CC
Heard at Field House

VK (Risk - Release – Escapes – LTTE) Sri Lanka [2003] UKIAT 00096

On 16 September 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

17/10/2003

Before
:
Mr J Barnes
Mrs R Faux JP

Between

Secretary of State for the Home Department

APPELLANT

and

RESPONDENT

Representation
For the Appellant: Mr S. Bilbe, Home Office Presenting Officer
For the Respondent: Mr R. Ali, of counsel instructed by Siva & Co. Solicitors

DETERMINATION AND REASONS

1. The respondent is citizen of Sri Lanka of Tamil ethnicity born on 12th February 1982. He arrived in the United Kingdom on 23rd September 1999 and applied for asylum on the same day. A Self Evidence Form was submitted in support of that application which was refused by the Secretary of State for the reasons set out in a letter dated 17 February 2001. On 12 March 2001 the Secretary of State issued directions for the removal of the respondent to Sri Lanka following refusal of leave to enter after refusal of his asylum application. He appealed against that decision on both asylum and human rights grounds. His appeal was heard on 24th March 2003 by an Adjudicator, Miss S Henderson, who allowed his appeal. The Secretary of State now appeals with leave to the Tribunal against that decision.

2. The Adjudicator found the respondent to be credible in his account of his own history in Sri Lanka. We set it out briefly. The appellant had lived at home with his family and his father was a relatively prominent local business man who was in a position to, and did in fact, give significant help to LTTE through financial contribution. This became known to the Sri Lankan Army and was a probable reason for the detention of the father and brother of the respondent on 25th July 1999. She accepts that the respondent has no further knowledge of them since their arrest. The respondent was detained by the army on 5 July 1999 because he was mistaken for another boy who was an LTTE member whom he resembled. He was detained for one and a half months and in the course of that detention he was severely ill-treated and forced to sign a document written in Sinhala, which he did not understand but was told was a confession to being a member of the LTTE and helping the LTTE. In late August 1999 he was released on payment of a large bribe by his mother and told that if found again he would be rearrested. The Adjudicator found that he had in the past received treatment amounting to persecution by reason of his ethnicity and perceived political opinion. The respondent left Sri Lanka in September 1999 and travelled to the United Kingdom. At that time his mother, his two younger brothers and older sister remained at the family home but he does not now know where they are because he has had no contact with them.

3. The Adjudicator rightly poses the question at paragraph 8 of the determination that she has to decide whether or not the respondent would be at real risk of persecution or of being subjected to ill-treatment in breach of his protected human rights, particularly under Article 3, on his return. She says this at paragraph 8:

> "I am not prepared to assume that the appellant was of no continuing interest simply because he was released. In a country where bribery is prevalent (the CIPU report speaks of "wide spread corruption" in the police force). It is quite possible in my view for a person who is a real suspect to be released on payment of a bribe, particularly a large bribe. The appellant's captors clearly had an interest in him which is why he was treated in the appalling manner described. The fact that he was released by means of a bribe does not indicate in my view that the attitude of his captors towards him necessarily changed."

She went on to say at paragraph 9 that she believed that the appellant was indeed told to leave the country and that he would be rearrested if found.

4. It is unfortunate that there was no representation for the Secretary of State before the Adjudicator and that the Sri Lanka bundle, which includes a number of important decisions of the Tribunal, was not filed on behalf of the Secretary of State either. Indeed, no relevant case law was filed although the respondent's representative sought to rely on the Tribunal decision in *Somasundram* [2002] UKIAT 03117 – an appeal heard on 8 May 2002 - and the Court of Appeal decision in *Selvaratnam* [2003] EWCA Civ 121.

