



**RECENT CASE LAW INVOLVING CONSIDERATION OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS
August 2008**

In this paper are summaries of three recent cases which are of interest. In all three questions concerning the European Convention on Human Rights are prominent. The third case, summarised in paragraphs 10 to 17, is of particular concern. It is a decision of the European Court of Human Rights which may well have the effect, if the Home Office feels obliged to follow it, of making it more or less impossible to deport failed asylum seekers back to Sri Lanka.

Secretary of State for the Home Department v JN

European Convention on Human Rights – Article 3 – return to Afghanistan

1 This was a judicial review case decided by the Court of Appeal in May 2008. The Asylum and Immigration (Treatment of claimants etc.) Act 2004, Schedule 3 Part 2 sets out a list of safe countries for the purposes of the 1951 Geneva Convention on the Status of Refugees (“the Refugee Convention”), those countries being all the member states of the EU plus Norway and Iceland. The effect of listing is that for the purposes of determining whether a person who has made an asylum claim or a human rights claim may be removed from the United Kingdom to another state of which he is not a citizen, the listed countries are to be treated as safe. “Safe” means (1) that the listed countries do not threaten the life and liberty on account of a person’s race, religion, nationality, membership of a particular social group or political opinion, (2) they will not deport persons in contravention of rights under the Refugee Convention and (3) will be deported to other states only in accordance with the Refugee Convention.

2 The applicant, JN, was a national of Afghanistan. He went to Greece and in December 2004 made an asylum claim which was refused. He entered the United Kingdom illegally in September 2005 and when his presence was discovered he claimed asylum here. The Secretary of State declined to deal with the application and set directions for the removal of the applicant to Greece in accordance with the EU’s Dublin 11 Regulations, which preserve the rule that an asylum claim will be substantively decided by the first Convention State where the claimant arrives. The Greek authorities accepted their responsibility to examine the claim in October 2005. Representations were made on behalf of the applicant that removal to Greece would violate his rights under Article 3 of the ECHR which provides “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” This is an

absolute right, from which there are no exemptions. It was not contended that the applicant would suffer ill treatment in Greece, but rather that the Greek authorities would return him to Afghanistan without properly considering his asylum and human rights application and that he would be ill treated in Afghanistan.

3 The argument was that the provisions of Schedule 3 Part 2, summarised in paragraph 1 above, precluded any investigation by the Secretary of State to ascertain whether the applicant's rights, in particular his rights under Article 3, would be respected by the Greek authorities. Those provisions therefore were incompatible with ECHR and the court should make a declaration of incompatibility accordingly. These arguments were accepted in the High Court at first instance, and the Home Secretary appealed to the Court of Appeal.

4 The decision of the Court of Appeal is contained in the judgment of Lord Justice Laws. The Court considered evidence which had been given before the court below on the record of the Greek authorities in respect of the Greek government's obligation under the Refugee Convention not to return (*refoul*) persons to a third country where they might be at risk of persecution. The Court said that on the evidence the relevant legal procedures in Greece were "to say the least shaky", but there was no evidence that there had been recent deportations or removals to Afghanistan, Iraq, Iran, Somalia or Sudan or of unlawful refoulement of any person to any destination. This was the basis on which the Court ruled that the inclusion of Greece on the list of safe countries in Part 2 of Schedule 3 of the 2004 Act was consistent with the United Kingdom's obligations under the ECHR. There was therefore no basis for saying that such inclusion was incompatible with those obligations. The Home Office appeal was allowed.

