



COUR EUROPÉENNE DES DROITS DE L'HOMME  
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

**CASE OF THAMPIBILLAI v. THE NETHERLANDS**

*(Application no. 61350/00)*

JUDGMENT

STRASBOURG

17 February 2004

**FINAL**

*17/05/2004*

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Thampibillai v. the Netherlands,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mrs A. MULARONI, *judges*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 27 January 2004,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in an application (no. 61350/00) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Sri Lankan national, Mr Tharmapalan Thampibillai (“the applicant”), on 30 August 2000.

2. The applicant was initially represented by Mr R. Heringa, succeeded by Mr J.H.S. Vogel and Ms D.G. Metselaar, lawyers practising in Alkmaar. The Netherlands Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker of the Ministry of Foreign Affairs.

3. The applicant alleged that his expulsion to Sri Lanka would place him at risk of torture or inhuman or degrading treatment. He relied on Article 3 of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. The President of the Chamber and subsequently the Chamber decided to apply Rule 39, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings that the applicant should not be expelled to Sri Lanka pending the Court's decision.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

7. By a decision of 9 July 2002 the Court declared the application admissible. It invited the Government to comment on the information on the situation in Sri Lanka, as set out in the decision on admissibility, and to

state their position on the applicant's complaint in the light of that information. The parties were further invited to submit relevant, more recent, information on the situation in Sri Lanka.

8. The applicant and the Government each submitted the information requested. The Government, but not the applicant, filed observations on the merits (Rule 59 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1973 and currently resides in Oosterbeek.

10. On 9 January 1995 the applicant arrived in the Netherlands, where, on 10 January 1995, he applied for asylum or, alternatively, a residence permit for compelling reasons of a humanitarian nature (*klemmende redenen van humanitaire aard*). In support of his claim for asylum he submitted the following.

11. He belonged to the Tamil population group and came from a farming family in the town of Vavuniya in the north of Sri Lanka, bordering on the area controlled by the Tamil Tigers (the "LTTE"), a Tamil terrorist organisation, engaged in an armed struggle for independence. LTTE members would often visit Tamils living in the area in order to obtain food. The Sri Lankan army was therefore quick to suspect local farmers of supporting the LTTE.

12. In August 1990 the applicant's father was shot dead on his land by the Sri Lankan army because they suspected him of providing material assistance to the LTTE. The day after his father's killing, the applicant's mother sent him to the town of Jaffna, which was under LTTE control at the time, where he stayed for two months with his uncle. Following the death of his father, the applicant's brother became a fighter with the LTTE and neither the applicant nor his mother have heard from him since.

13. On 12 January 1991 the applicant was arrested in his home by the Sri Lankan army and detained in the Joseph military camp for two weeks. Every other day he was questioned about the whereabouts of his brother. The soldiers told him that his father had been an LTTE member and that the applicant must know other LTTE members. During these interrogations soldiers beat him with their fists and sticks. He was also hung from the ceiling by his thumbs. Upon the arrival of new detainees, the applicant had to identify LTTE members among them.

14. After two weeks, he was released on condition that he report to the camp daily. The ill-treatment to which he had been subjected had resulted in internal injuries requiring hospital treatment for two weeks.

15. Every time he reported to the camp he was ill-treated, and often questioned. Sometimes he was made to accompany soldiers driving through Vavuniya so that he could point out LTTE members. After a month of reporting to the camp daily, he was told to report on a weekly basis. However, a daily reporting duty was once again imposed on him from May 1993 when a large number of LTTE members was said to have arrived in Vavuniya; the soldiers said that the applicant's brother might be among them and the applicant was to point him out to them. According to the soldiers, his brother was an important LTTE member who was responsible for many bomb attacks.

16. Because the applicant could no longer cope either physically or mentally with the daily reporting duty, the interrogations, the ill-treatment and having to identify LTTE members, he decided to leave the country. In addition, he knew of other persons who had a similar reporting duty who had disappeared. He feared the same thing could happen to him.

