

Appeal No.: HR/03442/01

[2002] UKIAT 000702
STARRED

IMMIGRATION APPEAL TRIBUNAL

Dates of hearing: 19 July 2001

15 August 2001

Date determination notified: 13 March 2002

Before:

Mr C. M. G. Ockelton (Deputy President)

Mr D. K. Allen

Mr P. R. Moulden

Between:

JUSTIN SURENDRAN DEVASEELAN
APPELLANT

and

The Secretary of State for the Home Department
RESPONDENT

DETERMINATION AND REASONS

SUMMARY

1. This 'starred' determination gives the Tribunal's view on a number of issues raised by human rights appeals and, particularly, human rights appeals by Tamils from Sri Lanka. At paragraphs 39-42 there are guidelines on how a second Adjudicator should approach the determination of another Adjudicator who has heard an appeal by the same Appellant. Our views on the 'extra-territorial effect' of Articles 5 and 6 of the European Convention on Human Rights are at paragraph

110. Our conclusions on whether, in general, the removal of Tamils to Sri Lanka breaches Articles 3, 5, 6, 8 or 14 of the Convention are at paragraphs 82, 87, 112, 124 and 126-7.

INTRODUCTION

a. The history of this appeal

2. The Appellant is a citizen of Sri Lanka. His date of birth is given as 22 September 1975. He came to the United Kingdom on 22 August 1996. He was carrying a false passport. He claimed asylum. On 30 October 1996 he was refused asylum. He appealed. His appeal was heard by an adjudicator on 2 May 1998. The Appellant, who was represented by an experienced firm of solicitors, expressly elected to have his appeal determined on the basis of the documentary evidence on file. The adjudicator considered that evidence, which included the record of the Appellant's interview in which he set out his story of what he claimed had happened to him in Sri Lanka. The adjudicator studied the evidence. He concluded that the Appellant's story was not the truth. He wrote as follows:

'I do not accept that it is reasonably likely that the Appellant was detained, ill-treated and released in the circumstances that he has described. This alleged incident is the only activity by the authorities, which was deliberately targeted at the Appellant. I have accepted that his home may well have been damaged during the military offensive, but I do not accept that the conduct of the military offensive can be classed as persecution of the Tamil population in the Jaffna Peninsula, or of the Appellant and his family in particular. For the foregoing reasons, I do not accept that the Appellant had a well-founded fear of persecution by the authorities when he left Sri Lanka. Nor do I accept the claim, at paragraph 2 of the grounds that Tamils in Sri Lanka are a persecuted group per se.'

3. He went on to examine the country evidence, and to consider whether the Appellant could, in his own particular circumstances, be lawfully returned to Colombo. He concluded that returning the Appellant to Colombo would not breach the Refugee Convention. He dismissed the appeal.
4. A party dissatisfied with the determination of an adjudicator has (and at the time in question had under section 20 of the Immigration Act 1971) a right of appeal to the Tribunal,

subject to any requirement as to leave. The Appellant did not apply for leave to appeal. He did not challenge the adjudicator's decision. His only claim to be in the United Kingdom had failed. He had no right to remain here. Yet he did not leave; and, so far as we are aware, the Secretary of State took no steps to remove him.

5. On 2 October 2000 the Human Rights Act 1998 came into force. On 10 October solicitors on behalf of the Appellant, Sri and Co., wrote to the Immigration Office at Heathrow. They were not the Appellant's previous solicitors: they said they had been instructed only that day. The letter includes a new claim for asylum. It is based on the solicitors' expressed opinion that "the situation has deteriorated further". That opinion is supported, in the letter, by selective references to documentation, some of which was already quite old. The letter suggested that documents not available earlier should be taken into account in assessing whether the Appellant is, after all, a refugee. It further suggested that, if the Immigration Officer were not minded to consider a fresh claim for asylum, he refer the case to an adjudicator under section 21 of the 1971 Act. That, as the solicitors should have known, was impossible: for 2 October 2000 also saw the repeal of section 21 together with the whole of the relevant Part of the 1971 Act.
6. The solicitors' letter went on to claim, as an alternative, that the Appellant's removal would be a breach of the European Convention on Human Rights. With astonishing ignorance of the field of law in which they do so much work, Sri and Co. write of "Art. 3 ECHR, which is soon to be incorporated into domestic law in the form of the Human Rights Act." If Sri and Co. were not, on 10 October 2000, aware that the Human Rights Act was already in force, that is entirely reprehensible.
7. The Secretary of State replied to the solicitors' letter on 21 November 2000. He indicated that, in his view, the matters set out in the solicitors' letter did not show that the claim to asylum now being made was sufficiently different from that which was made originally. He declined to entertain the letter as a fresh claim. He went on to consider the Appellant's claim that his removal would breach the European Convention on Human Rights, specifically Articles 3, 5 and 14, to which the solicitors' letter had referred. He said that he had decided that the information before him did not merit a grant of exceptional leave to remain – that is to say, a guarantee against removal. He informed the solicitors that the Appellant had a right of

appeal on human rights grounds. He served a One-Stop Notice.

8. As the Secretary of State's letter points out, the Appellant had no right of appeal to the Appellate Authority against the decision not to treat the letter of 10 October as a fresh claim for asylum. The only possible challenge would be by judicial review. So far as we are aware, no such challenge was made. The position so far as the Appellant's refugee claim is concerned is that he failed to establish that it was based on truth; that there have been judicial and administrative decisions that he is not a refugee; and that he has not pursued challenges to those decisions.
9. The Statement of Additional Grounds attached to the One-Stop Notice was completed and returned. It claims that the Appellant's return to Sri Lanka would breach Articles 3, 6, 9 and 14. The Secretary of State replied that he did not consider that that would be the case, and issued appeal forms. The grounds of appeal, sent in by a different firm of solicitors again, Tony Purton Solicitors, are that the Appellant's return would breach Articles 2, 3, 5 and 14. The Appellant's human rights appeal was heard by an adjudicator, Mr A.J. Olson, on 16 February 2001. Articles 2, 3, 5, 6 and 14 were argued. The adjudicator heard oral evidence from the Appellant. He dismissed the appeal.
10. It is against that determination that the Appellant appeals to the Tribunal. The grounds of appeal raise Articles 3, 5, 6 and 14.
11. Leave was granted because, in the opinion of a Vice President, "the grounds raise several important issues including to what extent an adjudicator in an appeal based solely on human rights grounds should rely on finding made in a previous determination dealing with an asylum claim. The parties will need to address the question, among others, of the relevance to this case of the findings of the European Court of Human Rights in the TI v UK case." The findings in TI v UK are, as both parties have acknowledged, of no direct relevance to this appeal. They are concerned with return of a Sri Lankan Tamil to Germany; the court did not consider the merits of the claimant's claim that his return to Sri Lanka would breach the Convention; and, in any event, as Miss Giovanetti pointed out, the most recent document before the court dated from 1998.

12. We are, however, concerned with the relevance of findings in a previous determination relating to the same Appellant, and we are concerned with whether this Appellant's return to Sri Lanka would breach the European Convention on Human Rights. Mr Lewis, who appeared for the Appellant, instructed by Tony Purton solicitors, expressly disavowed reliance on Articles 2 and 9, but argued Articles 3, 5, 6, 14 and (for the first time) 8. The Secretary of State was represented by Miss L. Giovanetti, instructed by the Treasury Solicitor. We have been very greatly assisted by the submissions on both sides, and for the orderly way in which the copious documentary material has been presented.
13. We intend no criticism of Mr Lewis, who put all his arguments with his usual elegance and conciseness. We would, however, generally expect that an Appellant who claims that his human rights are threatened, would be able to say, at an early stage, precisely *what* rights are being threatened. The Human Rights Act 1998 and section 65 of the Immigration and Asylum Act 1999 are intended to protect human rights; and, in appropriate cases, they provided that protection by prohibiting an individual's expulsion. As a result, certain individuals may have a claim to remain in the United Kingdom. But that is not the *purpose* of the legislation. A claimant who chops and changes between various Articles may raise the suspicion that he is not actually trying to protect any human rights of his but is merely seeking to use whatever means he can to remain in the United Kingdom.
14. The hearing before the Tribunal was on 19 July 2001 and 15 August 2001. There were then further written submissions by the Secretary of State. No date had been fixed for the Appellant's reply to those submissions. No reply has been received.

b. The situation in other European countries

15. One point was unresolved at the hearing and is in a sense still unresolved. As we shall in due course explain, and as Mr Lewis readily accepted, many of the human rights arguments deployed by this Appellant could be deployed with equal force by almost any young male Tamil from Sri Lanka. They are not necessarily any the worse for that. But, if those arguments are successful, the consequence is that almost no young male Tamil can be returned to Sri Lanka without there being a breach of the European Convention on Human Rights.

Again, that is no reason for not regarding the arguments as having substance. The position we find ourselves in, however, is that the United Kingdom, although an original signatory of the Convention, is a newcomer to human rights law as a central part of the national legal system. The rights which are incorporated into United Kingdom law by the 1998 Act are, however, not new rights. They are the rights set out in the Convention, and explored and refined in half a century of decisions of the European Court of Human Rights in Strasbourg. Section 2 of the 1998 Act makes that clear. They are also the rights that have been part of the national law of many other European countries for many years.

