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Heard at Field House

SB (Art 8 _ Mental Health _ Razgara Djali) Sri Lanka [2004] UKIAT 00033

On 5 September 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

24 February 2004

Before :

His Honour Judge N Ainley (Chairman)
Mr D R Bremmer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

Representation
For the appellant: Mr C Buckley, Home Office Presenting Officer
For the respondent: Ms J Laughton, Counsel

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State from the determination of Mrs Jones, Adjudicator, sitting on 17 March 2003. Before dealing with the grounds of appeal it would be convenient to deal with the facts of the case as found by the Adjudicator.

2. The claimant is a Tamil citizen of Sri Lanka who was born on 26 February 1960 and so is now 43-years old. She entered

the United Kingdom on 2 May 2002 and applied for asylum, apparently on arrival.

3. We should point out at the outset that the claimant's account of what had happened to her and what led to her fleeing Sri Lanka was found by the Adjudicator to be entirely credible. There is no challenge to the Adjudicator's findings of fact.

4. The claimant lived in Kilinochchi from the date of her marriage in 1979. She and her husband have one child, a daughter Imayalina. Her husband was a wealthy farmer.

5. From 1991 the LTTE came regularly to her house and she would prepare food for them. From 1994 her husband combined the regular trips that he made to Vavuniya to sell produce with picking up information useful to the LTTE and bringing back medicine for them. Their daughter joined the student organisation of the Liberation Tigers and began helping them full-time from about the age of 15.

6. In 1996 the army captured Kilinochchi and they were displaced. They left everything behind and went to live Mankulan in reduced circumstances.

7. On 10 October 1998 the claimant's husband tried to get back to Kilinochchi to check on the family's property but he never returned and nobody knows what has happened to him. It is thought that he may have been picked up by the army, was probably arrested and is probably now dead.

8. Somewhat after this occurred, prerhaps within a month or so of it occurring, the claimant and her daughter got a pass from the LTTE which allowed them to travel to Vavuniya to make enquiries about her husband. They were told there that certain people who had been arrested in the area had been transferred to Colombo. They managed to get a further pass and they travelled to Colombo in January 1999. They were registered with the police on arrival.

9. It is plain that neither the claimant nor her daughter were of any particular adverse interest to the authorities at this stage because on 18 June 2000 they flew together to Singapore where Imayalina was married to someone who is a refugee from Sri Lanka in the United Kingdom. Imayalina obtained a visa to join him as a spouse in the United Kingdom and, having in the meantime returned to Sri Lanka, flew to London on 24 July 2000. She has stayed here ever since and is settled in the United Kingdom.

10. Two days after her daughter's departure the claimant was arrested by police who had surrounded the lodge where she was living. They took her to Pettah police station where she was kept for a week. It was put to her that her daughter was an LTTE member and the police said that they knew about her husband and that he had been arrested for helping the LTTE. They accused her of coming to Colombo as a spy and of being a member of the LTTE. At about the beginning of August she was transferred to Kalutra prison where she was treated as a terrorist.

11. In prison she was appallingly ill-treated. Her ill-treatment was exacerbated by the asthma attacks from which she suffered. She was repeatedly kicked, beaten and abused by female guards who accused her of being an LTTE spy. They would grab her by the hair, bang her head against the wall, kick her in the face and whip her with her belt. She was made to eat food mixed with sand and tiny stones so that she would vomit and would then be beaten. She was also made to engage in arduous work which aggravated her asthma.

12. Worse than this she was raped on about six occasions. The means by which she was subjected to her ordeal were that she was made to take a drink which evidently contained drugs and was then, whilst drowsy or unconscious, stripped naked and raped. This was done by different men whom she knew nothing of apart from the fact that that they were under the influence of alcohol at the time.

13. In due course she was given a check-up by a Tamil doctor who was sympathetic to her plight and who said he would tell the guards that she was infected with some disease. This stopped the rapes occurring.

14. It is not known when these assaults occurred but she was in prison for a considerable period of time. In about December 2001 a man from her village, a Mr Selvarajah came to visit another prisoner and saw her. She persuaded him to help her by going to Kilinochchi and selling her family land and belongings. A Singhalese officer was bribed and she was taken under escort from detention to an office to get a passport in about January 2002.

15. On 29 April 2002 a female guard took her from her cell to the prison office where Selvarajah and an agent were waiting. She managed to get through Colombo airport on a false passport leaving Sri Lanka on 29 April 2002 eventually arriving in the United Kingdom.