17. On 19 May 1994 the applicant travelled to Colombo by train with his mother. During this trip, he was in possession of an identity card which his mother subsequently took back with her to Vavuniya. On 20 May 1994 the applicant, using a passport bearing his name, flew to Singapore and then, the next day, on to Moscow. He travelled from Moscow to the Netherlands in a van on 5 January 1995. His passport had been taken from him by an intermediary in Moscow.

18. Whilst in Moscow he received two letters from his mother stating that she had been arrested and detained for two days by the army, and that the army were searching for him because he had failed to report. The applicant did not keep these letters.

19. On 11 May 1995 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the applicant's requests, considering that it had not been established that the applicant had shown himself to be an opponent of the regime in Sri Lanka or that he was known as such by the authorities. Given that his arrest in 1991 had obviously not constituted a reason for him to leave the country immediately, and that he had been able to leave Sri Lanka unhindered through the normal channels, it could not be said that at the time of departure he had been in such a dangerous situation that he could not have been expected to remain in his country of origin. The applicant was also notified that he would not be allowed to remain in the Netherlands when any objection (*bezwaar*) he might submit was being considered.

20. The applicant lodged an objection on 9 June 1995 and also requested an interim measure (*voorlopige voorziening*) from the Regional Court (*arrondissementsrechtbank*) of The Hague sitting in Zwolle. The request for

an interim measure was declared inadmissible by the President of the Regional Court on 16 August 1995 because no grounds had been submitted for the objection. The objection itself was rejected by the Deputy Minister for Justice on 8 August 1996 for the same reason. The Deputy Minister held in addition that, even if grounds for the objection had been submitted, merely invoking the general situation in Sri Lanka was insufficient to justify the conclusion that the applicant would be subjected to either persecution or treatment contrary to Article 3 of the Convention if returned to that country.

21. On 18 September 1996 the applicant appealed to the Regional Court of The Hague sitting in Amsterdam. Finding that the Deputy Minister had been correct in rejecting the applicant's objection, the Regional Court dismissed the appeal by a final decision of 27 June 1997.

22. The applicant did not, however, leave the Netherlands and neither was he forcibly expelled. On 29 September 1997 he lodged a new request for a residence permit for compelling reasons of a humanitarian nature. This request was rejected by the Deputy Minister for Justice on 30 October 1997 who considered that, even though recent developments in Sri Lanka continued to give cause for concern, the general situation there had not changed to such an extent that it required the Netherlands Government to amend their policy relating to Tamil asylum seekers. The applicant had failed to show that concrete reasons, related to facts and circumstances affecting him personally, existed which could justify the conclusion that he would be exposed to a real risk of treatment contrary to Article 3 of the Convention if returned to Sri Lanka. The Deputy Minister further informed the applicant that he would not be allowed to remain in the Netherlands pending the examination of any objection he might wish to lodge.

23. On 27 November 1997 the applicant submitted an objection to the decision of the Deputy Minister, and on 26 January 1998 he requested an interim measure from the Regional Court of The Hague sitting in Amsterdam in order to prevent his expulsion. On 4 March 1998 the President of the Regional Court granted the interim measure, considering that the applicant belonged to one or more of the so-called "categories at risk": categories of people who ran the risk of being detained in Colombo for more than 48 hours pursuant to the Emergency Regulations in force.

24. The applicant was given the opportunity to comment on his application for a residence permit before an official committee (*ambtelijke commissie*) on 13 May 1998.

25. The applicant's objection was rejected by the Deputy Minister for Justice on 2 December 1998. Given that the applicant's claim for asylum had already been finally and conclusively rejected, and that he had failed to adduce any new facts or circumstances but had only made references to the general situation in Sri Lanka, the Deputy Minister considered that the request for a residence permit was no more than an attempt to frustrate his departure from the Netherlands. In any event, the fact that the applicant had

not left Sri Lanka until 1994, even though the problems he had allegedly suffered stemmed from alleged events in 1991 and 1992, militated against the assumption that he would currently run a real risk of treatment contrary to Article 3 of the Convention.

