COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF NA. v. THE UNITED KINGDOM

(Application no. 25904/07)

JUDGMENT

STRASBOURG

17 July 2008

FINAL

06/08/2008

This judgment may be subject to editorial revision.

In the case of NA. v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Päivi Hirvelä,
Ledi Bianku, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 24 June 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 25904/07) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Sri-Lankan national, Mr NA. ("the applicant").

2. The applicant was represented by Ms N. Mole, a lawyer practising in London with the AIRE Centre. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office.

3. The applicant alleged that if returned to Sri Lanka, he was at real risk of ill-treatment contrary to Article 3 and/or a violation of Article 2 of the Convention.

4. On 21 June 2007, the President of the Chamber to which the case was allocated acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

5. On 25 June 2007, the President of the Chamber decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings that the applicant should not be expelled to Sri Lanka pending the Court's decision. On the same day, the President decided to give notice of the application to the Government and granted it priority under Rule 41 of the Rules of Court. Under the provisions of Article 29 § 3 of the Convention, the President further decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant's domestic proceedings

6. The applicant was born in 1975 in Sri Lanka. He currently lives in London. He is of Tamil ethnicity.

7. The applicant entered the United Kingdom clandestinely on 17 August 1999 and claimed asylum the next day. He stated that he feared ill-treatment in Sri Lanka by the Sri Lankan army and the Liberation Tigers of Tamil Eelam ("the LTTE"). He explained that he had been arrested and detained by the army on six occasions between 1990 and 1997 on suspicion of involvement with the LTTE. Following his last detention he went into hiding until his family managed to fund his journey to the United Kingdom. He feared the LTTE on account of their adverse interest in his father who had done some work for the army. They had also tried to recruit the applicant on two occasions in 1997 and 1998.

8. His claim was refused by the Secretary of State on 30 October 2002. His appeal against that decision was heard and dismissed by an Adjudicator on 27 July 2003. It was found that the applicant's account was credible: namely, he had been arrested by the army on some six occasions between 1990 and 1997 on suspicion of his involvement with the LTTE. He was detained for less than twenty-four hours on the first occasion and for two days on the last. There was no evidence as to how long the other periods of detention had lasted. On each occasion he was released without charge. During one or possibly more of these periods of detention he was ill-treated and his legs had scars from being beaten with batons. According to the Adjudicator, it may have been that the arrests took place in the course of round-ups. During the 1997 detention the applicant was photographed and his fingerprints were taken and his father signed certain papers in order to secure his release. He went into hiding in a temple and wanted to leave Sri Lanka at that stage but it took time for his mother to obtain money from his brother to pay the agent for his departure.

9. However, the Adjudicator found that the applicant's fear of ill-treatment by the army upon his return was unjustified. It was noted that, since his departure from Sri Lanka, there had been a ceasefire between the army and the LTTE for a considerable time, checkpoints had been dismantled, and the LTTE had been able to open political offices and roads in the north. It was unlikely that he would attract any interest on the part of the authorities upon his return. Even if the record of his arrests was found it would be seen that he had been held for short periods and released without charge on each occasion. There was no record that he had ever been

involved with the LTTE or that he had ever been wanted by the authorities. There was no reason why he should be strip-searched on return and, even if his scars were found, they would not cause the authorities to take an interest in him, certainly not to the extent of detaining and ill-treating him.

10. As to his fear of the LTTE, the Adjudicator appeared to accept that the applicant's brother had done non-combative work for the LTTE, though he was never a member. He, the brother, had been arrested by the army but never charged and had left Sri Lanka for Saudi Arabia in 1997. It was found unlikely that the LTTE would still have any interest in the applicant and if he was settled in Colombo it would be unlikely that they could track him down. In any event, he could apply to the authorities for protection. As to his argument that he was in need of psychiatric treatment as a result of post-traumatic stress disorder, it was found that adequate treatment would be available in Sri Lanka.

11. He was issued with removal directions for 1 April 2006 and made further representations attempting to lodge a fresh asylum application on 29 March 2006. On 3 April 2006 the Secretary of State refused to consider his further representations as amounting to a new asylum application. The general situation in Sri Lanka did not indicate any personal risk of ill-treatment and there was no evidence that he would be personally affected upon return. The fact that he had been away from Sri Lanka for the past seven and a half years suggested that he would hardly be of any interest to the Sri Lankan authorities.

12. His application for permission to apply for judicial review was refused on 23 May 2006 on the papers by Mr Justice Collins who stated:

> "There is no question but that the situation in Sri Lanka has deteriorated over the past few months and to such an extent that there is a real prospect [that the full scale war between the LTTE and the authorities will recommence. However, that does not of itself mean that no-one can be returned. The adjudicator accepted the claimant's account but noted that he had only been detained for short periods, possibly in general round ups, and had not assisted the LTTE. All this was over 7 years ago.
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> In the circumstances, it is not possible to say what has been happening creates a real risk of relevant ill-treatment for this claimant. Thus I do not think there is any arguable error of law in the defendant's decision."

13. The applicant's renewed application was refused by Mr Justice Burnton at an oral hearing on 18 August 2006.

14. The applicant was then issued with removal directions for 10 January 2007. On 9 January 2007, he made further representations to the Secretary of State arguing, *inter alia*, that removal would be incompatible with his rights guaranteed by the Convention. When the Secretary of State did not respond, on 10 January 2007 the applicant sought to challenge this failure by judicial review.

15. It appears that the same day, the Secretary of State did in fact reject these representations as not amounting to a fresh claim. The Secretary of

State relied on the findings of the Adjudicator and the observations of Mr Justice Collins of 23 May 2006. The Secretary of State also considered a paper submitted by the applicant which had been issued by the United Nations High Commissioner for Refugees (UNHCR) on 22 December 2006, entitled "the UNHCR Position on the International Protection Needs of Asylum Seekers from Sri Lanka" ("the UNHCR Position Paper" see paragraphs 65–68 below). He found, however, that the paper was general in nature and therefore little weight could be attached to it. Consideration was given to the applicant's claim that the political and security situation in Sri Lanka had worsened and whilst it was acknowledged that there had been some problems with the peace process, the LTTE and the Sri Lankan authorities were committed to peace and working towards an agreement. Notwithstanding two bomb attacks in Colombo, there was a "distinct geographical limitation" to recent incidents and it was open to the applicant to avoid the northern and eastern areas affected by the continuing operations of the Sri Lankan armed forces and the LTTE. The majority of Tamils could live in Colombo and the south without harassment. Recent security operations in Colombo were also noted but it was not considered that Tamils in Colombo were at risk of persecution due to their ethnicity or political opinions. The majority of people detained had been quickly released following identity checks. In terms of internal relocation, it was not unduly harsh to return failed asylum-seekers there. While there had been increasing levels of disappearances in Sri Lanka, progress had been made by the creation of an independent body to observe government investigations. The Secretary of State concluded that the points made in the applicant's submissions had not been previously considered, but taken with the materials considered in the original refusal of the applicant's asylum claim and the determination of his appeal by the Adjudicator, the new materials would not have created a realistic prospect of success and the submissions did not therefore amount to a fresh asylum claim.

16. The applicant then made an out of hours application for an injunction to the High Court. This was granted by Mr Justice Underhill and the removal directions in place for the same evening were cancelled. In his subsequent order of 15 January 2007, Mr Justice Underhill stated:

> "I considered the Secretary of State's careful letter [of 10 January 2007] and am mindful of the fact that [the applicant] has had a previous application for judicial review dismissed. But in my view it is sufficiently arguable that the recent further deterioration in the situation in Sri Lanka may justify a fresh claim to make it just for removal to be deferred until this issue can be properly considered. I note in particular para. 34 (a) of the recent UNHCR report [which contained the UNHCR's recommendations in respect of Tamils from the north or east – see paragraphs 65 – 68 below]. I am aware that there are other pending applications for permission to apply for judicial review raising the same issue."

17. On 14 February 2007 Mrs Justice Black refused the applicant's application for permission to seek judicial review of the Secretary of State's

alleged failure to consider and determine the new representations made on 9 January 2007. She stated:

> "In fact [the Secretary of State] did consider the further representations and, in a letter of 10 January 2007, refused to treat them as a fresh claim. Strictly speaking that disposes of the proposed [judicial review] application.
>
> However, it is clear that the claimant seeks in fact to advance a more fundamental challenge to the removal directions on the basis that the situation in Sri Lanka has deteriorated since the matter was last considered and has reached a point where the claimant would be at risk on return. Reliance is placed on a UNHCR document dated 22 December 2006 setting out the dangerous situation in Sri Lanka...Underhill J granted an injunction prohibiting removal on 15 January 2007, apparently referring to the deterioration in the situation in Sri Lanka and particularly para 34(a) of the UNHCR report. It is understandable why he took this view.
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> However, now that some detail of the claimant's immigration history is available, it does not appear that he had advanced anything significantly different in the letter of 9 January 2007 from that which was considered when representations were made on his behalf in March 2006 and in particular during the JR proceedings that concluded with an oral permission hearing on 18 August 2006. There is material in the January 2007 letter in addition to the UNHCR report which is later but there is also material that in fact relates to the first half of 2006...Whilst I note with anxiety para 34(a) of the UNHCR report as Mr Justice Underhill did (and the contents of that report generally), in the light of the reasoning concerning this particular claimant who has been assessed by the adjudicator as not of interest to the authorities, the material does not amount to sufficient in my view to justify granted permission to commence a judicial review of the decision of 10 January 2007.
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> The injunction granted by Underhill J will, however, be continued until either the time for renewal orally has expired without such an application being made or determination of the oral permission hearing if there is one."

18. The applicant then sought to renew his application for permission to apply for judicial review, submitting detailed amended grounds for his application on 21 February 2007. The oral hearing of the renewed application was listed for 17 May 2007 but the applicant, appearing in person at the hearing, withdrew his application.

19. In a subsequent letter of 5 November 2007 from the applicant's solicitors at the time of the judicial review proceedings to his current representatives before this Court, the former stated that the reason the judicial review application was withdrawn was that they, the solicitors, were without instructions from the applicant. They were informed by counsel that this was a "pre-*LP*" case (see paragraphs 30–46 below) and counsel felt that there were insufficient merits in the case to proceed to the oral hearing.

20. The Secretary of State issued the applicant with removal directions to Sri Lanka for 25 June 2007. On that date the President of the Chamber decided to apply Rule 39 of the Rules of Court and indicated to the Government of the United Kingdom that the applicant should not be expelled until further notice (see paragraph 5 above).

B. Subsequent cases brought by Tamils being returned to Sri Lanka

21. In 2007, the Court received an increasing number of requests for interim measures from Tamils who were being returned to Sri Lanka from the United Kingdom and other Contracting States. By October 2007, the President of the Chamber had applied Rule 39 in twenty-two cases where Tamils sought to prevent their removal to Sri Lanka from the United Kingdom. On 23 October 2007, the Section Registrar wrote to the Government Agent, noting the increasing number of such Rule 39 applications. Having regard to the security situation in Sri Lanka, he further noted that Rule 39 had been applied on each occasion an interim measure had been requested by an ethnic Tamil. The letter continued:

> "The Acting President has consulted the Judges of the Section about his concerns including as regards the strain which the processing of numerous Rule 39 applications places on judicial time and resources. The Court has concluded that, pending the adoption of a lead judgment in one or more of the applications already communicated, Rule 39 should continue to be applied in any case brought by a Tamil seeking to prevent his removal.
>
> The Section has also expressed the hope that, rather than the Acting President being required to apply Rule 39 in each individual case, your Government will assist the Court by refraining for the time being from issuing removal directions in respect of Tamils who claim that their return to Sri Lanka might expose them to the risk of treatment in violation of the Convention."

In his reply of 31 October 2007, the Agent set out the conclusions of the Home Office's Operational Guidance Note of 9 March 2007 on Sri Lanka and the findings of the Asylum and Immigration Tribunal in *LP*. He concluded that in light of this information, the Government did not consider that the current situation in Sri Lanka warranted the suspension of removals of all Tamils who claimed that their return would expose them to a risk of ill-treatment. Each case had to be assessed on its merits against the available evidence. The Government was accordingly not in a position to assist the Court by refraining from issuing removal directions in all such cases on a voluntary basis. Finally, he stated that the Government would continue to make every effort to comply with any Rule 39 indications made by the Court in accordance with their obligations under the Convention and their long-standing practice. However, in the circumstances, the Government suggested that the difficulties posed by the increasing numbers of Rule 39 requests by Tamils could best be addressed through the adoption of a lead judgment by the Court. The Government stood ready to co-operate with the Court to bring such a case to an early conclusion.

22. The Court has since applied Rule 39 in respect of three hundred and forty-two Tamil applicants who claim that their return to Sri Lanka from the United Kingdom would expose them to ill-treatment in violation of Article 3 of the Convention.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Immigration and asylum: primary and secondary legislation

23. Sections 1(4) and 3(2) of the Immigration Act 1971 provide for the making of Immigration Rules by the Secretary of State. Paragraph 353 of the Immigration Rules (HC 395, as amended by HC 1112) states that:

> "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
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> (i) had not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

24. At the material time, the Nationality, Immigration and Asylum Act 2002 (Commencement No. 4) (Amendment) (No. 2) Order 2003, when taken with section 101 of the Nationality, Immigration and Asylum Act 2002 and Part IV Immigration and Asylum Act 1999, provided for a right of appeal from an Adjudicator's determination to the Immigration Appeal Tribunal. An appeal had to be on a point of law and the permission of the Immigration Appeal Tribunal was required.

25. At present, by section 94(2) of the Nationality, Immigration and Asylum Act 2002, when a person has made either an asylum claim or a human rights claim, or both, an appeal may not be brought while the person is in the United Kingdom if the Secretary of State certifies that the claim or claims are clearly unfounded. Under section 94(3), if the Secretary of State is satisfied that a claimant is entitled to reside in any of the States listed in the section 94(4), he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded. Section 94(4) provides such a list of States and subsection (5) gives the Secretary of State the power to add a State, or part of a State, to the list in subsection (4) if satisfied that: there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part; and removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Convention. Subsection (6) gives him the power to remove States from the list.

26. Sri Lanka was added to the list by the Asylum (Designated States) (No. 2) Order 2003 (Statutory Instrument 2003/1919) which entered into force on 22 July 2003. It was removed from the list by the Asylum (Designated States) (Amendment) (No. 2) Order 2006 which entered into force on 13 December 2006. Paragraph 7.4 of the Explanatory Memorandum to the order cites the latest available information about the

situation in Sri Lanka and in particular the deterioration in conditions as one of the factors for the Secretary of State's decision to remove it from the list.