16. As Lord Steyn expounded in the House of Lords in R v SSHD ex parte Adan [2001] 2 WLR 143, 153, the task of a court applying an international convention is to discover the autonomous meaning of the treaty in question. The jurisprudence of individual countries is not an infallible guide to that meaning, as Adan itself demonstrates. But the practice of other parties to the convention must be relevant, especially where, as in the case of the European Convention on Human Rights, the correctness of individual governmental decisions can readily be tested by application to a judicial body charged with applying the Convention. If a particular event occurs frequently, and has not been the subject of successful challenge, even in countries that have had the European Convention on Human Rights as part of their national law for many years, it may be that that event does not, in truth, breach the Convention. We should be rather cautious in reaching a conclusion that the regular practices of other countries, that have a much more developed national law of human rights than we have, are practices which breach the Convention.
17. Asylum claims by young male Tamils from Sri Lanka are by no means unique to the United Kingdom. UNHCR figures show that there were 17,455 applications for asylum by Sri Lankans in the year 2000. Not all those applications were in Europe: nearly three thousand, for example, were in Canada. The leading destination for asylum claimants was the United Kingdom, with 6,035 applications. France had 2,117, Germany had 1,170 new applications and, under a procedure unique to Germany, 722 repeat applications; the Netherlands and Switzerland each had the best part of a thousand. The vast majority of these claims were unsuccessful in achieving either refugee or humanitarian status. The recognition rate of refugees in Germany was 9%, in the Netherlands, 20 cases, an

entirely insignificant proportion of the total applications, which, when rounded to the nearest whole number, is entered by the UNHCR as '0%' - although the figures rises to 5% when appeal reviews are included; in Switzerland '0%'; in the UK 7%. In France the figure is much higher, at 43%, but even there there are well over a thousand individuals who failed to obtain refugee status in 2000. In each of the countries we have mentioned, there is a separate possibility of achieving what is called, for purposes of analysis, 'humanitarian status', if the claimant does not establish that he is a refugee. The number of grants of such status - the reasons for which would include (but not be limited to) non-returnability for human rights reasons - was 8 cases in Germany, none in France, and 71 cases in the Netherlands. The figure in Switzerland was much higher. The reason for this is unclear, but it may be related to the fact that Switzerland began the year with an enormous backlog of applications from previous years. Although there were very few decisions recognising refugee status, 53% of decisions were to grant humanitarian status. The figures still show that - because of the processing of the backlog - there were 7,095 individuals whose claims were rejected outright. The total outright rejections in 2000 for the four countries we have mentioned was 9,784.

18. We are aware that other European countries do return unsuccessful asylum claimants to Sri Lanka. Not only that, but the figures we have quoted show that there are very substantial numbers whose return is threatened, because they have failed to obtain status in their country of claimed refuge. It is not suggested that this is a new feature in the year 2000. We therefore asked Mr Lewis if he was able to point to any decision in any national court in any European country indicating that the return of young Tamils to Sri Lanka was a breach of their human rights protected by the Convention.
19. He was unable to do so. Since the hearing we have made such researches as we have been able, and we also have not discovered any such decision. Mr Lewis accepted that the lack of information meant that he was unable to show that there are human rights objections to the removal of Tamils to Sri Lanka from any other European countries.
20. That is, of course, not a conclusive argument against the Appellant. It may be that none of the other countries has properly understood the meaning of the Convention. Or it may be that no Tamils threatened with removal to Sri Lanka

have been properly advised. Or there may be some other explanation. But the absence of any specific support for the Appellant's arguments, in the host of similar cases arising elsewhere in Europe, is a factor that we must bear in mind in attempting to assess what impact the Convention has on his case.

SECOND APPEALS

a. The approach of the second adjudicator in this appeal

21. We must first consider in some detail the approach of the second Adjudicator, Mr Olson, to the evidence tendered on the Appellant's behalf and to his fact-finding role. We have already set out the first Adjudicator's conclusions on the evidence on which the Appellant relied in attempting to establish his claim under the Refugee Convention.

22. At the hearing before Mr Olson, the Appellant's representative said that the Appellant wanted to raise the issue of scarring. That is to say, he claimed that scars on his body would expose him to risk on return. He showed the Adjudicator his scars. He then briefly gave oral evidence, which was noted by the Adjudicator as follows:

'I was i/v'd on arrival in England. Everything I said was true. I adopt record of i/v. I have scars on body, which are result of accident.

XX If I was sent back – you know situation in Sri Lanka young boys lives are under threat. I found out that those returned are put in jail for 3 years. They tortured them I'm frightened of going there. I found out thro his friend. I had the scars when I left Sri Lanka. I left by plane thro airport. The authorities didn't notice the scarring then.

In my asylum claim I was only detained once I'd lived in Sri Lanka 21 years.'

23. There was no other oral evidence. The Adjudicator heard submissions from both representatives. There was reference to authorities and to documentary evidence. Mr Olson expressed his decision in the following way.

6. Decision

6.1 This is an appeal under Section 65 (1) of the Immigration and Asylum Act 1999 on the grounds that removal of the Appellant to Sri Lanka would be in breach of Articles 2, 3, 5 and 14 of the ECHR and Human Rights Act 1998.

6.2 The Appellant must demonstrate that there are substantial grounds for believing there is a real risk that one or more of the Articles will be breached.

6.3 The Appellant has previously appealed against the refusal of his asylum claim and the appeal was dismissed because the Adjudicator was not satisfied that it was reasonably likely that the Appellant was detained, ill-treated and released in the circumstances that he described and he did not accept that the Appellant had a well founded fear of persecution by the authorities when he left Sri Lanka.

6.4 The Appellant accepted that in his asylum claim he had only been detained on one occasion and although he said he had scars when he left Sri Lanka, he admitted that they were caused as a result of an accident rather than through any ill-treatment.

6.5 Mr O'Callaghan relies mainly on the background evidence to support the Appellant's case, rather than the evidence of the Appellant himself. I have noted the decision of the European Court in Vilvarajah -v- United Kingdom (1991) 14 EHRR 60 that it was not considered enough that there was a generally political situation in Sri Lanka and that some Tamils might be detained or ill-treated.

Claim under Articles 2 and 3.

6.6 Having regard to the Appellant's background and the fact that he had on his own account only been detained on one occasion and failed to satisfy either the Respondent or the Adjudicator to the lower standard of proof required in asylum cases that he had been ill-treated. I do not consider that there is a serious or real risk that he will be targeted by the authorities on his return or be killed, tortured or suffer inhuman or degrading treatment or punishment.

6.7 At worst he might be questioned about his identity before being allowed to go.

Claim under Article 5.

6.8 I have noted the decision of the European Court in Murray & Ors -v- United Kingdom (1996) 22 EHRR 29 in which it was held that the level of

suspicion required need not be sufficient to charge the detainee and in Brogan & Ors -v- United Kingdom (1998) 11 EHRR 117 detaining suspects to further police investigations by way of confirming or dispelling concrete suspicions of terrorism did not breach the Convention.

6.9 I did not consider that there were any substantial grounds for believing that any detention to which the Appellant might be subjected for identification for identification purposes on his return to Sri Lanka would be in breach of Article 5.

Claim under Article 6

6.10 As pointed out by the Respondent's representatives in his submission, there was no evidence that the Appellant would face a trial or hearing before a Court in Sri Lanka, let alone that he would face an unfair trial. The mere possibility that he might at some stage in the future be brought before a Court where he could not understand the proceedings was not in my view sufficient to show a real risk of a breach of Article 6.

Claim under Article 14

6.11 As has been accepted by both parties to this appeal, this Article is not "freestanding" and as the Appellant has not shown that there is a real risk of a breach of any of the other Articles of the ECHR. I have concluded that he has failed to show a "difference in treatment" that he would suffer on return to Sri Lanka, which had no reasonable or objective justification.

6.12 He has failed to show that he would be treated less favourably than others who are in a similar situation to himself as a returning failed Tamil asylum seeker.

6.13 For the above reasons this appeal is dismissed.

24. It is clear that the second Adjudicator took the first Adjudicator's determination of the Appellant's asylum appeal as his starting point in reaching his conclusion on the Appellant's human rights appeal.

b. The phenomenon of second appeals

25. The coming into force of the Human Rights Act 1998 and section 65 of the 1999 Act has led, in a large number of cases, to the possibility of a second appeal to an Adjudicator. Those

individuals whose appeals were (originally) determined well before 2 October 2000 may, if removal is now threatened, make an allegation that their removal will breach their human rights. They have a right of appeal under section 65. Those who had an appeal pending on 2 October 2000 against an immigration decision taken before that date cannot, in that appeal, raise matters relating to their human rights, because the relevant provisions of the 1999 Act apply only to decisions taken after 1 October. It is perhaps arguable that human rights issues could be raised in a pending appeal to an Adjudicator or the Tribunal under section 7 (1) (b) of the 1998 Act: but in Pardeepan (00 TH 2414) the Tribunal accepted an undertaking by the Secretary of State that such individuals would be allowed to raise human rights issues if threatened with removal after the dismissal of their appeal. Their position is thus assimilated to those whose appeals ceased to be pending before 2 October 2000.

