

CO/5582/2007

**Neutral Citation Number: [2008] EWHC 2917 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Tuesday, 4th November 2007

**B e f o r e:**

**MR JUSTICE BENNETT**

**Between:**

**THE QUEEN ON THE APPLICATION OF SINNATHURI**

**Claimant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

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(Official Shorthand Writers to the Court)

**Miss S Jegarajah** (instructed by Warnapala Sols) appeared on behalf of the **Claimant**  
**Miss D Rhee** (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

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

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1. MR JUSTICE BENNETT: The claimant is a Sri Lankan national and a Tamil. He arrived in the United Kingdom on 30th September 2002. On 8th October he claimed asylum on the ground that he had a well-founded fear of persecution at the hands of the government of Sri Lanka, to whom I shall refer to as ("GOSL") and the Liberation Tigers of Tamil Eelam, to whom I shall refer as ("LTTE").
2. On 3rd February 2003 the defendant refused his claim for asylum. In August 2003 the Adjudicator rejected his appeal. She found that the claimant did not have a well-founded fear of persecution from GOSL and that he would not have been maltreated at the hands of LTTE. Thereafter the claimant did not advance any rights to stay or submit any further representations.
3. On 3rd May 2006 the defendant detained the claimant for removal on 20th May. On 4th May the claimant submitted representations to the defendant claiming changed circumstances. On 16th May the defendant, having considered the matter in the light of previous material, concluded that there was not a realistic prospect of success before an Adjudicator.
4. The claimant thereupon began judicial review proceedings. Permission was refused by Stanley Burnton J (as he then was) in November 2006. On 20th March 2007 Sullivan J refused the claimant's renewed application for permission. However, that was done on the basis that the defendant would consider the letter before claim and the further material provided on 16th March 2007. The further material was a UNHCR paper of December 2006 and a CIRB report of December 2006.
5. The defendant then considered the letter before claim and the further material. By a decision letter of 2nd July 2007 the defendant refused to treat the further representations as a "fresh claim", within the meaning of paragraph 353 of the Immigration Rules. On 6th July Collins J refused permission. Thereafter the AIT promulgated its decision in LP v Secretary of State for the Home Department [2007] UKIAT (00076) to which I shall hereafter refer to as ("LP").
6. It was in the light of that decision that upon the claimant's renewed application for permission, Underhill J granted the claimant permission. I am told that the judge indicated that, but for LP, he would have refused permission.
7. On 9th May 2008 the defendant further considered the claimant's representations in the light of LP but decided that they did not constitute a fresh claim.
8. On 10th June 2008 and 17th July 2008 the IAT promulgated and the European Court of Human Rights gave judgment respectively, in AN and SS v Secretary of State for the Home Department [2008] UKIAT (00063) and NA v The United Kingdom (application 25904/07). In the light of these further decisions, on 29th October 2008 the defendant issued a further decision letter in which he again rejected the claimant's fresh claim.
9. Last Friday, 31st October, the claimant's former counsel was taken ill and had to return the brief. Miss Jegarajah stepped into the breach. She told me this morning that she

would concentrate solely on the decision letter of 29th October and would ignore all previous grounds, pleadings, representations and decisions that pre-dated LP. Her focus, she told me, was to be exclusively on the decision letter of 29th October 2008.

10. She submitted that the key issue was whether the primarily facts, as found by the Adjudicator, were properly considered by the defendant. Her core submission was that the determination of the Adjudicator was not an adequate starting point as the Adjudicator's findings on the critical facts are unclear.
11. I therefore turn to the Adjudicator's determination and her reasons. She found that the claimant was a member of LTTE between 1996 and 2001. In January 2001 the claimant was thought to have misappropriated funds under his control. He tried to leave the LTTE but was instead sent, in February 2001, to a punishment camp. After about a month he escaped and went to a refugee camp. There he was identified as a possible LTTE suspect and was detained. The Adjudicator found that the claimant was maltreated but was not tortured or subjected to significant physical maltreatment.
12. On 20th April 2001 the claimant was released unconditionally from detention and went to live with his sister. On 15th October 2001 the claimant contended that he was arrested by a pro-government group and tortured and beaten with batons and iron rods. He said that he was hung upside down and burnt with cigarettes. In June 2002 he was released after his sister had paid a bribe.
13. The Adjudicator rejected the matters relating to the claimant's arrest and ill-treatment on and after 15th October 2001. At paragraphs 26 and 27 of her reasons she said:

