

Heard at Field House

PK (Sri Lanka – risk on return –
exclusion clause) Sri Lanka
[2004] UKIAT 00089

On 11 March 2004

Prepared 11 March 2004

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

28 April 2004

Before:

Mr H J E Latter (Vice President)
Mr G H Getlevog
Mr P Rogers JP

Between

The Secretary of State for the Home Department

APPELLANT

and

RESPONDENT

Representation

For the appellant:

Miss T Hart, Home Office Presenting Officer

For the respondent:

Mr P Haywood, Counsel

DETERMINATION AND REASONS

1. The Secretary of State appeals against the determination of an Adjudicator, Mrs S Brookfield, who dismissed the respondent's appeal on asylum grounds but allowed it on human rights grounds against the decision made on 17 October 2001 refusing to grant him leave to enter following the refusal of his claim for asylum. In this determination the Tribunal will refer to the respondent to this appeal as the applicant.
2. The applicant left Sri Lanka by plane on 18 August 2001 travelling first to Hong Kong where he was refused entry. He was then able to travel on to the United Kingdom where he claimed asylum. He is a Tamil who lived in Jaffna. His family have strong connections with the LTTE. His older brother was granted asylum in Norway in 1989 and his other

brother refugee status in the United Kingdom on 5 February 2000. His brother-in-law has also been recognised as a refugee in the United Kingdom. He has cousins who are senior members of the LTTE's political and civil wings and an uncle was a founder member of the LTTE who went missing in 1999.

3. It was the applicant's claim that he joined the LTTE in 1994 becoming a full time member of the military wing in 1995. He witnessed atrocities committed by the Sri Lankan authorities and then took up arms against them after being in training for over twelve months. He took part in the Mulliatilivu battle and other attacks on the Sri Lankan forces. In November 2000 he was being taken to India to recover from injuries. His boat was intercepted. He was arrested and identified as an LTTE member. He was beaten and tortured and then made to sign a statement in Sinhala. He was released when his uncle paid a bribe on 23 July 2001. He was able to leave Sri Lanka on 18 August 2001.
4. The Adjudicator accepted that the applicant had willingly joined the LTTE and had been involved in combat as he described. His left foot had been injured during a battle at Elephant Pass and he spent three months in hospital when it was decided that he should be taken to India for further treatment. Medical evidence was produced to confirm that his left leg was shortened with scarring to the front and outer surfaces of the lower leg. His injuries are consistent with shrapnel injury and the scarring on the back of the leg consistent with surgical intervention for orthopaedic purposes. The Adjudicator accepted that the applicant was detained on the ship carrying him to India. He was ill-treated whilst in detention.
5. On the basis that the applicant had been a willing member of a terrorist group in Sri Lanka and had been responsible for the deaths of a number of wounded soldiers the Adjudicator found that it was reasonably likely that he had committed a crime against peace, a war crime or a crime against humanity and it followed that the provisions of the 1951 Convention did not apply to him.
6. However, she went on to consider whether there would be a real risk of a breach of Article 3. There was a computerised database of wanted persons in Sri Lanka including persons of interest in relation to suspected LTTE links. No amnesty had been declared for members of the LTTE. The Adjudicator was satisfied that there was a real risk of ill-treatment on return. Although checks on returnees at Colombo airport had eased with many failed asylum seekers being waved through since December 2001, the Adjudicator was not persuaded that this applicant with his lack of identity, obvious injuries and known connections with the LTTE would simply be waved through at the airport. He would be regarded as a terrorist and there was a real risk that he would be mistreated by the authorities because of his LTTE connections. The appeal was therefore allowed under Article 3 and also under Article 8 because the Adjudicator was satisfied that, because of the applicant's

mental health problems and psychiatric condition, any removal would not be proportionate to a legitimate aim at the present time.

7. In the Secretary of State's grounds of appeal it is argued that the Adjudicator erred when making her findings on the issue of whether the applicant would still be of interest to the Sri Lankan authorities due to his previous involvement with the LTTE and the fact that he would be detained and ill-treated due to his lack of identification. She had failed to deal with the case of Tharmakulaseelan [2002] UKIAT 03444 which dealt with the inferences to be drawn from release on payment of a bribe. She had failed to state why the applicant would be mistreated and how this mistreatment would reach the minimum level of severity required for a breach of Article 3. She had failed to indicate why he would be of interest in the light of the current ceasefire. The grounds also challenged the findings under Article 8. By letter dated 7 July 2003 the applicant submitted a respondent's notice. It is argued that the Adjudicator was wrong to apply the exclusion provisions. She failed to give the parties an opportunity of addressing this issue and in any event her conclusions were against T v Secretary of State [1996] 2 All ER 865 as his actions were not aimed at non-combatants and he was entitled to combatant status.
8. At the hearing before the Tribunal Miss Hart submitted that the Adjudicator had failed to give proper weight to the ceasefire and to the fact that no amnesty had been declared. On his own account the applicant had been released from detention by payment of a bribe. He would hardly have been released if he had been of any adverse interest to the authorities or was suspected of being an LTTE fighter. The Adjudicator had attached undue weight to the lack of an identity document. The applicant would not be returning undocumented. Even though he had been a willing member of the LTTE, there was no reason to believe that he would now be of any further interest to the authorities.
9. Mr Haywood submitted that the Adjudicator was entitled to conclude on the evidence before her that there was a real risk of treatment contrary to Article 3. The applicant had a high profile. He was from a family well-known for its links with the LTTE. He had not just been a member or supporter but a fighter. The fact that he had been released on payment of a bribe did not without more indicate that he would not be of interest to the authorities on return. The risk of further ill-treatment had not been eliminated by the ceasefire and peace agreement. Mr Haywood referred the Tribunal to the report of Dr Goode and to the views of the UNHCR that each case must still be looked at in the light of the applicant's own profile and background.
10. Both Mr Haywood and Miss Hart agreed that the Adjudicator had been wrong to apply the exclusion clauses on the particular facts of this appeal. The Adjudicator relied on the answer given to question 14 of his interview when the applicant was asked how many members of the army did he think he had killed. He replied, about eight soldiers and

