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CO/6920/2006

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

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 25 November 2008

B e f o r e:

IAN DOVE QC
(Sitting as a Deputy High Court Judge)

Between:
THE QUEEN ON THE APPLICATION OF VANNIYASINGAM KRISHANTHAS
Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr J Martin and Ms B Gill (instructed by K Ravi Solicitors) appeared on behalf of the **Claimant**
Mr N Sheldon (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. THE DEPUTY JUDGE: On 11 December 2001 this claimant arrived in the United Kingdom. He claimed asylum, and that application was refused on 30 January 2002. He appealed, and that appeal was allowed by the adjudicator, who determined his case in a determination dated 18 September 2002. During the course of that determination, the adjudicator made some findings which are of significance in this case. In particular, having set out the various aspects of the evidence and the submissions which he had received, at section 9 of his determination (on pages 23 to 27 of bundle A in the proceedings) he reached a number of conclusions.

> "9.1. In view of the similarity between the appellant's core account and that of other recent Sri Lankan appellants, I have viewed his evidence with some suspicion. However I have noted the freedom with which he was able to repeat the details of his narrative and the fact that no significant discrepancies have been thrown up. His account was indeed coherent and consistent and, with one important reservation, I accept it as probably true. The reservation concerns the circumstances of his arrest in Vavuniya and the events leading up to and including his escape.
>
> 9.2. He had been used, in common with others in his area, as labour by the LTTE, but not, it seems to me on the evidence, as a chosen or selected labourer: he was simply available to be picked when help was needed. I do not accept that he would have been of any interest to the LTTE once he had left (and I note that he asked for but was refused a travel pass, an act which would have provoked action from the LTTE had they been specifically interested in him). However it is to be noted that the LTTE had resumed hostilities after a four month cease-fire on 23 April.
>
> 9.3. On 24 July the LTTE attacked the airport and a military base in Colombo. I accept that when the appellant was discovered sneaking through the woods near Vavuniya the army would have suspected him to be a possible infiltrator and have initially detained and probably ill-treated him as he claims. That treatment, coupled with the likely interrogation, would amount to torture and persecution. However I note that he does not seem to have been interrogated with any determination, because no Tamil speaking interrogator was used. It seems to have been a routine rather than targeted interrogation. The attempt to get him to sign a blank sheet of paper looks like an act of desperation. All that occupied, he says, the first three weeks of his detention. For the remaining nearly two months he seems to have been kept and used as labour and not kept in any kind of formal detention area but in an otherwise deserted house. The respondent's comment on the guard situation is well made. Had the army considered him to be a serious LTTE activist or even contact, he would surely have been detained in a proper detention facility. That he was used on outside work as he describes is an indication of the low level of which he must have been regarded. I am sure that until he departed he was considered to be a useful pair of hands. Had it been otherwise I am sure that his escape could not have been so easily managed.

...

9.8. If he is returned to Colombo in October 2002 (ignoring for the moment any changes consequent on the current peace process) he will be another young Tamil with a temporary travel document. Were that his only characteristic he could be safely returned. However he has been in the hands of the army as an LTTE suspect of some kind and has escaped and there is a measurable risk that those facts are recorded and that they will lead to his return to captivity and probable ill-treatment. The checks will be made and he may well throw up his history, a history which might be enough to get him again tortured. I am not so convinced that the passage of over a year would be enough to save him that I am prepared to take the risk."

2. Following that decision, the defendant in these proceedings appealed to the Immigration Appeal Tribunal. That appeal was allowed. The basis on which it was allowed was that the Immigration Appeal Tribunal were concerned that the adjudicator had not referred to or had any regard to the guidance provided in the case of Jeyachandran. At paragraph 11 of their determination (set out at page 36 of bundle A in the proceedings), they concluded as follows:

"11. We are bound to say that we reach the conclusion that things have moved on even since Jeyachandran was decided. The ceasefire has continued, although it is right to note that recent talks have broken down although this is likely to be a temporary situation. We have considered the particular circumstances of this respondent and we have reached the conclusion that he would not be at risk if he was returned. The government's attitude in Sri Lanka has changed in respect of the LTTE. Indeed, the LTTE have been allowed to open offices in Jaffna and elsewhere. We have not heard of any ill-treated Tamil returnee to Colombo since February 2002. We make that comment with caution because there are no statistics available to indicate how many people are being returned from this country. However, it occurs to us that any hard line separatist would make capital out of any publicity which might confirm that a returnee had been persecuted or ill-treated. In this case we are merely considering the circumstances of a low level supporter of the LTTE. He was, of course, captured by the army and ill-treated for a period of two weeks but thereafter he appears to have been only engaged as a labourer and as the adjudicator says he was not detained in any form or manner. It would seem to us that the only difficulty that he might face would arise from the fact of his escape. The adjudicator has taken the view that this escape would be a matter of record and on his return he would be sent back to the army and then ill-treated. We consider that the adjudicator has taken an over pessimistic view of the likely consequences for this respondent. We consider that the improvements in the situation in Sri Lanka which have continued for some time are such that the authorities here would have no interest in the respondent if he returned. We consider that if it came to light that he had in fact escaped, and we