16. Those were the facts that the Adjudicator accepted. The Adjudicator also accepted the medical report of Dr Kanagaratnam which stated that she was suicidal, was suffering from PTSD, and was in a state of detachment and listlessness. The Adjudicator was in no doubt that the claimant had been "horrifically traumatised" to use her words by what had happened to her. The Adjudicator then went on to analyse the background information, in particular the treatment of returnees at Colombo airport, and concluded as follows:

> "51. In summary there is reason to believe the present peace process at the present time to be distinctly uneasy. I infer from this that the authorities will be loath to admit Tamils into the country who have a history of LTTE involvement and of detention.
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> 52. In the appellant's case I am satisfied that it is reasonably likely in view of her history and the present instability of the peace process that she is at risk of detention at the airport itself on return, that her detention will be lengthy and that she will be at grave risk of being tortured, on account of her political opinion."

17. The Adjudicator then went on further to say that in light of the past that the claimant had had it would be a breach of Article 3 to return her to Sri Lanka and further a breach of Article 8 because her only close immediate family are living in the United Kingdom and that she has established a family life over here with which her removal would prove a disproportionate interference. Further the Adjudicator concluded that the disparity in medical treatment between Sri Lanka and the United Kingdom was such that Article 8 would be breached on that ground also.

18. The grounds of appeal state that the Adjudicator made a number of errors of law and the first of these can briefly be described as a failure properly to appreciate the background evidence as to the state of affairs in Sri Lanka. The Secretary of State's contention was below and before us that the claimant would not be at real risk of persecution for her political beliefs if she were to be returned. It was submitted by the Secretary of State that the claimant had never been charged with any offence, has never signed any confession or other of paper and appears to have left detention in circumstances that make it overwhelmingly probable that her release would only be recorded as a legitimate release if it is recorded at all.

19. A number of cases before the Tribunal that have been decided since the ceasefire began in February 2002 illustrate in general terms what problems returning failed Tamil asylum seekers are likely to face if they go back to Sri Lanka.

20. The first thing to note, as was set out in the case of Jeyachandran is that unless somebody is wanted by the authorities for a reason which the authorities regard as important, they are unlikely to incur any trouble on return. The number of people who are likely to be wanted was not thought by the Tribunal in Jeyachandran to be large, indeed it was concluded that such persons would be likely to be in an exceptional category of returnee. The background evidence shows that people who are wanted may be people who the authorities suspect of being involved in particular specific or high profile crimes, people who are the subject of criminal charge or, perhaps, people with a high political profile who have intelligence which the authorities would be very anxious to obtain.

21. It was found by the Adjudicator in this case at paragraph 44, that the authorities probably covered their tracks when releasing her by listing her disappearance as an escape from custody. We do not know why the Adjudicator came to that conclusion, for findings of the Tribunal have shown that is not what one would expect the authorities to do when covering their tracks at all. In Tharmakumaseelan [2002] UKIAT 0344 the Tribunal found, relying also on earlier authority, that bribery related releases, particularly from army custody would not in the absence of some special and credible reason be likely to be treated as escapees.

22. It seems to us that would be particularly so in this case where every attempt appears to have been made to regularise the claimant's release from custody and her departure from the country.

23. We confess that we cannot see how the Adjudicator could have come to the conclusion she did about the likelihood of the claimant being listed as a wanted person in light of previous findings of the Tribunal, which of course are based n the background evidence of what actually goes on in Sri Lanka. It could be said that the claimant did not escape from army custody but from a prison, but we can see no reason why different principles should apply nor indeed did the Tribunal in Thamarkumaseelan which found that even if escapes are not from army custody, they are not likely to be recorded as escapes for the reasons set out in that case. We

thus do not consider that it is at all likely that this claimant would be listed as a wanted person on return to Sri Lanka and that despite the fact that she was detained for a long while. She has never been charged with any criminal offence and there is no sign that the authorities have retained any interest in her since her departure.

24. In those circumstances we cannot see how it would be likely that she would be a person who was either wanted by the authorities or fell into an exceptional category of returnee for any other reason. In those circumstances we consider that the Adjudicator was wrong to find in favour of the claimant on her asylum claim and we allow the appeal of the Secretary of State on that point.

