H-MA-V2

Appeal Number : **HX12646-2002**

DA (Risk-Return-Reporting Restrictions) Sri Lanka CG [2002] UKIAT 04279

IMMIGRATION APPEAL TRIBUNAL

Heard at : Field House
on : 15th August 2002
Dictated : 15th August 2002

Determination Promulgated
18-9-2002
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Before:

Mr D K Allen - Chairman
Mr N Kumar JP

between

The Secretary of State for the Home Department

Appellant

and

David ANTONYTHAS

Respondent

DETERMINATION AND REASONS

1. The Appellant has been granted leave to appeal to the Tribunal against the determination of an Adjudicator, Dr R Kekic, in which she allowed the Respondent's appeal against the Appellant's decision refusing to grant him asylum.

2. The hearing before took place on 15th August 2002. Miss A Holmes of the Home Office Presenting Officers Unit appeared on behalf of the Appellant, and Ms N Mallick for Rasiah and Co. appeared on behalf of the Respondent.

3. Miss Holmes relied on the grounds of appeal. She argued that the Adjudicator had not taken proper account of the March 2002 Home Office Fact-Finding Report on Sri Lanka. In the light of the current objective evidence, on the facts of this case as found by the Adjudicator the Respondent did not face a real risk on return. There was no evidence produced to show that strip searches occurred. There had been no roundups of Tamils for some nine to ten months and the ceasefire was holding. If a bribe had been paid then whoever took it would have safeguarded their position so it was unlikely there would be risk to the Respondent as a consequence. Failure to

observe reporting conditions did not arouse interest. The Tribunal was also referred to paragraph 5.2.23 of the recent CIPU Report.

4. In her submissions Ms Mallick argued that the Adjudicator had in fact paid proper attention to the most recent objective evidence, as could be seen from paragraph 6 of her determination. She was entitled to conclude as she did at paragraph 44 that the authorities would still be interested in the Appellant in the light of his failure to continue reporting as required. The Tribunal should not go behind the Adjudicators findings of fact. Reference was also made to the recent determination in **Jeyachandran [2002] UK IAT 01869**, where it was said that the Tribunal would only interfere in findings of fact if persuaded they were clearly wrong or if there was no evidence which could properly found such a finding of fact. From that case the significant findings made by the Chief Adjudicator were that the Appellant was on a wanted list that was confirmed by the prohibition upon his mother leaving the area until the Appellant was produced to the army. The Adjudicator had heard and made findings on the Appellant's claim.

5. As regards the decision in **Brinston [2002] UK IAT 01547**, there were clear factual differences between that case and the instant case. The Respondent in the appeal before the Tribunal was much more exceptional and the scars in **Brinston** were much less significant and also credibility was in issue there. At paragraph 11 reservations were expressed about the objective situation. The Tribunal was also asked to bear in mind the references in **Brinston** to the Fact-Finding Report and the UNHCR letter. Scarring could be a factor. Strip searches could occur. Paragraph 5.2.22 of the CIPU Report should be borne in mind. The Tribunal was also referred to the earlier Fact-Finding Report of the Home Office of July 2001, for example paragraphs 4.1.3, 6.2.2, 6.2.3, 6.3.8 and 6.3.10. The Adjudicator had assessed the evidence correctly and had come to proper conclusions. The appeal should be dismissed.

6. By way of reply Miss Holmes reiterated her argument that the Adjudicator was not entitled to conclude as she did at paragraph 44. There was nothing to show any interest in the Respondent on the part of the authorities. The March 2002 Fact-Finding Report was made in good faith and was not self-serving. Unlike the situation in **Brinston** there was no warrant and no letter of the kind referred to therefore. The July 2001 report was very worthy but was significantly out-of-date of now and could not properly be relied upon.

7. We reserved our determination.

8. The Adjudicator found the Appellant to be credible. It was wrong to say at paragraph 43 that no credibility issues were raised in the refusal letter, given the direct contradiction of that view to be found in paragraph 6 of the refusal letter, but the Appellant did not appeal on the basis of error in that regard, and accordingly we proceed on the basis that the Adjudicator's positive credibility findings are sound.

9. The Appellant's claim is that he had assisted the LTTE from around 1997. He had no problems with the army before May 2001, though his family, in particular his brother, brother-in-law and uncle had all been killed, his brother because he had been an EPDF member. The Appellant said that he was held at two army camps for two

months and beaten four or five times and his head submerged in water and he was kicked and burned with an iron rod which had been heated on a fire. He also sustained a head injury as a result of being pushed into bunker. No charges were brought against him but he was told to sign on at the army camp once a week. He did this on the day of his release and on one other occasion before fleeing. It seemed that a bribe of some 50,000 rupees had been paid for his release.

10. The Adjudicator saw some of his scars and also heard evidence about the burn on the left side of his chest. She did not accept the Secretary of State's contention that the authorities would not have released the Appellant (as he was before her) if he was of interest to them. She came to this view on the basis of the reporting condition imposed and the fact that the release occurred on payment of a bribe. She did not consider this indicated that the authorities were no longer interested in him and she considered in the light of his failure to continue reporting that the authorities would still be interested in him, perhaps even more on that account. She considered the scars on the side of his chest and back to be severe and very noticeable although she did not consider the scarring to his legs and hands to be such as would attract the adverse attention of the authorities. She considered that given his failure to abide by the reporting conditions there was a real likelihood that there would be a record of him, and that he would be known to the authorities which would lead to a thorough investigation and the real risk of a strip search. As such she considered that he was at significant risk on return. She noted the ceasefire and the encouraging signs of a peace but considered that in the Appellant's particular circumstances this would not necessarily assist him and nor was there an internal flight option.