B. The Human Rights Act 1998

27. Section 2 of the Human Rights Act 1998 provides that, in determining any question that arises in connection with a Convention right, courts and tribunals must take into account any case-law from this Court so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

C. Judicial review

28. Judicial review in England and Wales is regulated by Part 54 of the Civil Procedure Rules. Rule 54.1(2) defines a claim for judicial review as a claim to review the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function. An application for judicial review has two stages. The first is an application for permission to apply for judicial review; the second, if permission is granted, is a substantive application for judicial review. Where permission is refused without a hearing, under Rule 54.12(3) and (4) the claimant may not appeal but may within seven days request the decision to be reconsidered at a hearing. Rule 52.15 provides that where permission to apply for judicial review has been refused at a hearing in the High Court, the person seeking that permission may within seven days apply to the Court of Appeal for permission to appeal.

D. Country guidance determinations of the Asylum and Immigration Tribunal and former Immigration Appeal Tribunal

29. Appeals from decisions of the Secretary of State in asylum, immigration and nationality matters are now heard by the Asylum and Immigration Tribunal ("the AIT"), which replaces the former system of Adjudicators and the Immigration Appeal Tribunal. Paragraph 18 of the Practice Directions governing the operation of the AIT defines country guidance determinations of the AIT as follows:

> "18.2 A reported determination of the [AIT] or of the IAT [the former Immigration Appeal Tribunal] bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the [AIT] or the IAT that determined the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination,

or is inconsistent with other authority that is binding on the [AIT], such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:

(a) relates to the country guidance issue in question; and

(b) depends upon the same or similar evidence.

...

18.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for review or appeal on a point of law."

1. LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG *[2007] UKAIT 00076*

30. In the above country guidance determination promulgated on 6 August 2007, the AIT considered the case of a Tamil, LP, from Jaffna in the north of Sri Lanka. He had experienced problems with the LTTE and the Sri Lankan authorities and fled Sri Lanka on 29 December 1999 but had been refused asylum in the United Kingdom by the Secretary of State. Since the case had been identified as a country guidance determination, the AIT heard evidence from a number of experts on the situation in Sri Lanka and the treatment of Tamils there. It also considered the UNCHR Position Paper (see paragraphs 65–68 below) and considered evidence on the Sri Lankan authorities' treatment of returned failed asylum seekers at Colombo airport, including a series of letters from the British High Commission in Colombo and a report of the Canadian Immigration and Refugee Board (see paragraphs 60–63 and 74 below). In dismissing LP's appeal on asylum grounds but allowing it on the basis of Article 3 of the Convention, the AIT gave the following guidance in the headnote to its determination:

"(1) Tamils are not per se at risk of serious harm from the Sri Lankan authorities in Colombo. A number of factors may increase the risk, including but not limited to: a previous record as a suspected or actual LTTE member; a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the security forces to become an informer; the presence of scarring; return from London or other centre of LTTE fundraising; illegal departure from Sri Lanka; lack of an ID card or other documentation; having made an asylum claim abroad; having relatives in the LTTE. In every case, those factors and the weight to be ascribed to them, individually and cumulatively, must be considered in the light of the facts of each case but they are not intended to be a check list.

(2) If a person is actively wanted by the police and/or named on a Watched or Wanted list held at Colombo airport, they may be at risk of detention at the airport.

(3) Otherwise, the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment.

(4) Tamils in Colombo are at increased risk of being stopped at checkpoints, in a cordon and search operation, or of being the subject of a raid on a Lodge where they are staying. In general, the risk again is no more than harassment and should not cause

any lasting difficulty, but Tamils who have recently returned to Sri Lanka and have not yet renewed their Sri Lankan identity documents will be subject to more investigation and the factors listed above may then come into play.

(5) Returning Tamils should be able to establish the fact of their recent return during the short period necessary for new identity documents to be procured.

(6) A person who cannot establish that he is at real risk of persecution in his home area is not a refugee; but his appeal may succeed under article 3 of the ECHR, or he may be entitled to humanitarian protection if he can establish he would be at risk in the part of the country to which he will be returned.

(7) The weight to be given to expert evidence (individual or country) and country background evidence is dependent upon the quality of the raw data from which it is drawn and the quality of the filtering process to which that data has been subjected. Sources should be given whenever possible.

(8) The determinations about Sri Lanka listed in para 229 [of the determination – see below] are replaced as country guidance by this determination. They continue to be reported cases."

31. In its consideration of the expert evidence before it, the AIT heard argument on the correct approach to the UNHCR Position Paper (see paragraphs 65 – 68 below). It stated that:

"203. The UNHCR report was very topical and up to date. We agree with the general submission made by [counsel for the Secretary of State] that the protection agenda of the UNHCR is a wider one than the mere assessment of refugee or subsidiary protection status. However, these reports are prepared by persons with direct experience of the core issues involved and thus we accord them substantive weight in this case."

32. The AIT then considered each of the twelve risk factors that had been identified by the appellant, LP, and which it had summarised in its headnote. In respect of Tamil ethnicity, the AIT recalled that Tamils comprised more than 10 percent of the population of Colombo, which called for caution when assessing risk in Sri Lanka, especially Colombo. There was a need for knowledge of where applicants came from in Sri Lanka and their involvement or lack of it with Tamil organisations, whether voluntary, involuntary or otherwise. It found that there were different risk profiles for sub-groups of those with Tamil ethnicity (Sri Lankan Tamils coming from the north or east compared with "Indian", "Plantation" or "Hill" Tamils). Age and gender had to be taken into account and young male Tamils in Sri Lanka, particularly in Colombo, were at a relatively higher level of risk. There was a higher propensity on the part of the Sri Lanka authorities to target young men and women from the north and the east in a period of virtual civil war.

33. In respect of a previous record as a suspected or actual LTTE member or supporter, it was of vital importance to establish an applicant's profile and the credibility of his background in some depth. If he or she was not credible as to his claim to come from the north or east, which left a

situation where he could be a Tamil from Colombo with little or no involvement with the LTTE, there could be little risk.

34. A previous criminal record and/or arrest warrant was, in the AIT's view, a significant factor that needed to be taken into account in the assessment of the totality of the risk but did not mean, of itself, that the applicant had a well-founded fear of persecution or other significant harm on return to Sri Lanka for that reason alone. The issue was to establish the credibility of the criminal record, or an arrest warrant, and decide whether it was reasonably likely to exist in respect of the applicant.

35. Those who had jumped bail or absconded from police custody, the AIT noted:

> "We agree with the logic that those who have been released after going to court and released from custody on formal bail are reasonably likely, on the evidence, to be not only recorded on the police records as bail jumpers but obviously on the court records as well. Thus we would identify those in the situation such as this appellant who have been found to have been to court in Colombo, and subsequently released on formal bail, as having a profile that could place them at a higher level of risk of being identified from police computers at the airport. Their treatment thereafter will of course depend upon the basis that they were detained in the first place. It is important to note that we did not have before us any information as to the treatment of bail jumpers from the ordinary criminal justice system, and there may be many of them, when they again come to the attention of the authorities, be they Tamil or Singhalese. We had no evidence that Tamil bail jumpers are treated differently from Singhalese ones. Clearly punishment for jumping bail will not make someone a refugee. As we have said, the risk of detention and maltreatment will depend on the profile of the individual applicant."

For those who had not been brought to court and had possibly been released from detention after payment of a bribe, much would depend on the evidence relating to the formality of the detention. If the detention was informal and there were no records of a bribe, the risk level would be likely to be below that of a real risk. On this risk factor, the AIT concluded:

> "While we would agree that there may well be situations where Tamils, with little or no profile related to the LTTE, or other 'terrorist' groups, could be briefly detained and harassed, as no doubt happens in round ups in Colombo and elsewhere, we consider it illogical to assume that an escapee, from Sri Lankan government detention, or a bail jumper from the Sri Lankan court system, would be merely 'harassed' given the climate of torture with impunity that is repeatedly confirmed as existent in the background material from all sources. We consider, (as we think it does in the appellant's particular case), that the totality of the evidence may point to a real risk, in some cases, of persecution or really serious harm when a recorded escapee or bail jumper is discovered, on return to Sri Lanka."

36. When an applicant had signed a confession, this could be a significant risk factor and the AIT noted expert evidence to the effect that many Tamils were released after signing statements made in Sinhala that they often did not understand. The factor had to be considered in the totality of the risk. Equally, when an applicant had refused requests by the security

services to become an informer against the LTTE, there was a higher risk that they would be assumed to be a collaborator of the LTTE but such evidence had to be taken into account with the totality of the evidence and merely establishing that an applicant had refused to become an informer would not be in every case the basis for a valid asylum claim on its own.

37. On the risk arising from the presence of scarring on an applicant, the AIT stated:

> "217. The background evidence on the issue of scarring has fluctuated. Up until the time of the ceasefire it was generally accepted as something which the Sri Lankan authorities noted and took into account both at the airport and on detention and in strip searches of suspected Tamil LTTE supporters. Their perception that it may indicate training by the LTTE, or participation in active warfare, was self-evident, and simply was 'good' policing, as appeared to be suggested by the Inspector General of Police in his discussions with Dr Smith [one of the experts on Sri Lanka from whom the AIT heard evidence]. On the same logic it was also valid to conclude that the impact of scarring was of far less interest during the period 2002 – late 2005 while the ceasefire agreement was having some effective impact. The evidence that was provided in this case, including that from Dr Smith following his discussions with the Inspector General of Police (paragraph 80 of his report), the BHC [British High Commission] letter of 24 August 2006, and the COIR [United Kingdom Border and Immigration Agency Country of Origin Information Report on Sri Lanka] all indicate that scarring may again be relevant. We agree with the comments in Dr Smith's report, that the issue of scarring was considered by the police to be a very serious indicator of whether a Tamil might have been involved in the LTTE. However, on the evidence now before us we consider that the scarring issue should be one that only has significance when there are other factors that would bring an applicant to the attention of the authorities, either at the airport or subsequently in Colombo, such as being wanted on an outstanding arrest warrant or a lack of identity. We therefore agree with the COIR remarks that it may be a relevant, but not an overriding, factor. Thus, whilst the presence of scarring may promote interest in a young Tamil under investigation by the Sri Lankan authorities, we do not consider that, merely because a young Tamil has scars, he will automatically be ill-treated in detention."

38. In respect of the risk arising from return from London or another centre of LTTE activity or fund-raising, the AIT heard evidence from the Metropolitan Police on LTTE activities and fund-raising in London. It concluded that this factor was highly case-specific and any applicant would need to show the extent to which the Sri Lankan High Commission in the United Kingdom was aware of his activities and was thus likely to have passed the information on to Colombo when the applicant was being deported or removed.

39. Illegal departure from Sri Lanka did not of necessity establish a well founded fear of persecution or serious harm, although in the "heightened level of insecurity" in Sri Lanka it would add to the risk profile. Similarly, given the number of "cordon and search" operations by the Sri Lankan Government, the lack of a valid identity card could contribute towards an increased level of risk. In the AIT's view, it had to be coupled with other risk factors for those of Tamil ethnicity but it was a contributing factor. An

applicant would need to show why he would be at continuing risk and that he could not reasonably be expected to obtain a new identity card.

40. In respect of the risk factor of having made an asylum claim abroad, the AIT relied, *inter alia*, on a letter dated 24 August 2006 from the British High Commission in Colombo (see also paragraphs 60–63 below) which had stated that lists of failed asylum seekers could form part of search operations in Colombo (at paragraphs 65 and 221 of the determination). The AIT found that it was a reasonable inference that application forms for replacement passports and travel documents might alert the Sri Lankan High Commission in London and that information could be passed on. However, the AIT did not consider having made a failed asylum claim abroad to be an issue that alone would place a returnee at real risk on return. It would be a contributing factor that would need other, perhaps more compelling factors before a real risk could be established.

41. The AIT considered that the fact of having relatives in the LTTE was a logical factor but needed to be taking into account with the totality of other evidence and the profile of other family members. On its own, without established and credible evidence of the details of the other family members and their known role or involvement with the LTTE, it would be of limited weight. When assessing those who have relatives who were members of the LTTE, it was not only important to consider the relationship, and the involvement of the relative but whether, and to what extent, knowledge of the relative's activities were likely to have been known to the security forces in Sri Lanka. This would vary depending on the relative's profile and whether or not he or she had been previously detained. The question of how the authorities would know that an individual was so related might also be of concern.

42. In its conclusion on the risk profile for Tamils, the AIT stated:

> "227. Our assessment of the various risk factors above has highlighted that each case must be determined on its own facts. It may be that in some credible cases one of these individual risk factors on its own will establish a real risk of persecution or serious harm on return by the Sri Lankan authorities for Sri Lankan Tamils who are failed asylum seekers from the United Kingdom. For those with a lower profile, assessed on one or a combination of the risk factors we have noted however, such as this appellant, their specific profiles must be assessed in each situation and set against the above non-exhaustive and non-conclusive, set of risk factors and the volatile country situation. As can be noted, several factors, such as being subject to an outstanding arrest warrant, or a proven bail jumper from a formal bail hearing may establish a much higher level of propensity to risk than various other factors. In this situation therefore, the assessment exercise is a much larger and more detailed one than may have been the situation up to 2002 and certainly during the period of the cease fire agreement ('CFA'). The current worsening situation in Sri Lanka requires serious consideration of all of the above factors, a review of up to date country of origin information set against the very carefully assessed profile of the appellant."

43. In addressing the general situation in Sri Lanka at the time and the possible of relocation of Tamils from the north or east to Colombo, the AIT stated:

> "232. It has been accepted during the course of this determination that the general security situation in Sri Lanka has deteriorated following the effective breakdown of the ceasefire and the increase in terrorist activity by the LTTE. That has resulted in increased vigilance on the part of the Sri Lankan authorities and with it a greater scope for human rights abuses and persecution.
>
> 233. When assessing the risk to an individual it should be borne in mind that much of the background material about Sri Lanka, and the increase in violent activity, relates to the north and east. There are particular problems in the east because of the defection of the Karuna faction from LTTE ranks. This determination does not suggest that it would in every case be unsafe to expect a returning Tamil to return to his or her home area in the north or the east. Rather it looks at the position in Colombo whether that be for a Tamil who was from Colombo in the first place, or a person who could relocate there.
>
> 234. Tamils make up over 10% of the population of Colombo. Despite evidence of some forms of discrimination, the evidence does not show they face serious hardships merely because they are Tamils. As a result, other considerations apart and subject to individual assessment of each applicant's specific case, it cannot be argued that, even if he faces serious harm in his home area, as a general presumption it is unduly harsh to expect a Tamil to relocate to Colombo, or that it would be a breach of Article 3 to expect him or her to do so, or that doing so would put him or her at real risk of serious harm entitling them to humanitarian protection."