Baiai – House of Lords [2008] UKHL 53

Marriage of persons subject to immigration control – Immigration and Asylum Act 1999 – Asylum and Immigration (Treatment of claimants, etc.) Act 2004 – European Convention on Human Rights, Article 12

5 This was an appeal to the House of Lords concerning the right to marry, protected by Article 12 of the European Convention on Human Rights (ECHR) which provides that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

6 For some years now there has been a growing problem with what are referred to as "bogus" or "sham" marriages or "marriages of convenience" which may be defined as marriages concluded between persons in the United Kingdom who are subject to immigration control and other persons already present and settled in the United Kingdom for the purpose of securing an immigration advantage, i.e. the right to remain in the UK. A person subject to immigration control means anyone who is not a national of or person settled in the United Kingdom or any other state in the European Economic Area and needs leave to enter or remain in the UK. Many such marriages have been detected as shams by registrars officiating at them by such blatant signs as the fact that the two parties did not know each other, that they did not speak the same language or that they gave inconsistent particulars of each other's respective personal histories and circumstances. Section 24 of the Immigration and

Asylum Act 1999 sought to tackle this problem by imposing a duty on superintendent registrars and others to report to the Home Office any proposed marriage of which they had received notice which they had reasonable grounds to suspect as sham.

7 The oversight of marriages which involved persons subject to immigration control was taken a stage further by section 19 of the 2004 Act. This required the superintendent registrar to whom notice of such a marriage was given to satisfy himself:

- (i) that the person subject to immigration control had been given entry clearance specifically for the purpose of enabling him/her to marry in the UK; or
- (ii) that that person had the written permission of the Secretary of State to marry in the UK, or
- (iii) that that person fell within a class having such permission as a result of regulations made by the Secretary of State.

The defect subsequently established in this section was that it was mandatory in relation to marriages to be solemnised by a superintendent registrar but not in relations to marriages to be solemnised by a priest of the Church of England. On that ground the section was found to be discriminatory in a case earlier than the present case under consideration and hence to that extent incompatible with Article 12 of the ECHR. The Secretary of State has undertaken to rectify this defect in the Immigration and Citizenship Bill expected to be introduced into Parliament in the 2008-9 session.

8 The case which came before the House of Lords arose out of further requirements imposed by the Immigration and Nationality Directorate (now the UK Border Agency) without parliamentary approval. These were instructions to immigration officers to deny permission to marry to the following categories of applicants:

- (i) illegal immigrants
- (ii) people whose grant of leave to enter or remain in the UK at the time in question did not total more than 6 months and
- (iii) people who did not have at least 3 months' leave remaining at the time of making the application for permission.

The House of Lords ruled that these requirements, though relevant to immigration status, had no relevance to the assessment of the genuineness of a proposed marriage and could not therefore be taken into account when making a decision as to whether or not permission to marry should be granted under the provisions of the 2004 Act. They were therefore a disproportionate interference with the exercise of the right to marry and incompatible with Article 12.

9 However, the House of Lords made it clear that section 19 of the 2004 Act, summarised in paragraph 7 above was not open to objection on the ground of incompatibility with Article 12. In the words of Lord Bingham, "It is open to a member state [i.e. a signatory state of ECHR] consistently with Article 12, to seek to prevent marriages of convenience. This is a welcome endorsement of the substance of section 19.

NA v. The United Kingdom

European Court of Human Rights, Application no. 25904/07

Judgment on 17 July 2008

10 The applicant was a Tamil from Sri Lanka. He entered the UK clandestinely on 17 August 1999 and claimed asylum the following day. He claimed that if he were to be returned to Sri Lanka he feared ill treatment by the Sri Lankan army and/or the Tamil Tigers, who have been fighting a civil war against the government of Sri Lanka for many years. He said that he had been arrested and detained by the army on six occasions between 1990 and 1997 on suspicion of involvement with the Tamil Tigers and after the last such occasion went into hiding until his family managed to raise enough money to pay for his travel to the UK. His application for asylum was refused in 2002 and his appeal against refusal was dismissed in July 2003. The evidence on which he based his case was found to be credible but did not support a claim that he had cause to fear persecution for a Convention reason if returned to Sri Lanka. He had been detained by the Sri Lankan army on six occasions between 1990 and 1997 on suspicion of involvement with the Tamil Tigers. He was never detained for long and was released without charge every time. On one or possibly more than one occasion he was ill treated and his legs had scars from being beaten with batons. The adjudicator who heard his appeal found that his fear of ill treatment by the army on his return was unjustified. Since his departure from Sri Lanka there had been a ceasefire between the army and the Tamil Tigers. He had had no involvement with the Tamil Tigers. There was no reason why he should fear ill treatment by the Tamil Tigers and it was unlikely that they would track him down if he settled in Colombo.