5. At paragraph 9 of her determination the Adjudicator quoted an extract from the UNHCR letter of 15 April 2002, noting that it had been repeated in identical terms in January 2003. Whilst she noted at paragraphs 10 and 11 of the determination the information provided to the Home Office Delegation in March 2002 she also noted that in *Somasundram* the Tribunal had paid attention to a report by a Dr Good, which again was not produced to her and the date of which is unrecorded, saying that assurances given to the Home Office delegation that only "wanted" persons are stopped at the airport had to be read in the light of his observations which she quoted from *Somasundram* as follows:

> "After routine arrests at the airport or in round ups, police practice is to consult the NIB (National Intelligence Bureau) as to whether the person appears in their database. It does not follow that the police have information on every case, but they are likely to do so if a person has previously been arrested or informed upon. If there are grounds for suspicion, the police can also obtain information from the police in another district"

She then concluded as follows at paragraph 13:

> "Taking into account all the above, I am of the view that there is a real risk that the appellant will not simply be waved through the airport if returned. It may be that the position has improved in that not all returnees are routinely screened, but the fact remains that same are waved through and some are not. There is a risk which could not be said to be fanciful that this appellant will not be waved through. If the appellant's details are checked against the NIB database I am satisfied that the fact of and the reason for his previous detention will come to light. There is a real risk in my view that the appellant would be seen as a person with serious LTTE links by virtue of his assistance for the LTTE, his signed confession to LTTE membership and his known relationship with his father and brother."

6. At paragraph 14, she went on to consider the effect of his release by bribery, saying:

> "I am not prepared to assume that the officer or officers who released him from custody would necessarily have altered their records to show either that he had never been detained or that he had been released in the normal way as being no longer of any interest. There is in my view no evidence to support such a conclusion and it is not the only inference which can be drawn. Even if the paper based records in Vavuniya were altered, it is unlikely that the computerised records in the South could be similarly tampered with unless the officers had considerable influence. I am therefore satisfied that there is a real risk of the appellant's details remain on the NIB database as a "wanted" person."

7. At paragraph 17 of the determination, she went on to say this:

> "I am well aware of course of the ceasefire in Sri Lanka which appears to be holding. There is evidence of ceasefire violations and of apparent recruitment by the LTTE which gives some cause for concern. There is a history of failed ceasefires in Sri Lanka. In my view a climate of suspicion is likely still to persist and the risk to this particular appellant to remain notwithstanding the advances made in peace talks."

8. In the grounds of appeal, the Secretary of State observes that the adverse attention to the respondent and his father and brother occurred in 1999 at the height of the troubles, resulting in his release on payment of a bribe from detention. The thrust of the grounds of appeal is that the Adjudicator's finding of continuing interest was not based on an objective assessment of the objective evidence current at the date of the hearing before her, and that she had failed to take into account the terms of the truce of 22 February 2002, giving insufficient weight to the specific passages in the CIPU assessment of April 2003. It was his submission that the Adjudicator had placed too much weight on the Tribunal decision in *Somasundram* and the UNHCR letter of 15 April 2002, and he relied particularly on two later Tribunal determinations. The first was *Kamaleswaran* [2002] UKIAT 07032 where the Tribunal had accepted that even where a claimant's escape was on record, given the current state of the peace process he was not likely to be wanted, submitting that in the case of someone's release on payment of a bribe this must apply with greater force. The second was the decision in *Tharmapalan* [2003] UKIAT 07346 in which the Tribunal had concluded that Dr Good's report relied on in *Somasundram* was now based on out of date information. It was noted further that the Adjudicator's references to the United States State Department report as to the likelihood of

torture in detention was based on the situation in 2001 prior to the coming into force of the ceasefire. It was also submitted that the Adjudicator's approach to the current ceasefire was unsustainable and that there was nothing in the Adjudicator's reasoning to show why this respondent should be treated as one of the exceptional cases referred to in *Jeyachandran* [2002] UKIAT 01869.