44. Having reiterated that the list of factors was "not a checklist nor is it intended to be exhaustive" and that the factors should be considered individually and cumulatively (at paragraph 238 of the determination), the Tribunal again summarised the factors it had considered. It had heard evidence on procedures at Colombo airport, including the series of letters from the British High Commission in Colombo (see paragraphs 60–63 below), and the counsel for the Secretary of State had acknowledged there was no dispute that records were kept at the airport and that interviews were conducted there (at paragraph 159 of the determination). In its summary of its conclusions, the AIT therefore added:

> "239. When examining the risk factors it is of course necessary to also consider the likelihood of an appellant being either apprehended at the airport or subsequently within Colombo. We have referred earlier to the Wanted and Watched lists held at the airport and concluded that those who are actively wanted by the police or who are on a watch list for a significant offence may be at risk of being detained at the airport. Otherwise the strong preponderance of the evidence is that the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment."

45. On the facts of LP's case, the AIT noted that his credibility had been accepted, in particular that he was a "bail-jumper" from court-directed bail in Colombo and that on return to Colombo airport he would have been at real risk of being investigated. That investigation by the Sri Lankan

authorities would lead, in LP's particular circumstances, to the real risk of his being seriously maltreated while in detention and thus the AIT allowed his appeal on Article 3 grounds.

46. In its previous determination in *PT (Risk –bribery – release) Sri Lanka CG* [2002] UKIAT 03444, the AIT had held first that paying a bribe did not itself amount to an assisted escape from custody which would make the applicant of interest to the authorities. Second, it had held that scarring was a factor that should not be assessed in isolation but in light of the general security situation and the processing of returnees at Colombo airport. The AIT in *LP* confirmed both these rulings.

2. PS (LTTE – Internal Flight – Sufficiency of Protection) Sri Lanka CG *[2004] UKIAT 0297*

47. In *PS* the Immigration Appeal Tribunal, allowed an appeal by the Secretary of State against the decision of the Adjudicator who had found that the respondent, a Sri Lankan Tamil from western Sri Lanka, would be at risk from the LTTE if returned and that there would not be sufficient protection by the Sri Lankan authorities. He and his cousin had been coerced by the LTTE into transporting goods by sea for them and arrested and interrogated under torture by the Sri Lankan navy. He had told them where the goods were and was released after payment of a bribe. The LTTE sought the applicant and his cousin and killed his cousin. The respondent was again arrested on suspicion of LTTE involvement and again released after paying a bribe, at which point he fled to the United Kingdom. It was accepted on appeal that given the ceasefire in place at the material time, there was no risk to the respondent from the Sri Lankan authorities. As to the risk to him from the LTTE and the sufficiency of protection offered by the Sri Lankan authorities, IAT found that he could safely and reasonably relocate from his home area of Puttalam, western Sri Lanka to Colombo. The IAT stated:

> "71. As we have already observed, those whom the LTTE has on the objective evidence targeted in Colombo since the ceasefire have all been high profile opposition activists, or those whom they would see are renegades or traitors to the LTTE. Whether it could be successfully argued that even those of so high a profile would not be provided with a sufficiency of protection in Colombo in the Horvath sense [*Horvath v. the Secretary of State for the Home Department* – see paragraph 49 below], may be doubted, but what seems to us quite clear on the background evidence is that there is no arguable basis for saying that the Sri Lankan state does not provide a sufficiency of protection to the generality of Tamils having a localised fear of the LTTE in their home area who do not reach a similar high profile.
>
> ...
>
> 73. We cannot, of course, say that the safety of the respondent is guaranteed if he is now returned to Sri Lanka, but there is simply no objective evidence to support a claim that ethnic Tamils with his characteristics are in fact currently at risk from the

LTTE in Colombo, or that, if they are, it is a risk in respect of which the Sri Lankan state does not provide a sufficiency of protection applying the ratio in Horvath."

3. NM and others (Lone women – Ashraf) Somalia CG *[2005] UKAIT 00076*

48. In this country guidance determination, the AIT considered, *inter alia*, the correct approach to reports by the UNHCR. It observed:

"108. The extensive reliance upon UNHCR material makes a few observations germane. The value of the UNHCR material is first that where it has observers on the ground, it is in a good position to provide first hand information as to what in fact is happening. The process then whereby its observations of what is happening become position papers or recommendations is likely to increase the objectivity and soundness of its observations in that respect. It has a special role in relation to the Geneva Convention.

...

109. But their comments have their limitations and these need equally to be understood. The UNHCR often speaks of inhibitions on the return, usually forced, of failed asylum seekers, who have been rejected after a proper consideration of their claims. It follows that the UNHCR is not then commenting on the return of refugees at all; it is acknowledging that they would not face persecution for a Convention reason and it is going beyond its special remit under the Geneva Convention. This is not a question of picking up on loose language. The UNHCR is perfectly capable of using language which shows that it is or is not dealing with the risk of persecution for a Convention reason, and sometimes does so. These are considered papers after all.

...

112. But the assessment of whether someone can be returned in those circumstances is one which has to be treated with real care, if it is sought to apply it to non Refugee Convention international obligations, especially ECHR. The measure which the UNHCR uses is unclear; indeed, realistically, it may be using no particular measure. Instead, it is using its own language to convey its own sense of the severity of the problem, the degree of risk faced and the quality of the evidence which it has to underpin its assessment. It is often guarded and cautious rather than assertive because of the frailties of its knowledge and the variability of the circumstances.

113. This is not to advocate an unduly nuanced reading of its material, let alone an unduly legalistic reading. It is to require that the material be read for what it actually conveys about the level of risk, of what treatment and of what severity and with what certainty as to the available evidence. But there may be times when a lack of information or evidence permits or requires inferences to be drawn as to its significance, which is for the decision-maker to draw. There is often other relevant material as well.

114. UNHCR's language is not framed by reference to the ECHR and to the high threshold of Article 3 as elaborated in the jurisprudence of the Strasbourg Court and of the United Kingdom. That is not a criticism – it is not an expert legal adviser to the United Kingdom courts and couches its papers in its own language. So its more general humanitarian assessments of international protection needs should be read with care, so as to avoid giving them an authority in relation to the United Kingdom's obligations under the ECHR which they do not claim. They may give part of the picture, but the language and threshold of their assessments show that the UNHCR

quite often adopts a standard which is not that of the United Kingdom's ECHR obligations.

115. UNHCR papers are often not the only ones which Adjudicators or the Tribunal has to consider. Other organisations may have first-hand sources and differ from UNHCR; experts may bring a further perspective. A considered UNHCR paper is therefore entitled to weight but may well not be decisive."

E. *Horvath v. the Secretary of State for the Home Department* [2001] AC 489

49. In this case, the House of Lords considered the asylum claim of a Roma citizen of Slovakia on the ground, among others, that he feared persecution in Slovakia by "skinheads", against whom the Slovak police failed to provide adequate protection for Roma. In dismissing the applicant's appeal, the House of Lords held that in determining whether there was sufficient protection against persecution in the person's country of origin it was sufficient that there was in that country a system of criminal law which made violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agencies.

F. *R. v. the Secretary of State for the Home Department, Ex parte five Sri Lankan Tamils* [2007] EWHC 3288 (Admin)

50. Applications for permission to apply for judicial review were lodged by five Sri Lankan Tamils who sought to challenge the Secretary of State's decision either to reject representations made by them as not amounting to a fresh asylum claim or, in one case, to certify that his claim was clearly unfounded (see paragraph 25 above). The applications were considered in the High Court by Mr Justice Collins on 12 November 2007 in the light of the exchange of letters between the Section Registrar and Agent of the Government set out at paragraph 21 above. He adjourned one application, granted permission in two cases and refused permission in the remaining two. Before considering the merits of the individual cases before him, Mr Justice Collins considered the risk factors set out by the AIT in *LP*. He stated:

"10. Although those have been described as risk factors, they obviously vary in their significance. For example, Tamil ethnicity is obviously a highly relevant consideration, since the LTTE is a Tamil organisation and the battle is by the LTTE on behalf of the Tamils who seek specific objectives as Tamils. However, Tamil ethnicity by itself does not create a real risk of ill-treatment. Accordingly, some of these so-called risk factors are in reality, as it seems to me, background (as it has been described) factors; that is to say they do not in themselves indicate a real risk, but they are matters which, if there is a factor which does give rise to a real risk that the individual will be suspected of involvement in the LTTE, adds to the significance of

that. Thus Tamil ethnicity, return from London, illegal departure from Sri Lanka, lack of ID card or other documentation (unless it is such a lack beyond the period that the individual would be expected to take to obtain an ID card after return) and having made an asylum claim abroad, all are no doubt factors which may be held against an individual, but none of them, as far as I can see in themselves, or even cumulatively, would create a real risk. However, it is obvious that a previous record as a suspected or actual member or supporter, provided that it was at a level which would mean that the authorities would retain an interest would be likely to create a risk. I say that because it was made clear in LP itself that an individual who had a past low-level involvement which might have led to some detention, would not necessarily be regarded as a real risk so far as ill-treatment was concerned, although clearly the circumstances of the previous record might point in a different direction. A previous criminal record and an outstanding arrest warrant clearly are highly material and clearly capable, I would have thought, of producing a real risk.

11. Bail jumping and/or escaping from custody, again on the face of it are highly material. But it depends, as the Tribunal [the AIT] itself indicated, on what is covered by escaping from custody. Frequently custody was brought to an end by the payment of a bribe. That is commonplace (or was commonplace, perhaps still is) in the Sri Lankan situation. Generally release on the payment of a bribe without more would not indicate that there was an ongoing risk because the release would be likely to be recorded as a release because there was nothing further to be held against the individual. It is hardly likely that whoever took the bribe would stick his neck out by effectively admitting that there should not have been a release but for the bribe, although it might of course be different if there had been a release on formal bail. Police have the power to grant bail, but it can be done, it was said, either formally or informally. Frequently perhaps what is talked of as release on bail is no more than release by the police officer in question with some conditions apparently attached. Again one would have to look at the individual circumstances to see whether the nature of the release was such as to lead to a risk that he would still be regarded as someone under suspicion.

12. A signed confession or similar document obviously would be an important consideration.

13. Having been asked by the security forces to become an informer can be of some importance. It might indicate that the individual was regarded as someone who was indeed involved in the LTTE but was prepared, to save his own skin or for whatever reason, to provide information to the authorities. What would happen on occasions – and indeed one of the cases, as I shall indicate, contained this element – was that the release was on the basis that he would be an informant but in fact he did not carry out his side of the bargain, if that is the right way of putting it. The suggestion is that that failure would mean that he was likely to be recorded as someone who would arouse suspicion.

14. The Tribunal indicated that the presence of scarring in itself would not necessarily produce a real risk, but is something that would be added to and confirmatory of another factor which did give rise to a risk. It was generally speaking to be regarded as a confirmatory rather than a free-standing risk element.

15. Finally having relatives in the LTTE is something that one can well understand might produce suspicion.

16. The test therefore, as I see it, is whether there are factors in an individual case, one or more, which might indicate that authorities would regard the individual as someone who may well have been involved with the LTTE in a sufficiently

> significant fashion to warrant his detention or interrogation. If interrogation and detention are likely, then, in the context of the approach of the authorities in Sri Lanka, torture would be a real risk and thus a breach of Article 3 might occur. It is plain from LP and it is clear overall that a blanket ban on return to Sri Lanka simply because an individual is a Tamil cannot be supported. If the European Court is approaching it in that way, then in my view it should not be and it is not in accordance with what is required by the Convention.
>
> 17. The authorities in this country, the courts and the Tribunal, give very careful consideration to whether it is indeed appropriate to accept that a return of a Tamil to Sri Lanka can be made because there is no real risk that he will suffer any form of relevant ill-treatment. This country has not accepted the blanket approach which is advocated to an extent by the UNHCR, albeit there is no question but that its factual conclusions on matters where investigations have been carried out should be given weight."

III. RELEVANT EUROPEAN UNION LAW

51. Council Directive 2004/83/EC of 29 April 2004 (on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted) has the objective, *inter alia*, of ensuring EU Member States apply common criteria for the identification of persons genuinely in need of international protection (recital six of the preamble). In addition to regulating refugee status, it makes provision for granting subsidiary protection status. Article 2(e) defines a person eligible for subsidiary protection status as someone who would face a real risk of suffering serious harm if returned to his or her country of origin. Serious harm is defined in Article 15 as consisting of: (a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

52. On 17 October 2007, the Dutch Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*), when considering the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* (the Deputy Minister of Justice), lodged a reference for a preliminary ruling with the Court of Justice of the European Communities asking, *inter alia*, whether Article 15(c) of the Directive offered supplementary or other protection to Article 3 of the Convention.

IV. RELEVANT INFORMATION ABOUT SRI LANKA

53. Sri Lanka secured independence from the United Kingdom in 1948. Demographical information varies but its population is approximately 19.9 million. The majority are Sinhalese (73.8–82 per cent). Significant minorities include Sri Lankan Moors (Muslims, 7.2–7.9 per cent); Indian

Tamils (4.6–5.1 per cent); and Sri Lankan Tamils (3.9–4.3 per cent). The majority of Tamils live in the north and east of the country but a significant minority live outside those regions. Colombo has a population of approximately 2.25 million and approximately 248,000 Sri Lankan Tamils and 25,000 Indian Tamils live there (see United Kingdom Border and Immigration Agency Country of Origin Information Report on Sri Lanka, 3 March 2008 ("the March 2008 COI Report"), at paragraphs 1.03, 3.01, 20.11, and 20.14 with further references).

54. The internal conflict in Sri Lanka began over twenty years ago and has continued intermittently ever since. The conflict is largely between the LTTE, who seek independence for Tamils, and Government forces. A ceasefire was signed between the Government and the LTTE in February 2002 and a peace process started. In 2004, after divisions appeared with the LTTE, the ceasefire came under increasing pressure. The most serious threat to the peace process was the assassination in August 2005 of Lakshman Kadirgamar, the Sri Lankan Minister of Foreign Affairs, after which violence in the country escalated and there were renewed clashes between Government forces and the LTTE (see the March 2008 COI Report at paragraphs 3.13–3.42 with further references).

55. Mr Kadirgamar's assassination prompted the Sri Lankan Government to declare a state of emergency and introduce Emergency Regulations which gave the Government, the armed forces and law enforcement agencies broad counter-terrorism powers, including special powers of arrest and detention up to one year (see the March 2008 COI report at paragraphs 8.15–8.23 and 12.01–12.12 with further references). The regulations are reinforced by further such powers provided for in the Prevention of Terrorism Act, which was reinstated in December 2006 (see, *inter alia*, BBC News website story of 6 December 2006 and the 2006 United States of America Department of State Country Report on Human Rights Practices, quoted at paragraphs 3.26 and 8.15 of the COI Report respectively). Young Tamil men who are suspected of being LTTE members or supporters appear to be the primary target of arrests (see, *inter alia*, paragraph 3.7.18 of the United Kingdom Border and Immigration Agency Operational Guidance Note on Sri Lanka, set out at paragraph 58 below). The Emergency Regulations have been regularly extended, most recently on 6 February 2008 (see the same report at p. 10).

56. On 3 January 2008, the Government gave notice of their intention to withdraw from the ceasefire agreement. The withdrawal took effect on 16 January 2008 (the March 2008 COI Report at paragraphs 4.08 et seq.).