"I find that the Appellant was not arrested on the 15th October 2001. As I have explained above, there is no explanation for why the authorities would have been interested in the Appellant, in circumstances where he was released unconditionally on the 20th April 2001, was left for six months in peace and was of no interest to PLOTE who knew that the Appellant was living with his sister but gave him no difficulties. It is therefore inexplicable that he was then 'identified' by a pro-government group and taken to a detention camp. Nor is it clear why or how he could have been identified. He worked in the finance department of the LTTE and there is no reason to suppose that he would have had a high profile role. As I have indicated, there is no reason why the government would have been interested in the Appellant. Also, as I have indicated, there is some significant confusion over whether the EPRLF could have been in control. On the one hand the Appellant claims the bribe to secure his release was paid to the EPRLF. On the other, he states that he was rounded up by a pro-government group. The CIPU report does not indicate that the EPRLF is a pro-government group. I find that the Appellant lived in Vavuniya between 20th April 2001 and when he left Sri Lanka in June 2002. He lived with his sister without disturbance.

The Appellant said that he feared both the government and the LTTE were he to return to Sri Lanka. For reasons appearing above, I consider

that the Appellant has no well founded fear of persecution from the government. The Appellant's representative admitted that he had no background evidence of what the LTTE would do to escapees if they returned. However, he submitted that the LTTE is a violent group. This may be so but the LTTE's violence is not ordinarily directed at itself or at former members. On the Appellant's own evidence their reaction when they considered him guilty of defrauding them, was simply to require him to repay the money. When he could not, he was sent to a punishment camp where he was made to work hard. This does not indicate that the LTTE are vindictive or persecutory towards their own members or former members. There is no evidence that the LTTE ever made any attempt whatsoever to find the Appellant, in Sri Lanka after his escape. His difficulties were, on his own account, at the hands of the LTTE rivals of the government. In these circumstances, I do not think it is open to me to conclude, in the absence of any objective evidence in support, and in the face of what appear obvious inferences from the Appellant's own evidence, that he would face any significant maltreatment upon return to Sri Lanka at the hands of the LTTE. He lived from March 2001 to June 2002 in Vavunia without disturbance. I consider that he could return to Sri Lanka and live there in peace without fear of reprisals by the LTTE."

14. The question of scarring played an important part in the claimant's appeal to the Adjudicator. As to that the Adjudicator said, at paragraph 23, as follows:

"I have had regard to the medical evidence of Dr Yacob who examined the Appellant on the 25th June 2003. Dr Yacob confirms that the Appellant's body exhibits certain scars. I noted to the Appellant's representative that according to this report, every scar identified on the Appellant's body is said to have resulted from maltreatment in detention. I said that I found this strange in circumstances where the Appellant himself claimed to have been an LTTE fighter. The Appellant's representative's response was that he was a member of the LTTE but most of the time he was in the finance department. This is only partially true and only partially addresses the point as the Appellant spoke of having spent three months in basic training learning to use weapons including AK 47s, some time in a refugee camp and some time in a punishment camp. He spoke of a further three months carrying food and materials to fighters. I do consider it strange that the Appellant's scarring is accountable in its entirety to maltreatment at the hands of the authorities. I note the doctor's conclusions that the scars are 'compatible with' the Appellant's history (page 12), 'consistent with' the history (page 13) and that there is a 'reasonable likelihood' that the scar was caused as claimed (page 13). The doctor does not suggest that they are not compatible with having been caused in some other way."

15. Miss Jegarajah submitted that the proper approach to this court's review of the defendant's decision of 29th October 2008 was set out in the judgment of Sir George Newman in the case of Sivanesan v Secretary of State for the Home Department [2008]

EWHC 1146 (Admin), which referred extensively to the judgment of Collins J in Thangesarajah v Secretary of State for the Home Department [2007] EWHC 3288 (Admin) (see paragraphs 22 and 23 of Sir George Newman's judgment in Sivanesan). Sir George Newman agreed with the approach of Collins J.