9. For the respondent Mr Ali accepted that the Tribunal jurisprudence supported the view of the stability of the current ceasefire and that the Adjudicator had adopted views which were contrary to that jurisprudence. It was his submission that the respondent did fall into the exceptional category envisaged in *Jeyachandran* having regard to the interest because of his family connection and the fact that he had signed what he believed to be a confession written in Sinhala. He submitted that the situation in Sri Lanka was not necessarily as stable as it appears to be, and pointed to the fact that there had been outbreaks of sporadic violence so that the stability of the present situation was a relevant issue for consideration. He accepted, however, that there was nothing in the April 2003 CIPU assessment to suggest that the peace process was anything but positive and although the respondent's advisors had put in a substantial background bundle making it clear that there was some apprehension in Sri Lanka as to the peace process, there was no specific reference in it to which he sought to draw our attention, accepting that this was largely material which was customarily produced to the Tribunal in Sri Lankan appeals and that the Tribunal had in recent determinations expressed its views as to the continuing stability of the current peace process in the light of such material as was included in the respondent's bundle.

10. The respondent's factual history which we have set out above is not the subject of challenge in the grounds of appeal and we have proceeded on the basis that the respondent is to be regarded as credible in his personal history, as was accepted by the Adjudicator.

11. The first issue for our consideration is whether the Adjudicator's findings are sustainable in the light of the challenges raised in the grounds of appeal before us. Whilst we do not minimise the difficulties which an Adjudicator faces where there is no representation on the part of the Secretary of State and a failure to put in relevant current material, it is clear that the Adjudicator did have before her the current CIPU assessment of April 2003 and clearly has paid insufficient regard to its contents in arriving at her conclusions. Moreover she has been led to place considerable reliance on an appeal heard by the Tribunal at the very early stages of the peace process and to rely on an extract from an undated expert

report which can clearly take no account at all of what has happened in Sri Lanka subsequent to early May 2002 if, indeed, it reflects the position even at that date. The Secretary of State is also clearly right in drawing our attention to the fact that the Adjudicator has also sought to rely on what is said in a State Department report relating to the period prior to the ceasefire. It is difficult to believe that any Adjudicator can be unaware that it is a fundamental error to rely a year later on such material dating from or even ante-dating the February 2002 ceasefire. We are satisfied that the Adjudicator erred in law in so doing and that she should have paid far greater regard to the position as recorded in the April 2003 CIPU assessment, taking *Jeyachandran* and the question of whether the respondent could be regarded as falling into an exceptional category as her starting point based on a consideration of later Tribunal determinations. Given that the Adjudicator's findings are unsustainable as to the risk current at the date of the hearing before her for those reasons, but that there is no issue as to the credibility of the respondent in his personal history, the proper course is for us to consider whether at today's date a person with such an accepted history is able to discharge the burden upon him to show to the lower standard of proof that there is a real risk on return that he will be treated in breach of his rights under the Refugee Convention of 1951 or of his protected human rights under the 1950 European Convention, and specifically article 3 of that Convention.

12. Dealing with the specific situation of the respondent, we note that he is not connected with LTTE activists but is part of a family who like many others in Northern Sri Lanka, gave some assistance to the LTTE. That applies to the vast majority of the Tamil population in Northern Sri Lanka. So far as the question of continuing interest by the Sri Lankan authorities of those who have been released from detention is concerned, there are numerous Tribunal decisions prior to the ceasefire coming into force which held that generally release showed a lack of continuing interest on the part of the authorities. This was held to apply even in cases of release through bribery as there was no reasonable likelihood that those who had effected such a release would have done so other than on a basis which would reveal regular release, so as not to expose themselves to any risk, and that, given the prevalence of bribery in that society which would increase the likelihood that money for release would be accepted, there still remained no reasonable likelihood that it would be effective in the case of those who were of real and continuing interest to the authorities. We note that the respondent was arrested because he was mistaken for an LTTE member who looked similar to him and, whilst there can be no excuse for the ill-treatment which he suffered during his detention, he makes no suggestion that the authorities continued under their

original misapprehension. There is, of course, Tribunal authority, as noted above, for the proposition that in the changed circumstances even someone who has escaped from custody is unlikely to be of continuing interest absent clear evidence that he is currently wanted by the authorities.

