IN THE IMMIGRATION APPEAL TRIBUNAL

SS (Approach - Country Information) Sri Lanka [2003] UKIAT 00001
Heard: 11.04.03
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IMMIGRATION AND ASYLUM ACTS 1971-99

Before:

John Freeman (chairman)
and
Mr A Smith

Between:

Secretary of State for the Home Department,
appellant

claimant

DECISION ON APPEAL

Mr I Graham for the Secretary of State
Miss S Jegarajah (counsel instructed by KP Nathan & Co) for the claimant

This is an appeal from a decision of an adjudicator (Miss C Griffith), sitting at Taylor House on 5 September 2002, allowing an asylum and human rights appeal by a Tamil citizen of Sri Lanka. The grounds of appeal suggest, among other things, that there is nothing to show that this case falls into the exceptional category required for it to succeed, in terms of the Presidential decision in **Jeyachandran [2002] UKIAT 01869**.

2. Since those words were written, the situation has changed markedly for the better: in the course of the third week of September 2002, the ban on the Tamil Tigers was lifted, and peace talks started between them and the government. By 5 December, those talks had resulted in a joint declaration, described by the BBC as a 'breakthrough', by the government side as 'irreversible', and by the Tamil Tigers as 'historic'. While there is still no concluded peace agreement, for which the government would need a two-thirds majority in Parliament, and which the President still opposes, and while there may still be room for doubt as to the Tamil Tigers' commitment to democracy in the areas they control, it must be perfectly

clear to any reasonable person that the tide of history has turned, leaving many claims of this kind high and dry on the shores of the past. There is certainly nothing to be gained from reference to any case heard before **Jeyachandran** came out on 10 June. We have to decide this case on an individual basis; but it must be even clearer than it was when **Jeyachandran** was heard that for such an appeal to succeed, it must indeed be exceptional: that was confirmed in **Jeyabalan [2002] UKIAT 05992**.

3. The effect of **Jeyachandran** was considered by the Court of Appeal in **Selvaratnam [2003] EWCA Civ 121**. They endorsed the approach in **Jeyachandran**, though they took the view that it had been misapplied in the case before them. The clearest explanation is *per* Peter Gibson LJ at § 16:

... it is only in exceptional cases that a person returned to Sri Lanka will attract the attention of the authorities there and that such persons are likely to be limited to those who are wanted persons. The question is whether the case of the applicant is an exceptional case as a person likely to be of interest to the Sri Lankan authorities and so likely to be detained, it being conceded that, once he is detained, there is a substantial risk of persecution.

5. Miss Jegarajah's main argument was on **Oleed [2002] EWCA Civ 1906**. So far as it is possible to extract a general *ratio* from three separate judgments, one dissenting in part, it is this (*per* Schiemann LJ, with whom Aikens J expressed general agreement):

I accept that the Tribunal examines the situation in the country from which the refugee is fleeing as at the date of its determination. However in the present case in my judgment there was nothing wrong with the adjudicator's determination, there was therefore no reason to appeal it and it would be wrong for the Home Secretary, on the back of an appeal which has been dismissed, to seek to re-examine the threat to the refugee with reference to a date later than the adjudicator's determination.

The reference to an appeal being dismissed is slightly curious, as the adjudicator had allowed the claimant's appeal, and the Tribunal had allowed the Home Office appeal from that; but one can see what was meant.

6. The scope of this decision is made clear by the fact that all three judges indicated that they did not accept the submission of counsel for the claimant that any stricter test applied to Home Office appeals from an adjudicator than the "plainly wrong" on applicable to those by a claimant. As **Oleed** was a Home Office appeal, the point was *obiter*; but, while Arden LJ expressed no view on it, both Schiemann LJ and Aikens J said they were "not presently persuaded" by it. This must be logical, since, as Schiemann LJ noted himself, and Miss Jegarajah reminded us in her skeleton argument, the Court of Appeal in **Arshad [2001] EWCA Civ 587** stressed the importance of an even-handed approach to both sides. At the risk of stating the obvious, that must mean even-handed to the Home Office, as well as to the claimant.