A. United Kingdom Government reports

1. Operational Guidance Notes

57. Operational guidance notes (OGN) are prepared by the Border and Immigration Agency of the Home Office. They provide a brief summary of the general, political and human rights situation in the country and describe common types of claim. They aim to provide clear guidance on whether the main types of claim are likely to justify the grant of asylum, humanitarian protection or discretionary leave.

58. The OGN on Sri Lanka of 5 November 2007 (which updated and replaced the previous note of 9 March 2007, the conclusions of which were virtually identical) contained the following conclusions on the main kinds of asylum, human rights and humanitarian protection claims made by those entitled to reside in Sri Lanka:

> "[At. 3.6.19 on claims made by those fearing reprisals from the LTTE] We do not accept UNHCR's position that there is no internal flight alternative for individuals fleeing targeted violence and human rights abuses by the LTTE due to difficulties in travel because of the reinstatement of checkpoints and because of the inability of the authorities to provide 'assured protection' given the reach of the LTTE. UNHCR's reliance on the concept of 'assured protection' is not a fundamental requirement of the Refugee Convention. In referring to 'assured protection', UNHCR are using a higher standard than the sufficiency of protection standard required by the Refugee Convention...Moreover, asylum and human rights claims are not decided on the basis of a general approach, they are based on the circumstances of the particular individual and the specific risk to that individual. It is important that case owners give individual consideration to whether the applicant has a well-founded fear of persecution for a convention reason or are otherwise vulnerable that they may engage our obligations under the ECHR. Applicants who fear persecution at the hands of the LTTE in LTTE dominated areas are able to relocate to Colombo, or other Government controlled areas and it would not normally be found to be unduly harsh for claimants to relocate in this way. Similarly, the Government is willing to offer to protection to [sic] those who have relocated from LTTE controlled areas and who still fear reprisals from the LTTE.
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> ...
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> [At 3.7.18 on claims made by those fearing persecution by the Sri Lankan authorities] Following the announcement of the cease-fire in February 2002, the Sri Lankan authorities de-proscribed the LTTE and suspended arrests made under the Prevention of Terrorism Act (PTA). The emergency regulations imposed in August 2005 which continue to be in place allow for the arrest of individuals by members of the armed forces and those detained may be held for up to one year. Young Tamil men who are suspected of being LTTE members or supporters appear to be the primary target of arrests.
>
> However, most are reportedly released quickly and it can therefore still be said that generally the authorities in Sri Lanka are not concerned with those individuals with past low-level support for the LTTE. Claims under this category are therefore likely to be clearly unfounded and fall to be certified as such.

> 3.7.19 Those individuals who may be of continuing interest to the authorities would be those wanted for serious offences. These cases will be exceptional, and will normally be high-profile members of the LTTE who are still active and influential, and wanted by the authorities. Such individuals may face prosecution on return, although there is no evidence to suggest that they would not be treated fairly and properly under Sri Lankan law. Claims made under this category are therefore not likely to lead to a grant of asylum or Humanitarian Protection but taking into account the continuing interest of the authorities in those of high profile, and the introduction of the emergency regulations such claims cannot be considered to be clearly unfounded.
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> ...
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> 3.7.20 There cannot be said to be a general sufficiency of protection available to those applicants who express fear of state officials after having made complaints to the Sri Lankan authorities with regard to, for example, the use of torture. However, internal relocation to LTTE areas may be an option where, in the particular circumstances of the applicant's case, it is not considered unduly harsh for the victim to exercise this. The grant of asylum or Humanitarian Protection is unlikely therefore to be appropriate where there is an option of internal relocation. Such claims should only be certified as clearly unfounded if internal relocation is clearly an option."

59. The OGN also found that with the introduction of the Emergency Regulations in August 2005, round ups and arrests of Tamils in "cordon and search operations" had taken place. Citing a report of the International Committee of the Red Cross (ICRC), it stated that most of those detained, generally young Tamil males, were taken into custody because they were unable to produce identification or explain the reason for being in a particular area. It also quoted the website "TamilNet" which had reported a number of large scale arrests between May and July 2007 of Tamil civilians in Wellawatte and Colombo city who were taken into custody on account of failure to prove identity or provide reasons for their stay in the location. Finally, the OGN stated that according to a letter dated 11 September 2007 from the British High Commission in Colombo, the operations did appear to target those in casual employment or with temporary accommodation, but whilst a proportion of those detained did end up in longer term detention, most were released quickly (at a paragraph 3.6.11 of the OGN).

2. Letters from the British High Commission in Colombo

60. The March 2008 COI Report (at paragraphs 32.09 – 32.22), set out a number of extracts from a series of letters from the British High Commission in Colombo, which addressed the treatment of failed asylum seekers. At paragraph 32.09, the COI Report included an excerpt from a High Commission letter of 25 January 2008, which noted:

> "The BHC Risk Assessment Officer has recently visited the headquarters of CID [Criminal Investigations Department] in Colombo, and the ALO [Airline Liaison Officer] works closely with CID at Bandaranaike Airport. Both RAO and ALO recall that they have never seen any CID officers use a computer, and comment that neither their HQ nor airport offices has computers installed. The ALO added that CID officers

at the airport record details in a notebook, whilst the RAO stated that officers in Colombo had typewriters on their desks."

The same paragraph of the COI Report noted that in a letter of 24 August 2006, the High Commission had previously reported:

"The Sri Lankan authorities have a good IT system to track arrivals and departures at the main airport and are able to track, in most cases, whether an individual is in the country or not."

61. According to the COI Report (at paragraphs 32.12 and 32.13), in a letter dated 26 September 2005 the High Commission stated:

"We have spoken to the International Organisation of Migration locally about returns. They say that to their knowledge most returns are detained briefly and then released to their families. Our Airline Liaison Officer has contacted the Canadian, Australian and German Missions here, to ask about their experiences with returns. All of their experiences are similar. In August [2005] a charter plane returned approximately 40 failed asylum seekers from Germany. The Sri Lankan Police (CID) have told us that these were processed by them 'in a few hours'. In general, the Sri Lankan Immigration Services and CID are informed in advance of the passenger's arrival. The passenger is handed over to Immigration who briefly interview them and then hand them to CID. In most cases a record is kept by both of the returnees arrival and they are then allowed to proceed. Usually family are at the airport to meet them. In a few cases CID have detained people where there was an existing warrant for their arrest when they left Sri Lanka. DII (Directorate of Internal Intelligence) may also have an interest in these individuals and keep records on them. There is no reason to think that they have any information regarding asylum claims in the UK or elsewhere. There does not appear to be any involvement in the process by the Sri Lankan Army.

...

The role of scarring is extremely difficult to assess, I have not found any detailed reports, but anecdotal evidence is that it can play a part in rousing suspicion. The key issue is not what triggers suspicion, but how suspects are treated. Membership of the LTTE and fundraising for the organisation are no longer criminal offences in Sri Lanka (although they are in the UK) so even if the authorities acted on their suspicion Sri Lankan law gives them limited powers to act. Unarmed members of the LTTE are permitted to operate in government areas under the 2002 ceasefire agreement."

62. Paragraphs 32.14 and 32.15 of the COI report then quote the High Commission as stating in its letter of 24 August 2006 that:

"There is strong anecdotal evidence that scarring has been used in the past to identify suspects. In my own conversations with the police and in the media the authorities have openly referred to physical examinations being used to identify whether suspects have undergone military style training. A UK based member of staff who was present during the processing of two recent returns at Colombo airport on 04/08 and 23/08 [2006] reported however that no such examinations took place, and that the returnees, both ethnic Tamils from the north of Sri Lanka, were able to make onward journeys with little delay. His observations support more recent claims from contacts in government ministries that this practice has either ceased or is used less frequently. At the very least it appears to only take place when there is another reason to suspect the individual rather than a routine measure for immigration returnees.

...

> Our own experience of the return of failed asylum seekers and the shared information of other missions, particularly the Canadians, and the International Organisation of Migration is quite clear. As we have reported earlier [26 September 2005] the vast majority are questioned for a short period of time to establish identity and possibly on security issues and then released. Normally only when there is an outstanding arrest warrant are individuals detained for longer periods."

63. Finally, at paragraphs 32.20–32.22 the COI Report contained excerpts from the letter of 25 January 2008 which read as follows:

> "The Government of Sri Lanka's decision to abrogate the ceasefire agreement will reduce further the provision [of] information regarding the treatment of returnees. Ceasefire monitors from Norway and the Sri Lankan Monitoring Mission (SLMM) will have no further role and will be unable to provide any information regarding returnees.
>
> ...
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> The International Organisation for Migration (IOM) have advised the High Commission that whilst they monitor the persons who return from the UK under the Voluntary Assisted Return Programme (VARP) for up to 2 years, they do not monitor those who are forcibly returned. I was advised that even amongst the VARP returnees there were 2 cases in the last year where individuals have been arrested and detained. The first was a young Tamil male from Jaffna who was going through a reintegration programme in Colombo. Some 6 months after his return, he was stopped at a police checkpoint and detained, as he could provide no evidence of family in the capital. He was held at Boossa prison for one month before release, but is now back in the reintegration programme. The 2nd case also involved a Tamil male who was in the reintegration programme in Colombo. The circumstances of his arrest were somewhat different in that he had travelled to India on forged documentation and was apprehended by CID on his return to Colombo and detained. It could therefore be argued that there might have indeed been justification for this.
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> ...
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> IOM have also become involved with returnees who have forcibly been removed from the UK, providing post-arrival assistance. Ostensibly, this is to provide travel assistance to a chosen address. At time of writing IOM had been notified of 32 potential removals under this arrangement, of which they received only 8 returnees. Whilst a majority of the ones that did not arrive undoubtedly earned last minute reprieves in the UK by one means or another, IOM could not be 100% certain that some were not detained on arrival at Colombo Airport. IOM are under instructions not to approach these returnees until they have gone through all of the arrival procedures. FCO Migration Directorate has recently installed a Migration Delivery Officer at the High Commission in Colombo. His role will include liaison between the UK Border & Immigration Agency, the Sri Lankan Department of Immigration & Emigration and IOM, and will assist in the monitoring of such persons following their removal from the UK."

64. According to information provided to the Court by the Government, of above thirty-two returns, twenty-two were cancelled for a number of reasons such as judicial review proceedings being lodged, injunctions being granted by the High Court and this Court making indications under Rule 39 of the Rules of Court. Eight of the returnees were successfully met outside the airport by IOM. In the remaining two cases, removals were made but the

individuals concerned did not make themselves known to the IOM officer on arrival in Colombo. The Government had established that one of the two was in the Netherlands and they continued to make enquiries into the whereabouts of the other individual concerned.

B. United Nations reports

1. UNHCR Position on the International Protection Needs of Asylum Seekers from Sri Lanka ("the UNHCR Position Paper")

65. On 22 December 2006, the United Nations High Commissioner for Refugees published the above paper, observing that there had been several major developments in the country which fundamentally affected the international protection needs of individuals from Sri Lanka who sought, or who had sought, asylum abroad. After surveying the escalation in fighting between Government forces and the LTTE and its impact on the civilian population, the paper turned to the human rights situation. Tamils from the north and east were at risk of targeted violations of their human rights from all parties to the armed conflict, including harassment, intimidation, arrest, detention, torture, abduction and killing at the hands of government forces, the LTTE and paramilitary or armed groups. Where an individual sought to escape from the LTTE, even if they reached government-controlled areas, this did not necessarily mean that he or she would be able to secure the protection of the authorities given the LTTE's capacity to track down and target its opponents throughout the country. The position paper also considered the human rights situation for Tamils in Colombo and stated:

> "23. Tamils in Colombo and its outskirts, where there are large Tamil communities, are at heightened risk of security checks, arbitrary personal and house to house searches, harassment, restrictions on freedom of movement, and other forms of abuse since the imposition of new security regulations in April and December 2006.
>
> 24. Under emergency regulations, the police are empowered to register all persons within the jurisdiction of each police station. These regulations, which were enacted during the height of the conflict in the 1990s, remain in place and require all residents to register with their local police station. Such registration, which is taking place in Colombo, enables the police to have accurate information on the ethnicity and location of all inhabitants of Colombo.
>
> 25. Tamils in Colombo are especially vulnerable to abductions, disappearances and killings. Such actions are allegedly conducted by the paramilitary 'white vans' suspected to be associated with the security forces, as well as by the Karuna faction and the LTTE. According to press reports, some 25 Tamils were abducted in Colombo and its suburbs between 20 August and 2 September 2006, with only two of these people confirmed released. The whereabouts and fate of the rest remain unknown. Young Tamil professionals including several women, businessmen, as well as Tamil political figures and activists with a pro-Tamil stance can be specifically targeted (footnotes omitted)."

66. The paper also noted that Muslims from the east were also particularly vulnerable to human rights abuses from the parties to the conflict and that Sinhalese from the north and east were vulnerable to the generalised violence there. For the latter, there was protection from generalised violence in government-controlled areas but no protection from the LTTE, if they were targeted by it.

67. UNHCR recommended that all asylum claims of Tamils from the north or east should be favourably considered. Where individual acts of harassment did not in and of themselves constitute persecution, taken together they could cumulatively amount to a serious violation of human rights and therefore be persecutory. Where an individual did not fulfil the refugee criteria under the United Nations Convention Relating to the Status of Refugees of 1951, a complementary form of protection was to be granted. Tamils from Colombo were to be recognised as refugees if subjected to targeted violations of human rights by the LTTE, the authorities or paramilitary groups. Again, where individual acts of harassment did not in and of themselves constitute persecution, taken together they could cumulatively amount to a serious violation of human rights and therefore be persecutory. A similar recommendation was made for Muslims. For Sinhalese, those who were targets of persecution from the LTTE or other non-state agents should be accorded recognition as refugees.

68. For those asylum seekers from Sri Lanka whose claims had previously been examined and had been found not to be in need of international protection, the Position Paper recommended a review of their claims in light of the new circumstances it had described.

2. The United Nations High Commissioner for Human Rights

69. After her visit to Sri Lanka in October 2007, the United Nations High Commissioner for Human Rights, Louise Arbour, issued a press statement on 13 October 2007 in which she noted:

> "Sri Lanka has many of the elements needed for a strong national protection system. It has ratified most of the international human rights treaties. It has justiciable human rights guarantees in the Constitution. It has longstanding democratic and legal traditions. It has had a national human rights commission for more than a decade. Sri Lanka has an active media and benefits from a committed civil society.
>
> However, in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming. There is a large number of reported killings, abductions and disappearances which remain unresolved. This is particularly worrying in a country that has had a long, traumatic experience of unresolved disappearances and no shortage of recommendations from past Commissions of Inquiry on how to safeguard against such violations. While the Government pointed to several initiatives it has taken to address these issues, there has yet to be an adequate and credible public accounting for the vast majority of these incidents. In the absence of more vigorous investigations, prosecutions and convictions, it is hard to see how this will come to an end.

