CO/9146/2007

Neutral Citation Number: [2008] EWHC 2532 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 7 July 2008

B e f o r e:

JAMES GOUDIE QC
(Sitting as a Deputy High Court Judge)

Between:
THE QUEEN ON THE APPLICATION OF SUTHANANAN
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr M Chatwin (instructed by Scudamores) appeared on behalf of the **Claimant**
Ms C Patry Hoskins (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T

(As Approved by the Court)

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1. DEPUTY JUDGE: This is a renewed application for permission to apply for judicial review, permission having been refused on the papers by HHJ Hickinbottom on 24 April 2008. The claimant, a Sri Lankan national, seeks to challenge the decision of the defendant dated 1 October 2007 not to accept his further submissions of 16 May 2006 as a fresh asylum claim. Judge Hickinbottom observed as follows:

> "The claimant's claim for asylum was ultimately refused by the IAT on appeal on 17 April 2003. Further representations were made on 16 May 2006, and refused as a fresh claim on 1 October 2007. Further representations were made that day. On 17 January 2008, the day after these proceedings were issued, the defendant wrote again to the claimant refusing to deal with the further representations as a new claim. The only new information relied upon in these representations was (1) the IAT guideline case of LP (Sri Lanka) [2007] UKIAT 76, and (2) documents indicating a worsening position in Sri Lanka, such as the UNHCR report of 2006 and the Canadian report of 19 February 2007.
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> The defendant was justified in not accepting the representations as a fresh claim. On 23 February 2003, the IAT found at paragraph 27 that it was unlikely that the claimant was recorded as being wanted in Sri Lanka, and in the circumstances, he was not at risk on return as being of no interest to the authorities. Although the general situation in Sri Lanka has worsened since then, there is no cogent evidence that the risk to the claimant upon return has increased. Given the earlier finding of fact, the defendant was entitled to conclude that the recent guideline case of LP did not assist the claimant, and that the claimant had failed to overcome even the modest hurdle for fresh claims set out in WM (DRC) [2006] EWHC Civ 1495 at paragraph 7, ie informed by anxious scrutiny the content of the new representations taken with the previously considered material did not create a realistic prospect of success in an application to an immigration judge.
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> For these reasons, I consider the grounds relied upon are unarguable."

2. The ground for renewal is that the judge did not adequately consider LP in context. The claimant submits that since he was found credible by the Tribunal and his appeal was allowed by the original Tribunal, the new factors contained in LP individually and cumulatively expose him to risk. I do not accept that submission. I agree with Judge Hickinbottom that LP does not assist the claimant. The holdings in LP were as follows:

> "(1) Tamils are not per se at risk of serious harm from the Sri Lankan authorities in Colombo. A number of factors may increase the risk, including but not limited to: a previous record as a suspected or actual LTTE member; a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the security forces to become an informer; the presence of scarring; return from London or

other centre of LTTE fundraising; illegal departure from Sri Lanka; lack of an ID card or other documentation; having made an asylum claim abroad; having relatives in the LTTE. In every case, those factors and the weight to be ascribed to them, individually and cumulatively, must be considered in the light of the facts of each case but they are not intended to be a check list.

(2) If a person is actively wanted by the police and/or named on a Watched or Wanted list held at Colombo airport, they may be at risk of detention at the airport.

(3) Otherwise, the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment.

(4) Tamils in Colombo are at increased risk of being stopped at checkpoints, in a cordon and search operation, or of being the subject of a raid on a Lodge where they are staying. In general, the risk again is no more than harassment and should not cause any lasting difficulty, but Tamils who have recently returned to Sri Lanka and have not yet renewed their Sri Lankan identity documents will be subject to more investigation and the factors listed above may then come into play.

(5) Returning Tamils should be able to establish the fact of their recent return during the short period necessary for new identity documents to be procured.

(6) A person who cannot establish that he is at real risk of persecution in his home area is not a refugee; but his appeal may succeed under article 3 of the ECHR, or he may be entitled to humanitarian protection if he can establish he would be at risk in the part of the country to which he will be returned.

(7) The weight to be given to expert evidence (individual or country) and country background evidence is dependent upon the quality of the raw data from which it is drawn and the quality of the filtering process to which that data has been subjected. Sources should be given whenever possible.

(8) The determinations about Sri Lanka listed in para 229 [of the determination - see below] are replaced as country guidance by this determination. They continue to be reported cases."

3. LP itself, and subsequent decisions in relation to failed Tamil asylum seekers from Sri Lanka, have been helpfully reviewed by Sir George Newman in his judgment on 22 May 2008 in Sivanesan [2008] EWHC 1146 Admin. These decisions include the judgment of Collins J in Nishantbar Thangeswarajah [2007] EWHC 3288 Admin, at paragraph 16 of which Collins J said that the test was:

> "... whether there are factors in an individual case, or one or more, which might indicate that the authorities would regard the individual as someone who may well have been involved in the LTTE in a significant fashion to warrant his detention or interrogation."

