

APPEAL NO: HX62913-2000

TJ (Risk>Returns) Sri Lanka CG [2002] UKIAT 01869

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 21 May 2002
Date Determination notified:
10 June 2002

Before:

The Honourable Mr Justice Collins (President)
Mr R Baines JP
Mr C P Mather

THAVEM JEYACHANDRAN

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Represented by: Mr D Lawson of Counsel instructed by Tony Purton Solicitors, for the Appellant
Mr D Buckley, HOPO, for the Respondent

DETERMINATION AND REASONS

1. The appellant in this case is a Tamil from Sri Lanka who was born in May 1969. In 1985 his father was killed by soldiers following an explosion which had killed some other soldiers and in 1988 the appellant himself was detained and was he said tortured by soldiers from the Indian army. That resulted in some scarring to his legs. Between 1986 and 1992 the appellant was a full time student and then between 1992 and 1999 he ran alone a tutorial college first at Chavakacheri and then at Kilinochi. The former school was next to an LTTE hospital and the appellant said that he was forced to print leaflets for the LTTE. When the army took Jaffna he fled and then started up the second college. Again he had problems with the LTTE because in July 1999 he was compelled to dig bunkers. There was an attack by the army, either bombing or shelling and according to the appellant he took the opportunity to escape, indeed he ran away from the shelling and escaped from the LTTE.

But he was he said wanted by the army and his name was put on a wanted list because the army had discovered the materials which he had printed for the LTTE when he had been operating at Chavakacheri and thereafter he was on a wanted list. He knew that because his mother was living in an area controlled by the army and she was not allowed to leave that area until he was produced to the army. He was still on the wanted list, albeit he had never supported nor had he fought for the LTTE willingly. Anything he had done for them was as a result of pressure and threats.

2. His asylum claim was refused by the Secretary of State who was not entirely happy with the account that he had given. He appealed to an adjudicator and his appeal was heard on 20 February 2001 by the then Chief Adjudicator, His Honour Judge Dunn QC. Judge Dunn accepted the account which he had given and that he was an honest witness. The only reservation he had was about his running away and escaping from the LTTE when the shelling or bombing occurred. But, as Judge Dunn indicated, that had no effect on his overall credibility and on the basic account which had been established to a reasonable degree of likelihood. He dealt with a fear of persecution by the LTTE resulting from his unwilling assistance and his escape and that he rejected. He said that it did not constitute a case of persecution in the past by the LTTE and was not a basis for a well founded fear of persecution by the LTTE were he to return. Mr Lawson has attacked that finding and has submitted that his home area was where the LTTE was operating and he could not go there. It now transpires that it may well be that at least where he lived for part of the time has now been taken over by the army and were he to return there he would not be in danger from the LTTE. The reality is in our view that the claim of persecution by the LTTE is now irrelevant. This case depends upon whether there is reasonable likelihood of persecution by the authorities in the form of the army or any other security forces were he to return initially to Colombo where he would be, it is said, interrogated at the airport, or if he were to return to his home area which is now under army control where the same fate would await him.
3. The significant finding by the Chief Adjudicator is that he is on a wanted list and that is confirmed by the prohibition upon his mother leaving the area until he, the appellant was produced to the army. That is a finding which the Chief Adjudicator was entitled to reach. He heard the appellant and he assessed the evidence that he gave and decided that he believed the account that he was giving. Whether we would have reached the same conclusions is nothing to the point. We only interfere in findings of fact if we are persuaded that they are clearly wrong or if there is no evidence which can properly found such a finding of fact. That is not the situation in this case. That being so we have to regard this appellant as someone who if returned to Sri Lanka, will be likely to be recognised when his identity is examined on return as someone who is wanted by the authorities. Until recently that would undoubtedly have created a real risk of some lengthy interrogation having regard to the usual practices of the security authorities in Sri Lanka and there would have been a real risk that he would be tortured in the course of that investigation.
4. The question for us is whether the recent changes in Sri Lanka have altered that situation. We should say that the reason why it has taken some time for this case to reach the Tribunal is because the Chief Adjudicator dismissed the appeal on the basis that he had been an unwilling helper of the LTTE and that the authorities would if they examined him reach the conclusion that because he was unwilling he was not in any way involved and thus there was no risk of his being persecuted. Not surprisingly the Administrative Court, leave to appeal having been refused by the Tribunal, took the view that that was an erroneous approach and indeed it clearly is erroneous. The reality is that it is whether assistance has been given or not that is important, not whether it has been given willingly. So far as the investigating authorities are concerned, there is ample material which supported the view that at the time

the Chief Adjudicator reached his conclusion the process of investigation of someone who was suspected of involvement with the LTTE was likely to involve torture. That would be so if there were substantial grounds for believing that such an involvement had taken place, and there were in this case such grounds, whether or not the involvement was willing.