26. The Deputy Minister further informed the applicant that any appeal lodged by him would be dealt with expeditiously, and the applicant's departure from the Netherlands would be deferred pending such an appeal.

27. The applicant lodged an appeal with the Regional Court of The Hague sitting in Amsterdam on 23 December 1998. He argued that the information from the Ministry of Foreign Affairs, used by the Deputy Minister for the determination of asylum claims of Tamils from Sri Lanka, was seriously lacking. Referring to information from Amnesty International, the applicant submitted that the group of persons who ran the risk of being detained for more than a week and tortured during that time was far greater than assumed by the Ministry of Foreign Affairs. Moreover, the Ministry's official report (*ambtsbericht*) of 6 November 1998 itself stated that, if a detainee was held for more than one week, during which time he was questioned about LTTE involvement, there was a great likelihood that the detainee would be ill-treated. In addition, according to the same official report, a Tamil with a relative known to be an LTTE member ran the risk of being detained for more than a week.

28. At the hearing of his appeal before the Regional Court on 11 January 2000, the applicant further submitted that he ran an extra risk of detention now that an amendment to the Immigrants and Emigrants Act had entered into force, given that he had left Sri Lanka on an unofficial passport.

29. The Regional Court rejected the appeal by judgment of 22 February 2000. It considered that where Sri Lankan Tamils belonging to one of the categories at risk were concerned, it should in general be readily accepted that a real risk of treatment in breach of Article 3 existed. Nevertheless, not every Tamil belonging to one of the categories ran a real risk of treatment contrary to Article 3. The likelihood of such Tamils being apprehended for checks on a more or less regular basis upon their return to Colombo as a result of the security situation in Sri Lanka was in itself insufficient to conclude that unacceptable risks existed, even if the persons concerned encountered a certain heavy-handedness in the process. As regards the applicant, the Regional Court saw no reason to come to a different assessment from that made on the applicant's request for asylum. The applicant's argument that the Sri Lankan authorities held a file on him was only an assumption and had not been shown to be plausible. Even though the Regional Court considered it likely that persons returning would be interviewed by the Sri Lankan authorities at Colombo airport in order to establish whether or not they had left the country through illegal channels, this did not lead to a considerably increased risk of treatment in breach of Article 3. Neither was it contrary to Article 3 to prosecute and sentence

persons who had contravened the Immigrants and Emigrants Act. In any event, the applicant had stated that his uncle had obtained a passport for him from the Immigration Office in Colombo, and it was therefore unlikely that the applicant had left Sri Lanka on a passport which the authorities of that country knew to be forged.

30. On 12 September 2000, i.e. following the introduction of the present application to the Court, the applicant lodged a new request for asylum. This was refused on 16 September 2000. His objection against that decision, as well as his request for an interim measure, was rejected by the President of the Regional Court of The Hague sitting in Zwolle on 4 October 2000. In this decision the President based himself on information contained in official reports from the Ministry of Foreign Affairs of 28 July and 22 August 2000, the accuracy of which, according to the President, had not been sufficiently disproved by the applicant. The President concluded that the security situation in Colombo for rejected Tamil asylum seekers was not such that they had to fear treatment contrary to Article 3. The President further referred to a letter of the UNHCR (United Nations High Commissioner for Refugees) of 22 June 2000 in which the latter organisation stated its opinion that the expulsion of rejected Tamil asylum seekers was acceptable as long as they were in possession of identity documents issued by the Sri Lankan authorities. The President noted that the applicant would be provided with an identity document by the Sri Lankan Embassy in the Netherlands which he could use, even after its expiry, until such time as a new national identity card was issued to him.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### **A. Entitlement to refugee status or residence permits on humanitarian grounds**

31. Under Article 15 § 1 of the Aliens Act 1965 (*vreemdelingenwet*, hereinafter “the Act”), in force at the relevant time, aliens coming from a country where they have a well-founded reason to fear persecution on account of their religious or political conviction, or of belonging to a particular race or a particular social group, could be admitted by the Minister of Justice as refugees.