4. Sir George Newman gave judgment as follows at paragraphs 41 to 43 of his judgment:

> "41. The lesson to be learned from this case is that the central question is whether a real risk exists that the authorities would suspect the claimant of having a sufficiently significant link to the LTTE which could cause him to be detained on his return to Sri Lanka.
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> 42. The question must be answered after a thorough assessment has been made of the findings made by the judge in connection with the original claim. This is required because a fresh judge will take the original conclusion as his starting point. In the cases now pending, depending as they do on changed circumstances in Sri Lanka, the assessment should be directed at the conclusions which have been reached which establish the profile of the claimant. It is likely that the claimant (or his lawyers) will have advanced a profile by reference to a number of risk factors. Each case must be considered on its own facts. The factors in LP are not exhaustive but are ones commonly found to have been present in many cases. They may be reflected in any one case in a different manner to that described in LP. The requirement that each case should be considered on its own facts means that the formulaic repetition of a conclusion in LP will not be sufficient if differences of detail are present. Where factors capable of showing a connection of significance to the LTTE are relied upon, a careful assessment of the detail will be required. The judgment of Collins J. provides clear guidance on the line between real risk factors and background factors. That said, a combination of factors could materially affect the conclusion. It must always be remembered that the requirement for anxious scrutiny means addressing the relevant representations which have been advanced. A failure to do so will not be saved by repetitive citation of principle from cases or sections of a Determination which are arguably in point without the reason for referring to the section being stated.
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> 43. An examination of decisions in other cases, apparently similar, should be avoided. The detailed facts of another case can be an unreliable barometer of risk and are likely to lead to a decision being taken in the case under consideration which is driven, not after anxious scrutiny in the case in question, but by the decision of a judge in a different case. That is not to say that a comparative exercise cannot help a decision-maker, but undue weight should not be attached to the result."

5. Mr Chatwin, for the claimant, attacks in particular paragraph 20 of the decision letter of 17 January 2008. That paragraph relates to the risk factor of a previous record as a suspected or actual LTTE member or supporter. The decision letter concludes that

there is no evidence that the Government would have a record of this claimant. This claimant's case is a case of a bribery related release. In LP, there is a passage under the heading: "Bail jumping and/or escape from custody", which are addressed in paragraphs 212 and 213, and then in paragraph 214, LP continues as follows:

> "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
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> 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."

6. One notes therefore the contrast made there between a bail jumper or someone who escapes from custody on the one hand, and someone who is the subject of a bribery related release on the other hand. Section 11 of the decision in LP from paragraph 229 onwards deals with the Tribunal's conclusions on the continuing applicability of Sri Lankan country guidance cases. Paragraph 229 sets out country guidance cases that are no longer to be treated as country guidance, but which remain as reported cases (and a number of such cases are then set out), including PT [2002] UKIAT 01336 relating to medical reports and analysis, and then paragraph 230 states:

> "The following will retain country guidance status but, as always, should be looked at in the context of the developing situation and in the light of any more up to date evidence."

7. There are then two such cases, one of which is PT (Risk – Bribery – Release) Sri Lanka CG [2002] UKIAT 03444. Paragraph 230 continues:

> "Although this case concerned the position in mid-2002, paragraphs 28 and 29 of the determination (which deal with scarring) are not

inconsistent with the evidence that was before us and paragraphs 19 to 27 (which deal with the issue of bribery) remain consistent with the evidence we have heard, the submissions made and contains what continues to be a common sense approach to the issue of bribery-related releases."

8. In his judgment in Sivanesan, Sir George Newman at paragraph 19 of his judgment refers to paragraphs 19-27 of PT, having been approved in paragraph 230 of LP, and indicates that they give guidance, including what is set out in paragraphs 21, 24 and 25 as follows:

> "21. When someone has been in custody for a significant period of time it is reasonable to presume that some record was made of the detention and this record may still exist and be available for inspection by the authorities. If the record does still exist one may also reasonably presume that it includes a reference to the individual's current status. By this we mean whether he is currently wanted by the authorities, or whether his release concluded the authorities' adverse interest in him. These presumptions are supported by the statement from the CID superintendent, set out above, that their computer only holds the name and address and age of wanted people. We also note in passing that this record kept by the CID does not include people who failed to comply with reporting restrictions after a release.
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> ...
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> 24. This evidence is not wholly unequivocal in its terms but it reinforces the view taken by the Tribunal on common sense grounds in Amalathaasen that:
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> > 'It seems to us that it is highly improbable to say the least that a police officer, releasing a man on payment of a bribe, would record it as an escape. There is certainly no need to do so. If the police wanted to keep an interest in him all that was necessary was to note that he might be of interest in the future. Normally if someone is released on payment of a bribe or otherwise it is indeed because the authorities take the view that there is no good reason to detain him even if there is some involvement with the LTTE at a very level.'
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> 25. We agree and conclude, in the light of the UNHCR observations, that bribery related releases, especially from army custody, would not, in the absence of some special and credible reason, be likely to be treated as escapes, and would not result in the inclusion of the individuals involved on a wanted list."

9. It seems to me that the conclusion to be drawn from all of that is that, in general, on the country guidance currently applicable, a person released on payment of a bribe will not be on a wanted list. In my judgment, it was rational for the Secretary of State to

conclude that this was not an exceptional case. I agree with the reasons given by HHJ Hickinbottom, and I do not for my part find in the decision letter of 17 January 2008 any error in the approach adopted or in the conclusion which is arrived at.

10. I therefore uphold the refusal of permission to apply for judicial review.

11. MS PATRY HOSKINS: Thank you very much, my Lord. You will have seen that HHJ Hickinbottom also dealt with the question of costs, so I have no further application to make.

12. DEPUTY JUDGE: Yes.