7. The result is a rather surprizing one. None of the Court of Appeal in **Oleed** found it necessary to mention **Ravichandran [1996] Imm AR 97**, a decision of the same court which has been universally followed for the last six years. No doubt they thought it was so well-established that it could be taken for granted, as the oblique reference in the first sentence we have cited from Schiemann LJ suggests.

But if we have read **Oleed** correctly, what remains of **Ravichandran**? It will always be necessary, whether on a Home Office or a claimant's appeal, not simply to consider the background situation at the date of the hearing before the Tribunal, but also that before the adjudicator, to see whether there was "anything wrong" with it when made.

8. Can this twofold approach be reconciled with **Ravichandran**? Or with § 77.3 of the 1999 Act (in this case: see below), or § 102.2 of the 2002 Act, where that applies.

In considering-
(a) any ground mentioned in section 69, or

(b) any question relating to the appellant's rights under Article 3 of the Human Rights Convention,

the appellate authority may take into account any evidence which it considers to be relevant to the appeal (including evidence about matters arising after the date on which the decision appealed against was taken).

(§ 102.2 is in similar terms, but not limited to asylum or human rights appeals: it specifically refers to matters arising after the adjudicator's decision).

9. Both these sections say the Tribunal may (and by implication, where relevant, should) consider relevant post-decision evidence. It is not for us to say how the question posed at **8** can be answered; but the problems resulting from the decision in **Oleed** are only too obvious. Is a complete change of régime in the claimant's country of origin to be ignored? If in the claimant's favour (in the sense of the coming to power of a régime hostile to him), then the result will be a fresh application for asylum, and very likely further appeal proceedings. If in the other direction however, how is the Home Office to get a decision on the true facts of the case? There does not seem to be any means open to them other than an appeal to the Tribunal: see **Saribal [2002] EWHC 1542 (Admin)**.

10. We are left to approach this case as best we can on the basis of **Oleed**. The adjudicator certainly produced a very well-set out and considered decision. She said herself that it was a borderline case; but did she place it on the right side of the borderline? If she was "plainly wrong" about that at the date of the hearing before her, then the appeal must be allowed. This claimant's history, so far as relevant, amounts to this:

1996 – 1998	assisting Tamil Tigers at the front, as a medical orderly, initially under duress, but with some weapons training, and at one stage taking part in the fighting
May – July 2000	detained by police in Colombo, with ill-treatment, as suspected Tamil Tiger, under the Prevention of Terrorism Act; released on the intervention of the International Committee of the Red Cross, to sign on, which he does not
August 2000 – August 2001	detained by army in Vavuniya, with ill-treatment, as suspected Tamil Tiger; released on bribe paid by his uncle to pro-government militia, who kept him "in hiding" till he left Sri Lanka in October

11. The first point taken against the adjudicator in the grounds of appeal is that the decision of the Tribunal in **Tharmakulaseelan [2002] UKIAT 03444** showed that persons released on bribe were unlikely to be of any further interest to the authorities. That, said Miss Jegarajah, was shown to be wrong, at least in this case, by the fact that this claimant had again been arrested the month after his release. The main fault with that argument is of course that on the claimant's first detention he had been released on Red Cross intervention. His second detention was in a different part of the island, by a different section of the security forces, and (of course like the first) before the current cease-fire.

12. The last point in the grounds, on the attitude apparently taken by the adjudicator to the claimant's scarring, is now accepted by Miss Jegarajah to be the result of a proof-reading error by the adjudicator, who clearly meant to say at § 19 that in itself it would *not* excite the attention of the authorities. That leaves the main point, which is on the general line adopted by the adjudicator towards what was at the date of the decision the fast-changing background situation in Sri Lanka. The adjudicator herself noted that the ban on the Tamil Tigers had just been lifted, and concluded (§ 20) that "The outlook for an end to their hostilities looks promising although demanding of some caution".