...

Throughout my discussions, government representatives have insisted that national mechanisms are adequate for the protection of human rights, but require capacity building and further support from the international community. In contrast, people from across a broad political spectrum and from various communities have expressed to me a lack of confidence and trust in the ability of existing relevant institutions to adequately safeguard against the most serious human rights abuses.

In my view the current human rights protection gap in Sri Lanka is not solely a question of capacity. While training and international expertise are needed in specific areas, and I understand would be welcomed by the Government, I am convinced that one of the major human rights shortcomings in Sri Lanka is rooted in the absence of reliable and authoritative information on the credible allegations of human rights abuses."

3. The United Nations Special Rapporteur on Torture

70. After his visit to Sri Lanka on 1–8 October 2007, the United Nations Special Rapporteur on Torture issued a press release (dated 29 October 2007) in which he concluded:

"Though the Government has disagreed, in my opinion the high number of indictments for torture filed by the Attorney General's Office, the number of successful fundamental rights cases decided by the Supreme Court of Sri Lanka, as well as the high number of complaints that the National Human Rights Commission continues to receive on an almost daily basis indicates that torture is widely practiced in Sri Lanka. Moreover, I observe that this practice is prone to become routine in the context of counter-terrorism operations, in particular by the TID [Terrorism Investigation Department].

Over the course of my visits to police stations and prisons, I received numerous consistent and credible allegations from detainees who reported that they were ill-treated by the police during inquiries in order to extract confessions, or to obtain information in relation to other criminal offences. Similar allegations were received with respect to the army. Methods reported included beating with various weapons, beating on the soles of the feet (falaqa), blows to the ears ('telephono'), positional abuse when handcuffed or bound, suspension in various positions, including strappado, 'butchery', 'reversed butchery', and 'parrot's perch' (or dharma chakara), burning with metal objects and cigarettes, asphyxiation with plastic bags with chilli pepper or gasoline, and various forms of genital torture. This array of torture finds its fullest manifestation at the TID detention facility in Boossa.

Intimidation of victims by police officers to refrain from making complaints against them was commonly reported, as were allegations of threats of further violence, or threatening to fabricate criminal cases of possession of narcotics or dangerous weapons. Detainees regularly reported that habeas corpus hearings before a magistrate either involved no real opportunity to complain about police torture given that they were often escorted to courts by the very same perpetrators, or that the magistrate did not inquire into whether the suspect was mistreated in custody. Medical examinations were frequently alleged to take place in the presence of the perpetrators, or directed to junior doctors with little experience in documentation of injuries."

C. United States of America Department of State Report

71. In its 2007 Country Report on Human Rights Practices – Sri Lanka, dated 11 March 2008, the State Department observed:

> "The government's respect for human rights continued to decline due in part to the escalation of the armed conflict. While ethnic Tamils composed approximately 16 percent of the overall population, the overwhelming majority of victims of human rights violations, such as killings and disappearances, were young male Tamils. Credible reports cited unlawful killings by government agents, assassinations by unknown perpetrators, politically motivated killings and child soldier recruitment by paramilitary forces associated with the government, disappearances, arbitrary arrests and detention, poor prison conditions, denial of fair public trial, government corruption and lack of transparency, infringement of religious freedom, infringement of freedom of movement, and discrimination against minorities. There were numerous reports that the army, police, and pro-government paramilitary groups participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity. The situation deteriorated particularly in the government-controlled Jaffna peninsula. By year's end extrajudicial killings occurred in Jaffna nearly on a daily basis and allegedly perpetrated by military intelligence units or associated paramilitaries. There were few arrests and no prosecutions as a result of these abuses, although a number of older cases continued to make slow progress through the judicial system. Government security forces used the broad 2005 emergency regulations to detain civilians arbitrarily, including journalists and members of civil society.
>
> The LTTE, which maintained control of large sections of the north, continued to attack civilians and engage in torture and arbitrary arrest and detention; denied fair, public trials; arbitrarily interfered with privacy; denied freedoms of speech, press, and assembly and association; and forced recruitment, including of children. The LTTE was also active in areas it did not control and during the year carried out at least one politically motivated killing in Trincomalee, a politically motivated suicide attack in Colombo, a suicide attack against a government army base near Batticaloa, a bombing of civilian shoppers in a suburb of Colombo, and bombings of civilian buses in the south."

72. In the section of the report entitled "Arrest and Detention", the State Department noted, *inter alia*:

> "Between November 30 and December 3, in response to two LTTE bomb attacks in and around Colombo, the police conducted random cordon and search operations and arrested nearly 2,500 Tamils in the capital and an estimated 3,500 countrywide. The detained, mostly male Tamil civilians were reportedly arrested based solely on their Tamil surnames. The vast majority of the detainees were soon released. The Supreme Court ordered the government to release the detainees on bail if they were no longer required for questioning. By year's end only 12 of the 372 arrestees held in the Boossa detention camp were still in custody."

73. The report also documented the arrest of forty-eight Tamils in a lodge in a Colombo suburb on 6 October 2007 after the Supreme Court had intervened to prevent the police carrying out such forcible removals in June (see paragraph 79 below).

D. The Immigration and Refugee Board of Canada

74. On 22 December 2006, the Immigration and Refugee Board of Canada published the following "response to information request" on the treatment of failed asylum seekers returning to Sri Lanka, which provides:

> "In 19 December 2006 correspondence to the Research Directorate, an official at the Canadian High Commission in Colombo provided corroborating information [in reference to the letter from the British High Commission in Colombo dated 26 September 2005: see paragraphs 60–63 above] on the return of failed asylum seekers to Sri Lanka, stating that
>
> [r]eturnees, if identified to the airlines as such by immigration authorities who are removing them to Sri Lanka, have an established process awaiting them upon arrival. First, the Chief Immigration Officer (arrivals) documents the arrival of the person, takes a statement, and determines whether the returnee should be granted entry as a Sri Lankan national. Next an officer of the State Intelligence Service (SIS) documents the arrival and takes a statement. Finally, an officer of the Criminal Investigation Department (CID) of the Sri Lanka Police documents the arrival, checks for outstanding warrants and takes a statement. If there is an outstanding warrant for arrest, the returnee may be arrested. Otherwise, the returnee is free to go.
>
> **Persons with previous problems with the authorities**
>
> An October 2006 report published by Hotham Mission's Asylum Seeker Project (ASP), an Australian non-governmental organization (NGO) that 'works with asylum seekers in the community' (Hotham Mission n.d.), similarly notes that persons returning to Sri Lanka who have had previous problems with the government of Sri Lanka may be detained by the police upon their arrival (47). According to the report, persons who have been detained or questioned in the past are more likely to be arrested and, because of the state of emergency and ongoing conflict in the country, 'may face further human rights violations, such as torture' (Hotham Mission Oct. 2006, 47). The report also notes that Sri Lanka's National Intelligence Bureau keeps records on people dating back more than ten years and, since 2004, has been using a national computerized database (ibid.).
>
> **Persons travelling without valid identity documents**
>
> Persons who leave Sri Lanka using false documents or who enter the country under irregular or suspicious circumstances are reportedly more likely to be singled out and questioned under the country's current state of emergency (ibid.; see also Daily News 15 Sept. 2006). The state of emergency reportedly permits the Sri Lankan authorities to make arrests without warrant and to detain persons for up to 12 months without trial (US 8 Mar. 2006). Under Section 45 of the country's Immigrants and Emigrants Act, amended in 1998, persons found guilty of travelling with forged documents may be subject to a fine of between 50,000 and 200,000 Sri Lankan Rupees (LKR) [approximately CAD 533 (XE.com 12 Dec. 2006a) to CAD 2,133 (ibid. 12 Dec. 2006b)] and a jail term ranging from one to five years (Sri Lanka 1998).
>
> **Tamil asylum seekers with scars**
>
> Cited in an October 2006 UK Home Office report, a 1 January 2005 position paper by the Office of the United Nations High Commissioner for Refugees (UNHCR) indicates that Tamil asylum seekers with scars may be more likely to be questioned and experience 'ill-treatment' by the Sri Lankan security forces upon their return to Sri Lanka (31 Oct. 2006, 126). The paper states that

> [the] UNHCR maintains its position ... that 'Tamil asylum seekers with scars, should they be returned to Sri Lanka, may be more prone to adverse identification by the security forces and taken for rigorous questioning and potential ill-treatment' ... Please note that the UNHCR's comments are strictly limited to the risk of adverse identification, rigorous questioning, and potential ill-treatment of returned persons with scars upon their arrival at the airport, not the potential risk of arrest subsequent to the initial interrogation at the airport. (UK 31 Oct. 2006, 126)

A 24 August 2006 letter from the British High Commission in Colombo, cited in the October 2006 UK report suggests, however, that physical examinations of returnees conducted by the authorities are less common or have ceased altogether. The letter states that

> [t]here is strong anecdotal evidence that scarring has been used in the past to identify suspects. In ... conversations with the police and in the media, the authorities have openly referred to physical examinations being used to identify whether suspects have undergone military style training. ... [R]ecent claims from contacts in government ministries [indicate] that this practice has either ceased or is used less frequently. At the very least, it appears to only take place when there is another reason to suspect the individual rather than [as part of] a routine measure for immigration returnees. (UK 31 Oct. 2006, 127)

Further information from 2005 and 2006 on whether Tamils asylum seekers with scars would be targeted by Sri Lankan security forces upon their return could not be found among the sources consulted by the Research Directorate.

Persons with an affiliation to the LTTE or other political groups

The October 2006 Hotham Mission report cites information obtained during consultations with the Sri Lanka Monitoring Mission (SLMM), a body of international observers that monitors the ceasefire agreement between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) (SLMM n.d.), concerning the return of failed asylum seekers (47). The SLMM indicates that if a person returning to Sri Lanka has any previous affiliation with the LTTE, they may be targeted by the police (ibid.). The organization also notes that if a person has previous affiliations to certain individuals or political groups, they may be targeted by the LTTE (ibid.). The SLMM provides the example of persons who have been members of the People's Liberation Organisation of Tamil Eelam (PLOTE), an inactive Tamil militant organization (SATP n.d.), who were still being targeted by the LTTE in Sri Lanka at the time the Hotham Mission report was published (Hotham Mission Oct. 2006, 47).

Persons returning from abroad

Persons returning from abroad may also be subject to extortion (Sri Lanka 27 Nov. 2006; Hotham Mission Oct. 2006, 49). According to the Hotham Mission report, in some instances, returnees have been pressured into paying immigration officials to be able to pass through the airport without incident (ibid.). The report also indicates that, across Sri Lanka, wealthy businessmen are being kidnapped for ransom and that 'people returning from overseas may be a target, as it will be assumed that they have money' (ibid.).

A 27 November 2006 article by the Media Centre for National Security, a division of Sri Lanka's Ministry of Defence, Public Security, Law and Order, provides a listing of 'extortion rates of the LTTE.' According to the article, the LTTE charges 500 LKR [approximately CAD 5.30] per journey to persons returning from abroad (Sri Lanka 27 Nov. 2006).

Returnees from Canada

In 19 December 2006 correspondence, an official at the Canadian High Commission in Sri Lanka indicated that

'[s]ince 2004 ... no returnees from Canada have been arrested or experienced negative repercussions at the airport or after exiting the airport grounds in Sri Lanka. Sri Lankan authorities who have dealt with the returnees have carried out their duties in a professional manner in compliance with international norms.'"

E. Non-governmental Organisations' reports

1. The Independent International Group of Eminent Persons

75. In November 2006, the President of Sri Lanka appointed a Commission of Inquiry to investigate and inquire into sixteen incidents of alleged serious violations of human rights, including abductions, disappearances and extra-judicial killings. The President subsequently invited eleven eminent persons to form the Independent International Group of Eminent Persons ("the IIGEP") to observe the Commission's work and to comment on the transparency of its investigations and inquiries and their conformity with international norms and standards. By a public statement released on 6 March 2008, the IIGEP announced its decision to terminate its operation in Sri Lanka, concluding that the proceedings had fallen far short of the transparency and compliance with basic international norms and standards pertaining to investigations and inquiries.

2. Amnesty International

76. In its 2007 Annual Report ("The State of the World's Human Rights"), Amnesty International noted that in 2006 the human rights situation in Sri Lanka had deteriorated dramatically. Unlawful killings, recruitment of child soldiers, abductions, enforced disappearances and other human rights violations and war crimes had increased. Civilians had been attacked by both sides as fighting escalated between the Sri Lankan Government and the LTTE. Hundreds of civilians had been killed and injured and more than 215,000 people displaced by the end of 2006. Homes, schools and places of worship had been destroyed. Although both sides maintained they were adhering to the ceasefire agreement, by mid-2006 it had in effect been abandoned. A pattern of enforced disappearances in the north and east re-emerged. There were reports of torture in police custody; perpetrators continued to benefit from impunity.

77. In its 2008 Annual Report of the same title, Amnesty International further noted that "2007 was characterized by impunity for violations of international human rights and humanitarian law". It stated that "soaring human rights abuses" included hundreds of enforced disappearances, unlawful killings of humanitarian workers, arbitrary arrests and torture. The

report also stated that the Sri Lankan police had conducted mass arrests of more than 1,000 Tamils, allegedly in response to the suicide bombings carried out in Colombo on 28 November 2007. The arrests said to have been made on arbitrary and discriminatory grounds using sweeping powers granted by the Emergency Regulations. The report also quoted unnamed reports as stating that "Tamils were bundled in bus loads and taken for interrogation". The report further alleged that more than four hundred of those arrested, including fifty women, were taken to the Boosa Camp near Galle and held in poor conditions of detention.

3. Human Rights Watch

a. Return to War: Human Rights Under Siege

78. In the above report of August 2007, Human Rights Watch characterised Sri Lanka as being in the midst of a human rights crisis and found responsibility lay with both the Government and the LTTE. The report catalogued instances of human rights abuses during the armed conflict, including abductions, disappearances and arbitrary arrests and detentions. It also found there to have been a crackdown on dissent, a culture of impunity for human rights violations and an abuse of the Emergency Regulations introduced by the Government (see paragraph 55 above). It found that ethic Tamils had suffered the brunt of abuses but members of the Muslim and Sinhalese ethnic groups had also been the victims of Government human rights violations. The report also noted that the Government had detained an undetermined number of people (reaching into the hundreds) under the Emergency Regulations, with young Tamil males being the primary targets. The report also noted that on the Government's own figures, Tamils constituted the overwhelming majority of those detained. Large-scale arrests were said to be particularly common after attacks attributed to the LTTE.