25. We now turn to the other matters on which the Adjudicator found in her favour. The first of these was in respect of Article 3 of the Human Rights Convention. It was stated that her past treatment was such and her medical condition was such that on return to Sri Lanka she would suffer inhuman or degrading treatment.

26. Following the recent decision of the Court of Appeal in N [2003] EWCA Civ 1369 we cannot see, as far as Article 3 is concerned, that the Adjudicator's finding can possibly be upheld. This is not a case where the claimant is in the latter stages of a terminal illness nor is it one, as it seems to us, where the humanitarian appeal of the case is so powerful that it could not be reasonably resisted by the authorities of a civilised state. The claimant is ill and has mental problems, ones which are perfectly understandable in light of the treatment that she has undergone at the hands of the Sri Lankan authorities. It would be distressing for her to return, even to a country where she is no longer being sought by the authorities and is no longer at real risk of persecution or other inhuman treatment, but her condition comes nowhere near the sort of level of extremity that has to be satisfied before Article 3 could successfully be invoked. On this ground also we allow the Secretary of State's appeal.

27. We turn now to Article 8 which is pursued in two distinct ways in this case. It is convenient to deal first with that aspect of Article 8 which is concerned with her health rather than with her family.

28. Here reliance is placed upon the recent authority of the Court of Appeal in Razgar [2003] EWCA Civ 840. In that case the Court of Appeal concluded at paragraph 22:

> "22. We suggest that in order to determine whether an Article 8 claim is capable of being engaged in the light of the territoriality principle the claim should be considered in the following way. First, the claimant's case in relation to his private life in the deporting state should be examined. In a case where the essence of the claim is that expulsion will interfere with his private life by harming his mental health this will include consideration of what he says about his mental health in the deporting country, the treatment he receives there and any relevant support that he says that he enjoys there. Secondly it will be necessary to look at what he says is likely to happen to his mental health in the receiving country, what treatment he can expect to receive there and what support he can expect to enjoy. The third step is to determine whether on the claimant's case serious harm to his mental health will be caused or materially contributed to by the difference between the treatment and support that he is enjoying in the deporting country and that which will be available to him in the receiving country. If so, then the territoriality principle is not infringed and the claim is capable of being engaged.
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> 23. The degree of harm must be sufficiently serious to engage Article 8. There must be a sufficiently adverse affect on the physical and mental integrity and not merely on health. …
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> 25. Even if a removal case engages Article 8(1) there is Article 8(2) to consider. …
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> 41. When it comes to deciding how much weight to give to the policy of maintaining effective immigration policy the Adjudicator should pay very careful deference to the view of the Secretary of State as to the importance of maintaining such a policy. …"

29. It will be noted that what was stated in Razgar quite clearly was that before Article 8 is engaged at all there must be a sufficiently adverse affect on what is described as physical and mental integrity, not merely an affect on health.

30. It seems from comments in N and also from what was said by Simon Brown LJ in Djali, that Article 8 claims appear to have been decided on a different and less stringent approach to the responsibilities of the United Kingdom towards persons making claims than those who were suffering from purely physical illnesses rather than mental disorders. Simon Brown

LJ went so far as to say that it would seem to be very odd if a markedly more generous approach were brought to bear in respect of those suffering mentally rather than physically. Perhaps an example of an approach which would not have succeeded in respect of a physical ailment can be seen in the case of Januzi [2003] EWCA Civ 1187 which of course was decided after Razgar but before N or Djali.

31. The apparent discrepancy is or may be explained by what was said by Lord Justice Simon Brown at paragraph 29 of Djali, in a judgment with which both other members of the Court of Appeal agreed. Simon Brown LJ held as follows:

> "True it is that in Bensaid v UK [2001] 33EHRR 205 the ECtHR in paragraph 46 of its judgment referred to the possibility of there being an Article 8 breach "where there are sufficiently adverse effects on physical and moral integrity". Paragraph 47 however indicates what the Court there had in mind:
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> 47. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements in the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects the right to identity and personal development and the right to establish and develop relationships with other human beings in the outside world. The preservation of mental stability is in that context an indispensable pre-condition to effect employment of the right to respect of the private life".

Interference with sexual orientation or sexual life may adversely affect physical integrity; not, however, in this context physical health." [emphasis added]

It seems to us that what the Court of Appeal are saying there is that it is with the context of a right to identity, personal development and the establishment of development of relationships that the Article is concerned rather than with issues that go to health, which are properly the subject of Article 3.