26. The 1999 Act is designed to encourage claimants to put forward all their grounds for staying in the United Kingdom in one appeal. Typically, therefore, where the appeal is against a decision made after 1 October 2000, the Adjudicator will consider such human rights grounds as are raised before him. If the claimant attempts to reserve human rights points for a later allegation, he may be met by a certification under section 73 (2) of the 1999 Act, essentially putting an end to his claim. But if there is no certification (for example, if the human rights claim depends on facts that have arisen only since the date of the appeal), then again there may be a second appeal to an Adjudicator if actual removal is threatened.
27. The possibility of a second appeal will continue to arise in practice because the Secretary of State does not, in the majority of cases, attempt promptly to enforce decisions of the Immigration Appellate Authorities. Broadly speaking, an adverse decision by an Adjudicator or the Tribunal has no immediate effect on the claimant's continued presence in the United Kingdom (although it does affect the payment of benefits to him). An unsuccessful claimant is the subject of proposed removal (if at all) only after a passage of time. In that time he may have been able to discover more about the situation and his prospects in his own country; or the situation in his own country may have changed for the worse; or he may have developed family links or medical conditions relevant in considering rights under Article 8. These are, of course, only examples.

28. Parliament clearly recognises the possibility of a second appeal to an Adjudicator within the structure of the 1999 Act. The considerations set out above show that a second appeal is, and will continue to be, by no means unusual. In this context the question we have to decide is what effect the determination of the Adjudicator in the first appeal should have on the decision-making process of the Adjudicator in the second appeal.
29. The law relating to the previous Adjudicator's determination when an appeal is remitted is of no relevance here. It is well established that when an appeal is remitted for rehearing an Adjudicator should have no regard to any previous determination, and should not even look at it except with the consent of all parties. But that is because the previous determination has been set aside. In cases such as the present, the determination has not been set aside. It remains in full force as the determination of the Appellant's original claim.

c. Submissions relating to procedure

30. Mr Lewis complained that the second Adjudicator failed to make any explicit reference in his decision to the copious documentary evidence before him, some of which referred to frequent, routine ill-treatment of detainees. He argued that, although the first Adjudicator found that the Appellant had not established that he had been beaten 'to the extent claimed', he had apparently made no finding on whether the Appellant had suffered some lesser form of physical ill-treatment. In basing his findings so firmly on the first Adjudicator's conclusions, the second Adjudicator had failed to give independent consideration to these issues, which might establish a breach of the European Convention on Human Rights. Mr Lewis argued that the circumstances of this case illustrate the 'potential errors in relying upon a factual assessment in an asylum appeal when considering a human rights appeal'.
31. Mr Lewis went on to submit that in a case such as this, the previous determination is merely 'a relevant matter to be taken into account' in the human rights appeal, but that neither the findings nor the conclusions of the first Adjudicator are binding upon the second Adjudicator. He further said that it is 'of significance' in this case that the

Appellant did not appear before the first Adjudicator but gave evidence before the second Adjudicator. His written skeleton argument on this issue concluded as follows:

'2.10 In the circumstances it is submitted that the second Adjudicator has erred in failing to make an independent assessment of the Appellant's history, and further or alternatively in failing to set out with sufficient clarity his primary factual findings and the reasons for those findings.

It is further submitted that these errors are compounded by the second Adjudicator's failure to make any reference to the background evidence.

2.11 Further to the above it is submitted that this deficiency in the second Adjudicator's determination can only be remedied to the Appellant's satisfaction by either an acceptance in its entirety of his account, or a fresh hearing (either before the IAT or by way of remittal to a different adjudicator).'

32. In his oral submissions Mr Lewis pointed out that in relation to new evidence, Ladd v Marshall [1954] 1 WLR 1489 could not apply in proceedings such as the present, because the appeal is a new one. He acknowledged, however, that where an Appellant relied before a second Adjudicator on material that (for no good reason) he did not tender to the first Adjudicator, there may need to be an assessment of credibility. He also submitted that the second Adjudicator should give his reasons for agreeing or disagreeing with the first Adjudicator's assessment. He asked us to look at the first Adjudicator's determination not as something that ought generally to be applied to the determination of the second appeal, but merely as part of the background. The second Adjudicator was, in his view, entitled simply to differ from the first Adjudicator and to determine the appeal accordingly.
33. Miss Giovanetti agreed that the first Adjudicator's determination cannot be regarded as binding on the second Adjudicator. She submitted, however, that it was entirely proper for a second Adjudicator to have regard to the first Adjudicator's findings, and that the second Adjudicator should only differ from those findings where there is good reason to do so. If the human rights appeal was based on the *same* factual matrix as the asylum appeal, a good reason might be found in a change in the situation in the country of origin, or the availability of evidence that was not before the first

Adjudicator. If the human rights claim was based on a *different* factual matrix, it would generally be necessary to make new findings, probably on additional evidence. The different factual matrix would itself be a good reason for not following and applying the first Adjudicator's determination. Otherwise, however, legal and policy considerations demanded that the Appellant's second appeal be determined in line with his first. She identified four such considerations.

34. The first is fairness: it would be unfair to an Appellant, who had satisfied the first Adjudicator that his account of events was credible, to deprive him of the benefit of that finding. If that is right, it must follow that an Appellant who has failed to satisfy an Adjudicator of his credibility is not entitled to have the same evidence re-assessed by a second Adjudicator. It is not fair to the public for there to be a system in which favourable findings stand but unfavourable findings are always questionable. Secondly, general principles of consistency and finality in litigation are important even in the absence of a rule of *res judicata*. Thirdly, the general approach to findings of fact in immigration cases both on appeal to the Tribunal and outside the IAA (e.g. ex parte Danaie [1998] 1mm AR 84) is that findings of fact stand unless there is good reason to displace them. Fourthly, it would, in Miss Giovanetti's submission, be contrary to good administration to have a system which allowed for the continuing existence of two undisturbed determinations of the IAA containing inconsistent findings of fact in relation to the same individual.
35. Miss Giovanetti also submitted that it is clear from the 1999 Act that the human rights appeal is not truly independent of an asylum appeal. We do not accept that: there may be cases where the two are properly linked, but in a case such as the present there are clearly two appeals.
36. We should also say at this point that, at the hearing, there was some discussion of the possible applicability of rule 44, which allows summary determination where "the issues raised in an appeal have been [already] determined ... in previous proceedings to which the appellant ... was a party, on the basis of facts which did not materially differ from those to which the appeal relates." Rule 44 applies to a situation where, in a second appeal, the issues may be the same as in the first although the evidence might (if the matter proceeded to a hearing) be different. The present problem is in a sense the reverse: the evidence might be largely the same and the

facts might be largely the same but the issue is one which has not been already determined. The first Adjudicator determination whether, at the date of his determination, the Appellant's return to Sri Lanka would breach the Refugee Convention; whereas the second Adjudicator determines whether at the date of *his* determination, the Appellant's return to Sri Lanka would be in breach of his human rights. Rule 44 has no obvious application to cases such as the present.

d. Our guidelines on procedure in second appeals

37. We consider that the proper approach lies between that advocated by Mr Lewis and that advocated by Miss Giovanetti, but considerably nearer to the latter. The first Adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination.
38. The second Adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's determination may be shown to be different from that which obtained previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that were not – or could not be – raised before the first Adjudicator; or evidence that was not – or could not have been – presented to the first Adjudicator.
39. In our view the second Adjudicator should treat such matters in the following way.
 - (1) **The first Adjudicator's determination should *always* be the starting-point.** It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues

such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

(2) Facts happening since the first Adjudicator's determination can *always* be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.

(3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can *always* be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.

40. We now pass to matters that could have been before the first Adjudicator but were not.

(4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should *not usually* lead to any reconsideration of the conclusions reached by the first Adjudicator.

(5) Evidence of other facts – for example country evidence – may not suffer from the same concerns as to credibility, but should be treated with caution. The reason is different from that in (4). Evidence dating from before the determination of the first Adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his

determination without it. The situation in the Appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the Appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the Appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.

41. The final major category of case is where the Appellant claims that his removal would breach Article 3 for the same reason that he claimed to be a refugee.

(6) **If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator**, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, **the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination** rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that *available to the Appellant*' at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.

42. We offer two further comments, which are not less important than what precedes then.

(7) **The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is *some very good reason* why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him.** We think such reasons will be rare. There is an increasing tendency to suggest that unfavourable decisions by Adjudicators are brought about by error or incompetence on the part of representatives. New representatives blame old representatives; sometimes representatives blame themselves

for prolonging the litigation by their inadequacy (without, of course, offering the public any compensation for the wrong from which they have profited by fees). Immigration practitioners come within the supervision of the Immigration Services Commissioner under part V of the 1999 Act. He has power to register, investigate and cancel the registration of any practitioner, and solicitors and counsel are, in addition, subject to their own professional bodies. An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence; and such a finding should *always* be reported (through arrangements made by the Chief Adjudicator) to the Immigration Services Commissioner.

Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second Adjudicator would, in such a case, be able to build very meaningfully on the first Adjudicator's determination; but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)

(8) **We do not suggest that, in the foregoing, we have covered every possibility.** By covering the major categories into which second appeals fall, we intend to indicate the *principles* for dealing with such appeals. It will be for the second Adjudicator to decide which of them is or are appropriate in any given case.

e. Application of the guidelines to this appeal

43. The Appellant's human rights appeal before the second Adjudicator was based on the same factual matrix as that on which he had relied in attempting to prove that he was a refugee, with one addition, that is to say his scars.
44. In addition, Mr Lewis submits that the first Adjudicator did not make findings on matters which, although not establishing past persecution, might give rise to a successful human rights appeal. He argues that the first Adjudicator, in declining to believe that the Appellant had been 'beaten to the extent claimed' appeared to be accepting that the Appellant had been beaten to some extent. He further suggests that the first

Adjudicator made no finding on whether the Appellant was made to eat cow dung and drink urine during his detention.