79. The report also recorded attempts in early June 2007 by the Sri Lankan police to evict Tamils staying at lodges in and around Colombo and to transport them to LTTE controlled areas. On 8 June 2007, the Supreme Court issued an order preventing the police and others from continuing the expulsions or restricting the free movement of Tamils in and out of Colombo.

b. Recurring Nightmare: State Responsibility for Disappearances and Abductions in Sri Lanka

80. In a further report published in March 2008, Human Rights Watch documented ninety-nine instances of disappearances, which it alleged were, for the most part, attributable to Government security forces. The report stated that the vast majority of the victims were ethnic Tamils, although Muslims and Sinhalese had also been targeted, with individual being

targeted primarily because of their alleged membership in or affiliation to the LTTE. Young Tamil men were among the most frequent targets, though civil society activists were also among those who had disappeared. The report characterised the Government's investigation and response to the disappearances as "grossly inadequate".

4. The International Crisis Group

81. In a report of 20 February 2008, entitled "Sri Lanka's Return to War: Limiting the Damage, Asia Report No. 146", the International Crisis Group commented on the rising ethnic tensions in Sri Lanka since the collapse of the ceasefire and in particular observed:

> "With the collapse of the ceasefire, the LTTE's return to terror attacks and the government's counter-terrorism measures, fear and inter-ethnic tension have grown significantly. Tamils increasingly see themselves, not the Tigers, as the government's target. The decision in June 2007 to evict some 375 Tamils from hotels and boarding houses in Colombo and bus them 'home' to the north and east and to the central hill country was a major blow to confidence. This was followed by mass round-ups of more than 2,500 in Colombo in early December after a series of bomb attacks blamed on the Tigers. [the accompanying footnote refers to a Government press release of 5 December 2007] The arrests were disorganised and indiscriminate, affecting many long-established residents of the capital with proper identification. More than 400 were sent to detention centres in the south. Most were released within a week, but the experience was a shock. Many felt such 'security measures' were meant to send a message that all Tamils pose a security threat and are unwelcome in Colombo or Sinhalese areas. Tamils from the north and east are particularly vulnerable (footnotes omitted)."

82. The report also observed that violations of civil and political rights were widespread, with the majority and worst in the north and east of the country. There were daily occurrences of political killings and disappearances. Both sides were responsible but additionally on the government side there appeared to be no prosecutions for human rights violations and an unwillingness on the part of the police to investigate killings, disappearances and abductions. Other government institutions were "equally ineffective".

5. Medical Foundation for the Care of Victims of Torture

83. The Medical Foundation for the Care of Victims of Torture is a United Kingdom registered charity which provides medical and other rehabilitative support for victims of torture. In a 2007 report, submitted by the Government as part of their observations in the present case, and entitled "Torture once again rampant in the Sri Lanka conflict", the Foundation summarised the work it had done with Sri Lankan clients. The report stated that the overwhelming majority of Sri Lankans seen by the Foundation were Tamil and the majority of them were young males. The report stated that its

findings "challenged the UK Government's readiness to return unsuccessful asylum applications to Sri Lanka where they might face further abuse".

F. Other relevant sources

1. The British Broadcasting Corporation

84. On 19 August 2007, the British Broadcasting Corporation's Sinhala website quoted Amnesty International as stating that three Tamil men had been held incommunicado in Colombo after having been returned there from Thailand. A Sri Lankan police spokesman was also quoted as stating that the men had been detained on immigration charges but refuted the allegation that they were being held incommunicado. Amnesty International also stated that the applications for political asylum in Thailand by the three men were refused by UNHCR. The story was recorded in the March 2008 COI Report at paragraph 8.16 and at paragraph 8.15 of the previous, November 2007 version of the same report.

2. The Sri Lankan Government

85. From a press release available on the official website of the Government of Sri Lanka, the Chief Government Whip, Jeyaraj Fernandopulle, gave the following information at a press briefing on 4 December 2007. The Government had released 2,352 persons out of a total of 2,554 persons taken into custody during search operations conducted the previous weekend. 1,959 had been released on the day of arrest and another 393 were released following identification. The remaining 202 persons had been remanded or kept under detention orders.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION AND ADMISSIBILITY

A. The parties' observations

86. The Government submitted that the application should be rejected for non-exhaustion of domestic remedies, as the applicant had failed to maintain his judicial review application, listed for 17 May 2007, especially since any refusal at that oral hearing carried the right of appeal to the Court of Appeal. The applicant had similarly failed to appeal against the original decision of the Adjudicator. They further referred to the fact that the applicant had given apparently contradictory explanations for his decision to

withdraw his application for judicial review. Doubt had to be cast on the accuracy of the applicant's explanation (see paragraph 87 below) that his solicitors were informed by counsel that this was a "pre-*LP*" case since *LP* was not promulgated until 6 August 2007 and thus counsel could not have known before the applicant's judicial review hearing on 17 May 2007 what the outcome of *LP* would be. There was no direct evidence that the applicant's counsel had advised him that there was no prospect of success.

87. In response, the applicant submitted the letter from his previous representatives to his representatives before this Court and summarised at paragraph 19 above. He further relied on *H. v. the United Kingdom*, no. 10000/82, Commission decision of 4 July 1983, Decisions and Reports (DR) 33, p. 247 and argued that where counsel had advised a remedy had no prospect of success, it was not to be considered an effective remedy for the purposes of Article 35 § 1 of the Convention. Any possible appeal from the Adjudicator's determination had been overtaken by the lodging of a fresh asylum claim on 29 March 2006. The domestic authorities had every opportunity to provide redress and had ample opportunity to consider the merits of his case.

B. The Court's assessment

88. The Court recalls that the rule of exhaustion of domestic remedies in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time, namely, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *T. v. the United Kingdom* [GC], no. 24724/94, 16 December 1999, § 55). Article 35 must also be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention (*Hilal v. the United Kingdom* (dec.), no. 45276/99, 8 February 2000).

89. The Court has consistently held that mere doubts as to the prospects of success of national remedies do not absolve an applicant from the obligation to exhaust those remedies (see, *inter alia*, *Pellegrini v. Italy* (dec.), no. 77363/01, 26 May 2005; *MPP Golub v. Ukraine* (dec.), no. 6778/05, 18 October 2005; and *Milosevic v. the Netherlands* (dec.), no. 77631/01, 19 March 2002). However, it has also on occasion found that where an applicant is advised by counsel that an appeal offers no prospects of success, that appeal does not constitute an effective remedy (see *Selvanayagam v. the United Kingdom* (dec.), no. 57981/00, 12 December

2002; see also *H. v. the United Kingdom*, cited above; and *McFeeley and others v. the United Kingdom*, no. 8317/78, Commission decision of 15 May 1980, Decisions and Reports (DR) 20, p. 44). Equally, an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail (*Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI; *Salah Sheekh v. the Netherlands*, no. 1948/04, §§ 121 et seq., ECHR 2007-... (extracts)).

90. In determining whether the applicant in the present case has exhausted domestic remedies for the purposes of Article 35 § 1 of the Convention, the Court first observes that where the applicant seeks to prevent his removal from a Contracting State, a remedy will only be effective if it has suspensive effect (*Jabari v. Turkey* (dec.), no. 40035/98, 28 October, 1999). Conversely, where a remedy does have suspensive effect, the applicant will normally be required to exhaust that remedy (*Bahaddar v. the Netherlands*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, §§ 47 and 48). Judicial review, where it is available and where the lodging of an application for judicial review will operate as a bar to removal, must be regarded as an effective remedy which in principle applicants will be required to exhaust before lodging an application with the Court or indeed requesting interim measures under Rule 39 of the Rules of Court to delay a removal. This is particularly so when a claim for judicial review is defined in the domestic law of the respondent State, *inter alia*, as a claim to review the lawfulness of a decision (see paragraph 28 above) and section 6(1) of the Human Rights Act provides that it is unlawful for a public authority, which would include the Secretary of State, to act in a way which is incompatible with a Convention right (see paragraph 27 above).

91. In the present case, while the Court notes the Government's concern as to the veracity of the account furnished by the applicant in respect of counsel's advice, it nonetheless considers that for the following reasons it is unnecessary to rule on this aspect of the Government's preliminary objection. It is clear that the basis for the applicant's fresh asylum claim and successive applications for permission to apply for judicial review was the deterioration in the security situation in Sri Lanka. By the time the applicant's case was listed for an oral hearing, three of the four High Court judges who had considered the applicant's claim had formed the view that the situation in Sri Lanka had deteriorated but that in itself was not sufficient to alter either the Adjudicator or the Secretary of State's decisions (see paragraphs 12, 13, 16 and 17 above). As the Court has observed, Article 35 must be applied to reflect the practical realities of the applicant's position. Notwithstanding its view expressed above, that an application for judicial review is in principle an effective remedy in such cases, the Court

also considers that applicants cannot reasonably be expected continually to make applications for permission to apply for judicial review where previous such applications have failed. In the circumstances of the applicant's case, the Court finds that, having regard to the practical realities of his position, he could not reasonably be expected to have renewed his application for permission to apply for judicial review at the oral hearing since by that stage it could not be said that the application had any reasonable prospects of success.

92. The Court therefore rejects the Government's preliminary objection on non-exhaustion. It further notes that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

93. The applicant complained that it would expose him to a real risk of being subjected to treatment in breach of Article 3 of the Convention and/or a violation of Article 2 if he were to be returned to Sri Lanka. Articles 2 and 3 provide, so far as relevant, as follows:

> "**Article 2**
>
> 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.
>
> ...
>
> **Article 3**
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

94. The Government contested that argument and also argued that the applicant's complaint under Article 2 was indissociable from his complaint under Article 3.

95. The Court agrees with the Government that it is more appropriate to deal with the complaint under Article 2 in the context of its examination of the related complaint under Article 3 and will proceed on this basis (*Said v. the Netherlands*, no. 2345/02, § 37, ECHR 2005-VI; *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports* 1997-III, § 59).

A. The parties' submissions

1. The applicant

96. The applicant relied on the AIT determination in *LP*, the UNHCR Position Paper and the reports by Amnesty International and Human Rights Watch (see paragraphs 30–46, 65–68, 76 and 78–79 above), as evidence of

a general decline in the human rights situation in Sri Lanka. This demonstrated that the Court would need to reassess its findings in *Venkadajalasarma v. the Netherlands*, no. 58510/00 and *Thampibillai v. the Netherlands*, no. 61350/00, judgments of 17 February 2004, where it had found that, at the time, the considerable improvement in the security situation in Sri Lanka meant the return of two Tamils who had provided low-level support to the LTTE would not give rise to a violation of Article 3. In particular, the UNHCR Position Paper, in contrast to the Home Office Operational Guidance Note of 9 March 2007, suggested a much broader risk to Tamils than simply a risk to high profile Tamils. It was also not possible for the Government to rely on the AIT's determination in *PS* on the sufficiency of protection from the LTTE in Colombo since the risk to the applicant also came from the Sri Lankan authorities.

97. The applicant relied on the AIT's determination in *LP* and identified nine of the twelve risk factors set out in that determination which applied to him and which, he argued, increased the risk of harm to him at the hands of the Sri Lankan authorities. First, he was a young male Tamil from the north-east of the country and thus clearly at a higher risk of both persecution from the Sri Lankan authorities and forced recruitment by the LTTE than many ethnic Tamils. The LTTE had already tried twice to recruit him. Second, he had a previous record as a suspected LTTE member and had been arrested and ill-treated on six occasions because of this suspicion. The fact that he had been photographed and his fingerprints taken meant there was a record of his detention. Third, and on the same grounds, the risk factor of a previous criminal record or arrest warrant also applied to him. Fourth, after each detention the applicant was released without charge but during his last detention his father secured his release by signing a suspicious document indicating that his release was abnormal and akin to those who were at greater risk because they had jumped bail or escaped from custody. Fifth, while he was not aware of the content of the document his father had signed, when considered with the taking of his photograph and fingerprints, this placed him in the same category as someone who had signed a confession or similar document. Against the background of the current situation in Sri Lanka, it was reasonable to assume that the document, whatever its content, could be used against him on his return. Sixth, the scars he bore from his ill-treatment were clearly relevant, though he observed that the *LP* determination indicated that this was not determinative. Seventh, in respect of his return from London, he did not claim to have been fund-raising for the LTTE or that the Sri Lankan High Commission was aware of his involvement with the LTTE so his return from London would not be sufficient. However, since suspicion fell on those previously known to the authorities and returned from London, this factor contributed cumulatively to the risk he would face if returned. The same considerations applied to the eighth factor he identified, having made

an asylum claim abroad. The ninth and final factor, having relatives in the LTTE, was of particular significance to the applicant given his brother's associations with the LTTE and the LTTE's suspicion that his father had informed on them to the army.

98. Relying further on the UNHCR Position Paper, the applicant considered that in respect of the risk to him from the LTTE, there was no internal flight alternative available to him since he was also at risk from the Sri Lankan authorities in Government-controlled areas. In *Salah Sheekh*, cited above (§ 148), the Court had accepted the general statements made by the UNHCR on the situation in the "relatively unsafe" areas of Somalia in so far as members of the Ashraf minority were concerned and the absence of any internal flight alternative. He argued that in *Sultani v. France*, no. 45223/05, ECHR 2007-... (extracts) the Court had again accepted that it may only be necessary for an applicant to prove that he belongs to a minority group that is particularly at risk. As demonstrated by the UNHCR Position Paper, the present applicant belonged to an ethnic group for whom no safe area existed. Even if the Court did not accept such a generalised approach, in light of the applicant's particular circumstances, the real risk to him was sufficient to make internal flight unavailable.

99. It was also not open to the Government to rely on their own country information in contradiction to the recommendations of the UNHCR Position paper since it would allow Contracting States to avoid their Convention obligations by invoking their own information instead of objective information collected by independent bodies.

100. Finally, the applicant relied on Council Directive 2004/83/EC and submitted that under Article 53 of the Convention the level of protection offered by the Convention had to be equal or higher to that in the Directive.

2. The Government

101. While the Government did not accept that there was a real risk to the applicant in any area of Sri Lanka, the latest objective country information made it clear that an individual in the applicant's position would not be at risk in Colombo, where they sought to return him. They relied on the Court's rulings in *Venkadajalasarma* and *Thampibillai*, cited above. The Court's findings in those cases were reflected in the AIT's country guidance determination in *PS* (see paragraph 47 above). In the light of the domestic authorities' decisions in the present applicant's case, *a fortiori*, there would be no violation if he were to be returned.

102. It was necessary to consider whether the situation in Sri Lanka had changed sufficiently to mean that removal there would be a violation of Article 3, but the Government relied on the findings of the domestic authorities that, in the circumstances of the applicant's case, the situation had not changed sufficiently to warrant such a conclusion. The Government relied on the Home Office Operational Guidance Notes of 9 March 2007

and 5 November 2007 and the AIT's determination in *LP* (see paragraphs 58–59 and 30–46 above). The UNHCR Position Paper of December 2006 had been carefully considered by the Government when it prepared the Operational Guidance Notes. Such UNHCR Position Papers had to be understood in their true context and in this connection the Government relied on the Immigration Appeal Tribunal's determination in *NM and Others* (see paragraphs 48 et seq. above) and the finding there that such papers were to be treated with care since language used by the UNHCR was not framed by reference to the Convention and the high threshold of Article 3 as understood in this Court's case-law. This was accepted by the AIT in *LP* and indeed the particular position paper of December 2006 had been duly considered by it. According to the BBC's report of 19 August 2007, the UNHCR in Thailand had itself refused the asylum claims of three Tamils (see paragraph 84 above).