32. The expression “refugee” in this provision was construed to have the same meaning as in Article 1 of the Convention relating to the Status of Refugees of 28 July 1951 (decision of the Judicial Division of the *Raad van State* of 16 October 1980, *Rechtspraak Vreemdelingenrecht* – Immigration Law Reports – 1981, no. 1).

33. Aliens, other than refugees, wishing to reside in the Netherlands for any length of time had to hold a residence permit (Article 9 of the Act).



Such a permit was to be requested from, and granted by, the Minister of Justice (Article 11 § 1 of the Act).

34. Given the situation obtaining in the Netherlands with regard to population size and employment, Government policy was – and is – aimed at restricting the number of aliens admitted to the Netherlands. In general, aliens are only granted admission for residence purposes if:

(a) the Netherlands are obliged under international law to do so, as in the case of citizens of the European Union or Benelux member States and refugees covered by the above-mentioned Geneva Convention; or

(b) this serves the “essential interests of the Netherlands”, e.g. economic or cultural interests; or

(c) there are “compelling reasons of a humanitarian nature”.

35. An alien not, or no longer, qualifying for admission to the Netherlands could be expelled (Article 22 § 1 of the Act). However, aliens claiming that their removal from the Netherlands would compel them to travel to a country where they have reason to fear persecution on one of the grounds set out in Article 15 § 1 (see paragraph 31 above) could not be expelled except by a specific order of the Minister of Justice (Article 22 § 2).

36. An objection (*bezwaar*) against the refusal to grant refugee status or a residence permit lay to the Deputy Minister of Justice (Articles 6:4 and 7:1 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), Article 29 of the Aliens Act). An appeal against the rejection of an objection lay to the Administrative Law Section of the Regional Court of The Hague (Article 8:1 of the General Administrative Law Act; Article 33a of the Aliens Act). No further appeal was allowed (Article 33e of the Act).

## **B. Netherlands policy on asylum seekers of Sri Lankan nationality**

37. At the time of the decision on the applicant's objection (2 December 1998), as well as in the period leading up to the introduction of the present application, Netherlands policy was based on country reports issued by the Ministry of Foreign Affairs on 24 March and 6 November 1998.

38. To assess whether a person ran a real risk of being treated in a manner contrary to the provisions of Article 3 of the Convention, the following factors were taken into account:

- All young Tamils in Colombo who speak little Sinhalese and whose documents reveal that they were born in the north ran the risk of being taken to a police station for questioning following an identity check. Most were released within 48 to 72 hours once their identity had been established and they had explained their reasons for being in the city.

- People who had recently come to Colombo from a war zone and had no identity documents or “valid” reason for being in Colombo, ran the risk

of being held for longer than 48 to 72 hours so that further enquiries could be made. People who failed to register on arrival also lay themselves open to suspicion.

- Tamils suspected of LTTE activities on the basis of police files or information from other sources ran the risk of being held for more than a week. This also applied to people whom the authorities believed could provide information on the LTTE, such as people known to have a relative who is an LTTE member.

- People could be detained for 3, 12 or 18 months under the Emergency Regulations or the Prevention of Terrorism Act if there was firm evidence that they were involved in the LTTE. Such evidence included arms caches or suspect documents.

39. Persons held for longer than 48 to 72 hours for further questioning could be treated roughly (beatings). Where the person concerned was held for more than a week, and questioned about LTTE involvement, the risk of ill-treatment was considerable.

40. The mere fact that a Tamil belonged to one or more of the above categories of persons, who in theory ran the risk of longer detention, did not necessarily mean that there was a real risk of their being subjected to treatment prohibited by Article 3 of the Convention. According to the country report of 6 November 1998, it could be assumed that, in any event, no such risk existed in the case of Tamils falling into the first two categories.

