, the Adjudicator at paragraph 19 of his determination turned his attention to a

medical report dated 28 May 2003 relating to the scarring to the respondent's body. He continued as follows:

"... The report states that the scarring is consistent with his own description as to how the wounds were caused. **At his Counsel's request, I inspected the appellant's scars on his chest and back although I made it clear that I did so as a layman without any medical knowledge. The scars are large and numerous and unmissable**". [The typed emphasis is ours].

11. Later in his determination at paragraph 24 and in summarising the submissions of the appellant's Counsel, Mr Coleman, (who also appeared before us) the Adjudicator noted that:

"... However the appellant's scars are unmistakable. They caused him to be arrested on the last occasion that he was detained as the army thought that he was a combatant."

12. The Adjudicator's findings in relation to the respondent's asylum appeal are set out between paragraphs 26 and 32 of the determination. The Adjudicator found the appellant had been forced to leave Sri Lanka, "due to his family's involvement with the LTTE". The Adjudicator accepted the appellant's evidence, "as to the degree of torture that he received at the hands of the Sri Lankan authorities when they forced him to state what he knew about LTTE activities".
13. The Adjudicator accepted the appellant's evidence, "that the LTTE came looking for him because he was informing against them".
14. The Adjudicator continued inter alia:

"I accept the appellant's evidence as being credible. Where there are inconsistencies in his statements, as raised in the refusal letter, I am satisfied that they do not go to the core of his evidence. I am similarly satisfied that when the appellant fled Sri Lanka in March 2000 he did so with a well-founded fear of persecution which, at that time, would certainly have been a Convention reason for obtaining refugee status in the UK.

Circumstances since January 2002 have, of course, changed significantly in Sri Lanka with the development of the peace process. I am aware of the indication given by Mr Justice Collins in the case of **Jeyachandran** when he stated that it is as yet premature to accept that everyone

who has claimed asylum in this country would be able to return safely. But the present view is that it is only the exceptional cases that will not be able to return in safety. There are few who would not be at risk but it is always necessary to consider the circumstances of each individual case.

I have examined the latest objective evidence produced to me. **I am also conscious of the major scarring to the appellant's body. There is a serious risk that this scarring would bring him to the immediate attention of the authorities if he were to return. The state of affairs in Sri Lanka has not yet moved to the position where a man in the appellant's situation can be reasonably sure of passing through immigration unnoticed.**

Applying the lower standard of proof that applies in asylum cases, I am satisfied that this appellant is at risk if he is sent back. The fact that he is a Tamil with serious scarring would be likely to bring him to the attention of the authorities and it would not be right to subject him to that risk.

Having made such a finding of fact I am obliged to and do allow the appeal on asylum grounds. [The typed emphasis is ours].

15. Ms Sigley drew our attention to the recent decision in the Court of Appeal in **Sabanathan** [2003] EWCA Civ 1517. It was a case where the Tribunal allowed an appeal by the Secretary of State against the decision of an Adjudicator and as Ms Sigley pointed out the circumstances of the appellant in that case were not dissimilar from the respondent in the case before us. The Tribunal had concluded that the scarring to that appellant was not particularly visible and was not of any significance and that it would not draw him to the attention of the Sri Lankan Army if he was returned. It was also said that there was no evidence that the appellant was wanted in Sri Lanka as an escapee or for any other reason.
16. The Court considered the issue of whether there was any conflict between the cases of **Oleed** [2002] EWCA Civ 1906 and **Ravichandran** and concluded that there was no such conflict.
17. We are mindful of the passages in the judgment that Ms Sigley most helpfully highlighted. They include an assessment of the background documentation and in particular the Fact Finding Report of March 2002 which records the position outlined by the Director of the Sri Lankan CID that if a returnee were not wanted

they would not be stopped at the airport but where the CID are certain that an individual has committed or been convicted of an offence then they would be stopped. Further, a computer holds the name and address and age of a wanted person. Police purely go on records – scars would not make a difference and the authorities would not make a decision on that basis. It is right that this report also states that obtaining a release from army custody on the payment of a bribe appears to be a possibility and it is possible that such 'releases' would be recorded as an official release without charge.