103. In respect of the nine risk factors relied on by the applicant, the Government adopted the approach to assessing these risk factors which had been set out in *LP* and argued that the applicant had provided no evidence either to the domestic authorities or this Court to substantiate the assertion that these risk factors were engaged in his particular case and even less so that they would lead to a real risk of treatment contrary to Article 3. The risk to him as a young male Tamil was only relative to the risk to other Tamils. There was an express finding by the Adjudicator that there was no record of his even having been involved with the LTTE and there was no evidence that he had a criminal record. The applicant had not jumped bail or escaped from custody. The Government thus relied on the fact that in *LP* the AIT had made it clear that while someone who had escaped from custody or jumped bail would be at a higher risk of being identified at Colombo airport, it would be very different if a person had merely been informally detained and released after payment of a bribe. There was no evidence that the document signed by the applicant's father amounted to a confession and no evidence that it would ever be used against him in Sri Lanka. In respect of the applicant's scars, the Government again relied on the fact that in *LP* the AIT had found that scarring was significant only when there were other factors that would bring someone to the attention of the authorities. Without further evidence from the applicant, the same reasoning applied to the fact that he would be returning from London and had made an asylum claim abroad. Finally, according to the applicant, his brother had assisted the LTTE only through non-combatant work before he fled to Saudi Arabia.

104. The domestic authorities had taken adequate account of the most recent security situation in Sri Lanka. In particular the Secretary of State's letter to the applicant of 10 January 2007 (see paragraph 15 above) was fully reasoned and considered all available objective evidence and its approach was subsequently confirmed in the *LP* case. None of the available objective country information undermined the conclusions of the AIT in *LP*

and the need for a detailed and careful risk assessment in relation to the personal circumstances of each applicant. While the general human rights situation in Sri Lanka had deteriorated, there was no generalised risk applicable to Tamils being returned there. This approach had been confirmed by the High Court when considering the applications of five Tamils in light of the exchange of letters between the Section Registrar and the Agent of the Government (see paragraph 21 above).

105. As to the applicant's reliance on Directive 2004/83/EC (see paragraphs 51 and 100 above), the Government observed that Article 53 of the Convention did not prevent Contracting Parties from providing a higher level of protection than that provided for by the Convention. The interpretation of the Directive was primarily for the European Court of Justice and ultimately could be subject to supervision by the Court (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI).

B. The Court's assessment

106. In its assessment in the present case, the Court will consider the general principles applicable to expulsion cases. It will then set out its approach to the objective information which has been placed before it. On that basis, it will assess the risk to Tamils returning to Sri Lanka and the individual circumstances of the applicant's case in order to determine whether there would be a violation if he were to be returned to Sri Lanka.

107. In doing so, the Court also recalls that its sole task under Article 19 of the Convention is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto. It is not the Court's task to apply directly the level of protection offered in other international instruments and therefore considers that the applicant's submissions on the basis of Directive 2004/83/EC are outside the scope of its examination of the present application.

1. General principles

108. In assessing whether there would be a violation of Article 3 if a Contracting State were to expel an individual to another State, the Court will consider the following principles, as they appear in its settled case-law.

109. In the first instance, Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention to control the entry, residence and expulsion of aliens (*Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-....; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42). The right to political asylum is also not contained in either the Convention or its Protocols (*Salah Sheekh*, cited

above, § 135, with further authorities). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (*Saadi v. Italy* [GC], no. 37201/06, § 125, 28 February 2008).

110. The assessment whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (*Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 40).

111. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

112. If the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy*, cited above, § 133). A full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see *Salah Sheekh*, cited above, § 136).

113. The foregoing principles, and in particular the need to examine all the facts of the case, require that this assessment must focus on the

foreseeable consequences of the removal of the applicant to the country of destination. This in turn must be considered in the light of the general situation there as well as the applicant's personal circumstances (*Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 108). In this connection, and where it is relevant to do so, the Court will have regard to whether there is a general situation of violence existing in the country of destination.

114. However, a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion (see *H.L.R.*, cited above, § 41). Indeed, the Court has rarely found a violation of Article 3 on that ground alone. For example, in *Müslim v. Turkey*, no. 53566/99, 26 April 2005, where the Court considered the expulsion of an Iraqi national of Turkmen origin to Iraq, it found the mere possibility of ill-treatment because of the unstable situation in that country at the material time would not in itself amount to a breach of Article 3 (paragraph 70 of the judgment). Equally, in *Sultani*, cited above, § 67, the Court took notice of the general situation of violence at that time in Afghanistan but found that this, without more, was not sufficient to find a violation of Article 3. Moreover, in the *Thampibillai* and *Venkadajalasarma* judgments relied on by the parties in their observations in the present case, the Court considered the considerable improvement in the security situation in Sri Lanka and the "very real progress" in the peace process at the material time as relevant factors in its finding that there were no substantial grounds for believing that the applicants would be exposed to a real risk of ill-treatment contrary to Article 3 (*Thampibillai* at paragraphs 64 and 65; *Venkadajalasarma* at paragraphs 66 and 67). In the earlier case of *Vilvarajah and Others*, cited above, the Court recognised the possibility of detention and ill-treatment in respect of young Tamil males returning to Sri Lanka. However, it insisted that the applicants show that special distinguishing features existed in their cases that could or ought to have enabled the United Kingdom authorities to foresee that they would be treated in a manner incompatible with Article 3 (paragraphs 111-112 of the judgment). Finally, while in *Ahmed v. Austria*, judgment of 17 December 1996, *Reports* 1996-VI, the Court did find a violation of Article 3 partly on account of conditions in Somalia in the early 1990s, it also noted that the Austrian Government had not contested the applicant's submission that there was no observable improvement in the general situation and had also accepted that at the material time the applicant could not be returned there without being exposed to the risk of treatment contrary to Article 3 (see paragraph 5 of the judgment).

115. From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most

extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

116. Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see *Saadi v. Italy*, cited above, § 132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see *Salah Sheekh*, cited above, § 148). The Court's findings in that case as to the treatment of the Ashraf clan in certain parts of Somalia, and the fact that the applicant's membership of the Ashraf clan was not disputed, were sufficient for the Court to conclude that his expulsion would be in violation of Article 3.

117. In determining whether it should or should not insist on further special distinguishing features, it follows that the Court may take account of the general situation of violence in a country. It considers that it is appropriate for it to do so if that general situation makes it more likely that the authorities (or any persons or group of persons where the danger emanates from them) will systematically ill-treat the group in question (see *Salah Sheekh*, § 148; *Saadi v. Italy*, §§ 132 and 143; and, by converse implication, *Thampibillai*, §§ 64 and 65; *Venkadajalasarma*, §§ 66 and 67, all cited above).

2. The assessment of objective information

118. In the light of the large amount of objective information placed before it by the parties, the Court also considers it necessary to restate the approach it takes to the assessment of such information before considering what conclusions may be drawn from it the present case. This is particularly important given that there is a dispute between the parties as to the weight to be attached to the UNHCR's assessment of the general situation in Sri Lanka (see paragraphs 96 and 102).

119. In this connection, the Court recalls the principles recently set out in *Saadi v. Italy*, cited above, §§ 128-133, that in assessing conditions in the proposed receiving country, the Court will take as its basis all the material placed before it or, if necessary material obtained *proprio motu*. It will do so, particularly when the applicant – or a third party within the meaning of the Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent

Government. The Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations (see *Salah Sheekh*, cited above, § 136; *Garabayev v. Russia*, no. 38411/02, § 74, 7 June 2007, ECHR 2007-... (extracts)). As regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection organisations such as Amnesty International, or governmental sources, including the US State Department (see *Saadi v. Italy*, cited above, § 131).

120. In assessing such material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations (see *Saadi v. Italy*, cited above, § 143).

121. The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the Court observes that States (whether the respondent State in a particular case or any other Contracting or non-Contracting State), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it. It finds that same consideration must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do.

122. While the Court accepts that many reports are, by their very nature, general assessments, greater importance must necessarily be attached to reports which consider the human rights situation in the country of destination and directly address the grounds for the alleged real risk of ill-treatment in the case before the Court. Ultimately, the Court's own assessment of the human rights situation in a country of destination is carried out only to determine whether there would be a violation of Article 3 if the applicant in the case before it were to be returned to that country. Thus the weight to be attached to independent assessments must inevitably depend on the extent to which those assessments are couched in terms similar to Article 3. Thus in respect of the UNHCR, due weight has been given by the Court to the UNHCR's own assessment of an applicant's claims when the Court determined the merits of her complaint under Article 3 (see *Jabari v. Turkey*, no. 40035/98, § 41, ECHR 2000-VIII).

Conversely, where the UNHCR's concerns are focussed on general socio-economic and humanitarian considerations, the Court has been inclined to accord less weight to them, since such considerations do not necessarily have a bearing on the question of a real risk to an individual applicant of ill-treatment within the meaning of Article 3 (see *Salah Sheekh*, cited above, § 141).

3. Assessing the risk to Tamils returning to Sri Lanka

123. In considering whether the applicant has established that he would be at real risk of ill-treatment in Sri Lanka, the Court observes as a preliminary matter that the Government propose to remove him to Colombo. In the light of this, the Court does not consider it necessary to examine the risk to Tamils in LTTE controlled areas or any other part of the country outside Colombo and will proceed to examine the risk to Tamils returning to Sri Lanka on this basis.

124. The Court first observes that it is accepted by the parties to the case that there has been a deterioration in the security situation in Sri Lanka. The Court finds no reason to disagree with the parties' assessment and notes that all the objective evidence before it supports this conclusion. This deterioration took place before the present application was lodged with the Court and has continued while the case has been pending, particularly since the formal end of the ceasefire in January 2008. It is also clear to the Court that the evidence before it supports the conclusion that the deterioration in the security situation in Sri Lanka has been accompanied by an increase in human rights violations, on the part both of the LTTE and the Sri Lankan Government. Killings, abductions and disappearances have increased (see the UNHCR Position Paper at paragraph 65 above; the United Nations High Commissioner for Human Rights at paragraph 69 above; the 2007 Amnesty International report at paragraph 76 above; and the Human Rights Watch report at paragraph 78 above). Investigations into such serious human rights violations are inadequate (see the IIGEP at paragraph 75 above and the Human Rights Watch report "Recurring Nightmare" at paragraph 80 above). Torture and ill-treatment are common place (see the conclusions of the United Nations Special Rapporteur on Torture at paragraph 70 above) and there is also clear evidence of what the AIT described as "a culture of torture with impunity" (see paragraph 35 above and the 2008 Amnesty International report at paragraph 77 above).

125. However, the Court also notes that the domestic authorities, while recognising this deterioration and the corresponding increase in human rights violations, did not conclude that this created a general risk to all Tamils returning to Sri Lanka (see in particular the findings of the AIT in *LP* in paragraphs 232 –234 of the determination; set out at paragraph 43 above), nor has the applicant in the present case sought to challenge that conclusion in his submissions. The Court has examined closely the

developments in Sri Lanka since the AIT's determination in *LP*, particularly the information that has become available since that determination (see paragraphs 53–85 and 124 above). It considers that there is nothing in that objective information which would require the Court to reach a different conclusion of its own motion.

126. The Court also finds that in reaching the conclusions they did, the United Kingdom authorities, including the Secretary of State, the AIT and the High Court, gave serious and anxious consideration to the risk to Tamils returning to Sri Lanka (see paragraphs 58–59, 30–46, and 50 above). They considered all the relevant objective evidence and, just as importantly, considered the appropriate weight to be given to it.

127. In respect of the UNHCR Position Paper (see paragraphs 65–68 above) and in light of its own observations at paragraphs 118–122 above, the Court shares the view of the AIT in *LP* that "substantive weight" should be accorded to it. However, the Court also accepts the domestic authorities' view that the UNHCR Position Paper, by its nature, speaks in necessarily broad terms. In contrast to the findings made by the UNHCR and relied on by the Court in the *Jabari* judgment, cited above, §§ 18 and 41, the UNHCR's Position Paper is a general survey of the varying risks to each of Sri Lanka's different ethnic groups. As such, the views expressed in that paper could not themselves be decisive in the domestic authorities' assessment of the risk to Tamils returning to Sri Lanka and cannot be decisive in the Court's own assessment of the same. Indeed, the Position Paper said that Tamils "with certain profiles" were liable to suffer serious human rights transgressions and that where individual acts of harassment did not in and of themselves constitute persecution, taken together, they might cumulatively amount to a serious violation of human rights and therefore be persecutory.

128. It follows that both the assessment of the risk to Tamils of "certain profiles" and the assessment of whether individual acts of harassment cumulatively amount to a serious violation of human rights can only be done on an individual basis. Thus, while account must be taken of the general situation of violence in Sri Lanka at the present time, the Court is satisfied that it would not render illusory the protection offered by Article 3 to require Tamils challenging their removal to Sri Lanka to demonstrate the existence of further special distinguishing features which would place them at real risk of ill-treatment contrary to that Article (see *Salah Sheekh*, cited above, § 148 and paragraphs 116–117 above).

129. The Court therefore considers that it is in principle legitimate, when assessing the individual risk to returnees, to carry out that assessment on the basis of the list of "risk factors", which the domestic authorities, with the benefit of direct access to objective information and expert evidence, have drawn up. The Court also notes that the AIT in *LP* considered all the relevant risk factors identified and put before it by the appellant in that case

and that the AIT itself was careful to avoid the impression that these risk factors were a "check list" or exhaustive. It further notes that in the present case, the parties' observations as to the individual risk to the applicant are made with reference to the same risk factors considered in *LP*. Furthermore, the applicant has not identified any further risk factors which were not considered in *LP* but which would assist the Court in its assessment. As it has recalled, the Court's own assessment must be full and *ex nunc* (paragraph 112 above) but on the basis of the objective evidence before it, the Court itself does not consider it necessary to identify any additional risk factors which have not been duly considered by the domestic authorities or raised by the parties in their observations.

130. Despite this conclusion, the Court emphasises that the assessment of whether there is a real risk must be made on the basis of all relevant factors which may increase the risk of ill-treatment. In its view, due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk. Both the need to consider all relevant factors cumulatively and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case (see the *Hilal* judgment, cited above, § 60).

131. Moreover, the Court finds that the information before it 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 LTTE. This was the underlying conclusion which formed the basis of the elaboration of the risk factors in *LP* (see paragraphs 227 and 232 of the determination, set out at paragraphs 42–43 above). Indeed, as Mr Justice Collins later put it (see paragraph 50 above):

> "The test therefore, as I see it, is whether there are factors in an individual case, one or more, which might indicate that authorities would regard the individual as someone who may well have been involved with the LTTE in a sufficiently significant fashion to warrant his detention or interrogation. If interrogation and detention are likely, then, in the context of the approach of the authorities in Sri Lanka, torture would be a real risk and thus a breach of Article 3 might occur."