> think that might be very debatable, such a disclosure would not put him at risk. We take the view that there is no reasonable likelihood of him being persecuted or of him having his human rights infringed."

3. The claimant appealed to the Court of Appeal following that decision, but his appeal was dismissed on 17 March 2004. Following that decision, he remained in the UK. That background brings us to the circumstances around the present case.

4. On 17 July 2006 further representations were made by the claimant to the defendant in relation to his circumstances, he having by then of course exhausted all of his statutory rights of appeal. It is unnecessary for the purposes of this judgment for me to read out the detail of those representations. The essence of them was that the situation in Sri Lanka had worsened, and that on the basis of the conclusions which have been reached factually by the adjudicator at the first hearing, he now had a valid claim, and that, in any event, these representations should be treated as a fresh claim.

5. Those representations were rejected, in fact after directions for removal had been set on 2 August 2006 for his removal on 18 August 2006. Needless to say, those directions were not acted upon. These proceedings were issued. Whilst initially the application for permission was refused on the papers and at an oral renewal hearing, ultimately permission was granted by Keene LJ in the Court of Appeal, and that has led to the current hearing.

6. In the event, because of the delays, firstly in obtaining permission, and secondly in bringing this matter to trial, it was recognised by the defendant that a significant passage of time had occurred since they had offered their original reasons for their decision in this case. On the advice of counsel and having reflected upon the matter, on 19 November 2008 they issued a further decision, with reasons, in respect of the claimant's case. That, it is to be observed, is the day before the hearing. It is a tribute to Mr Martin's commonsense and pragmatism that he was prepared, notwithstanding the fact that this letter arrived the day before the trial, to approach and deal with the case on the basis of the reasoning which had then been offered. I ventured to suggest during the course of argument that it seemed to me potentially foolish for there to be such a short period of time between the offering of fresh reasons and the hearing, but, in any event, it caused no difficulty here, although I could envisage that in other cases it might give rise to considerable problems.

7. The letter of 19 November provides a range of reasoning in respect of the claimant's case. Whilst it is necessary obviously to read the letter as a whole, for the purposes of the discussion during the course of the case, and indeed for my judgment, the paragraphs upon which particular focus was placed were paragraphs 11 to 13, which provide as follows:

> "11. Your client's case puts him squarely in the category of people who were once held for questioning in the conflict area 'years ago'. It is clear from the adjudicator's findings that the questioning was routine and that your client was not found to be of interest, albeit that he was forced to remain 'as a useful pair of hands' (paragraph 9.3). Despite his escape

from the army, it was held that he would not be at risk in northern Sri Lanka (paragraph 9.7). The adjudicator himself emphasised that the detention was, at that time, relatively recent. The evidence does not suggest a real risk that your client was or was thought to be involved with the LTTE at a level which would mean the authorities retain an interest some 7 years later. In these circumstances, it is not accepted that there is a real risk that there is a continuing centralised record of your client's informal detention and escape.

12. The question of record-keeping by the Sri Lankan authorities was also considered by the European Court of Human Rights in the case of NA v The United Kingdom [2008] ECHR 616. The court in that case noted that the Sri Lankan National Intelligence Bureau had been using computerised records since 2004. Given the profile of your client's case, and in the light of the Tribunal's findings in AN and SS, it is not established that, if any continuing record was kept of his informal detention and escape, that record would have been transferred to the new system. Furthermore, in the case of NA the European Court found that an individual who had been photographed and fingerprinted in army custody, who was released after his father had signed some papers and who had a brother in the LTTE was at risk. The fact that your client was not fingerprinted and did not sign papers is not determinative, but it is a further indication of the relative lack of interest in which he was held by the Sri Lankan authorities.