11 Directions for the appellant's removal were issued in April 2006. His attempt to lodge a fresh asylum application was refused. The refusal letter noted that there was no evidence to support a claim that he would be ill treated on return. Furthermore, he had been away from Sri Lanka for 7½ year, which suggested that he was unlikely to be of any interest to the Sri Lankan authorities. Fresh removal directions were issued for January 2007. The appellant made further representations to the Secretary of State and two applications for leave to bring judicial review. These moves were unsuccessful. There was evidence of some deterioration in the general security situation in Sri Lanka, but only in the north and east of the country. Removal directions were again set, this time for 25 June 2007. However, the President of the European Court of Human Rights indicated to the government of the UK that the appellant should not be removed until further notice. This was done by the application of Rule 39 of the Court's rules. Rule 39 had already been applied in 22 other cases in which Tamils sought to prevent their removal from the UK and the court's judgement notes that after this case was started, Rule 39 was applied in respect of 342 Tamil applicants who claimed that their return to Sri Lanka from the UK would expose them to ill treatment in violation of Article 3 of the Convention.

12 The court referred to a case decided by the Asylum and Immigration Tribunal in 2007, assessing the risks of returning Sri Lankan asylum seekers to the country. This was a country guidance case which took oral and written evidence from various experts, including the British High Commission in Colombo. The Tribunal in its decision noted *inter alia* that if a person was actively wanted by the police or his name was on a wanted list at Colombo airport, he might be at risk of detention on arrival, but otherwise the majority of returning failed asylum seekers were processed

quickly and without any difficulty. A Tamil in Colombo might face a risk of harassment, but the Tribunal noted that Tamils made up 10% of the city's population and there was no evidence that they faced general hardship. The court quoted also a judicial review case reported at [2007] EWHC 3288 IN WHICH Mr Justice Collins reviewed applications from five Sri Lankan Tamils. The judge considered a range of factors which should be considered when assessing the safety of returning failed asylum seekers to Colombo. He considered that the following might create a risk to the returnee:

- (i) a previous record or suspicion of involvement with the Tamil Tigers;
- (ii) previous criminal record;
- (iii) outstanding arrest warrant.

The judge thought that other factors such as Tamil ethnicity or having made an asylum claim abroad were unlikely to put the individual at risk. The court then considered a vast amount of evidence from various sources as to the then current situation in Sri Lanka, but I will not attempt to summarise that evidence.

13 The court noted that it had been accepted by the parties to the case that there had been a deterioration in the security situation in Sri Lanka and that this continued to be the case following the formal end of the ceasefire in January 2008. It found also that there had at the same time been an increase in human rights violations, both by the Tamil tigers and by the authorities. However, it was also accepted by the parties and by the court that these facts did not create a general risk for all returning Tamils.

14 In paragraph 129 the court appears to accept that in general there is no risk to returning Tamils. However, in paragraph 131 it goes on to say that the evidence points to "the systematic torture and ill treatment by the Sri Lankan authorities of Tamils who will be of interest to them in their efforts to combat the [Tamil Tigers]". In paragraph 134 the court says:

"[T]he court's assessment of whether a returnee is at real risk of ill treatment may turn on whether that person would be likely to be detained and interrogated at Colombo airport as someone of interest to the authorities. While this assessment is an individual one, it too must be carried out with appropriate regard to all relevant factors taken cumulatively including any heightened security measures that may be in place as a result of an increase in the general situation of violence in Sri Lanka."