41. A country report of 30 September 1999 stated that an amendment to the Immigrants and Emigrants Act had entered into force on 28 July 1998, pursuant to which the penalty for using forged travel documents was increased. According to the report, at the time of a person's return to Sri Lanka there was generally insufficient evidence of use having been made of forged documents for the outward journey.

This country report also contained information on the procedure followed by police in respect of persons apprehended at the airport or in the course of a round-up. The list of names of the arrested persons was passed to the National Intelligence Bureau to see if any of the names featured in the database held by the Bureau. All persons suspected of violating the Prevention of Terrorism Act or the Emergency Regulations were included in the files of wanted persons. However, the police did not in all cases have information concerning that person. Information was only available if the person concerned had either been arrested previously or been denounced by another detainee.

42. The Netherlands policy in force at the time of the most recent decision of the Deputy Minister of Justice (16 September 2000, see paragraph 30 above), was based on the country reports of 28 July and 22 August 2000. These reports indicated that Tamils fleeing the war could find an alternative place of residence in Government-controlled areas,

including Colombo. Tamils were subject to frequent identity checks in Government-controlled areas, especially on or around public holidays, after attacks and if the military position of Government troops had deteriorated. Tamils who could not identify themselves on the spot or who were believed to come from the north or east of Sri Lanka could be arrested. Most were released within 48 to 72 hours, after their identity and background had been checked. As to the factors which could occasion longer detention, the report of 28 July 2000 referred to that of 6 November 1998.

43. The country report of 15 May 2002 included information on the developments of the peace process that was started in 2000, stating that a formal cease-fire agreement (CFA) between the Government and the LTTE had been signed on 22 February 2002. It further stated that during the period under review one suicide attack had taken place in Colombo, which had not been followed by the usual round-ups, large-scale identity checks and arrests. After the installation of Ranil Wickremasinghe as prime minister in December 2001, the security situation in Colombo had improved considerably and the atmosphere in the city was relaxed and had normalised. Most roadblocks and checkpoints were removed. The number of identity checks had been drastically reduced and there were no reports of arrests of LTTE suspects.

44. The most recent country report, of 28 May 2003, confirmed that the security situation in Sri Lanka had significantly improved as had freedom of movement. Tamils were free to travel through the whole of the country without requiring prior permission to enter certain areas. As a result, it was now far simpler for Tamils fleeing LTTE-controlled areas to go to areas under Government control. In Colombo, no restrictions on freedom of movement applied. During the period under review, the Sri Lankan authorities had in general respected human rights, in line with the provisions of the CFA. No arbitrary arrests had been made. Ill-treatment and torture to which persons who had been arrested on suspicion of membership of, or involvement in, the LTTE had been subjected in the past, no longer occurred.

45. As of 2001, returning rejected asylum seekers were for the most part allowed to leave the airport after their identity documents had been checked. In a few cases, returnees had been handed over to the Criminal Investigation Department (CID), usually within 24 but sometimes within 48 to 72 hours, and subsequently transferred to a Magistrates Court. The Magistrates Court judge decided whether, on the basis of the information provided by the CID, the person concerned should be remanded in prison, released on bail pending the conclusion of the investigation, or simply released. During the period under review, all returnees were released the same day, either on or without bail. Unless they tried to enter the country using forged travel documents, returning rejected asylum seekers generally did not have to fear prosecution under the terms of the Immigrants and Emigrants Act.

### III. RELEVANT INTERNATIONAL MATERIAL

46. In its Annual Report 2003, covering events from January to December 2002, Amnesty International noted with respect to Sri Lanka:

“There was a major improvement in the human rights situation in the context of a cease-fire and peace talks between the Government and the LTTE. However, torture in police custody continued to be reported frequently...

