FIFTH SECTION

CASE OF N.S. v. DENMARK

*(Application no. **58359/08**)*

JUDGMENT

STRASBOURG

20 January 2011

FINAL

20/04/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of N.S. v. Denmark,

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

Renate Jaeger, *President,*
Peer Lorenzen,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 14 December 2010,

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

PROCEDURE

1. The case originated in an application (no. **58359/08**) against the Kingdom of Denmark 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, N.S. ("the applicant"), on 25 November 2008. The acting President of the Chamber decided to grant the applicants anonymity (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Hans Boserup, a lawyer practising in Sønderborg. The Danish Government ("the Government") were represented by their Agent, Mr Thomas Winkler, of the Ministry of Foreign Affairs, and their Co-agent, Mrs Nina Holst-Christensen, of the Ministry of Justice.

3. The applicant alleged in particular that an implementation of the deportation order to return him to Sri Lanka would be in violation of Article 3 of the Convention.

4. On 11 December 2008, the acting President of the Chamber decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was 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 6 January 2009 the acting President decided to give notice of the application to the Government and granted it priority under Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant's domestic proceedings

5. The applicant was born on 21 November 1967 in Sri Lanka. He is of Tamil ethnicity.

6. Having been granted family reunification on 3 December 1997, by virtue of the former section 9, subsection 1(2), of the Aliens Act (*Udlændingeloven)*, on 13 December 1997, with a valid passport and visa, the applicant joined his Sri Lankan wife in Denmark. It appears that she had left Sri Lanka in 1992 and stayed in India before, at some unknown time, she was granted asylum in Denmark, apparently due to her connections with the LTTE.

7. Three children were born to the couple in 2000, 2002 and 2005.

8. By a judgment of 4 July 2006 by the City Court in Tønder (*Retten i Tønder*), upheld on appeal on 19 September 2006 by the High Court of Western Denmark (*Vestre Landsret*), the applicant was convicted of the sexual abuse of a girl who was less than twelve years old. He was sentenced to three years and three months' imprisonment and expelled with a prohibition on returning.

9. The applicant did not request leave to appeal against the judgment to the Supreme Court (*Højesteret*).

10. The applicant finished serving his prison sentence on 20 March 2009.

11. In the meantime, on 14 June 2007 the applicant requested asylum under section 7 of the Aliens Act and maintained in support thereof, *inter alia*, that his three siblings, two of whom were dead, had been members of the Tamil Tigers (LTTE). He had not been a member of any organisation in Sri Lanka.

12. According to an interview report of 11 December 2007 prepared by the Immigration Service, the applicant added that until he turned 30 years of age, he had been a fisherman. Then he had married and been reunited with his family in Denmark in 1997. When the applicant went to school, persons from the LTTE had come up and asked him if he could dig holes, move things and carry out various jobs. The applicant took no part in action, exercises or military training. He assisted the LTTE on a full-time basis for three years. During this period he stayed with the LTTE all the time. Thereafter he moved back to his family without telling the LTTE. Confronted with the fact that he had previously stated that he had no involvement with the LTTE, he maintained that his statement had been translated incorrectly. He had assisted the LTTE from 1990 to 1995 but had not been a member. He did not recall whether he had been wanted by the Sri Lankan authorities but he had been arrested by them ten to fifteen times. When asked why he had not previously mentioned the arrests, he stated that most of the arrests had been of only a few hours' duration but that the last one had lasted some months. It was in 1991 when he was arrested in connection with the mass arrest. He remembered being released after six months as a result of a peace agreement but his memory was not very good. Whenever he had been arrested the authorities asked him whether he was working for the LTTE. He had denied this, although this was the period during which he had worked for the organisation. Confronted with the fact that he had previously stated that he would not risk any harm upon return to Sri Lanka as he was neither wanted nor persecuted, the applicant submitted that this must have been a misunderstanding.

13. On 21 December 2007 the applicant's application for asylum was refused by the Immigration Service (*Udlændingeservice*), finding that he lacked credibility and that there was no substantiated risk that he would be subjected to treatment contrary to Article 3 of the Convention upon return.

14. The applicant appealed to the Refugee Appeals Board (*Flygtningenævnet*) before which, during an oral hearing held on 20 May 2008, he explained for example that the LTTE had approached him numerous times between 1985 and 1997 to ask him to work for them, which he did, but he had not been a member of the LTTE. The last time he assisted them was in January 1997. The applicant left in December 1997.