15 The facts of the appellant's case are fairly typical of many Tamil asylum cases over the past 20 years, the period during which there has been a state of civil war between the Tamil Tigers and the Sri Lankan government. He had been through the whole gamut of proceedings in the British courts in an attempt to claim asylum and to claim also that he was entitled to protection under Article 3 of the European Convention on Human Rights in that he had cause to fear torture or other ill treatment on return as a failed asylum seeker. He was unsuccessful with these claims before the Home Office and the Tribunal. It is a matter of serious concern that the European Court, having considered a vast amount of evidence about the general

situation in Sri Lanka and about the appellant in particular, should come to a different conclusion in relation to Article 3. The following are the main factors which led to the dismissal of the appellant's case in the UK:

- (i) He had not personally had any involvement with the Tamil Tigers.
- (ii) He was detained six times by the authorities between 1990 and 1997, but never for a long period. On each occasion he was released without charge. His last period of detention was more than 10 years before the European Court came to deal with his case.
- (iii) There was no general risk to returning Tamils from any questioning they might undergo at Colombo airport except in the three cases listed in paragraph 12 above, none of which applied to the appellant.
- (iv) The appellant had arrived in the UK in 1999, so by the time removal directions were made against him in 2006 he had been out of the country for 7 years, which would strongly suggest that he was unlikely to be of any interest to the authorities.
- (v) Tamils constitute 10% of the population of Colombo and generally live at peace with other communities.

16 The court had considered all the general factors and although it had accepted on the basis of the evidence that there was in general no serious risk to returnees, nevertheless it concluded that the cumulative effect of the various factors considered was to increase the risk to the appellant. The court considered that the record of detentions created a risk, even though the appellant had never been charged and the last period of detention had been in 1997. In paragraph 146 the court comes to conclusions as to the risks which the appellant might face on the basis of pure speculation, totally unsupported by any evidence, in areas in which all the available evidence is to the contrary:

“Finally, any return of the applicant to Sri Lanka would be from London or another United Kingdom airport and clearly he has made an asylum claim abroad, In respect of the latter risk factor the court accepts the Asylum and Immigration Tribunal’s finding ...that this would be a “contributing factor” which would need other, perhaps more compelling factors before a real risk could be established but it also notes with concern the Tribunal’s findings that lists of failed asylum seekers *could form part of search operations in Tamil areas of Colombo and that application forms for replacement passports and travel documents might alert the Sri Lanka High Commission in London and that information could be passed on.*” [Emphasis supplied to indicate the speculative nature of statements which form an important part of the court’s reasons for giving judgment in the appellant’s favour.]

It is astonishing that the court, after giving careful and detailed consideration to a huge volume of evidence at considerable length, should at the end give judgment in favour of the appellant on such speculative and fanciful grounds.

17 In concluding that returning the appellant to Sri Lanka would be a breach of the United Kingdom's obligations under Article 3, the court has in effect set aside the decisions of case workers and immigration judges on the basis of evidence typical of that which falls to be considered in many asylum and human rights cases from Sri Lanka, the overwhelming majority of which cases fail. The UK government has accepted that in view of the court's decision the appellant cannot now be returned to Sri Lanka. Section 2 of the Human Rights Act 1998, the Act which brought the Convention into UK domestic law, provides that a court or tribunal (which would include the High Court and the Asylum and Immigration Tribunal) in determining a question which has arisen in connection with a right under the Convention must take into account *inter alia* any judgment of the European Court of Human Rights. The expression "take into account" was obviously carefully chosen by the draftsman. A judgment of the European Court is not a binding precedent which has to be followed by domestic courts, but in practice it will be very difficult for any Tribunal or other decision taker to disregard such a judgment. As noted in paragraph 11 above, some hundreds of other Sri Lankan Tamil cases were also stayed following the intervention of the European Court in this case. It is highly unlikely that directions for removal will be given in any of those cases or in any others which may fall to be considered.

Harry Mitchell QC
20 August 2008