13. The Adjudicator placed some reliance on the UNHCR letter to A J Paterson Solicitors, of 15 April 2002. What it says is this:

> "Although steps towards peace have been taken in Sri Lanka recently, it is still premature to advocate that the situation has reached a satisfactory level of safety to warrant the return of all unsuccessful asylum applicants to Sri Lanka. In this regard UNHCR has been aware that returning Tamils are potentially open to risk of serious harm similar to those generally encountered by young male Tamils in certain circumstances. This risk may be triggered by suspicions on the part of the security forces founded on various factual elements relating to the individual concerned, including the lack of proper authorisation for residence and travel, the fact that the individual concerned is a young Tamil male from an un-cleared area or the fact that the person has close family members who are or have been involved with the LTTE."

14. Although that letter was reproduced in identical terms in January 2003, there is nothing to show that the UNHCR have taken any account of the developments which have occurred in the meantime. It will be immediately apparent that the general assertion is hedged about with a number of cautionary words and it has to be seen in its historic context of being made in April 2002 at a very early time in the peace process. A similar caution was expressed by the Tribunal in *Brinston* [2002] UKIAT 01547 and *Jeyachandran*. Indeed *Brinston* deals in terms with the need to look carefully at such situations as suggested by the UNHCR but that, having done so, it is open to the Immigration Appellate Authority to make their own assessment of the particular appellant's accepted position on the basis of the country background evidence.

15. By the time that this appeal came before Miss Henderson the peace process had been well-established and was proceeding, in general terms, in a way which has greatly changed the situation in Sri Lanka and the risk to members of the Tamil population. These are partly reflected even in the earlier determination of the Tribunal in Jeyachandran where at paragraph 5 it was said:

> "The situation has changed in recent months. There was a ceasefire in February of this year [that is 2002] and the most recent CIPU report for April 2002 reports some

> of the relaxations which have occurred since that ceasefire. Paragraph 3.67notes that in April 2002 the LTTE opened a political office in the government held area in the North of the country and that that had been inaugurated under the ceasefire agreement. There had been permission for LTTE cadres wearing cyanide capsules to move back to an LTTE controlled area and those who were clearly recognised as being LTTE activists there permitted to moved around unmolested. On 13 April the LTTE signed a pact with the Sri Lankan Muslim Congress and agreed that nearly one hundred thousand Muslims expelled from the North by the Tamil Tigers would be allowed to return. All this indicates a change of the situation and gives hope that the situation will stabilise to such an extent that the persecution which had existed in the past and the havoc created by civil war will cease. The likelihood of any difficulties on return has also been considered by a fact finding mission to Sri Lanka which visited that country at the end of March of this year and those involved discussed the situation with, among others, the Director and the Senior Superintendent in the Criminal Investigations Department. The report records that if a returnee were not wanted he would not be stopped at the airport. … The police purely go on records, scars would not make a difference and the authorities would not make a decision on this basis."

16. We have carefully considered the current CIPU assessment. As Mr Ali properly conceded this shows nothing but that there has been a continuing improvement and does not suggest that the peace process is in jeopardy. Put at its highest, the case for the respondent is that before release he signed a paper which he believes to be a confession to LTTE membership, but there is no current evidence that LTTE members as such are at risk of arrest or adverse attention from the authorities unless they are currently engaged in criminal or terrorist activity. We are aware that this applies to a small minority of LTTE activists and that those who are acting in what is undoubtedly a criminal and unlawful way are sought by the police, but it is equally clear that the Sri Lankan government insists on observance of the terms of the ceasefire agreement which specifically states that "arrests under the Prevention of Terrorism Act shall not be made, and that arrests shall be conducted under due process of law in accordance with the criminal procedure code." We are aware of the background evidence that Sri Lankan police have recently been investigating current claimed covert operations in Colombo and its suburbs, but even the reports from Tamil websites make it clear that the police are observing the terms of the ceasefire agreement and that under the application of normal criminal law procedures the police are required to