Unilateral cease-fires declared by both the Government and the LTTE in late 2001 were followed by a formal cease-fire agreement (CFA) that came into force on 23 February. Peace negotiations, facilitated by the Norwegian Government, started in September in Thailand. A Sri Lanka Monitoring Mission (SLMM) consisting of representatives of Nordic countries was set up to verify the implementation of the agreement through on-site monitoring. By November, about 180,000 of the estimated 800,000 internally displaced persons (IDPs) had returned home...

As part of the CFA, the Government made a commitment not to arrest anyone under the PTA.”

47. On 31 March 2003 the US Department of State released the Sri Lanka Country Report on Human Rights Practices for 2002. It stated:

“In the past, arbitrary arrest and detention were problems; however, there were no reports of arbitrary arrests or detentions during the year...

Unlike in previous years, there were no large-scale arrests of Tamils during the year...

The ... reports of regular mistreatment by security forces largely ceased...

The reconciliation also has led to a sharp reduction in roadblocks and checkpoints around the country, the return of approximately 150,000 IDPs to their points of origin in the north and east, and to the opening of numerous investigations into actions by security force personnel...

The Government restricted the movement of displaced Tamils due to possible security, economic, and social concerns. These restrictions have been lifted with the onset of the peace process.”

48. The Operational Guidance Note on Sri Lanka, issued on 23 July 2003 by the Immigration and Nationality Directorate (Asylum and Appeals Policy Directorate) of the United Kingdom Home Office reported:

“The authorities in Sri Lanka will no longer be concerned with those individuals with past low-level support for the LTTE (e.g. digging trenches, providing food/shelter to LTTE fighters), those with no police/criminal record or those who may have been arrested in the past and subsequently released. Those individuals who may be of continuing interest to the authorities would be ... “those wanted in a relatively serious fashion”. This could mean high-profile members of the LTTE who are still active and influential, and wanted by the authorities.”

#### IV. RECENT DEVELOPMENTS

49. On 4 November 2003, the Sri Lankan President Chandrika Kumaratunga suspended parliament and sacked three senior ministers. The President accused the Government of making too many concessions to the LTTE. On 14 November 2003, Norwegian mediators said, after talks with the LTTE, that the peace process was on hold until the country's political crisis was resolved. The mediators had passed on to the LTTE guarantees from both the President and the Prime Minister that they would abide by the CFA. The LTTE stated that they would be patient during the political upheaval.

### THE LAW

#### I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

50. The applicant complained that he would be exposed to a real risk of torture or inhuman or degrading treatment contrary to Article 3 of the Convention if he were expelled from the Netherlands to Sri Lanka.

51. Article 3 of the Convention provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

##### **A. The parties' submissions**

###### *1. The applicant*

52. The applicant submitted that the direct reason for his flight had been his inability to tolerate any longer the constant ill-treatment and intimidation to which he was subjected when reporting daily (or for part of the time, weekly) to the army. He further argued that the fact that he had encountered no problems when travelling from Vavuniya to Colombo or when he left Sri Lanka by no means implied that he ran no risk if he were returned to that country.

53. There were two reasons why the Sri Lankan authorities were likely to have a file on him; firstly because of his brother's membership of the LTTE. If a person had relatives who were active in the LTTE, the authorities would consider that person a means by which to get their hands on the family member whom they were seeking, or to obtain information on the LTTE. They would also very quickly suspect this Tamil to be himself

involved in the LTTE. Netherlands policy recognised this risk, since it acknowledged that Tamils known to have a relative who was an LTTE member ran the risk of being held in detention for an extended period. This policy also acknowledged that such detention entailed a significant risk of being subjected to torture. The applicant therefore failed to understand how this policy could be reconciled with the Government's view that he ran no real risk of being exposed to treatment proscribed by Article 3. This was particularly true given that his brother's LTTE membership had already led to his detention, interrogation and torture during two weeks in 1991, and to ill-treatment each time he had complied with the order to report to the authorities.