18. We have, however, taken particular note of the conclusions of Keene LJ at paragraph 27 which we set out below:

"Insofar as one is seeking to reach a conclusion from such documentation as to whether the appellant would be on record as an escapee, the IAT was in as good a position as the Adjudicator to form a view and was entitled to do so. By itself I do not suggest that the mere fact that the IAT could form a different view from that of an Adjudicator even in the case where one is dealing with documents, is enough. As has been indicated on authorities to which I have referred, the IAT should be slow to intervene in such matters merely because it takes a different view but if it does come to the conclusion that an Adjudicator was clearly wrong in the conclusion which he reached then it is entitled and bound to do. In the present case the IAT did, in effect, conclude that the Adjudicator was plainly wrong on the inferences drawn by him in his assessment of the risks. In those circumstances I cannot say the IAT went wrong in the approach which it adopted in this case. It was entitled to allow the appeal as it did".

19. The authorities to which Keene LJ had made reference included in addition to **Oleed** the approach of the Court in **Borissov** [1996] IAR 524 and Keene LJ quoted a passage from the judgment of Hirst LJ in which he spelt out the basic principles which Keene LJ found in his judgment was still applicable today. The passage reads as follows:

"Thus the jurisdiction of the Immigration Appeal Tribunal is not limited to questions of law and it is within the scope of their jurisdiction for them to review, if they see fit to do so, the Special Adjudicator's conclusions of fact, though no doubt this power will be sparingly exercised in any event in accordance with general principles, the Immigration Appeal Tribunal will naturally be most reluctant to interfere with a finding of primary fact by the Special Adjudicator

which is dependent upon his assessment of the reliability or credibility of a witness who has appeared before him".

20. It is right to note that the Court further noted **Balendran** [1998] IAR 162 where the argument that perversity was required before the IAT although the term of conclusion of fact was rejected. Ms Sigley indeed highlighted a particular section of a passage of the judgment of the then Lord Chancellor in a case cited in **Balendran**, namely **Montgomerie & Co Ltd v Wallace-James** [1904] AC73 as follows:

"Where no question arises as to truthfulness and where the question is as to proper inferences to be drawn from truthful evidence then the original Tribunal is in a better position to decide than the judges of an Appellate Court".

Keen LJ observed that there was a difference between cases where the Adjudicator had arrived at the conclusion of fact based on or principally upon oral evidence put before it and those where his conclusion is based on (or principally on) documentary material. That was the difference as spelt out by Jawitt J in **Balendran**.

21. We are mindful that although the Adjudicator in the case before us stated at paragraph 30 of his determination that he had examined the basis of the objective evidence produced to him, he fails to make any further or more specific reference to objective evidence in order to substantiate his conclusion that the respondent would at the date of his determination, be at risk upon return for the reasons stated.
22. Mr Coleman submits that given the length of the respondent's detention in 1999/2000 and notwithstanding that he had eventually been released on the payment of a bribe, there was a clear risk that a record of the appellant's detentions would indeed exist. Apart from observing to Mr Coleman these were not factors considered by the Adjudicator within his determination, we do not find that the objective evidence placed before us supports his contention in this regard. Indeed there is evidence to the contrary as set out in the Fact Finding Report of March 2002 to which we have above referred as did indeed the Court of Appeal in **Sabanathan**.
23. As mentioned earlier the report also stated that bribery related releases might result in the possibility that such "releases" will be recorded but only as an official release without charge. Indeed in this regard we are persuaded by Ms Sigley's submission that in the unlikely event that the computer at the airport disclosed a record of the appellant's detentions they would show that he

was detained and released and therefore there was still no reason why the appellant's scarring to his body should be discovered. We agree with Ms Sigley that the Adjudicator failed to give adequate and clear reasons for his conclusions. Notwithstanding the unsatisfactory nature of the Adjudicator's reasoning it was Ms Sigley's submission with which we agree that the authorities would do nothing. There is a ceasefire in place. There must be many Tamils in the unfortunate position of this appellant not only in relation to his past dreadful experiences in detention but in being forced to identify LTTE members.