45. There is no merit in those submissions, which rely, like so many submissions relating to Adjudicators' determinations, on an unrealistic reading of parts of the determination and a disinclination to read the determination as a whole. If an Appellant claims to have suffered in a particular way and the Adjudicator does not believe that he has suffered in that way, the Adjudicator is entitled to say so. It does not follow from what the Adjudicator says that he thinks that the Appellant suffered in some other way that he did not mention. The position is that the Appellant has failed to show that his evidence is worthy of belief. As a result, there is no evidential basis for a finding in his favour.
46. The first Adjudicator in the Appellant's appeal considered all the evidence adduced by the Appellant relating to his claim to have suffered and to be at risk of suffering persecution. He concluded, on the basis of the evidence relating to the history of Sri Lanka at the relevant time, that it was 'quite likely' that the Appellant's family house was damaged, that he and many others from his village had to leave the area, and that the family ended up in a refugee camp in Vavuniya. Following his review of the Appellant's story about how he had been treated, he said that he did not think that, if the Appellant had been beaten with the severity he claimed, he would have not had any signs of the beating to show when he arrived in the United Kingdom. That is a rejection of the Appellant's story of his beating. There was no other story of beating. In the circumstances the Adjudicator would have been quite wrong to find that the Appellant had been beaten in any other way, and he did not do so.
47. Indeed, after further analysis of the Appellant's story, he said this: 'I do not accept that it is reasonably likely that the Appellant was detained, ill-treated and released in the circumstances that he has described'. The same observations apply. The Appellant had not provided an alternative story. The Adjudicator rejected the only evidence there was of the Appellant's detention, ill-treatment and release. That was a clear and complete finding.
48. It is true that in making that finding he did not specifically refer to the Appellant's claim that he had been made to eat cow dung and drink urine. He did not need to do so. Those claims were claims of ill-treatment. The Adjudicator said

comprehensively that he did not believe the evidence on such claims. There can be no doubt, however, that all that the Appellant said in relation to his past ill-treatment was relevant to his asylum claim, for persecution may consist of a cumulation of individual events of ill-treatment. The 'lesser form of physical ill-treatment' to which Mr Lewis refers in the hope of showing that the Adjudicator's finding was incomplete might not have been enough by themselves to establish persecution. But they were part of the Appellant's story of ill-treatment, all of which was told in an effort to establish that he had been persecuted, and all of which had been rejected.

49. Mr Lewis then says that the Adjudicator should have made reference to the documentary evidence. It is clear that the Adjudicator had documentary evidence in mind, for he made findings on the basis of it, relating to the flight of the Appellant's family from their village. The purpose that would have been served by his making specific references is entirely unclear. The evidence is said to have demonstrated 'the frequent, routine ill-treatment of detainees'. But, first, the Adjudicator had rejected the Appellant's claim to have been 'detained' (although accepting that he had spent time in a refugee camp); secondly, the Adjudicator did not suggest that the evidence did not tell, within its limits, an accurate story; and thirdly, the fact that something is said to happen routinely does not mean that it happened to the Appellant.
50. Before the second Adjudicator the Appellant relied on evidence that (with the exception of the scars) differed in no material way from what was before the first Adjudicator and was considered by him in making his determination. The first Adjudicator's determination has never been challenged and, even before us, it was not suggested that it was not a perfectly adequate determination of the issues before him. For the reasons we have given, we regard it also as a sufficient assessment of the credibility of the Appellant's account of the matters relevant to his present claim. In our view there was no reason at all for the second Adjudicator not to follow it and to make his own findings in line with it, as he did.
51. There is no doubt that the Appellant has some scars. They therefore fall within the words in brackets in guideline 4. The evidence of the scars needed to be built on to the Appellant's failure to establish that he had been ill-treated in the past. This the second Adjudicator also attempted to do, in

paragraphs 6.4, 6.6 and 6.7 of his determination. Here, however, the second Adjudicator fell into error. Two things are clear about scars in Sri Lankan Tamil cases. The first is that not every scar makes a person a refugee. The second is that it is not the cause of the scars, but their effect, that counts. The question is whether the scars are such as to give rise to the risk that a Sri Lankan official will think that the person is an insurgent. The Adjudicator was wrong to treat the scars as of no importance for the reason simply that they were admitted to have been caused accidentally.

52. Before him the only evidence about the nature of the scars was what he was invited to observe with his own eyes. The first Adjudicator had, as long ago as May 1998, adverted to the lack of any medical report, and had indeed made his findings partly on the basis that, as no medical evidence had ever been sought, the inference was that the Appellant knew that no such evidence would help his case. The Appellant's human rights claim was made, as we have said, some two and a half years later, and this appeal was heard by the Tribunal nearly a year later again. The Appellant's representatives put in material amounting in total to over 500 pages, but there is still no medical report. In other words, there is no proper description of the scars from which we or anybody else could assess what risk, if any, they pose to the Appellant. In the circumstances there is no basis for a finding that the scars are such as to engender any risk.

f. What has the Appellant established?

53. The Appellant has failed to show a history of ill-treatment and has failed to show that the condition of his body is such as to expose him to ill-treatment. He is in the same position as any other young male Tamil: there are no personal factors heightening the risk.

THE APPEAL ON HUMAN RIGHTS GROUNDS

a. Introduction: the general law

54. He nevertheless presses his human rights claim on the basis of evidence not relating to himself particularly but to Tamils generally. Mr Lewis does not shrink from the implications of this. If the Appellant can succeed in this appeal, no young male Tamil can be returned to Sri Lanka. That is why we made some reference to the international position in paragraphs 13-18 of this determination.

55. It is to the Appellant's general human rights claim that we must therefore turn and we begin by setting out the Articles of the European Convention on Human Rights to which we shall be making reference.

Article 1

Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

**Section 1
Rights and freedoms**

Article 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a in defence of any person from unlawful violence;

b In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a the lawful detention of a person after conviction by a competent court;

b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of an obligation prescribed by law;

c the lawful arrest or detention of a person effected for the purposes of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his released ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of his article shall have an enforceable right to compensation.

Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b to have adequate time and facilities for the preparation of his defence;

c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a

democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

55. Article 1 is not expressly incorporated into English law by the Human Rights Act 1998. The relevant sections of that Act are the following:

1. The Convention Rights

- (1) In this Act 'the Convention rights' means the rights and fundamental freedoms set out in –
- (a) Articles 2 to 12 and 14 of the Convention
 - (b) Articles 1 to 3 of the First Protocol, and
 - (c) Articles 1 and 2 of the Sixth Protocol,
- as read with Articles 16 to 18 of the Convention.
- (2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

2. Interpretation of Convention Rights

- (1) A court or Tribunal determining a question which has arisen in connection with a Convention right must take into account any -
- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
 - (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
 - (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
 - (d) decision of the Committee of Ministers taken under Article 46 of the Convention,
- whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

6. Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

7. Proceedings

(1) A person who claims that a public authority has acted (or proposed to act) in a way which is made unlawful by section 6(1) may –

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

56. Section 65 of the Immigration and Asylum Act 1999 gives a right of appeal to the Immigration Appellate Authorities to a person who alleges that an authority has acted in breach of his human rights in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom. In this appeal it was not suggested that we have no jurisdiction on the ground that the decision against which the appellant appeals was not one relating to his entitlement to remain. For the purposes of this determination we should state that we follow the reasoning of the Tribunal in Kehinde (01/TH/2668*) and that of Newman J in Kumarapuraran [2002] EWHC 112 Admin, rather than that of Stanley Burnton J in Kariharan (CO/1692/2001). Put briefly, the basis of our view is that if a person has, as a result of the Human Rights Act, a right not to be removed from the United Kingdom, then a decision that will result in his removal is a decision relating to his entitlement to remain. (All the decisions mentioned in this paragraph postdate the hearing of this appeal.)

b. Meaning of 'Convention right' and 'act of a public authority'

57. One primary question is whether the terms of section 6(1) of the 1998 Act give greater protection in an immigration case than the mere enactment of the Convention would have done. The Convention is a treaty between States. An individual may have a claim against any of those States for breach of the rights that the State has contracted to afford him. As will be seen in the course of this determination, however, his right to inhibit any of the signatory States from removing him to a non-signatory State, which may not be so anxious in the protection of human rights, is different. Mr Lewis argues that deciding to remove someone to a place where they are at risk of breach of a right protected by the Convention is an act 'incompatible

with a Convention right' and is therefore prohibited by section 6(1).

58. This is, in essence, the question of the 'extra-territorial effect' of the Convention. This was a matter dealt with in some detail by the Tribunal in Kacaj (01/TH/0634). As we pointed out there (in paragraphs 22-26), the term is not really apt, because what is in issue is indeed (as Mr Lewis argues) the act of the signatory State in deciding to expel the individual. Depending on the circumstances of the case, a governmental act may be prohibited by the Convention not because it directly breaches the individual's human rights but because it puts him in a situation where others breach his human rights. We said this about Article 4:

'In the context of this case, the adjudicator was in error in concluding that Article 4 could not be relied on because it did not, as he put it, have extra-territorial effect. That definition is misleading since there is no question of extra-territorial effect in the true sense since the breach, if any, will have occurred within the jurisdiction by the decision to remove which will have the effect of exposing the individual to whatever violation of human rights is in issue. We have used the word [extra-territorial] as a convenient label for the argument but, for the reasons given, we reject the argument.'