13. Your client was not released from detention but escaped from the Sri Lankan army. However, the Tribunal in LP repeatedly emphasised the importance of relating a claimant's individual profile to the background evidence. The adjudicator found that, at the time of his escape, he was being held 'informally' under relatively relaxed security as an outside labourer and that consequently he was of no continuing interest to the authorities as either an LTTE suspect or 'contact'. The adjudicator went on to find that, because his escape was recent, he would be at risk of persecution. However, for the reasons given above, the current background evidence as analysed by the Tribunal in AN and SS suggests that there is no real risk that his name is held in central records. That being the case, the Secretary of State does not accept that the current country information creates a realistic prospect that your client would succeed in a further appeal before an Immigration Judge."

8. The claimant's action for judicial review brought in this case, and initially based upon the earlier reasons offered in this case but now based upon the reasons given on 19 November 2008, are that those representations ought to have been considered as a fresh claim affording him a right of appeal, and that it was irrational of the defendant not to so treat them. The legal principles against which that issue fall to be assessed are well-known, and were set out by the Court of Appeal in the case of WM and AR v the Secretary of State for the Home Department [2006] EWCA Civ 1495. Those principles are set out in the following paragraphs of the judgment:

"7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in Bugdaycay v SSHD [1987] AC 514 at p 531.

...

10. That, however, is by no means the end of the matter. Although the issue was not pursued in detail, the court in Cakabay recognised, at p191, that in any asylum case anxious scrutiny must enter the equation: see §7 above. Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.

11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? 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."

9. In this case, Mr Martin accepts that the test has been asked correctly. What he contends is that the Secretary of State has not applied anxious scrutiny, and indeed that there is clear evidence that that is the case. He submits that, since the consideration of the claimant's appeal, there has been country guidance, in particular in a determination of the Tribunal, which leads to the conclusion that had anxious scrutiny been applied, a different result would have been arrived at.

10. In order to set the matter out in context, it is necessary to review the recent country guidance authorities in respect of the circumstances in Sri Lanka. The starting point for that is the Tribunal's determination in LP (Sri Lanka) [2007] UKIAT 00076. In that country guidance case, a matrix for the assessment of risk is provided by the Tribunal following a very detailed and thorough examination of the objective evidence relating to the circumstances in Sri Lanka. In particular, in order to assist the decision-maker, the Tribunal identified a number of risk factors (12 in all) which provide the framework for an assessment of risk. There are two which are of particular importance to Mr Martin's submissions in this case. The first is the question of whether there is a previous record of the claimant as a suspected or actual LTTE member or supporter, and in that respect, the Tribunal's guidance is set out in paragraph 210 as follows:

> " 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)."

11. The other factor of pertinence in this case is described as bailing jumping and/or escape from custody. The Tribunal provided guidance in that respect at paragraphs 213 and 214 of their determination:

> "213. We noted in particular the comments made by Professor Goode that the appellant's account here is an unusual one. It is unusual in that it has been shown that the appellant was granted bail by a court in Colombo. 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.
>
> 214. 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. The respondent contends that a detention by the authorities, when there is a suspicion of bail jumping or escape from detention, would lead to harassment only, and not maltreatment rising to the level of persecution, or a breach of the humanitarian protection or Article 3 thresholds. While we would agree that there may well be situations where Tamils, with little or no profile related to the LTTE, or other 'terrorist' groups, could be briefly detained and harassed, as no doubt happens in round ups in Colombo and elsewhere, we consider it illogical to assume that an escapee, from Sri Lankan government detention, or a bail jumper from the Sri Lankan court system, would be merely 'harassed' given the climate of torture with impunity that is repeatedly confirmed as existent in the background material from all sources. We consider, (as we think it does in the appellant's particular case), that the totality of the evidence may point to a real risk, in some cases, of persecution or really serious harm when a recorded escapee or bail jumper is discovered, on return to Sri Lanka."

12. Those findings in LP were elaborated and considered in the case of Thangeswarajah [2007] EWHC 3288 (Admin). In that case Collins J at paragraph 16 summarised the essence of the correct approach to LP as follows:

> "16. The test therefore, as I see it, is whether there are factors in an individual case, one or more, which might indicate that authorities would regard the individual as someone who may well have been involved with the LTTE in a sufficiently significant fashion to warrant his detention or interrogation. If interrogation and detention are likely, then, in the context of the approach of the authorities in Sri Lanka, torture would be a real risk and thus a breach of Article 3 might occur. It is plain from LP and it is clear overall that a blanket ban on return to Sri Lanka simply because an individual is a Tamil cannot be supported. If the European Court is approaching it in that way, then in my view it should not be and it is not in accordance with what is required by the Convention."