24. Mindful of the judgment of Keene LJ in **Sabanathan** in noting the difference in cases where the Adjudicator arrived at a conclusion of fact based on oral evidence put before him and those where his conclusion is based on the documentary material, we have concluded that the Adjudicator drew the wrong conclusions from his findings of fact. As we say, he makes reference in his determination to having considered the objective material but fails to be more specific.
25. We find that the Adjudicator was indeed plainly wrong to conclude that the respondent's circumstances would place him in the category of an exceptional case. In that regard we agree with Ms Sigley that the Adjudicator, although taking into account other factors, appears upon a careful reading of his determination to have placed heavy reliance on an examination of the respondent's scarring. In this regard, Mr Coleman accepted that the doubts expressed by the Tribunal in the past as regards the weight to be attached to reports prepared by Asylum Aid as in this case but he pointed out, as reflected in the determination, that at Mr Coleman's request the Adjudicator inspected those scars and concluded as he did at paragraph 30 that he was "conscious of the major scarring to the appellant's body" and that there was "a serious risk the scarring would bring him to the immediate attention of the authorities if he were returned".
26. It is difficult to follow the Adjudicator's reasoning in concluding that the scarring to the appellant's body would bring him "to the immediate attention" of the authorities upon return. It was accepted by Mr Coleman and indeed observed by us and as stated by the learned Vice President granting leave, Mr D J Parkes, "that according to the medical report the only scar upon the respondent's body which could be observed whilst he was wearing normal clothing was a cord of hardened skin upon his right little finger".
27. The objective evidence makes clear that computerised records are kept of those citizens that are wanted by the Sri Lankan

authorities. As Ms Sigley rightly submitted, there is no reason to suppose that the respondent was on record and indeed this was not a matter with which the Adjudicator, in any event, made any reference such as to suggest that it formed part of his considerations in reaching his conclusions.

28. Mr Coleman had at the outset accepted that the Tribunal were concerned with the objective situation as it stood in Sri Lanka at the time of the Adjudicator's determination, but nonetheless submitted that looking at the situation at the time of the hearing before us, there was an atmosphere of current heightened tension in relation to which the authorities would be on a higher state of vigilance thus placing the respondent in his circumstances at higher risk.
29. Having found that the Adjudicator was plainly wrong in the conclusions that he drew from his findings of fact we have indeed considered Bulletin 1/2003 recently issued by the Home Office which refers to the recent political development whereby on 4 November 2003 President Kumaratunga removed the portfolios of the Defence, Interior and Mass Communication from the relevant Ministers and suspended Parliament until 19 November 2003. We are however mindful that the Bulletin further records that on 5 November 2003 the President issued a statement: -

". that the ceasefire between the Government and the LTTE was not in jeopardy. Her spokesman said, 'the President has no intention of resuming or provoking the resumption of hostilities'."

The Bulletin further records that following the return to Sri Lanka of the Prime Minister on 7 November 2003 that:

"That just after his arrival, Sri Lankan officials said that the ten day state of emergency declared on 6 November was being lifted to be replaced by less draconian security regulations".

We do not therefore agree with Mr Coleman's submission that in the respondent's particular circumstances he would be at heightened risk if now returned to Sri Lanka.

30. Although the Adjudicator made no reference within his determination to whether or not the respondent was a person on a wanted list, we find on the facts accepted by him that the respondent was released on two occasions from detention by payment of a bribe. The circumstances of the respondent's release is of clear relevance to the question of whether or not

the Sri Lankan authorities would be interested in him on return and in our view no such interest would exist.

31. As the Tribunal have made clear in **Tharamakulaseelen** [2002] UKIAT 03444, and other cases, bribery related releases, especially from army custody will not in the absence of some special and credible reason be likely to be treated as escapes and will not result in the inclusion of the individuals involved on a wanted list.
32. As regards Mr Coleman's submissions in relation to the respondent's stated fear of the LTTE, we can but only point out that the LTTE are no longer an illegal organisation and though that by itself in no sense indicates an end of human rights problems for persons associated with the LTTE or are perceived by them as being informers in the past, we are satisfied that a person with a profile such as this respondent does not face any real risk on return of persecution or breach of his human rights at their hands. We are mindful that each case must turn on its own facts and the normal risk factors have to be assessed and cannot be divorced from a consideration of the objective evidence.
33. As was observed by Peter Gibson LJ in **Selveratnam** [2002] EWCA Civ 121:

"... it is only in exceptional cases that a person returning to Sri Lanka would attract the attention of the authorities there and that such persons are likely to be limited to those who are wanted persons. The question is whether the case of the applicant is an exceptional case as a person likely to be of interest to the Sri Lankan authorities and so likely to be detained, it being conceded that, once he is detained, there is a substantial risk of persecution".
34. The Adjudicator makes no reference to any consideration of this important aspect of the matter at all within his determination. The Adjudicator simply confines himself to what he describes as the indication given by Mr Justice Collins in **Jeyachandran**.
35. Given that the only visible scars to the respondent is that which appears on his right little finger, there is no reason to believe that the Sri Lankan authorities' attention would be drawn to the more extensive scarring to his body.
36. We conclude on the facts as found by the Adjudicator that the appellant is not a person on a wanted list. He was released on payment of a bribe and that is of clear relevance to the question of whether or not that there is interest in him on the part of the authorities on return. In our view no such interest exists in the appellant's circumstances and as the Tribunal has made clear in

many cases 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 will not result in the inclusion of the individuals involved on a wanted list.

37. We find that there is no real risk that the respondent will be detained simply by virtue of his prior detentions. The respondent is not an escapee. He is not on any wanted list. His case is not exceptional.
38. As regards the respondent's fear of the LTTE it is noteworthy that although the Adjudicator in his determination accepted the respondent's evidence that the LTTE had come looking for him because he was informing against them, the Adjudicator made no finding or gave any consideration to the question of whether there would be continued interest in the respondent by the LTTE if he were now returned. Although since the peace process the LTTE have opened political offices in government controlled areas in the North and have been allowed to engage in activities in areas outside of their control, it would, as Ms Sigley rightly submitted, take matters too far to suggest that given not least the passage of time, the LTTE would continue to have a specific interest in this respondent or be prepared to concentrate their resources on establishing his return to Sri Lanka and then hunting him down. If that were so, as Ms Sigley rightly submitted, it would impact on the circumstances of probably thousands of young Tamil men who had been forced by the authorities to identify LTTE members in the past in similar circumstances. Further, as paragraph 4.81 of the CIPU report of April 2003 made clear the majority of cease - fire violations perpetrated by the LTTE occurred in the North East of the country and not in Colombo to where the respondent would be returned and where a sufficiency of protection would be available to him. It was noteworthy that Mr Coleman did not draw our attention to any objective evidence to the contrary.
39. For the above reasons we find that there is no reasonable chance or a serious possibility of the respondent being persecuted for a Refugee Convention reason on his return to Sri Lanka or that the United Kingdom's obligations under the European Convention on Human Rights under Articles 2 and 3 would be breached on that return.
40. We further so conclude in relation to the Adjudicator's finding that the appellant's circumstances in this country were such that his removal to Sri Lanka would be disproportionate in terms of Article 8(2).

41. Mr Coleman submitted that the appellant's circumstances here "were far beyond emotional ties". He submitted one of the respondent's brothers was a refugee in England and therefore could not return to Sri Lanka and that the respondent had lived with his brother for three and a half years as a family in one home and helped to take care of his brother's children. Close family ties here had therefore had been established.
42. We are however mindful of both the recent decision of the Tribunal in **Salad** [2002] UKIAT 06698 and indeed an earlier decision of the Tribunal on a similar basis in **Puvaneparan** [2002] UKIAT 04876. Reference to both cases was made in the course of the hearing before us and indeed Ms Sigley provided us with a transcript of the Tribunal determination in **Salad**. Both cases establish that where the relationship relied upon is not a close family relationship between adults such as siblings there would have to be special circumstances before it was shown that there was a family life within Article 8(1) or sufficient elements of private life to establish a protected right. Further in **Salad** the Tribunal reiterated that the link between adult siblings would not normally required the protection of Article 8 without evidence of further elements of dependency involving more than the normal emotional tie.
43. We conclude that there is nothing in the respondent's situation that establishes such special circumstances as to constitute family life within Article 8(1) or sufficient elements of private life to establish a protected right. Indeed, we note that it is the appellant's account he has a family, not least his parents still living in Sri Lanka.
44. We therefore find that the Adjudicator was plainly wrong to conclude that the respondent's circumstances engaged Article 8 of the ECHR.
45. We therefore reverse the Adjudicator's decision and allow the Secretary of State's appeal.

N H Goldstein
Vice President