59. That conclusion was reached without reference to section 6(1), but it shows why that section takes the form it does. The breach of the Convention, if there is such a breach, takes place within the signatory State by the decision the effect of which is to expose the individual to treatment that is prohibited. To this extent we are with Mr Lewis. He invited us to follow Kacaj, which we should do in any event.
60. But Mr Lewis wants to go further. He says that the effect of section 6(1) is stronger still, in that it prohibits the exposure of the individual to any treatment that would be prohibited if it took place in the United Kingdom. It is difficult to deal coherently with this argument as it ignores the development of the interpretation of the Convention and the requirement (in section 2(1) of the Act) to take such development into account. The rights set out in the Articles of the Convention are, with few exceptions, not absolute; and the Articles of the Convention, although appended to a statute, are not amenable to interpretation in the same way as an English statute. Their meaning has been hammered out in litigation largely over the

last twenty-five years. If a young enquirer were to ask an old master 'What is the meaning of Article such-and-such? What rights precisely are protected?', he would not be told 'You go away and read the Article, and then you will know as much about it as I do', but 'It all depends on the circumstances. Bring your problem to me and we will work together through the cases.'

61. It is for this reason that it would in our view be wrong to give section 6(1) a fuller meaning than that the scheduled Articles are in force as part of the law of England. Section 2 makes it clear that the content of any 'Convention right' has to be established after consideration of the jurisprudence. That jurisprudence shows, as we shall see, that the rights protected by some of the Articles differ according to the circumstances of the case. Nothing, save for Article 3, to which we shall shortly pass, is absolute.
62. It should, however, be borne in mind that in a human rights appeal it is the act of the public authority that is challenged. In the present case, as usually in Sri Lankan appeals, the Respondent proposes to remove the Appellant to Sri Lanka. That means in practical terms that he will fly by scheduled airline to Colombo airport. He may be expected to go from there to Colombo itself, where there is a large minority Tamil population. The authority's decision encompasses no more. If the Appellant goes from there to a place where he is on any account at greater risk, the risk is not attributable to the act of the public authority.

c. Article 3

(i) Law

63. It is now well appreciated that Article 3 amounts to an absolute prohibition on the ill-treatment specified in it. The Article admits of no derogation, justification or modification; and it prohibits a signatory State from expelling a person to a place where there is a real risk that he will suffer such ill-treatment.
64. In order for there to be a breach of Article 3, it is clear that the ill-treatment must reach a sufficient level of severity. Miss Giovanetti referred us to a recent decision of the European Court of Human Rights in Kudla v Poland (application 30210/96; judgment 26 October 2000) as an illustration of the rule. At paragraph 91 of that judgment, we find this:

'However, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.'

There is then a reference to Raninen v Finland (1998) 26 EHRR 563, to which Mr Lewis also referred us. The wording in Ireland v UK (1978) 2 EHRR 25 at paragraph 162 is almost identical.

65. In expulsion cases, the harm that is the subject of the claim has not yet been suffered. The issue is therefore not confined to the evaluation of the harm: there is another variable, which is whether the claimant is at risk of suffering that harm. Not all prospective ill-treatment, and not all claims of a prospective risk, are enough to engage this Article of the Convention. The individual claimant or Appellant needs to establish that he is at real risk of suffering proscribed treatment. In Bensaid v UK (application 44599/98; judgment 6 February 2001) the Court was faced with clear facts relating to the claimant's mental health, his prognosis, the availability of medical treatment both in the United Kingdom and in Algeria, his country of nationality, the difficulty of travelling in Algeria, the cost of medicines, the reaction of his family to his illness, and so on. Despite the clarity of the factors, the Court (at paragraphs 39-41 and 48-49 of the judgment) regarded the risk of them combining to cause the claimant to suffer treatment contrary to Article 3 (or Article 8) on his removal as 'largely speculative' and declined to find that a real risk was established.
66. The task, therefore, is to assess the risk of harm by reference at the same time to the seriousness of the prospective harm and the likelihood of its being inflicted on the claimant. It was no doubt the difficulties faced by a claimant in establishing the double contingency that caused the Court in Bensaid to refer (at paragraph 40; emphasis added) to 'the high threshold set by Article 3, *particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm*'.

(ii) Evidence

67. We turn then to the country evidence. Mr Lewis has put before us the 2001 reports of the US Department of State and Human Rights Watch, the entry for Sri Lanka in the 2000 Amnesty International Yearbook, a report 'The Situation of Tamils in Colombo', produced in November 1999 by a Dutch body called Sri Lanka Werkgroep, a report 'Tamils in Sri Lanka' produced in September 1999 by the Dutch Foreign Ministry at The Hague; and a book 'Caught in the Middle: a Study of Tamil Torture Survivors Coming to the UK from Sri Lanka', written by Dr Michael Peel and Dr Mary Salinsky, both of the Medical Foundation for the Care of Victims of Torture, and issued by that body in June 2000. Miss Giovanetti has put before us the 'Sri Lanka Assessment' of the Home Office's Country Information and Policy Unit, dated April 2001, and correspondence relating to the documentation of those returned from European countries to Sri Lanka. We also have the benefit of a 'Synopsis' and a 'Digest' prepared on behalf of the Appellant.
68. Miss Giovanetti urges caution in dealing with some of this material. She is right to do so. As she points out, much of what is sometimes called 'objective evidence' is unsourced. Much of it derives from anecdotal evidence of asylum claimants, without any proper enquiry into whether what they say is the truth. Miss Giovanetti also asks us to note the geographical context of what is said in the various reports.
69. The Medical Foundation report, 'Caught in the Middle', is in our view of extremely limited value as evidence – although it is the source of over half those entries in Mr Lewis' 'Synopsis' under the heading 'The use of torture is widespread'. We must explain the reasons for our assessment of this report, because we should not want to be seen as expressing anything other than admiration for the work the Foundation does with and for its patients.
70. The report is based largely on the views Dr Peel has reached as a result of his medical examination of those who claim to have been ill-treated in Sri Lanka. If he regards the injuries they display (or do not display – see below) as consistent with the story they have told, he writes a report indicating that that is the case. The whole of the story told by such a person is then accepted, for the purposes of the published report, as true, regardless of whether it has any medical content, and regardless of whether there might be any alternative explanation for the medical signs (or lack of them). So, for

example, the report states confidently that ‘many asylum seekers were badly advised by their agents’ (page 74). This is a conclusion that, so far as we are aware, the authors’ medical expertise does not entitle them to draw. What they mean is ‘many asylum seekers say that they were badly advised by their agents, and we do not challenge that’.

71. As members of the Medical Foundation for the Care of Victims of Torture the authors are no doubt perfectly within their rights not to challenge a patient’s story. As lawyers we should not want to intrude into their medical expertise, but we should not be surprised to learn that the medical care of any individual in the situation in which he finds himself is not likely in many cases to begin by accusing him of lying. But it is not the role of the doctor to provide (either generally or in particular cases) an assessment of a claimant’s truthfulness. That, if the story is challenged, is for the appropriate court. (And, of course, it goes without saying that, despite the title of the body, it does not follow that the Foundation’s patients have all been subject to what a lawyer would class as ‘torture’.)

72. An attitude of broad acceptance to evidence is appropriate for a doctor and carer but exactly how misleading it can be in a forensic context is well illustrated by a feature of the present appeal. On page 30 of the Report, Dr Peel writes:

‘I would not necessarily expect to see scarring on someone who had been detained for a few days and beaten in many of the ways that are common in Sri Lanka, such as punching, kicking, and being beaten with SLON pipes, but not assaulted in other ways. The absence of physical signs, however, does not mean that the person has not been tortured.’

73. The whole of that passage, with the exception of one word, is a valuable piece of medical advice. Just because a person has no scars, it does not mean that he has not, in the past, suffered beatings. As a medical judgement, the second sentence is little more than a repetition of the material in the first. But the addition of the word ‘however’ sets the second sentence against the first, and makes it look as though additional information is being given – that people without scars *have* (or may have) been tortured. It is in this sense that the passage has been understood by those who prepared the ‘Synopsis’ on the Appellant’s behalf. Under the heading ‘No Trace’ the passage is part of the assemblage of material designed to

establish that there is widespread torture in Sri Lanka. The absence of scars does not mean an absence of torture; but the absence of scars is *no evidence at all* of the presence of torture.

74. We must also add that this Report is structured as a reply to (or rebuttal of) the Home Office's reasons for refusing many Tamil asylum claims. Nobody could regard the whole report as anything other than partisan. It is written against the Respondent, by those who have taken the side of Appellants. In its proper place, it is none the worse for that. But it should not under any circumstances be regarded as 'objective evidence'.
75. We note that the CIPU Bulletin is also a partisan document, in that it comes from an organ of the Respondent. It is, however, little more than a compendium of material from other published sources, which are listed in the bibliography. They range from reports of international organs, through various governmental bodies in Britain and abroad, to news reports around the world. The Bulletin is arranged in such a way that the source of each statement in it can readily be traced.
76. We appear to have virtually no information on the nature of the Sri Lanka Werkgroep. It evidently takes a position opposed to the Dutch government on the treatment of Tamil asylum-seekers. The Dutch Foreign Ministry report appears to make no mention of the Sri Lanka Werkgroep in either its text or its list of sources, although the Werkgroep had produced earlier publications (see footnote 21 in the Werkgroep report). Whether that is out of mere antipathy, or because the Dutch government has good reasons for ignoring the Sri Lanka Werkgroep, or for some other reason, we do not know.
77. What is important, however, is that the report of the Sri Lanka Werkgroep is very narrowly based. Although there are occasional references (see the first paragraph of the report and footnote 33) to a wider range of information, this report is 'based on nine interviews with deported Tamil asylum seekers in Sri Lanka, seven of whom were deported by the Netherlands'. We are told nothing more about these nine prime sources of information, but no doubt many of them had their credibility assessed either administratively or judicially (or both) and were found wanting: their claims were unsuccessful and they were returned to Sri Lanka. In the circumstances it is difficult to attribute very much evidential value to the accounts given by the individuals interviewed.