5. The situation has changed in recent months. There was a ceasefire in February of this year and the most recent CIPU report for April 2002 records some of the relaxations that have occurred since that ceasefire. Paragraph 3.67 notes that in April 2002 the LTTE opened a political office in a Government held area in the north of the country and that that had been inaugurated under the ceasefire agreement. There had been permission for LTTE cadres wearing cyanide capsules to move back to an LTTE controlled area and those who were clearly recognised as being LTTE activists were permitted to move around unmolested. On 13 April the LTTE signed a pact with the Sri Lankan Muslim Congress and agreed that nearly 100,000 Muslims expelled from the north by the Tamil Tigers would be allowed to return. All this indicates a change of the situation and gives hope that the situation will stabilise to such an extent that the persecution which has existed in the past and the havoc created by the civil war will cease. The likelihood of any difficulties on return has also been considered by a fact finding mission to Sri Lanka which visited that country at the end of March this year and those involved discussed the situation with among others the Director and the Senior Superintendent in the Criminal Investigations Department. The report records that if a returnee were not wanted he would not be stopped at the airport. We underline 'if a returnee were not wanted' because there is of course a finding in this case that the appellant was wanted. He went on a computer which holds the name, address and age of a wanted man. The police purely go on records, scars would not make a difference and the authorities would not make a decision on this basis.
6. Accordingly it seems to us that it is clear that there is every likelihood that on return this appellant would because he was on a wanted list, be investigated. He would be stopped at the airport and would be questioned. That should not of itself mean necessarily that he would be tortured but although the Government has regularly said that it is taking steps to prevent torture by the investigating authorities, that has not been achieved. Mr Buckley has submitted that the only basis upon which the appellant could be wanted was because of a political involvement in that the LTTE materials that he had been involved in printing had been found at his Tutor. We do not know on what basis the authorities wanted him and what suspicions they may have had. We note the finding about his mother. That does not suggest to us that he was necessarily to be regarded as someone who was only a low level supporter who would not be considered to have been involved with assisting the LTTE militarily. We do not feel that we would be justified in making the assumption that it was in the circumstances merely as a political sympathiser.
7. We note that the UNHCR has indicated that although in general it may be that asylum seekers can properly be returned and that scarring was perhaps not a significant factor, nonetheless it could not be accepted that there was even now no risk to anyone. The situation is still somewhat fluid, although there are reasons to be optimistic. The fact is that this ceasefire has only been in place for a relatively short period and the authorities are still interested so far as we are aware, and it would be surprising if they were not, in those who may have been involved in active assistance of the terrorists in the past. There are signs from reports that there is still a degree of mistrust and suggestions that the Tigers are taking some opportunity to regroup and possibly even to re-arm. Whether that in fact will result in a breakdown of the ceasefire in due course we do not know. We hope that it will not but we cannot at this stage be sure about it.

8. The reality is in our judgment that it is as yet premature to accept that everyone who has claimed asylum in this country would be able to return safely. We certainly are of the view that in the present situation and having regard to the present trends it is only the exceptional cases that will not be able to return in safety. The question is whether this appellant is such an exceptional case. In our judgment he is for the reasons that we have indicated, namely that he is someone who is wanted and is someone in our view who must be wanted in a relatively serious fashion, if we may put it that way, because of the attitude in relation to his mother. We do not think that the scars add anything to the danger. They were inflicted a very long time ago and, as the Chief Adjudicator found, they were in no way prominent nor were they caused in any form of combat. He did conclude that there was a possibility that he might be investigated because of the scars. We regard that as a remote possibility and we do not believe that there is indeed a real risk that the scars themselves would have resulted in any danger. However we have to have regard to the scars in conjunction with the fact that he was on a wanted list. They are in that context of perhaps some marginal relevance.

9. We make it clear that the Tribunal is in a difficult position, as indeed are all Adjudicators at this time in relation to Sri Lankan Tamils. It is still too early to be satisfied that the situation has changed to such an extent that there is now no risk to anyone. Equally we take the view that there are few who now would be at risk, but it is necessary always to consider the circumstances of each individual case. That can only be done by considering the facts of that individual case against the information that exists at the precise date on which the Adjudicator or the Tribunal has to reach a decision. If things are seen to be improving the time may well come and may well come soon when it can be said that all can be returned. Equally it may be unfortunately that things do not turn out quite so well. The problem is yet again the Home Office practice of granting 'indefinite leave to remain' to all these cases which is not what the rules provide for. In these sorts of cases, as may be obvious, where the situation is somewhat fluid, it would surely be sensible to give some limited leave. However that is not a matter for us; it is a matter for the Secretary of State. He has decided the policy, we can only look at the situation as it now is in relation to the individual appellant and as we have said in the case of this individual appellant we take the view that this appeal must be allowed.

MR JUSTICE COLLINS