13. That passage was quoted in the case which is referred to in the defendant's reasons, namely the recent case of the European Court of Human Rights in NA v The United Kingdom. It is unnecessary to quote from that authority. It is agreed that the effect of that authority is (with the addition of one or two matters which were not the subject of detailed consideration in LP) to endorse the approach of the Tribunal as set out in LP.

14. Following LP, there was a further consideration of the situation in Sri Lanka in the country guidance determination of AN and SS (Sri Lanka) [2008] UKAIT 00063. In essence, the reconsideration of the objective evidence in respect of Sri Lanka by the

Tribunal in AN and SS reinforced support for the approach which had been taken in the case of LP. There is, however, an important passage in the determination which has a bearing on the present case; that is, the view which was expressed by the Tribunal in relation to the issue of record-keeping in respect of those who have been detained. The guidance of the Tribunal is, in particular, set out in paragraph 107:

> "107. We think that Dr Smith has allowed himself, as he did with the LTTE database, to slip from the idea that it would be useful to have certain information on a database to a prediction that the information must be on a database. We think it intrinsically unlikely that everyone who has ever been detained by the authorities in the course of the Sri Lankan conflict, or at least in the last 10-15 years, is now on a computer database which is checked by the Immigration Service when failed asylum seekers arrive at the airport, and is checked by the police or army when people are picked up at road-blocks or in cordon-and-search operations. The evidence suggests, on the contrary, that the database is far narrower than that. When Tamils are picked up in Colombo the authorities want to know why they have come and what they are doing, if they are not long-term residents of the city. There are no reports of people being detained and perhaps sent to Boossa camp at Galle because they were once held for questioning in Jaffna or Batticaloa years before. As for arrivals at Bandaranaike International Airport, the 'Watch List' and the 'Stop List' clearly contain the names of people who are 'seriously' wanted (to use a phrase of Mr Justice Collins) by the authorities. Equally clearly, the evidence does not indicate that they contain the names of everyone who has ever been questioned about possible knowledge of, or involvement in, the LTTE. The majority of Sri Lankan asylum seekers coming to this country claim to have been detained at some time by the authorities, but there are no reports of any being detained at the airport on return because they were once held for questioning years ago and then released."

15. The basis of the submissions made by Mr Martin is that, if the defendant had applied anxious scrutiny to this case, she would have paid particular regard to the starting point of the immigration judge's determination and, in particular, the finding at paragraph 9.8 of his determination set out above:

> "However he has been in the hands of the army as an LTTE suspect of some kind and has escaped and there is a measurable risk that those facts are recorded and that they will lead to his return to captivity and probable ill-treatment."

16. He submits that, when one takes that finding and applies it to the country guidance as recorded, exercising anxious scrutiny, there is at least the requisite realistic prospect of a different decision applying in this case. In addition, he submits that, on the basis of the adjudicator's findings, the claimant would have been recorded as an escapee, and that again would lead to the potential to a different finding were the matter to be considered by an immigration judge. On the basis of the facts of his detention and

release, he submits that there is a real risk that a record exists, and that therefore, applying the lower standard, there is ample opportunity in a fact-sensitive exercise of the kind upon which an immigration judge would be engaged for a different result to emerge.

17. Moreover, he draws attention to what he describes as "selective quotation" in paragraph 11 of the 19 November reasons, in that bits of the adjudicator's determination are quoted which suit the defendant's case, but other parts, such as paragraph 9.8, are not. Further, in paragraph 12 he notes that the defendant refers to the keeping of records since 2004, as cited in NA, when in reality the totality of that piece of objective evidence shows that in fact records were being kept (if not computerised) at a far earlier date.

18. Furthermore, he submits that, in paragraph 13, the findings which the defendant has reached in that case are unexplained. All of these matters, he says, is redolent of the absence of anxious scrutiny being applied, and therefore redolent of an irrational decision.

19. By contrast, Mr Sheldon, on behalf of the defendant, contends that when the cases of LP and, in particular, AN and SS (set out above) are applied to the circumstances of this claimant as the defendant has done, in particular within the section of the letter dealing with principal risk factors, there is no realistic prospect that an alternative decision might be arrived at, and the conclusions reached by the Secretary of State are sound.