(iii) Conclusions

78. The Appellant claims that he faces a risk of arrest, either at the airport because of the documents on which he will be travelling, or at a checkpoint on the way to or in Colombo, or in a round-up in Colombo. He claims that if arrested he faces a serious risk of being subjected to torture or other serious ill-treatment: and that his return to Sri Lanka therefore exposes him to real risk of treatment contrary to Article 3.
79. Mr Lewis did not press the claim relating to the Appellant's putative documentation. He was right not to do so. The evidence that returnees are subject to ill-treatment at the airport for this reason is, to say the least, frail. But he insisted that the general risk for a Tamil is of being detained on one pretext or another and, during detention, suffering to severe ill-treatment.
80. The evidence does not establish that there is widespread torture in Colombo. Miss Giovanetti points to the Dutch Foreign Ministry's report, indicating that in the year 1998 Amnesty International were aware of four case of torture in Colombo, and the Sri Lanka Monitor reported only one other. No properly quantified reliable evidence suggests the contrary. A Tamil is not at real risk of torture in Colombo.
81. Following round-ups, the evidence is that the vast majority of those detained are released within a short period of time (up to 72 hours). The aim of the round-ups is the detection of LTTE activists: and there is little doubt that where there is reason to suspect that a detainee is such a person, detention may be prolonged for the purpose of enquiries. Risk factors mentioned in the Dutch Foreign Ministry report are not being in possession of an identity card, not being registered with the police, recent arrival from the north or east, and possession of scars leading to suspicion of LTTE membership. The Appellant (in common with other Tamil returnees) will be able to collect an Emergency Certificate (equivalent to an identity card) on the first morning after his arrival in Colombo; he will be able to register; he will not have arrived recently from the north or east, and has no scars likely to raise suspicions of his having been an LTTE member. If he is rounded up, there is no reason to suppose that any detention will be other than brief. There is nothing in his case to cause suspicion.

82. If he were to be detained for a lengthier period, the risk of ill-treatment (short of torture) would be higher. But that risk is largely speculative (to use the wording of Bensaid v UK), because he may never be detained at all and (if detained) is most likely not to be detained for long. The Appellant fails to establish that, generally or universally speaking, a returned Tamil asylum-seeker is at real risk of being ill-treated in a way the breaches Article 3.
83. We do not ignore the fact that Mr Lewis argued also that the Appellant's detention would itself breach the Convention and that he would be deprived of a fair trial. These are claims of breaches of Articles 5 and 6 of the Convention and are treated in section 'e' below. Nor do we ignore the claim that generalised discrimination against Tamils in Sri Lanka amounts to degrading treatment. We have found it more convenient to treat this issue in our discussion of Article 14, at paragraphs 117-124 below.

d. Article 8

84. The Appellant also claims that his return to Sri Lanka would interfere with his 'physical and moral integrity' so as to be a breach of Article 8. In his submissions, Mr Lewis acknowledged that this claim depended on the same factual matrix as the claim under Article 3. We have found that the Appellant has not established a real risk of being exposed to treatment breaching Article 3. The risks are speculative. For the same reasons we find that the Appellant fails to establish a real risk of interference with his physical or moral integrity.
85. In any event, a breach of Article 8.1 may be justified, in a removal case, within the proportionality principles of Article 8.2, by the need to maintain immigration control. It is for the Respondent to establish proportionality: but whereas the general need to maintain immigration control is a matter of which we take judicial notice, as well as being the reason behind numerous decisions of national courts and the European Court of Human Rights, there is no evidence on this issue from the Appellant's side. In these circumstance we are entitled to decide, as we do, that any infringement of the rights set out in Article 8.1 would not be disproportionate to that need.
86. For the avoidance of doubt we should add that it has not been seriously suggested that the Appellant's removal from the United Kingdom to his country of nationality would interfere

with his private or family life here: there would be no evidential basis for any finding that it would.

87. For the foregoing reasons we find no breach of Article 8.

e. Articles 5 and 6

(i) General

88. We can take Articles 5 and 6 together, for the arguments in respect of them are sufficiently similar. It is common ground that Articles 5 and 6 are not ‘absolute’ in the sense that Article 3 is. They are, however, not ‘non-absolute’ in precisely the same way as Articles 8 – 11.
89. Each of Articles 8-11 incorporates a general provision allowing interference or limitation of the right protected by the Article in question. As a result, a balancing exercise has to be undertaken when a breach of the Article is alleged; and in expulsion cases it may be, for example, that the need for firm and fair immigration control will be found to justify an interference with private or family life. (See R v SSHD ex parte Mahmood [2001] 1 WLR 840, CA; Kacaj (01/TH/0634), paragraph 25)
90. There is no such general provision in Articles 5 and 6. Article 5 lays down circumstances in which deprivation of liberty is allowed but with that reservation the two Articles are both expressed in absolute terms. Nevertheless, it has been the consistent approach of the Court that the rights guaranteed by Articles 5 and 6 are not absolute rights and that what appears to be a breach may be found to be justifiable in the light of all the circumstances. This is quite different from the equally consistent approach to Article 3: if treatment comes within Article 3 at all, it cannot be justified.
91. Miss Giovanetti submits that Articles 5 and 6 should not be, and indeed have not been, interpreted in such a way as to prohibit the return or expulsion of individuals to non-signatory countries which do not observe the same standards in relation to liberty and a fair trial as are guaranteed by Articles 5 and 6. In her written skeleton she states that those acting for the Respondent have not found a single instance where the Court or the Commission have held that expulsion would be unlawful because it would expose the Applicant to treatment contravening Articles 5 and 6. Nothing we heard

from Mr Lewis causes us to think that there was any instance that was not found.

92. Miss Giovanetti also points out that the obligation to protect persons from treatment contrary to the Convention is rather limited (except under Article 3) when the treatment is by third parties. Even the right to life is not absolute in this sense, even on the territory of a country that is a party to the Convention. In Osman v UK (2000) 29 EHRR 245, the Court noted, at paragraph 115, that Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the life of those within its jurisdiction. It went on (at paragraph 116) to express its view that

'bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.'

93. In relation to Article 6, Miss Giovanetti cited Soering v UK (1989) 11 EHRR 439 and Drozd and Janousek v France and Spain (1992) 14 EHRR 745. In Soering, the UK proposed to extradite the Applicant to the USA, which is of course, not a party to the Convention. The Court unanimously held that the Applicant's complaints that he would not have legal aid for his trial in the USA did not give rise to an issue under Article 6(3)(c). It said, at paragraph 113:

'The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.'

94. The legal background of Drozd is somewhat more involved. The Applicants, citizens of Spain and Czechoslovakia respectively, were convicted of armed robbery and sentenced to imprisonment by the *Tribunal de Corts* in the Principality of Andorra. Following normal procedure there the court was composed of French and Spanish judges, and the sentence was to be served in a French prison. (The constitutional and legal system in Andorra is conveniently set out in paragraphs 32 –

76 of the report). Andorra is not a party to the Convention; the Applicants claimed against France and Spain that the trial in which their judges took part was in breach of Article 6, and against France that their imprisonment was in breach of Article 5.

95. The Court found that not only is Andorra not a party to the Convention in its own right: it is not subject to the Convention as a result of its relationship with either France or Spain. It also held that in exercising office as judges in Andorra, the French and Spanish judges were not acting as French or Spanish officials, but as judges of the Principality. Their acts as such judges were therefore not attributable to France or Spain. The allegation of breaches of Article 6 was therefore not within the jurisdiction of the Court.
96. Having found that the alleged breach of Article 6 was not within its jurisdiction, the Court then proceeded to consider the claim that the Applicants' detention in France was a breach (by France) of their rights under Article 5. The question was twofold. First, was there a sufficient legal basis, in French law, for the detention? Secondly, should the French authorities have exercised control over the judgment pronounced in Andorra?
97. The first question was answered by reference to similar principles to those which had motivated the decision on Article 6. There was a clear basis, valid in customary law, for the Applicants' detention in France (or, indeed, Spain) following conviction by an Andorran court. On the second question, whether France should have exercised any control over the *Tribunal de Corts*, so as to ensure that a sentence of imprisonment was imposed only in accordance with the requirements of Article 6, the Court's conclusion, in paragraph 110, was as follows:

'The Court, like the Commission, considers that in this case the *Tribunal de Corts*, which pronounced the conviction of Mr Drozd and Mr Janousek, is the 'competent court' referred to in Article 5(1)(a). As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening

international cooperation in the administration of justice, a trend which is in principle in the interest of the persons concerned. The Contracting States are, however, obliged to refuse their cooperation if it emerges that the conviction is the result of a flagrant denial of justice.