11. It is clear that in recent months there have been significant improvements in the human rights situation in Sri Lanka. The situation has been considered recently by the Tribunal in its determinations in **Brinston** and in **Jeyachandran**. The Appellant in **Brinston** was considered by the Tribunal, as was noted at paragraph 8 in the determination, on the basis of accepting what he said as being true. On that basis he was a person who some five years previously had been arrested and released and was the subject of a warrant under the Prevention of Terrorism Act for purposes yet unknown and was also the subject of a letter of 19th April 1998 which noted his failure to appear at a police station in spite of earlier notices and that that failure would entail a warrant being taken out for his arrest and detention until completion of enquiries and thereafter if necessary. He also bore some scarring on his arms and legs. The Adjudicator concluded the scarring was not so significant as to cause the authorities to believe that he had been involved in violence or conflict. The Tribunal noted the matter set out at paragraph 6 of the Fact-Finding Mission conducted on behalf of the Secretary of State in Sri Lanka between 14th and 23rd March 2002. Among other things it was said by the senior superintendent of the Criminal Investigation Department in Sri Lanka on 21st March 2002 that if a returnee were not wanted they would not be stopped at the airport. Where the CID was certain that the individual had committed or been convicted of an offence then they would be stopped. A computer holds the name, address and age of a wanted person. It was said that the police purely go on records and scars would not make a difference and the authorities would not make a decision on this basis. There had been no roundups of Tamils in Colombo in the previous six months. The Prevention of Terrorism Act is still in force but the government is seriously considering repealing it and there has been an order not to make any arrests under the Act but only under Common Law. It

was also said that failure to comply with reporting restrictions would not warrant reporting or recording.

12. The UNHCR's senior protection officer, Mr Lindenbauer told the Fact-Finding Mission that checks on returnees at Colombo airport have been eased with many returned rejected asylum seekers simply being waved through since December 2001 by contrast to what happened previously where basically every returnee was referred to the CID and thereafter referred to a magistrate. Scarring was not seen to be a significant issue although obvious scarring could draw attention and result in further enquiries and detention by the authorities. A subsequent letter from the deputy representative of UNHCR in London dated 15th April 2002 specifically indicated that it did not seek to be inconsistent with what was said by Mr Lindenbauer. It noted the relevance of torture related scars on the body of a returnee and relevant factors that could trigger interest in a returnee.

13. The Tribunal in **Jeyachandran** noted at paragraph 8 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 Appellant in that case was regarded as an exception, given the fact that it had been found by the Chief Adjudicator, who heard the initial appeal, that the Appellant in that case was on a wanted list and that that was confirmed by a prohibition upon his mother leaving the area until the Appellant was produced to the army. In our view that is significantly different from the situation of the Appellant before us. We agree with Miss Holmes' submission that he is not an exceptional case and not a person with a particular profile. The fact of his release, albeit on conditions and as a consequence, he claims, of a bribe does not in our view make him in any sense an exceptional case. We note the comment to which we have referred to above from the senior superintendent of the CID in Sri Lanka that failure to comply with the reporting restrictions would not warrant reporting or recording. We also consider that there is merit in Miss Holmes' suggestion that a person who had released the Appellant on a payment of a bribe would, as a matter of commonsense, be likely to protect their position and cover their tracks rather than reveal the fact that release had only taken place as a consequence of a bribe being paid. The Appellant's history as found by the Adjudicator does not indicate a person with a high profile and as not being a person of continuing interest to the authorities. Unlike the Appellant in **Jeyachandran** he is not a person who has been found to be on a wanted list. In our view the Adjudicator did not take adequate account of the Fact-Finding Report. If she had done then we do not consider that she could reasonably have concluded in the light of that that a failure to observe the reporting condition or release on payment of a bribe or both together would entail a continuing interest by the authorities in the Appellant. Her findings are not consistent with that up-to-date objective evidence. We agree with Miss Holmes that the earlier report from 2001 and the earlier Fact-Finding Mission is of largely historical interest now in the light of the fact of particular significance that the ceasefire has occurred since then and the significant improvement in human rights in Sri Lanka to which we have referred above has developed apace subsequently. The point that Ms Mallick made with regard to paragraph 5.2.22 relates to evidence provided by the UNHCR in a letter dated 4th January 2000, which again very significantly predates the more recent significant improvement in human rights in Sri Lanka. We do not accept Miss Malick's contention that we are bound to agree with the Adjudicator's conclusions. For the reasons we have stated above, we consider that her conclusions about risk

on return cannot be sustained in the light of the fact that she did not in our view take proper account of the up-to-date objective evidence.

14. Nor do we find anything in the evidence to indicate that strip searches take place. The Adjudicator's views on the degree of likelihood of this, expressed at paragraph 48 of her determination, essentially followed from her views about the real likelihood of a record existing of the Appellant given his failure to abide by the reporting conditions. As we have stated above, we do not consider that there is a real risk that there will be a record of him for this reason or for any other reason. Accordingly we do not consider that there is a real risk that he will be strip searched, and accordingly we do not consider there is a real risk that the significant scars on his chest and back would be revealed to the authorities on return. As a consequence we consider that the Adjudicator's conclusions in this case can not be sustained, and in the light of the up-to-date objective evidence and in the light of this Appellant's history, we consider that his appeal should not have been allowed by the Adjudicator, and accordingly we allow the Secretary of State's appeal against that decision.

D K ALLEN
CHAIRMAN