132. The Court observes that the evidence which has become available since the domestic authorities considered the return of Tamils to Sri Lanka provides further support for this conclusion. The United Nations Special Rapporteur on Torture found that torture is widely practiced in Sri Lanka and observed it was "prone to become routine" in the context of counter-terrorism operations (see paragraph 70 above). This is corroborated by the annual reports of the US State Department and Amnesty International (see paragraphs 76, 77 and 71 above) and the report of the Medical Foundation for the Care of Victims of Torture (see paragraph 83 above). The culture of

impunity identified by the AIT in *LP* was also noted by the United Nations High Commissioner for Human Rights in her visit to Sri Lanka: her press release described the prevalence of impunity as "alarming" (see paragraph 69 above).

133. On the basis of this evidence, the Court therefore finds that, in the context of Tamils being returned to Sri Lanka, the protection of Article 3 of the Convention enters into play when an applicant can establish that there are serious reasons to believe that he or she would be of sufficient interest to the authorities in their efforts to combat the LTTE as to warrant his or her detention and interrogation (see *Saadi v. Italy*, cited above, § 132).

134. In respect of returns to Sri Lanka through Colombo, the Court also finds that there is a greater risk of detention and interrogation at the airport than in Colombo city since the authorities will have a greater control over the passage of persons through any airport than they will over the population at large. In addition, the majority of the risk factors identified by AIT in *LP* will be more likely to bring a returnee to the attention of the authorities at the airport than in Colombo city. It is also at the airport that the cumulative risk to an applicant arising from two or more factors will crystallise. Hence the 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.

135. In this connection, the Court notes that the objective evidence before it contains different accounts of the precise nature of the procedures followed at Colombo airport and the nature of the information technology there (see the British High Commission letters and the Immigration and Refugee Board of Canada report at paragraphs 60–63 and 74 above). Indeed, the evidence suggests that the procedures followed by the Sri Lankan authorities may change over time. However, the Court also notes that, with the exception of the extracts of the British High Commission's letter of 25 January 2008 that appeared in the March 2008 COI Report (see paragraph 60 above), all the above evidence was considered by the AIT in *LP* where it was undisputed that records were kept and interviews conducted at the airport and where the AIT found that computerised records were available to the police at the airport, from which they could identify possible "bail jumpers" (see paragraph 35 above). In the light of the extensive evidence before the AIT on this subject and its findings, the Court cannot come to a different conclusion on the basis of the uncorroborated British High Commission's letter of 25 January 2008 and the observations therein that the Sri Lankan CID do not use computers, particularly when, as the COI Report noted, in its letter of 24 August 2006, the British High

Commission had previously reported that "the Sri Lankan authorities have a good IT system to track arrivals and departures at the main airport and are able to track, in most cases, whether an individual is in the country or not" (see paragraph 60 above). The Court also considers it to be of some significance that both the British High Commission letters and the assessment of the Immigration and Refugee Board of Canada indicate that there are established and routine procedures for briefly detaining and questioning returnees at the airport.

136. This evidence on procedures and facilities at the airport must also be placed alongside the AIT's finding on the availability of lists of failed asylum seekers to the Sri Lankan authorities, which was based on the British High Commission's letter of 24 August 2006 (see paragraph 40 above) and the evidence that scarring has been used in the past by the authorities as a means of identifying Tamils who will be of interest to them (see the finding of the AIT set out at paragraph 37 above). The Court notes the AIT's finding, in light of that evidence, that "failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment" (see paragraph 44 above) but it considers that at the very least the Sri Lankan authorities have the technological means and procedures in place to identify at the airport failed asylum seekers and those who are wanted by the authorities. The Court further finds that it is a logical inference from these findings that the rigour of the checks at the airport is capable of varying from time to time, depending on the security concerns of the authorities. These considerations must inform the Court's assessment of the risk to the applicant.

137. Finally, in the Court's view, it cannot be said that there is a generalised risk to Tamils from the LTTE in a government controlled area such as Colombo. The Court accepts the findings of the domestic authorities that individual Tamils may be able to demonstrate a real and personal risk to them from the LTTE in Colombo. However, it also accepts their assessment that this will only be to Tamils with a high profile as opposition activists, or as those seen by the LTTE as renegades or traitors (see in particular the *PS* determination of the IAT at paragraph 47 above). The Court therefore considers that it must also examine any complaint as to the risk from the LTTE in the context of the individual circumstances of the applicant's case.

4. The applicant's case

138. On the basis of the foregoing observations, the Court will examine the applicant's particular circumstances in order to determine whether there would be a violation of Article 3 if he were to be expelled to Sri Lanka. As the Court has observed, the applicant complained that he was at real risk from both the LTTE and the Sri Lankan authorities. Consequently, it will examine each of these aspects of his complaint in turn.

139. Before doing so, it observes that the Government do not appear to have disputed the Adjudicator's findings as to the credibility of the applicant's account. These were that the applicant bears scars from ill-treatment during detention; that he was arrested by the army six times between 1990 and 1997 on suspicion of his involvement with the LTTE and that on the last occasion he was photographed, fingerprinted and released after his father signed a document (see paragraph 8 above). The Court also notes the Adjudicator's finding that, following the ceasefire agreement, the applicant would be of no interest to the Sri Lankan authorities because he had been held for short periods and released without charge on each occasion (see paragraph 9 above). Finally, the Court notes the Adjudicator's findings that it was unlikely that the LTTE would have any interest in the applicant and unlikely that they could track him down in Colombo (see paragraph 10 above).

140. However, the Court also observes that the Adjudicator's decision of 27 July 2003 was the last full factual assessment by the domestic authorities of the applicant's case. As it has noted at paragraph 91 above, the basis for the applicant's subsequent fresh asylum claim and successive applications for permission to apply for judicial review was the deterioration in the security situation in Sri Lanka. As the Court has found, by the time the applicant's case was listed for an oral hearing, three of the four High Court judges who had considered the applicant's claim had formed the view that the situation in Sri Lanka had deteriorated but that in itself was not sufficient to alter the decisions of either the Adjudicator or the Secretary of State and the applicant did not, therefore, renew his application for permission to apply for judicial review at the oral hearing. In these circumstances, the Court is called upon to assess the risk to the applicant without the benefit of a recent and full factual assessment by the domestic authorities in his case.

141. In respect of the alleged risk to the applicant from the LTTE, the Court reiterates that it accepts the domestic authorities' assessment that while there may be a risk to Tamils in Colombo from the LTTE, this will be only to Tamils with a high profile as opposition activists, or those seen by the LTTE as renegades or traitors. Like the domestic authorities, it can discern no such factors in the applicant's case and is persuaded that, since his encounter with the LTTE took place ten years ago, if returned to Colombo he would be of little interest to them. He would therefore not be at real risk of ill-treatment contrary to Article 3 by the LTTE if returned to Colombo.

142. In assessing the risk to the applicant from the Sri Lankan authorities, the Court will examine the strength of the applicant's claim to be at real risk as a result of an accumulation of the risk factors identified in *LP* (see paragraphs 30–46 above). However, it will do so in light of its own observations set out in paragraphs 130–136 above. In particular, the Court

underlines first, the need to have due regard for the deterioration of the security situation in Sri Lanka and the corresponding increase in general violence and heightened security; and second, the need to take a cumulative approach to all possible risk factors identified by the applicant as applicable to his case.

143. In *LP*, the AIT considered a previous criminal record and/or arrest warrant to be a significant factor, albeit with the qualification that it did not mean, of itself, that the applicant had a well-founded fear of persecution or other significant harm on return to Sri Lanka. The Court recalls that the AIT also found that the issue was to establish the credibility of the criminal record, or an arrest warrant, and to decide whether it was reasonably likely to exist in respect of the applicant in the particular case (see paragraph 34 above). In the Court's view, the present applicant, who was arrested and detained by the Sri Lankan authorities six times, photographed and fingerprinted, can rely on this risk factor, particularly since his claim was found credible on this point. The applicant did not jump bail or abscond from police custody so as to engage this separate risk factor identified by the AIT in *LP* (see paragraph 35 above) and the Court accepts the AIT's view that persons who jump bail or abscond are at a higher level of risk of being identified from police computers at the airport. However, the applicant's father signed a document to secure his son's release. Understandably, this document was not available to the parties and so was not put before the Court. Its precise nature is not known but the logical inference is that it would have been retained by the Sri Lanka authorities at the time of the applicant's release. The Court notes that the Government did not suggest that there was never such a document, rather they sought to question the weight to be accorded to it and argued that there was no evidence that this amounted to a confession and no evidence that it would be used against the applicant in Sri Lanka. The Court accepts that no firm conclusions can be drawn as to whether the document amounted to a confession or, as the AIT also considered in *LP*, a statement made in Sinhala which the applicant or his father did not understand. However, in the Court's view it is not necessary to consider whether such a document additionally engages the particular risk factor identified by the AIT as relating to confessions or statements (see paragraph 36 above) since whatever the nature of that document, at the very least it amounts to a record of the applicant's detention.

144. The Court also accepts the assessment of the AIT that scarring will have significance only when there are other factors that will bring the applicant to the attention of the authorities such as being wanted on an outstanding arrest warrant or a lack of means of identification (see paragraph 37 above). However, where there is a sufficient risk that an applicant will be detained, interrogated and searched, the presence of scarring, with all the significance that the Sri Lankan authorities are then

likely to attach to it, must be taken as greatly increasing the cumulative risk of ill-treatment to that applicant.

145. The Court recognises that it has been over ten years since the applicant was last detained by the Sri Lankan army. However, the Court considers that the greatest possible caution should be taken when, as in the applicant's case, it is accepted that a returnee has previously been detained and a record made of that detention. As the AIT found in *LP* (see paragraph 44 above), such a record may be readily accessible to airport authorities, meaning the person in question may become of interest to the authorities during his or her passage through the airport. Where there is a likelihood that this will result in delay in entering the country, there is clearly a greater risk of detention and interrogation and with it a greater risk of ill-treatment contrary to Article 3 (see paragraphs 131–133 above). Equally, in light of its observations at paragraphs 130–136 and 142 above, the Court finds the passage of time cannot be determinative of the risk to the present applicant without a corresponding assessment of the current general policies of the Sri Lankan authorities (see, *mutatis mutandis*, *Saadi v. Italy*, cited above, § 43; the *Jabari* judgment¸ cited above, § 41, *in fine*). Their interest in particular categories of returnees is likely to change over time in response to domestic developments and may increase as well as decrease. In the Court's view, it cannot be excluded that on any given date if there is an increase in the general situation of violence then the security situation in Sri Lanka will be such as to require additional security at the airport. The Court also recalls its finding at paragraphs 134–136 above, notably that computerised records are available to the airport authorities. Given that it is undisputed that the applicant was arrested six times between 1990 and 1997, that he was ill-treated in detention and that it appears a record was made of his detention on at least one occasion, the Court considers that there is a real risk that the applicant's record will be available to the authorities at the airport. Furthermore, it cannot be excluded that on any given date the security situation in Sri Lanka would be such as to require additional security at the airport and that, due to his risk profile, the applicant would be at even greater risk of detention and interrogation.

146. Insofar as they have been relied on in this case, the Court has also examined the additional factors in *LP*: the age, gender and origin of a returnee, a previous record as a suspected or actual LTTE member, return from London, having made an asylum claim abroad and having relatives in the LTTE. It has also noted the relative weight which the AIT attached to each risk factor (see paragraphs 32, 33, 38, 40 and 41 above). It considers that, where present, these additional factors contribute to the risk of identification, questioning, search and detention at the airport and, to a lesser extent, in Colombo. In respect of having relatives in the LTTE, the Court accepts the Government's submission that this is of little weight in this case; few details of the involvement of the applicant's brother in the

LTTE or his present whereabouts have been provided. However, the Court accepts that the remaining factors are all capable of being relied upon by the applicant and, on the facts of his case, their cumulative effect is to increase further the risk to him, which is already present due to the probable existence of a record of his last arrest and detention. He is a male Tamil who is thirty-two years of age and the AIT found there was a higher propensity on the part of the Sri Lanka authorities to target young men and women from the north and east in a period of "virtual civil war" (see paragraph 32 above). This must apply *a fortiori* since the formal end of the ceasefire (see paragraph 54 above). On the applicant's account, which was found to be credible by the Adjudicator, his six arrests were on the basis of suspicion of LTTE involvement, even if he was ultimately found to have no such involvement. While the Court agrees with the AIT in *LP* that in respect of this risk factor it is of "vital importance" to establish an applicant's profile and the credibility of his background in some depth (see paragraph 33 above), it also finds that this was so established in the present applicant's case and thus significant weight must be given to the Adjudicator's finding as to his credibility (see paragraph 8 above). 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 AIT's finding in *LP* 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 AIT'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 Lankan High Commission in London and that information could be passed on (see paragraph 40 above).

147. The Court has taken note of the current climate of general violence in Sri Lanka and has considered cumulatively the factors present in the applicant's case. It also notes its finding at paragraphs 131–133 above that those considered by the authorities to be of interest in their efforts to combat the LTTE are systematically exposed to torture and ill-treatment. There is a real risk that the authorities at Colombo airport would be able to access the records relating to the applicant's detention and if they did so, when taken cumulatively with the other risk factors he has relied upon, it is likely the applicant would be detained and strip-searched. This in turn would lead to the discovery of his scars. On this basis, the Court finds that these are substantial grounds for finding that the applicant would be of interest to the Sri Lankan authorities in their efforts to combat the LTTE. In those circumstances, the Court finds that at the present time there would be a violation of Article 3 if the applicant were to be returned.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

148. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

149. The applicant expressly made no claim in respect of pecuniary and non-pecuniary damage and the Government similarly made no observations under this head.

B. Costs and expenses

150. The applicant claimed a total of GBP 3,510 in legal costs and expenses incurred before the Court, which is approximately EUR 4,451. This claim comprised the costs and expenses of two solicitors in the amount of GBP 770 and GBP 2740 for eleven and sixty-eight and a half hours' work respectively.

151. The Government made no submissions under this head.

152. The Court considers that the amount claimed is not excessive in light of the nature of the dispute, particularly given the complexity of the case. It therefore considers that the applicant's costs and expenses should be met in full and thus awards him EUR 4,451, inclusive of VAT, less EUR 850 already received in legal aid from the Council of Europe.

C. Default interest

153. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that the applicant's expulsion to Sri Lanka would be in violation of Article 3 of the Convention;

3. *Holds* that no separate issue arises under Article 2 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,451 (four thousand four hundred and fifty-one euros), plus any tax that may be chargeable, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement, less EUR 850 (eight hundred and fifty euros);

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 17 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President