The Court takes note of the declaration made by the French Government to the effect that it could and in fact would refuse its customary cooperation if it was a question of enforcing an Andorran judgment which was manifestly contrary to the provisions of Article 6 or the principles embodied therein. It finds confirmation of this assurance in the decisions of some French courts: certain indictments divisions refuse to allow extradition of a person who has been convicted in his absence in a court where it is not possible for him to be retried on surrendering to justice, and the Conseil d'Etat has declared the extradition of persons liable to the death penalty on the territory of the requesting State to be incompatible with French public policy.

In the Court's opinion, it has not been shown that in the circumstances of the case, France was required to refuse its cooperation in enforcing the sentences.'

98. In his written skeleton argument, Mr Lewis did not address the question of the application of Articles 5 and 6 to acts having effect outside the territory of contracting parties. Instead, he simply argued, on the basis of the evidence, that the treatment to which the appellant would be subject on his return would breach those Articles as they have been interpreted and applied by the Court in assessing acts having an effect within the territory of the contracting parties. In his oral submissions, he argued that the authorities to which Miss Giovanetti had referred tended towards the opposite of the conclusion she had urged on us.
99. As Mr Lewis observed, in Drozd, the Court prefaced its discussion of the responsibility of the judges as French or Spanish authorities with the following (paragraphs 89 – 91)

'89 ... In short, the objection of lack of jurisdiction ratione loci [i.e. because the events took place on territory not part of a signatory State] is well-founded.

90. This finding does not absolve the Court from examining whether the Applicants came under the 'jurisdiction' of France or Spain within the meaning of Article 1 of the Convention because of their conviction by an Andorran court.

91. The term 'jurisdiction' is not limited to the national territory of the High Contracting Parties; their responsibility can to be involved because of acts of their authorities producing effects outside their own territory.'

100. Mr Lewis relies on paragraph 91 in particular to support his submission that the Court is – and hence national courts are – concerned with the effect, outside the territory of contracting parties, of a decision made by the authorities in a State party to the Convention. But that proposition is not in dispute. It is clearly of concern under Article 3. Mr Lewis referred generally to Article 8, but that may not be quite accurate. In many expulsion cases under Article 8, the complaint is that the expulsion will interfere with the claimant's private or family life as it is at present enjoyed in the expelling country. In such cases there is no need to see what are the effects outside the territory of that country. It is clear, however, that such effects may also fall to be taken into account: see, for example, D v UK (1997) 24 EHRR 423. What paragraph 91 of Drozd does *not* establish is that the Convention is engaged in every case where the acts of authorities of contracting parties may produce an effect which, if it took place within the territory of a contracting party, would be within the jurisdiction of the court.
101. On Soering, Mr Lewis submitted that the Court's view was that Article 5 was analogous to Article 3 in extradition cases. That submission was based only on paragraph 85 of the judgment, which does not support it. Article 5 is mentioned in the paragraph only in order to show (by the presence of the word 'extradition' in Article 5(i)(f)) that the Convention imposes no universal prohibition on extradition. It is true that it repeats the proposition that expulsion may, "assuming that the consequences are not too remote", engage the Convention obligations of a contracting State. But, although the footnote reference is to Abdulaziz and others v UK (1985) 7 EHRR 471 – an Article 8 case – the discussion is confined to Article 3.
102. The Court's decision in Drozd was by a bare majority. The views of the dissenting judges are of the very greatest of interest in the present context. Six of them (pages 796 and 800 of the report) took the view that France had a liability under Article 6 of the Convention because it was in France that the imprisonment was taking place.

‘As the case concerns a fact (a long term of imprisonment) which must take place in France, the Convention is certainly applicable. And it would be contrary to the Convention for a country which was bound by it to agree to deprive a person of his liberty where he had been convicted in another country under conditions which did not appear to be compatible with the Convention.’

103. Those judges considered that the finding of a violation of Article 5 would “merely” entail the applicant's return to Andorra. It would then be the duty of the French and Spanish authorities to apply diplomatic pressure on Andorra, but no more.
104. The other five judges, in two separate opinions (pages 794 and 800 of the report) took the view that as the sentence was served in France, France had a duty to ensure that the conviction was compatible with the minimum standards required by the Convention to justify deprivation of liberty.
105. It is to be noted that all the judges, whether agreeing or disagreeing on the result, paid great attention to the fact that Andorra is not a party to the Convention. Nobody thought that it was possible to require a non-party country to conform to the obligations imposed by the Convention. And, despite the criticisms of the Andorran system, the majority of those judges who would have decided that the Court had jurisdiction would have confined their judgment to finding that imprisonment in France was unlawful. The consequence would, as they acknowledge, be the return of the applicants to the very country whose criminal justice system is said not to comply with the requirements of Articles 5 and 6.
106. Miss Giovanetti submitted that, if the Convention were interpreted so as to prohibit removal to countries that do not observe the same procedural safeguards as in Europe, it would place a disproportionate burden on the signatory State. It would also constitute an unwarranted fetter on the right of signatory States to control immigration. We agree that it would impose a burden and be a fetter. We agree also with her distinction between Article 3, which relates to the most fundamental of rights, and Articles 5 and 6, which provide procedural and substantive rights. The fact that there would be a burden on signatory States would not, however, of itself show that that was not the effect of the Convention: and, if it

were, it would not follow that the burden was disproportionate or unwarranted.

107. We are, however, perfectly satisfied that it is not the intention of the Convention that any person who can make his way from another State, where the rights set out in the Convention are not all protected, to a signatory State, can resist return on the basis that some human right of his may be infringed in his home country. There are three reasons. First, that would place a burden on signatory States so unacceptable that no such State could be thought to have undertaken it. Secondly, the European Convention on Human Rights, as interpreted in Strasbourg, embodies merely one approach to the delineation and protection of human rights. Other regional treaties are not identical; nor is the approach of the United Nations Human Rights Commission. Europe does not have a monopoly in the identification, hierarchy and enforcement of human rights.
108. Thirdly, such an approach entirely ignores the dynamic of the enforcement of human rights in Europe and the process by which the law of human rights develops in Europe. If Sri Lanka were a party to the Convention, an individual might bring proceedings against her in the European Court of Justice. In reply, Sri Lanka might bring evidence to show that the matters described by the Appellant were not the whole story; and she might raise arguments directed to show that her position, and her practice, was not such as to give rise to breaches of the Convention. She might even be able to show that she had validly (under Article 15 of the Convention) derogated from the Article alleged to have been breached. The importance of consideration of the situation in the country in question is amply demonstrated by the variety of results in claims under Article 6, reflecting the Court's recognition of a wide margin of appreciation.
109. But Sri Lanka is not a party to the Convention. Whatever the circumstances in that country, Sri Lanka cannot derogate from the European Convention on Human Rights. She has no *locus standi* in Strasbourg. Whatever is said about her, she has no opportunity to rebut or explain. Sri Lanka is not and could not be a party to these proceedings, and no party before us has either the authority or the duty to put before us such arguments and evidence as she might have put in response to the Appellant's claims. In these circumstances, we cannot judge the Appellant's situation on return there by the standards that would apply in a signatory State, because a

signatory State would not be obliged to remain silent in the face of the claim. We could judge the Appellant's situation only by reference to some idealised version of the standards of the Convention – which would, of necessity, be a standard higher than that imposed by the Convention and the Court on any actual signatory State. This consideration alone is enough to show that the Convention cannot, in general operate so as to prevent removal to a non-signatory country whose human rights standards are said in some respects to be less than would be required in a signatory State.

110. It is for these reasons, we apprehend, that the Court takes the position exemplified in Drozd. It is clear that the Court does not attempt to impose the duties of the Convention on States that are not party to it. It is also clear that the fact that a person may be treated in a manner that would, in a signatory State, be a breach of the Convention does not of itself render his expulsion to another country unlawful, unless *either* the breach will be of Article 3, *or* the consequences of return will be so extreme a breach of another Article that the returning State, as one of its obligations under the Convention, is obliged to have regard to them. Following the jurisprudence on Articles 5 and 6, this consequence will only arise if the situation in the receiving country is that there will be a flagrant denial or gross violation of the rights secured by the Convention. For this reason we have not needed to consider in this determination the precise implications of Articles 5 and 6 within signatory States.

111. The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case – where the right will be completely denied or nullified in the destination country – that it can be said that removal will breach the treaty obligations of the signatory State however those obligations might be interpreted or whatever might be said by or on behalf of the destination State.