16. At paragraph 36 of his judgment Sir George Newman, having concluded that the decision letter was deficient, said at paragraphs 37 and 38 of his judgment as follows:

"The position appears to me to be as follows. The claimant has raised a fresh claim which, in its crucial respects, is unsupported by the Adjudicator's decision, but it is not clear whether the lack of specific support stems from the adequacy of the Adjudicator's conclusions or the clarity of the evidence before the Adjudicator or the emphasis of the case at the hearing, or a combination of some or all of the above. It follows that the Adjudicator's Determination and Reasons constitutes an inadequate starting place and foundation for the exercise of the degree of anxious scrutiny which the case requires...

39. I have little doubt that had the original decision been in the terms of the fresh decision the chances of obtaining permission would have been significantly reduced because the important point in connection with the Adjudicator's decision has only emerged from detailed argument. The absence of clear findings by the Adjudicator, which the fresh decision itself recognises, goes both ways. The Adjudicator's decision is the starting point. If it is unclear or other material is available the whole position must be weighed. Where there are no clear findings the defendant is at risk of assuming more than a role of determining whether a new judge would realistically reach a decision favourable to the claimant. Uncertainties should be unravelled by evidence or an opportunity for evidence to be adduced. That is a consequence of the obligation of anxious scrutiny. I am left with the uneasy conclusion that the matters now highlighted as significant may have received less attention than is required by reason of the heightened tension and change of circumstances in Sri Lanka."

17. Accordingly Miss Jegarajah submitted that the breakdown of the ceasefire in Sri Lanka and the general violent unrest constituted a considerable change since the Adjudicator's decision. Critically she submitted that the Adjudicator's decision was not an adequate starting point in two important respects. First she said that the Adjudicator at paragraph 25 found that at the refugee camp the claimant was identified by an informer as "a possible LTTE suspect". Whereas in the claimant's statement of 3rd May 2006, he said that he was identified as an LTTE member. Positive identification as a member rather than as a suspected member is likely to mean that the claimant's past is known to GOSL and thus he is likely to be on its records and that is relevant to the risk of possible maltreatment, should he be returned to Sri Lanka.
18. The second reason relates to paragraph 23 of the Adjudicator's decision. Miss Jegarajah submitted that the Adjudicator made a mistake, perhaps not corrected by the

claimant's representative before her, in that she believed that Dr Yacob's report was saying that every scar identified on the claimant's body resulted from maltreatment whilst under detention by GOSL. Whereas, according to Dr Yacob, there were two obvious and noticeable scars on the lower third of the right shin and the inner aspect of the right ankle, which were apparently not related to torture but sustained through accidental injuries whilst with the LTTE as a fighter. Furthermore the Adjudicator did not explicitly either accept or reject Dr Yacob's report. At paragraph 24 of the decision letter the defendant set out part of Dr Yacob's report. She then at paragraphs 25 - 28 continued:

"Furthermore, the Adjudicator considered Dr Yacob's report dated 27 June 2003 in relation to the risk posed to your client because of any invisible scars he may have. Since the Adjudicator's finding in August 2003, some 5 years ago, your client has not provided any evidence to show that the scars he had remains visible. In any event, the medical reports shows your client's scars are mostly on his legs so would not be easily identified unless he was searched by the authorities."

So it is that Miss Jegarajah says that the defendant misdirected herself in failing to consider that the Adjudicator had fallen into error in the ways in which she alleges.

19. It is convenient at this stage of the judgment if I read into the judgment paragraphs 26 - 28 of the defendant's decision letter. There she says as follows:

"In addition, at paragraph 73 of his report, Professor Good observes that the 'UNCHR *stated that people with torture scars are likely to be targeted*' however your client's scar were found not to be as a result of torture by the Adjudicator."