32. If that be the case then Razgar is of very much more limited application than might have been thought but we cannot see how else to interpret what the Court of Appeal are here saying. We are fortified in our view that that is what the Court

of Appeal are saying and that that does represent the law in this country by consideration of what was said by Laws LJ in N at paragraph 38:

> "38. I am bound to declare with great respect, that as a matter of principle I have much difficulty with the case of D. The contrast between the relative well-being accorded in a signatory state to a very sick person who for a while, even a long while, is accommodated there, and the scarcities of grave hardships which, without any violation of international law, he would face if he were returned home, is to my mind – even if the contrast is very great – an extremely fragile basis upon which to erect a legal duty upon the state to confirm or extend the right to remain in its territory, a duty unsupported by any decision or policy adopted by the democratic arm, executive or legislature of the state's government. The elaboration of the immigration policy, with all that implies for the constituency of persons for who within its territory a civilised state will undertake many social obligations is a paradigm of the responsibility of elected government. One readily understands that such a responsibility may be qualified by a supervening legal obligation arising under ECHR where a person in question claims to be protected from torture or other mistreatment in his home country in violation of the Article 3 standards, especially if it would be meted out to him at the hands of the state. But a claim to be protected from the harsh effects of a want of resources, albeit made harsher by its contrast with facilities available in the host country, is to my mind something else altogether. The idea of the "living instrument" which is a well-accepted characterisation of the ECHR (and some other international texts dealing with rights) no doubt gives the Convention a necessary elastic quality, so that its application is never too distant from the spirit of the times. I have difficulty in seeing that it should stretch so far as to impose on the signatory states forms of obligation only different in kind from anything contemplated in the scope of their agreement."

Laws LJ then went on to point out that since D had been decided the Court had avoided any extension of the exceptional category of case which it represented.

33. If D represents an extension beyond which the Court has shown no willingness to go in imposing an obligation on a host country then logically Article 8 cannot be interpreted as

imposing such an obligation because it is much wider in scope, as it has been interpreted in Razgar if Razgar truly does refer to mental or physical health rather than the very limited kind of circumstance that it would apply to if the interpretation of Simon Brown LJ in Djali is correct. We find ourselves in some difficulty in interpreting Article 8 in light of recent authorities but we have concluded that we must now hold that it bears a restricted meaning of being referable only to cases where physical or moral integrity as defined by Simon Brown LJ are harmed and that it does not have an implication where physical or mental health are concerned; Article 3 deals with those circumstances.

34. Thus we would allow the appeal of the Secretary of State on the Article 8 health ground.

35. That leaves the Article 8 family ground.

36. If the claimant were to go to Sri Lanka she would be in a country where she says, and there is no reason to doubt it, she has no immediate family members left, her husband being presumed to be dead. It could also be said that her son-in-law could not visit Sri Lanka because he is a refugee in this country. We know nothing of his history and nothing of the problems that he would face on return to Sri Lanka now because it appears that he was classified as a refugee before the ceasefire, but we must assume on the material before us that it would be expecting too much to expect him to go to Sri Lanka. We are not aware that her daughter would face an insuperable problem in making a visit to Sri Lanka but yet again we will assume that there would be difficulties in that taking place because of her relationship to her husband. We do not go so far as to say they would be insurmountable but they would exist. In those circumstances it is unlikely that the claimant would be visited by her family in Sri Lanka. That does not stop her making an application to come to the United Kingdom to visit her family here r. The only impediment in her way of doing that would be financial, and that is an impediment faced by many families that are split because of migration. If her circumstances are such that when in Sri Lanka she is only subsisting because of support from this country and they can be said to be ones that as a matter of compassion require that the family are back together then she may make an application under Rule 3171(e) of the Immigration Rules to settle in the United Kingdom and her application will be dealt with in the ordinary way.

37. We cannot see in the circumstances of this case that it would be disproportionate to apply the ordinary immigration rules to

this case, for if it is a case deserving of the most compassionate consideration she will be permitted to come to the United Kingdom; if it is not then she would be in the position of many other parents who are under 65 but who have families in the United Kingdom; she will be permitted to visit but not to settle.

38. On this ground also therefore we allow the appeal of the Secretary of State.

39. In conclusion the Secretary of State's appeal is allowed in its entirety from the determination of the Adjudicator.

His Honour Judge N Ainley
Vice President