(ii) Application to this appeal

112. Mr Lewis took us through a great deal of material relating to detention, imprisonment, charge and trial in Sri Lanka. It does not, in our view show that there is in Sri Lanka a flagrant denial or gross violation of the rights secured in signatory States by Articles 5 and 6. On the contrary, there is a developed criminal justice system, and a National Human Rights Commission. Things may not always work as they

ought to, but there is no question of flagrant denial. It follows that the Appellant's removal to Sri Lanka would not be a breach by the United Kingdom of his rights under Article 5 or Article 6.

f. Article 14

(i) General

113. Article 14 is not free-standing. It prohibits discrimination only in respect of the rights and freedoms set forth in other Articles of the Convention. Mr Lewis pointed to the existence of discrimination against Tamils in Sri Lanka. He submitted that in general racial discrimination might constitute an affront to dignity and so a breach of Article 3, or an interference with private life or 'respect for physical and moral integrity' and so a breach of Article 8. He further argued that discrimination against Tamils in the criminal justice system in Sri Lanka – whether in detention policy, in prison awaiting trial, or in the trial process itself – meant that the removal of a Tamil to Sri Lanka would be a breach (or potential breach) of Article 5 or 6 taken with Article 14.
114. Miss Giovanetti said in her skeleton simply that there was no breach of any of the other Articles relied on by the Appellant and that she therefore had no need to deal with Article 14. In her oral submissions, recognising that there can be a breach of Article 14 even when the conduct complained of would not of itself amount to a breach of any other Article, she asked us nevertheless to find no breach of Article 14. Any discrimination did not come within the ambit of a protected right, or was justifiable in the light of the security situation in Sri Lanka.
115. We have not been shown any case in which Article 14 has prevented expulsion to a non-signatory country on the ground of discrimination in that country. There are cases in which Article 14 has been relied on in expulsion cases, but the argument there was in the context of discrimination by the expelling, signatory, country. See Monstaquim v Belgium (1991) 13 EHRR 802; C v Belgium (96/25). (The claim was not upheld in either of those cases.)
116. Generalised discrimination is not enough to engage Article 14; nor is discrimination in an area not within the 'ambit' of another applicable Article. It is therefore necessary to

consider the effect of Article 14 in conjunction with the other Articles upon which the Appellant relies. We begin with Article 3.

(ii) With Article 3

117. As we said at the hearing, we have considerable difficulty with the concept of a combination of Articles 3 and 14, save in very exceptional cases. One example of such an exception is evidently the East African Asians cases, (1973) 3 EHRR 76. Here the Commission took the view that the removal of status on racial grounds was degrading treatment and a breach of Article 3. What was exceptional about that case was not, in our view, the fact that the removal of status was contrary to legitimate expectation or that the degrading treatment had a public element. It is that the removal of status could not conceivably be a breach of Article 3 except when accompanied by discrimination. It was the discrimination that made the removal of status degrading.
118. This is important because the East African Asians cases were rather early and it is only more recently that the rights protected by Article 3 have been clearly and indisputably established as absolute. They are enjoyed by all individuals and breach of them cannot be excused. Ill-treatment has to achieve a level of severity before it amounts to a breach of Article 3, however. If it is at that level, it ought to be prohibited, whoever the victim is. We are unwilling to contemplate a situation where (in the case of a type of ill-treatment that is clearly within the ambit of Article 3 even if discrimination is *not* alleged) the *same* level of ill-treatment is considered a breach of Article 3 taken with Article 14 if administered in a discriminatory manner, but not a breach of Article 3 if not so administered.
119. We hesitate to give examples, for fear of influencing future cases. Suppose, however, that there has been some sort of anti-government demonstration, which has been violently broken up by government officials. Suppose further that it is established that there was generalised ill-treatment of the demonstrators, but that, on the whole, members of race A were treated worse than members of race B and that the reason for that is that in the country's society as a whole there is discrimination against race A. Suppose further that a member of race A and a member of race B have been ill-treated in precisely the same way, at a level which (though severe) is not

sufficient to amount to a breach of Article 3 on its own. Is the member of race A entitled to claim that there was a breach of the Convention in his case because the ill-treatment had a discriminatory motive, while the member of race B cannot establish his claim? Surely not. Such a conclusion would make severe inroads into the absoluteness of the protection offered by Article 3; and indeed would diminish the protection offered by Article 3 to members of race B. Further, it would make Article 3 almost impossible to apply, as there could be no consensus as to the level of ill-treatment that made it applicable.

120. In this example we have had the advantage of positing affairs in the past and a situation of identical ill-treatment. In an expulsion case the relevant factors cannot be so clear-cut. It is necessary to look to the future, and to the risks. Generalised discrimination may make it easier for a member of race A to establish that he is at risk of treatment at the higher level of severity: but in that case, his claim is made out because he shows that he is at risk of ill-treatment contrary to Article 3. Article 14 has nothing to do with it: it is the *evidence of* discrimination, not the allegation that discrimination breaches the Convention, that enables him to make his case. If, on the other hand, (even with the evidence of discrimination) he is unable to show that he is at risk of treatment that, if administered to a member of the other race, would breach Article 3, then Article 14 cannot lower the threshold for him.
121. Our conclusion therefore is that Article 14 has little to add to Article 3 in the absolute sense that the latter has been interpreted. The role of Article 14 in conjunction with Article 3 must be limited to showing the degrading nature of treatment based on race but otherwise entirely outside the ambit of Article 3.
122. The question then is whether the general discrimination against Tamils in Sri Lanka amounts to degrading treatment within the meaning of Article 3. We accept that round-ups are likely to be of Tamils only; but any particular round-up may be justified by the security situation and the fact that it is Tamils, not Sinhalese, who have been waging a violent campaign against the government. Requirements for registration can be viewed similarly; but it is to be noted that permanent residents of Colombo, of whatever race, do not need to register (see the regulation appended to the Dutch Foreign Ministry report). It is difficult to see that the evidence

of round-ups or registration shows any clear unjustifiable differentiation or discrimination against Tamils.

123. Conditions in prisons are very poor: but they are poor for all prisoners. The language of the state is not Tamil: but being spoken to in a language that is not one's own (but is the language of the majority in the country) could hardly be described as degrading. There may be, and no doubt are, *individual* instances of degrading treatment that are entirely unjustifiable. But that is not the point, unless the Appellant were able to show a real risk of being subject, on racial grounds, to one of those instances, which he cannot. The evidence before us relates mostly to Tamils and does not purport to present a balanced picture from which one could ascertain whether ill-treatment is administered in a discriminatory fashion. But there is some evidence of ill-treatment or degrading treatment of Sinhala.
124. The general situation is that Tamils are subject to difficulties not shared by other races in Sri Lanka, but we do not find that the treatment of Tamils is such as to amount generally to degrading treatment of them. The Appellant has not established that on return he is at real risk of treatment amounting to a breach of Article 3 taken with Article 14.

(iii) With Article 8

125. So far as concerns Article 8 taken with Article 14, the position is, as we have indicated above, that Mr Lewis relied on the same facts, and essentially the same arguments, to support his claim that the Appellant's removal would breach Article 8 by interfering with his 'physical and moral integrity', as he had relied on in support of the Article 3 claim. Article 8, however, is not absolute. There is, in principle, no reason why treatment of a kind which, without discrimination, would not amount to an interference with private or family life, could not be found to do so if motivated by discrimination.
126. On the other hand, Article 8 is also not unqualified. As we noted at paragraph 85, the claim under Article 8 is subject to the need to maintain immigration control. It is not said that that requirement is being applied in a discriminatory fashion, and, so far as concerns the Appellant's prospective position in Sri Lanka, we take the view that any interference with his private or family life resulting from the Respondent's decision

is proportionate, and so not a breach of Article 8 even when that Article is taken with Article 14.

(iv) With Articles 5 and/or 6

127. We have also concluded that the return of the Appellant (or Tamils generally) to Sri Lanka would not be a breach by the United Kingdom of Article 5 taken with Article 14 or Article 6 taken with Article 14. We reach this result by either of two routes.
128. First, we note that Article 14 is essentially procedural. Its language mirrors that of Article 1. It regulates the *way in which* rights set forth in the Convention are to be secured by signatory States: that is, without discrimination. As we have shown, in relation to expulsion to the territory of a non-signatory State, the right secured by the Convention is merely not to be expelled to a state where there is a flagrant denial or gross violation of the principles of Article 5 or Article 6. There is no suggestion that the United Kingdom applies improper discrimination in the application of its expulsion policy. Matters of detention and trial procedure outside signatory States are not within the ambit of the Convention at all except in cases of gross violation or flagrant denial of the rights. Thus discrimination in Sri Lanka in matters relating to detention and trial, if it were established, would not affect the securing by the United Kingdom of the rights set forth in the Convention. The discrimination alleged is not discrimination against which the Convention protects the Appellant.
129. The second route is quite different in principle but it leads to the same result on the evidence. It is to take Article 14 with Articles 5 and 6 in assessing the question whether the effect of the claimed discrimination is to produce a flagrant denial of the rights protected by Articles 5 or 6 *in the case of the group against which the discrimination operates*. That effect is, however, not established on the evidence. Tamils suffer, as we have said, some disadvantages. But those disadvantages are not such as to enable one to say that there is in Sri Lanka a flagrant denial to Tamils of the rights of liberty and fair trial.

g. Cumulation

130. Mr Lewis' final argument was based on cumulation. We have considered the risks of ill-treatment cumulatively in our treatment of Article 3. But Mr Lewis submitted that a combination of factors, not breaching any single Article of the

Convention, might add up as a whole to a breach of the Convention. He drew an analogy with the Refugee Convention: but the analogy is false. Under the Refugee Convention there is one composite question relating to the risk of persecution; and persecution is itself often established by the repetition of events each of which would not individually amount to persecution. Neither under the European Convention on Human Rights nor within the Human Rights Act 1998 is there any conception of a single composite question. The rights are individual; they (in the plural) are secured by the Convention; and section 6(1) of the Act makes unlawful an act inconsistent with a (singular) Convention right. There is no authority for Mr Lewis' claim that a series of failures to breach Convention rights should be taken together as a breach of 'the rights secured by the Convention'. We reject it.

131. Even if we are wrong about that, we see no breach of the Convention in the Appellant's removal to Sri Lanka, whether the Articles of the Convention are taken together or separately. His appeal is dismissed.

C. M. G. OCKELTON
Deputy President