In paragraph 25 she states:

*"I find that he was maltreated during detention, but he was not tortured or subjected to very significant physical maltreatment". As noted above, those Tamil individuals who are actively wanted by the police or who are on a watch list for a significant offence may be at risk of being detained on arrival at the airport and this indicates that an individual such as your client would not be at risk on their return as the government had no interest in him. In any event the sole fact of having scarring does not put an individual to risk on arrival at Sri Lanka airport (See also paragraphs 37 and 144 of the judgment of NA)".*

In NA, the ECtHR also accepts the assessment of the IAT that scarring will have *'significance only when there are other factors that will bring the applicant to the attention of the authorities, such as being wanted on an outstanding arrest warrant or a lack of means of identification.... Whilst the presence of scarring may promote interest in a young Tamil under investigation by the Sri Lankan authorities, we do not consider that, merely because your client has scars, he will automatically be ill-*

*treated in detention.'* Giving the findings of the Courts and the information specific to your client's case, it is therefore not accepted that your client would be at risk simply because he may have some visible scars upon return to Sri Lanka.

Further, it is noted in paragraph 32.13 of COIS Report dated 11 June 2008 that the letter from the British High Commission (BHC) of 26 September 2005 states that *'The role of scarring is extremely difficult to assess, I have not found any detail reports, but anecdotal evidence is that it can play a part in arousing suspicion. The key issue is not what triggers suspicion, but how suspects are treated. Membership of the LTTE and fundraising for the organisation are no longer criminal offences in Sri Lanka (although they are in the UK) so even if the authorities acted on their suspicion Sri Lankan law gives them limited powers to Act. Unarmed members of the LTTE are permitted to operate in government areas under 2000 ceasefire agreement.'*

Your client was found to be a low level LTTE member and the authorities were not interested in him. It is not accepted that your client would now be of any interest to the authorities after five years were he to return to Sri Lanka."

20. In my judgment I cannot accept Miss Jegarajah's submissions. The Adjudicator did indeed refer to the claimant being identified as a "possible suspect". However, the defendant dealt with the claimant's claim on the basis that he had been a member of LTTE. Indeed the decision that the claimant would not be at risk if he returned to Sri Lanka is predicated on the basis, not that possibly the claimant had been, but that in fact he had been a member of LTTE.
21. In my judgment, a fair reading of Dr Yacob's report, would indicate that he was attributing the vast majority of the claimant's injuries to torture. I quote:

"In my opinion, I feel that Mr Sinnathuri has been through very frightening, distressing and traumatic experiences since earlier 2001 at the hands of both the LTTE Movement and the Sri Lankan Authority which culminated in his detention, ill-treatment and torture, especially after his last arrest and detention in Joseph Camp where he was subjected to cruel methods of torture and lengthy detention.

Understandably, he became physically exhausted and mentally depressed and withdrawn, with little hope for the future.

In my opinion, I feel that Mr Sinnathuri's description of his current psychological state and feelings, being a mixture of happiness to be free and safe in the United Kingdom, coupled with extreme worry and apprehension since the rejection of his Asylum Application are understandable and genuine.

At the same time, I feel that his fear of being returned and the possible risk to his safety is genuine and justifiable.

From the physical point of view, I feel that he has made a reasonable, functional recovery from his injuries and there is a reasonable likelihood that the multiple, scattered scars and visible markings over his body are related to the torture as he described the account to me during the interview.

The oblique linear scar above the left eye and the slightly wide scar in the upper part of the forehead are compatible with the history of being caused through assault with an object like a wire as he stated.

There is also a reasonable likelihood that the scars in the right elbow and left thumb are caused through an assault with an object like a wire, causing random areas of either a clean split or a small area of skin loss.

The two small rounded slightly elevated scars in the chest wall are consistent with a history of being caused through burning his skin with a cigarette butt.

There is a reasonable likelihood that the irregular shaped 2cm scar over the right lower back region is caused through an assault or being hit with a wooden stick.

There is also a reasonable likelihood that the scars in the right thigh and upper part of the left knee were caused again through an assault with a stick, causing random areas of different size and irregular shaped abrasion or skin loss.

The multiple small scars scattered over the dorsum of the left foot and both ankle regions and below the left knee are all compatible with the result of being kicked randomly with army boots, causing different shaped size skin abrasions."