54. The second reason why it was most probable that the Sri Lankan authorities had a file on him lay in the fact that people who had in the past been arrested were included in the database of the National Intelligence Bureau. As described in the country report of 30 September 1999, after routine arrest, the names of those arrested were checked with the National Intelligence Bureau which indicated whether such persons appeared in their database.

55. The applicant maintained that, for the above reasons, there was every chance that he would be held in detention for a long time and that during his detention he would be subjected to torture.

## *2. The Government*

56. The Government argued that it had not been demonstrated that the applicant was known to the Sri Lankan authorities as an opponent of the regime or that he was regarded with suspicion by those authorities. The killing of his father by the Sri Lankan army in 1991 because he was suspected of assisting the LTTE, did not adequately justify the applicant's fear of inhuman treatment. The Government also considered it improbable that, because of his brother's membership of the LTTE, the Sri Lankan authorities were likely to assume that the applicant himself had links with that organisation and would therefore detain him for longer than 48 to 72 hours. The fact that, after his alleged arrest in January 1991, the applicant had been released after only two weeks – albeit with an obligation to report to the authorities regularly – strongly suggested that he was not regarded as being involved in the LTTE. In addition, the applicant had not decided to leave his country of origin as a direct result of the killing of his father in 1990 or of his arrest in 1991. Instead, he had left Sri Lanka in 1994.

57. As to the applicant's claim that the Sri Lankan authorities have a file on him, the Government pointed out that, despite the alleged existence of such a file, the applicant himself stated that he had encountered no problems during checks, either when travelling within Sri Lanka or when leaving the country. In the opinion of the Government, therefore, the unavoidable

conclusion was that the Sri Lankan authorities were not particularly interested in the applicant.

58. The Government further argued that, prior to the announcement of the CFA in February 2002, it was as a rule only a combination of factors which might prompt suspicions of involvement in the LTTE, incurring an increased risk of arrest. The most significant of these factors were an inability to produce identity papers, a failure to register with the police or to provide a valid reason for his or her stay in Colombo, the presence of scars, or nervous or frightened behaviour suggestive of LTTE involvement. Bearing in mind that there had been no large-scale round-ups in Colombo since the summer of 2001, and that after the CFA took effect not a single report had been received of Tamils arrested in Colombo after being stopped and asked for their identity papers at a checkpoint, the risk of arrest must now be deemed to have declined considerably. Furthermore, Sri Lankans awaiting repatriation from the Netherlands were issued with an identity certificate by the Sri Lankan embassy, which document could be used as proof of identity when subjected to checks by the security services.

#### **B. The Court's assessment**

59. The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see, for example, *Hilal v. the United Kingdom*, no. 45276/99, § 59, ECHR 2001-II, and *Ahmed v. Austria*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2206, §§ 38-39).

60. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

61. In determining whether it has been shown that the applicant runs a real risk, if expelled to Sri Lanka, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material

placed before it, or, if necessary, material obtained *proprio motu*. Further, since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215, p. 36, § 107, and *H.L.R. v. France*, 29 April 1997, *Reports* 1997-III, p. 758, § 37). In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the application. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, pp. 1856 and 1859, §§ 86 and 97, *Reports* 1996-V, and *H.L.R. v. France*, cited above).

62. The Court observes that the applicant left Sri Lanka in May 1994, almost four years after the killing of his father by the army and some three and a half years after he himself was arrested by the army and detained for two weeks. Thus, it does not appear that these events constituted the reason for the applicant to flee his country. Indeed, according to the applicant, he left because he could no longer endure the ill-treatment to which he was subjected every time he complied with the obligation imposed on him to report to the army.