13. The adjudicator then referred to ***Jeyachandran***, before coming to her conclusion on the facts of the individual case (§ 22) that it was a borderline one. Mr Graham challenged that, on the basis that one could not have a borderline exceptional case; but we do not see any logical difficulty with that. It is the adjudicator's application of ***Jeyachandran***, and the background evidence as it then was, to the facts of the individual case that we have to consider, bearing in mind that she did not consider the consequences of the claimant being released on bribe from his second detention, as recommended in **Tharmakulaseelan**, perhaps because she was not referred to that decision. (It had come out on 5 August, but the copy before us shows it was not received at the Home Office research unit till 9 September).

14. Even at the date of the hearing before the adjudicator, as she recognized, the guidelines in ***Jeyachandran*** required her to find that this was an exceptional case before the appeal could be allowed. Looking at the basis (in § 22) on which she did so, we cannot agree with her assessment of the claimant's involvement in the Tamil Tigers as having been "at a reasonably high level": he was a foot-soldier at most.

15. As for the claimant's having been "charged under the Prevention of Terrorism Act" in Colombo, the whole point about that act was that it allowed detention without charge: there is no question of such detention having led to any still pending proceedings against him. At that stage it was still being vigorously used as a means of detaining Tamil Tiger suspects; but, though it was still on the statute book at the date of the hearing before the adjudicator, it is not suggested that it was still being used in that way, if at all.

16. The adjudicator then went on to consider the claimant's lengthy detention at Vavuniya; but she did not consider, as we have seen, the guidance in **Tharmakulaseelan** as to the effect of his having been released on bribe. The question before her was only incidentally whether the claimant had been badly treated in the past, but mainly whether he would be so on return.

17. Miss Jegarajah relied on the decision (by McCombe J at first instance on judicial review of refusal of leave to appeal from an adjudicator) in **Paramanathan [2003] EWHC 484 Admin**. It is not suggested that this claimant had ever confessed to Tamil Tiger membership, but that the fact that he had been detained as such should be considered as equivalent. McCombe J did not go so far into the factual domain of the appellate authorities as to suggest that **Paramanathan**'s confession to Tamil Tiger membership before the ceasefire would put him at risk now, but simply took the view that in the circumstances the Tribunal chairman who refused leave ought not to have regarded the adjudicator's conclusion that his subsequent release on bribe would have left no record on file as one he was entitled to make. We do not find the decision of any particular help in the present case. Mr Graham has not suggested that the claimant's detentions would have left no paper trail; merely that his final release on bribe is most likely (as explained in **Tharmakulaseelan**) to have been recorded in some way that indicated that he was of no further interest.

18. **Conclusions** Since we are obliged by **Oleed** to consider the adjudicator's decision on this basis, we have to say that we do find "something wrong" with the adjudicator's decision when it was made, on the points noted at **13**, **14** and **15** above. We think that together these led her to place this case, which she herself called a borderline one, clearly on the wrong side of the line drawn in ***Jeyachandran*** (heard by the Tribunal over four months before she heard the present case) between the exceptional and the unexceptional. Since we have found a mistaken view was taken at the time, we are entitled to apply **Ravichandran**, note the progress that has been made since then, and conclude that the decision was plainly wrong on the merits of the situation at the time it came before us.

19. That consideration of the substance of the decision leads us to allow the appeal; but we should not like the adjudicator to think that we do not appreciate the decision's real merits. Technically speaking (on presentation and general thoroughness) it is far and away better than most we see from adjudicators generally, and a great many from those of considerably more experience than we think she has. Needless to say, those merits cannot make us shrink from our task of expressing our view on the substance; but that does need to be set in context.

Appeal allowed

John Freeman (chairman)