22. The only injuries that Dr Yacob did not expressly attribute to torture were as I have set out. In my judgment, the Administrator's comments are nonetheless entirely valid. The report of Dr Yacob was put forward by the claimant to buttress his story of having been tortured by or on behalf GOSL. What the Adjudicator was saying was that it was implausible that where the claimant had been a fighter for LTTE, and thus at risk of getting scars, the scars on his head and face, right elbow, left thumb, chest wall, right lower back region, right thigh, upper part of left knee and multiple scars over the dorsum of the left foot, ankles and below the left knee were all attributable to torture at the hands of GOSL. In any event, in my judgment, the defendant did fully take into account the scarring and its significance (see the paragraphs of the decision letter that I have already set out).
23. In my judgment, the core point in this case is that in April 2001 the claimant was released by GSOL unconditionally. Thereafter GOSL displayed no interest in him



whatsoever. The same applies to LTTE. The claimant lived with his sister undisturbed. He was not subsequently detained. The defendant was entitled to conclude that the claimant was not a high profile individual, that he was unlikely to be on the records of GOSL and there was no evidence to show that GOSL or indeed LTTE had or had any interest in him.

24. Thus, in my judgment, the Secretary of State was entitled to conclude that the claimant would not have a realistic prospect of success before an immigration judge and her decision to refuse to treat the claimant's representations as a "fresh claim" is valid, even in the light of the approach laid down in LP. The claimant was considered to be a low-level supporter of the LTTE whilst the heightened security situation in Sri Lanka would indicate that the authorities should be more vigilant in their lookout for LTTE supporters. It does not suggest that they would now be interested in those whom they had previously judged to be low-level supporters and of no interest to the authorities.
25. Accordingly, for those reasons, the application will be dismissed.
26. MISS RHEE: My Lord, in those circumstances I am asked to ask for our costs on the normal basis that costs follow the event?
27. MR JUSTICE BENNETT: Have you a cost schedule?
28. MISS RHEE: My Lord, I am afraid I do not have a costs schedule. We can certainly undertake to file one as quickly as possible.
29. MR JUSTICE BENNETT: What are you asking for, a detailed assessment in default of agreement, or what?
30. MISS RHEE: My Lord, yes.
31. MISS JEGARAJAH: My Lord, this case is publicly funded. I have nothing more to say in respect of that.
32. MR JUSTICE BENNETT: What is your client's contribution, or is it not there?
33. MISS JEGARAJAH: There is no contribution. I would say though, my Lord, when considering costs, that this court takes into account the fact that the defendant's grounds and skeleton argument were served quite late in relation to this case. So the claimant, and our on side, obviously, we did not have a great deal of time....
34. MR JUSTICE BENNETT: You mean 29th October, but that was based on 9th May and what it was really doing was just taking into account the two authorities that have been decided since 9th May.
35. MISS JEGARAJAH: My Lord, I do not have any observations in relation to costs. Obviously we have not succeeded.
36. I would like to make an application for leave to appeal.

37. MR JUSTICE BENNETT: Let us deal with the question of costs. Is there any point in me making an order in light of the fact that he is publicly funded?
38. MISS RHEE: We would nonetheless like to have an order as we believe it does set a precedent, in future cases it is a question of enforcement.
39. MR JUSTICE BENNETT: What I could say is that the claimant will pay the defendant's costs, not to be enforced without leave of the court.
40. MISS RHEE: My Lord, I am grateful.
41. MR JUSTICE BENNETT: That I will do. You have an application?
42. MISS JEGARAJAH: Yes, my Lord. Obviously I have taken on board your judgment and it is with the greatest of respect that I ask for permission to appeal on these bases: firstly, that even if the defendant had dealt with the claim on the basis that he had in fact been a member of LTTE, the issue of whether he would be or has been identified as an LTTE member is still an issue that the defendant ought to address properly. Secondly, it is still not clear whether the Adjudicator actually accepted or rejected the medical evidence. In that respect the findings were uncertain. Thirdly, the Adjudicator's findings at paragraph 23 deal not with the clinical opinion of consistency but with what was said by the claimant to the doctor in terms of his own narrative of how the scars were caused. My Lord, those are my submissions.
43. MR JUSTICE BENNETT: I would like to thank you very much for your submissions, Miss Jegarajah. You have obviously come into it very late and, if I may say so, you have presented your client's case extremely attractively and very well. But I am afraid I take the view that your client has no reasonable prospect of success and therefore I refuse leave.
44. MISS JEGARAJAH: I am grateful, my Lord.