produce those arrested before magistrates even before they may have had the opportunity to interrogate them. That evidence seems to us simply to underline the fact that the nature of the security force operations in Sri Lanka has changed dramatically since the ceasefire in February 2002, and that any investigations currently carried out are based on an observance of normal policing methods in respect of which any breach of the law or discipline is likely to result in prosecution by the authorities of those responsible. It removes even further to our mind the likelihood of any treatment in violation of the respondent's human rights on return to Sri Lanka simply by reason of his past history. His identity will be known in advance of his return because there will be arrangements for the issue of appropriate travel documents with the Sri Lankan authorities. That is, no doubt, the reason that the vast majority of returnees are currently waved through at the airport as being on no interest to the authorities, who have been able to check their identities in advance of their arrival.

17. In reaching this assessment, we are not unmindful of the decision of the Court of Appeal in *Selvaratanam* but it is in our view doubtful whether that case would now be decided on the same basis having regard to the continuing evidence of improvement of the situation and of the observance of the ceasefire conditions on the part of the authorities in Sri Lanka. It is possible that the fact of escape in that case, coupled with the signing of a purported confession and a further blank piece of paper, may have led the court then to consider that the claimant there fell into a special category who remained at potential risk.

18. Had there been any evidence, however, of the sort of conduct which the UNHCR refer to in their letter of 15 April 2002, or that there were regular arrests and detentions of returnees for the reason given by the Adjudicator, it would be most surprising if that were not now a matter of record available to be put before the Immigration Appellate Authority by asylum claimants. There is, to our knowledge, no such evidence and, indeed, that available to us is to the contrary. There is a lengthy section in the current CIPU assessment as to the peace process at paragraphs 4.49 to 4.84. We note at paragraph 4.63 that during 2002 the Ministry of Defence reported capturing several LTTE cadres with weapons in government-controlled areas in direct contradiction of the terms of the ceasefire agreement, but returned most LTTE personnel directly to the closest LTTE checkpoint, although some were detained for longer periods. Key roadways to the North had been reopened throughout 2002. In April 2002 the LTTE cultural and social wing leader addressed a public gathering in Jaffna, the first time such an event had taken place in seven years and which led a BBC correspondent to

comment how much freedom the rebels now had to operate in areas under government control. In July 2002 the Sri Lankan monitoring mission issued a statement expressing their satisfaction about the progress saying that both parties had successfully refrained from military operations during the ceasefire, most fishing restrictions had been removed and freedom of movement for both parties and public had been greatly enhanced, among other benefits (paragraph 4.71). In September 2002 the government lifted its ban on the LTTE (paragraph 4.74). On such occasions as there had been any clashes, as in early October 2002 when ten people where killed in Eastern Sri Lanka, the ceasefire monitors blamed "irresponsible" and "destructive elements who are trying to destabilise the peace process" (paragraph 4.76). But this did not prevent the continuation of peace talks. The SLMM had investigated 556 ceasefire violations during 2002, of which only 56 were on the part of the authorities and mainly related to harassment, extortion and restriction of movement by the military.

19. We accept that in April 2003 the LTTE suspended participation in the peace talks and that, as in any such negotiating process, there will be setbacks from time to time. Nevertheless there is nothing in the most recent documentation produced on behalf of the respondent to show that what is currently happening is any more than the jockeying for position which may be expected from parties to such negotiations. What seems to us most important and relevant to a continuation of the present improving situation is that there has been no major breach of the ceasefire agreement, and that the senior members of both sides have made it clear that there is no intention on their part to return to the situation of armed conflict which applied prior to the ceasefire.

20. On the totality of the evidence before us, former membership of or connection with the LTTE is no longer reasonably likely to led to adverse interest on the part of the authorities save in exceptional cases. There is nothing exceptional in the situation of the respondent, who does not succeed in discharging the burden of proof upon him that someone with his history and profile is at real risk either of persecution for a Refugee Convention reason, or of treatment in breach of his protected human rights under article 3 of the European Convention.

21. For the above reasons the appeal of the Secretary of State is allowed.

J Barnes
Vice President