20. In my judgment, obviously central to this question is the findings that were made by the adjudicator on the first occasion. I accept the submission that is made, and undisputed, that that would be the starting point for any immigration judge reconsidering the matter. I have no doubt that, in doing so, one can describe paragraphs 9.1 to 9.3 (which I have set out above) as being findings of primary fact in respect of the claimant's case. An issue emerges, however, in relation to paragraph 9.8 and the conclusions reached by the adjudicator as to the measurable risk, as he described it, of the facts of detention being recorded.

21. In my judgment, it is important to distinguish between those matters which are the bedrock or primary fact of the claimant's case and those matters which are essentially inferences drawn against the background of both those primary facts and the objective material as it is understood at the time when the decision is being reached.

22. I am satisfied that the conclusion which was reached by the adjudicator in paragraph 9.8 is not a finding of primary fact, but rather an inference or judgment which he has reached taking account of the primary facts and then applying or setting them against the country guidance or objective evidence as it was then understood at the time of him reaching his decision in September 2002. There is no doubt that that is a matter which would require reconsideration if the matter were to go on appeal, and that it would require reconsideration against the backdrop of the current country guidance contained in the cases of LP, NA and AN and SS. That assessment would be guided by those

cases. In my judgment, they provide an important matrix or framework within which the risk assessment has to be undertaken.

23. I am satisfied, and indeed it is not in dispute, firstly applying the test from WM, that in this case the defendant has set herself the correct test from paragraph 353 of the Immigration Rules as to whether or not the representations are properly to be treated as a fresh claim.

24. I turn then to the question of whether or not Mr Martin has established that there has been an absence of anxious scrutiny in this case. I am not satisfied that he has established that. In my judgment, when one reads paragraphs 11 through to 13 of the defendant's conclusions, it is clear that, firstly, the starting point which she has reached as to her own views are properly grounded in the country guidance cases and, in particular, the case of AN and SS. Taking the primary findings of fact from paragraph 9.1 to 9.3 of the adjudicator's original findings as the basis, it is clear, as is set out in paragraph 11 of the reasons of 19 November, that the claimant was of a low level of interest, and that his detention was informal, he being deployed, as it is said by the adjudicator, as a useful pair of hands, but not formally detained in any way.

25. It seems to me to be clear, when one sets that against the guidance both in paragraphs 213 and 214 of LP, and paragraph 107 of AN and SS, and uses that, as the defendant has clearly done in this case, as a framework against which to make the risk assessment, that the factors which are particularly subjective to the claimant in this case do not give rise to a realistic prospect of the appellant's case being determined differently were a right of appeal to be granted, even setting to one side the initial conclusion of the defendant that the representations do not give rise to concern as to the claimant's return.

26. Whilst I accept what Mr Martin says, that there is an element of selective quotation in paragraph 11, in my judgment it is important to read the letter as a whole, and when one does so, one can see that, whereas there are paragraphs which the Secretary of State refers to, in respect of the paragraphs she does not refer to, namely paragraph 9.8, the conclusions which she reaches on that issue as to records and risk are set out effectively in both paragraph 11 and paragraph 13. In those circumstances, not only are those conclusions which are adequately reasoned, but they did not, in my judgment, give rise to any issue that the defendant has failed to apply anxious scrutiny in respect of this case.

27. Similarly, so far as the criticism of paragraph 12 is concerned, again whilst there is some substance on its face in what Mr Martin says about the failure to include the totality of that objective evidence, when one reads paragraph 12 and paragraph 13 together, it is clear the basis upon which the defendant is reaching her conclusions as to record-keeping.

28. I am also satisfied in relation to paragraph 13 that the defendant's conclusions there have borne in mind the touchstone of the framework of factors as to the formality of detention and as to the level of interest from the primary facts which were found, formed a proper conclusion as to whether or not, against the background of the country guidance which I have quoted above, the claimant would have a realistic prospect of

success in a further appeal, and that there is nothing in that paragraph which betrays an absence of anxious scrutiny in assessing the claimant's case.

29. For all of those reasons, I am not persuaded that there has been an error of law in the defendant's consideration of the claimant's case, and I give judgment for the defendant.

30. MR SHELDON: My Lord, thank you very much. I have an application to make for the Secretary of State's costs. In my submission, there is no reason in this case why costs should not follow the event in the ordinary way. I informed Mr Martin that I would be making this application, and I regret to say we have been unable to reach an agreed position on it. So at the moment, as I understand it, my application is contested.

