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Immigration Newsletter. Special Bulletin

NA v UK ECtHR

application no. 25904/07 judgment 17th July 2008

Introduction

A special bulletin concerning the case of NA in the European Court of Human Rights. The full text of the report can be found on the ECtHR website.

The European Court of Human Rights has considered the case of a Sri Lankan asylum seeker faced with expulsion from the United Kingdom. Due to the number of applications made to the ECtHR for interim measures the ECtHR treated this case as a test case. It was reported that there 342 cases where interim measures were granted by the ECtHR. (See paragraph 42 of the judgment)

The Court's assessment begins at paragraph 106 after setting out the background to the application, various objective reports and the arguments of the parties.

In paragraphs 118-122 the Court makes observations about the assessment of objective information and the proper approach.

From paragraph 123 the Court considers the risks to Tamils returning to Sri Lanka. The Court did not consider that Tamils were at risk per se and it was not argued before the Court that they were. In the circumstances at paragraph 128 the Court concludes that the breach can only be assessed on an individual basis.

In paragraph 130 the Court emphasizes that the assessment of whether there is a real risk must be made on the basis of all the relevant factors which may increase the risk of ill treatment. The Court adopted the approach of the AIT in the LP case.

In paragraph 131 the Court considered that on the information before it, it pointed to the systematic torture and ill treatment of Tamils, who will be of interest to the authorities in their efforts to combat the LTTE.



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In paragraph 134 the Court considered that there was a greater risk of being stopped at the airport than in Colombo itself and hence considered the risk at the airport. At paragraph 135 the Court noted that there were different accounts of the procedure at the airport. The Court considered that it would not come to a different conclusion from that reached by the IAT in LP following a letter from the British High Commission (dated 25th January 2008) about the use of computers by the CID at the airport. It further noted that the security checks and the rigour of those procedures would vary from time to time.

In paragraph 137 the Court accepted and agreed with the AIT's assessment that there is not a generalised risk from the LTTE in Colombo.

In paragraph 138 onwards the Court assessed the individuals case. In paragraph 142 the Court assessed the risk by reference to the non-exhaustive risk factors set out in the LP case. The Court stated that there was a need to have due regard for the deteriorating situation in Sri Lanka and the need to take a cumulative approach to all possible risk factors identified by the applicant as applicable to his case.

The Court was of the view that the applicant could rely upon the fact that he had been arrested and detained 6 times during 1990-7 as a risk factor. The applicant in the case was not a bail jumper or escapee. However a document was signed to affect his release. Its precise nature was not known but the Court was of the view that it would be retained by the authorities. The Court stated that it was of the view that it did not matter that the document did not amount to a confession or statement (and that particular risk factor) because at the very least it amounted to a record of the appellant's detention. (See paragraph 143)

The Court accepted that scarring would have significance only where there are other factors. However where there is sufficient evidence that there is as sufficient risk that an applicant would be detained interrogated and searched, then the presence of scarring must be taken as increasing the risk. (See paragraph 144)

Despite the length of time since the last arrest (in this case 10 years) the Court stated that caution must be exercised especially when a returnee has been detained and there is a record made of that detention. (see paragraph 145). Such a record may be readily available at the airport meaning the person in question may become of interest to the authorities. The Court stated that particular interest in particular categories of returnees is likely to change over time and may increase as well as decrease.



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In paragraph 146 the Court considered the other risk factors, age, gender, origin, return from London, claiming asylum (note paragraph 146), etc In assessing all the factors the Court concluded that the applicant would be at risk.

Comment

It should be noted in this case that there was no argument that all Tamils were at risk or even that Tamils from the north and east in Colombo would be at risk. The ECtHR endorsed to some extent the approach of the AIT in the country guidance case of LP and assessing the factors pleaded by the applicant cumulatively, and bearing in mind the current security situation and deterioration and the latest country objective information.

In essence each case will turn upon its own facts to assess whether there is a risk.

RECORDS

Looking at certain risk factors though, it is my view that the ECtHR differed in its view about the records that would be available at the airport and hence the question of whether the individual would be subjected to interrogation and detention (see paragraph 135). In future it is likely that, like in Turkish cases, there will be further evidence about the procedures at the airport and the questions of what documents are accessible at the airport and around Colombo. It is likely that argument will concentrate upon these issues in future cases and the categories of those individuals that will be detained and interrogated.

The applicant in the case of **NA** was released without charge and the circumstances of the release are not further considered by the Court in assessing risk. (see paragraph 8,143,145,146 of **NA**) It will be interesting to see whether a distinction will be drawn in other cases on the basis that the appellant **NA** signed a document and he was photographed and fingerprinted. However what is important is that there was a record of the applicant's previous arrest whether or not he is an escapee, bail jumper or otherwise. This record the ECtHR found would be accessible at the airport and would potentially cause the detention and interrogation of the applicant. The ECtHR did not really further discuss the case of **PT (risk-bribery-release)** other than comment in paragraph 46. It is likely that the SSHD will attempt to resurrect arguments about what records will contain from this case, which was endorsed in **LP**. **PT** discusses that the record is likely to contain information as to "interest" and whether that has been concluded. It is my view that given the AIT in **PT** did not consider an actual "record" and in placing reliance upon comments by the authorities in Sri Lanka, this does not really follow the observations of the ECtHR about assessing the sources of the information (see from paragraph 118 in **NA**).



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Whether interest has been concluded at that particular time, does not mean that an individual will not be arrested again in the future. It also does not mean that there is no record but more likely that there will be a record. If the record states eg "arrested as suspected of involvement with LTTE. Released not sufficient evidence" This does not mean that they think the individual has no connection with the LTTE. It is possible in a heightened security situation that such people will be suspected of continued involvement. (see ECtHR comments about the applicant's record at paragraph 146 of NA)

Scarring

This issue follows the comments of the AIT in LP. However, it becomes a factor when the scars are discovered by the authorities. IE It does not become a factor unless stripped searched? What of obvious scars on the face, hands and legs? For some of these there is no need to strip search the individual to see them. Could they then be a factor on their own? Will we see a return to the days of assessments of scars in open court? It is my view that this is an issue that should be covered carefully and supported by photographs and medical evidence. The significance of the scars is not necessarily how they were genuinely caused. If they could be interpreted by an officer as to training, combat scars etc then their actual cause will not necessarily matter.

General summary

It will be very important in future cases that all the relevant facts are established properly and weighed accordingly. Also current objective evidence as to the security situation, the categories of those stopped and suspected will be clearly important.

This Immigration newsletter is produced by Iain Burnett a member of 4 King's Bench Walk (4KBW). The summaries and opinions reflect the author's views and not the opinions or views of any other member of 4 KBW. (Unless otherwise stated)

Note- the above provides only a summary of the case and comments upon it. It is important that reliance is not placed upon it as setting out the law. Individuals are advised to consult the report for themselves to determine its scope and application.