63. It would appear that the army wanted him to report to them so that he might inform them of the whereabouts of his brother, and so that he would identify Tamils who were members of the LTTE. Although the applicant alleged that he was more likely to be suspected of LTTE involvement given that a close relative of his was a member of that organisation, it has, however, by no means been established that the authorities indeed harboured any such suspicions against him. In this connection the Court notes that, after his arrest and detention in January 1991, the applicant was released without charge and not arrested again. In addition, he was able, in May 1994, to travel unhindered from Vavuniya to Colombo and to leave the country through the regular channels with a passport in his own name – a course of events which appears rather incredible if the authorities were suspicious of the applicant. In these circumstances, the Court finds that it has not been established that the applicant is known to the authorities as a (suspected) LTTE supporter and that they would therefore have an interest in him.

64. Even assuming that the applicant were to be apprehended upon his arrival at the airport in Colombo or subsequently in the course of an identity check, the Court considers that, in the current climate in Sri Lanka, it is



unlikely that he would run a real risk of being subjected to ill-treatment. In this connection, the Court has noted the considerable improvement in the development of the security situation in Sri Lanka in recent years, as set out in various reports referred to in paragraphs 43-48 above. The Court thus observes that, for some time now, no round-ups and no large-scale and/or arbitrary arrests of Tamils have taken place and that Tamils no longer require prior permission before travelling to certain areas (see paragraphs 43-44 and 47 above). It is further reported that persons who are arrested on suspicion of membership of, or involvement in, the LTTE are not subjected to ill-treatment and torture as has occurred in the past (see paragraph 44 above).

65. It is true that the situation in Sri Lanka cannot yet be described as stable, as is illustrated by the recent developments on the political front (see paragraph 49 above). Nevertheless, bearing in mind that the main parties to the conflict have emphasised their commitment to the peace process in spite of these developments, the Court cannot ignore the very real progress that has been made which has led to a substantial relaxation of the previously precarious situation of Tamils arriving or staying in Colombo, as confirmed by the most recent country report compiled on Sri Lanka by the Netherlands Ministry of Foreign Affairs (see paragraph 44 above). As pointed out above (paragraph 61), the Court has to assess whether at the present time and in the present situation there exists a real risk of the applicant being subjected to treatment proscribed by Article 3 if he was returned to his country of origin. Whilst stability and certainty are factors to be taken into account in the Court's assessment of the situation in the receiving country, the fact that peace negotiations have not yet been successfully concluded does not preclude the Court from examining the individual circumstances of the applicant in the light of the current general situation (see *Vilvarajah and Others*, cited above, § 108).

66. In this context, the Court notes that the applicant submitted that, following his flight and his failure to report to the army, his mother had been arrested and detained for two days. However, the applicant did not keep the letters in which his mother communicated these events to him. In any event, it has not appeared, nor has it been alleged, that the applicant's mother has experienced problems with the Sri Lankan authorities since that time. The Court does not, therefore, consider it likely that those authorities are still looking for the applicant, almost ten years after he left the country. Neither is the Court willing to accept that, in the current climate, the authorities have the intention of apprehending the applicant in order to discover the whereabouts of his brother, especially since it does not appear that the applicant's mother has been questioned by the authorities on this matter.

67. Finally, the Court notes that Tamils are now free to travel throughout the whole country without requiring prior permission to enter certain areas,

and that there has been a sharp reduction in roadblocks and checkpoints around the country (see paragraphs 44 and 47 above). Therefore, should the applicant remain fearful of the Sri Lankan authorities, he might be expected to settle in LTTE-controlled areas.

68. Having regard to the particular circumstances of the case, the Court finds that no substantial grounds have been established for believing that the applicant, if expelled, would be exposed to a real risk of being subjected to torture or inhuman or degrading treatment within the meaning of Article 3 of the Convention.

Accordingly, the expulsion of the applicant to Sri Lanka would not be in violation of Article 3.

### FOR THESE REASONS, THE COURT UNANIMOUSLY

*Holds* that the expulsion of the applicant to Sri Lanka would not violate Article 3 of the Convention.

Done in English, and notified in writing on 17 February 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY  
Deputy Registrar

J.-P. COSTA  
President