most of them were injured. This answer must be read in context. It followed a question asking whether the applicant had been actively involved in the battles he had just described. There is no basis for inferring that the applicant was admitting to the unlawful killing of wounded soldiers. The Tribunal are not satisfied that the applicant's participation and conduct fighting for the LTTE bring him within the exclusion clauses nor that his participation in this conflict amounted to a crime against peace, a war crime or a crime against humanity as defined in international instruments such as the 1945 London Agreement and Charter of the International Military Tribunal.

11. Article 1F(a) of the Refugee Convention provides that the provision of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes. The Tribunal in Amberber (00/TH/01570) made it clear that participation in a war of aggression would not without more bring a claimant within this clause. We were referred to a report prepared by Karen Parker entitled "On the Legal Status of the War in Sri Lanka and the Liberation Tigers of Tamil Eelam". This report argues that as there has been a war in Sri Lanka between the government forces and the LTTE, the LTTE have combatant status and the right to engage in combat. It was the applicant's admission that he had killed about eight Sri Lankan army soldiers in battle not that he had unlawfully killed wounded soldiers. The Tribunal is not satisfied on this basis that he is disqualified from the protection of the Convention under Article 1F(a). His participation in the war does not give rise to serious reasons for considering that he has committed either a crime against peace, a war crime or a crime against humanity. The cross-appeal refers to T. The Adjudicator did not find that the applicant was excluded by Article 1(f)(b) which was considered in T. The applicant's activities were carried out in the course of combat and cannot be categorised as serious non-political crimes.
12. The Tribunal now turn to the Secretary of State's appeal against the decision to allow the appeal on Article 3 grounds. Ground 2 argues that the Adjudicator erred in her findings of fact that the applicant would still be of interest to the Sri Lankan authorities because of his previous involvement with the LTTE and that he would be detained and mistreated on his return due to his lack of identification. The Tribunal agrees that his lack of identification is a factor of relatively limited importance but the applicant's previous involvement with the LTTE is more significant. There is clear evidence that the Sri Lankan authorities remain interested in those who have been involved with the LTTE. The applicant's involvement was at a high level and he is from a family with a high political profile. In these circumstances the Tribunal is satisfied that the Adjudicator was entitled to come to the view that the applicant would be of continuing to the authorities on return.

13. It is also submitted that the Adjudicator failed to give proper weight to the fact that the applicant was previously released from detention on payment of a bribe. It is argued that in these circumstances he would be of no further interest to the authorities. The Adjudicator referred to the determination in Tharmakulaseelan in paragraph 11(i) of her determination but she has not dealt with it at any great length if at all in her reasoning. However, it is clear that she has taken into account the fact that the applicant was released on payment of a bribe. It was for her to assess in the light of all the evidence whether this indicated that he would now be of no further interest to the authorities. Her finding that there was a real risk of detention on return was properly open to her.
14. It is also submitted that the Adjudicator has failed to give proper weight to the peace agreement. The Adjudicator has referred to this in paragraph 15(vii) of her determination. She has balanced the information in the CIPU report with the report from Dr Goode about the computerised database of wanted persons including those of interest with suspected LTTE links. In our view there is no proper basis for a challenge to the Adjudicator's assessment of risk.
15. In summary the Tribunal is satisfied that the Adjudicator was entitled to conclude that there was a real risk that this applicant might be detained and ill-treated on return. In the light of his profile and background her findings are properly sustainable on the evidence. This is a case where subject to the exclusion clauses, the refugee claim stands or falls with the claim under Article 3. As it is now accepted that the applicant should not be excluded from the Refugee Convention, his claim should succeed under that Convention as well as the Human Rights Convention. The applicant's appeal should have been allowed on both asylum and human rights grounds.
16. In these circumstances the Secretary of State's appeal is dismissed. The cross-appeal is allowed and the Adjudicator's determination varied so that the applicant's appeal is allowed on both asylum and human rights grounds.