31. THE DEPUTY JUDGE: What is the position in relation to costs, Ms Gill?

32. MS GILL: Your Honour, we would say that, as we are publicly funded and the defendant is a Government body, it would be rare in these cases for costs to be awarded against a claimant in this position. I would also remind your Honour that this is a case where the Court of Appeal had granted permission, and there were some merits in us bringing this judicial review application, and the issues were complex and complicated, and I would ask you to follow the general rule which is not to grant costs against a funded body.

33. THE DEPUTY JUDGE: There is a difference, it seems to me, between the general rule that one might make an award for costs not to be enforced, and a suggestion that there should be no costs in principle. I imagine, Mr Sheldon, you have to accept -- and I do not know, I have not seen any certificate -- so I assume there is Legal Service Commission Funding, or has been, for the claimant's case, but it would be the ordinary football pools order, would it not?

34. MR SHELDON: Yes, my Lord. I have not seen a certificate; nor has my instructing solicitor, although I do not for a moment doubt what Ms Gill says. But the issue, if I may respectfully say so, my Lord, is as you have indicated, namely there is no reason why costs should not be ordered in principle, subject to the usual provision relating to public funding.

35. THE DEPUTY JUDGE: That they are not to be enforced without leave of the court.

36. MR SHELDON: Certainly, and I do not seek to dissuade you from making an order in those terms.

37. THE DEPUTY JUDGE: You would have difficulty in doing so. Is there anything further you would like to say?

38. MS GILL: Just to say that, as I said, in general costs are not ordered against somebody like the claimant.

39. THE DEPUTY JUDGE: I am not proposing to make a monetary award which you would be fixed with, but the principle must follow, it seems to me, that, in the event that he has been unsuccessful, there must be a costs order against him. The protection

he is afforded by the Legal Services Commission funding is that that is not to be enforced without leave, so if he buys a Lotto ticket on Saturday and is happily successful, wins the jackpot, then it may be the Treasury Solicitors will come after him. But other than that, unless he finds himself in receipt of substantial funds, they will not. It seems to me that is the right order to make. So I propose to make that order. Is it detailed assessment or has there been an agreed figure?

40. MR SHELDON: It is detailed assessment because of the public funding.

41. THE DEPUTY JUDGE: I am going to order that there be a detailed assessment of costs, and that the claimant pay the defendant's costs, such costs not to be enforced without leave of the court.

42. MR SHELDON: My Lord, I wonder if I might hand up a draft order which I think reflects the substance of your Lordship's decision?

43. THE DEPUTY JUDGE: I am sure it is worded far better than I could have managed.

44. MR SHELDON: I do not think so. Your Lordship may not even be able to read my writing. (Pause)

45. THE DEPUTY JUDGE: Yes, I am happy with that.

46. MR SHELDON: Thank you very much.

47. MS GILL: Your Honour, I do have an application to make. My application is for permission to appeal, on the basis that this is a case which is of some public interest and raises a number of issues which need to be ventilated.

48. THE DEPUTY JUDGE: Just bear with me while I fill in the form. (Pause)

49. Yes, what would you like to say? I am so sorry, I interrupted you because I just wanted to fill in the form before I heard your argument.

50. MS GILL: Your Honour, yes, I would submit that there are a number of issues which my colleague on the previous occasion made to the court, and a number of these issues are in the public interest, and this is a case where the issues ought to be ventilated and heard further.

51. THE DEPUTY JUDGE: Anything you would like to say?

52. MR SHELDON: My Lord, only to observe that that, in my submission, is not right. The reason it is not right is because, as your Lordship has observed during the course of your judgment, the issues relevant to the determination of this case are well-established. It is well-established what test needs to be applied by the Secretary of State in a fresh claim case: see WM. It is well-established what the matrix of risk assessment needs to be in those cases: see the country guidance case of NA which your Lordship has referred to. Within that accepted framework these cases are, by their nature, fact specific, and your Lordship's judgment, if I may respectfully observe, is simply an

application of the facts of this particular case to that established framework. So there is nothing, in my submission, of public importance wider than the ambit of this case which arises from it.

53. THE DEPUTY JUDGE: Anything you want to say in reply?

54. MS GILL: Your Honour, there are a number of cases similar to this claimant's where they were found credible, but because of the cease-fire a lot of the appeals were dismissed, and just as the claimant has found himself in this position, they then made a fresh application which has not been considered as a fresh claim. So I would submit that these are issues which ought to be considered further.

55. THE DEPUTY JUDGE: Thank you. I am not satisfied that there are any issues of particular public importance raised by this case. Nor am I satisfied that there is any realistic prospect of success on appeal. For those reasons, I refuse to give permission to appeal.