15. By decision of 13 June 2008 the Refugee Appeals Board refused to grant the applicant asylum. It noted that the applicant had expanded his motive for requesting asylum and had submitted various divergent explanations. Moreover, even disregarding the fact that the applicant had made various unclear statements about the dates, number and duration of his detention by the authorities, it could be considered a fact that he was last detained in 1991, which was five or six years before his departure, in connection with a mass arrest; that he was released in connection with a peace agreement; that he was never charged or sentenced; and that he had been able to leave Sri Lanka in 1997 on a valid passport without any problems. The Refugee Appeals Board did not find that the applicant had substantiated being at risk of persecution by the Sri Lankan authorities or the LTTE upon return. Finally, it observed that the general situation in Sri Lanka for Tamils coming from the north and east of the country could not alone justify the granting of asylum, and that the applicant's case had been assessed on its concrete and particular circumstances.

B. Subsequent events before the Court and domestic proceedings

16. On 11 December 2008, upon the applicant's request, the Court of Human Rights decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was 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.

17. On 2 March 2009 the Refugee Appeals Board refused the applicant's request to reopen the case.

18. On 16 June 2009 the Refugee Appeals Board decided to suspend the examination of asylum cases concerning Tamils from northern Sri Lanka, including the applicant's case.

19. On 16 December 2009, on the basis of the most recent background information concerning Sri Lanka including, *inter alia*, a Memorandum of 26 October 2009 prepared by the Ministry of

Foreign Affairs, the Refugee Appeals Board decided to review the suspended cases, including the applicant's case.

20. On 16 March 2010 the Refugee Appeals Board refused to reopen the applicant's case as it found that the most recent general background information would not lead to a revised assessment of the case. More specifically in its letter to the applicant's representative it stated as follows:

> ... In its decision of 13 June 2008, the Refugee Appeals Board found ... The Refugee Appeals Board still finds that your client's fear of being forcibly recruited by the LTTE or of being subjected to outrages by the LTTE as a result of having fled from the LTTE does not warrant a residence permit under section 7 of the Aliens Act. In this connection, the Refugee Appeals Board emphasises that your client's statements about his alleged connection with the LTTE were extended during the asylum proceedings and were diverging in essential areas. In this connection, the Refugee Appeals Board also refers to the fact that the Sri Lankan military forces defeated the LTTE in May 2009. Moreover, the Refugee Appeals Board refers to the background information available to the Board from which it appears that it is hardly likely that former low-ranking members of the LTTE or persons who have previously supported the LTTE will risk reprisals from the LTTE, see United Kingdom: Home Office, Operational Guidance Note, Sri Lanka, August 2009. Regardless of whether your client's information about his previous activities for the LTTE is considered a fact, the Refugee Appeals Board stills find that your client would not risk persecution or being subjected to outrages as covered by section 7 of the Aliens Act by the Sri Lankan authorities if returned to Sri Lanka, including in connection with his arrival at Colombo airport. The Refugee Appeals Board emphasizes that from his detention in 1991, where his photo was taken, and until his departure in 1997 your client has not been detained or had his picture or fingerprint taken or in any other way been the object of interest from the Sri Lankan authorities. The authorities have thus not carried out any acts aimed at your client that indicated that he was suspected of being a member of the LTTE. In this connection, the Board also refers to the fact that your client departed lawfully from Sri Lanka with his own Sri Lankan national passport for the purpose of family reunification with his spouse. Similarly, the Refugee Appeals Board refers to the background material available to the Board, according to which persons who have previously supported the LTTE on a lower level are generally not of interest to the authorities, see United Kingdom: Home Office, Operational Guidance Note, Sri Lanka, August 2009, and see United Kingdom: Home Office, Report of Information Gathering Visit to Colombo, Sri Lanka 23-29 August 2009. Against that background the Refugee Appeals Board also finds that the fact that one or more of your client's siblings have been members of or active for the LTTE cannot warrant a residence permit under section 7 of the Aliens Act, according to the background information now available. The fact that as an ethnic Tamil from northern Sri Lanka your client may risk being questioned and investigated by the authorities on entry into the country cannot lead to a revised assessment of the case under asylum law. In this assessment, consideration has been given to the background information available to the Board, according to which the individuals at particular risk of being detained and investigated upon entry in Colombo are young Tamils, men in particular, from northern and eastern Sri Lanka, those without identification or residence in Colombo, and those recently returned from the West, see United Kingdom: Home Office, Report of Information Gathering Visit to Colombo, Sri Lanka 23-29 August 2009. In this connection the Board refers to its finding that it has not been rendered probable that your client would be an object of particular interest to the Sri Lankan authorities. As in its decision of 13 June 2008, the Refugee Appeals Board still finds that the general situation in Sri Lanka is not of such nature as to warrant in itself the grant of a residence permit under section 7 of the Aliens Act. The Board observes in that connection that it is a condition for a residence permit under section 7 of the Aliens Act that, upon a specific, individual assessment, an alien is deemed at risk of persecution or outrages. The authority of the Refugee Appeals Board is restricted to deciding asylum-relevant issues, and it is thus outside the Board's authority to determine whether an alien who does not meet the conditions of section 7 of the Aliens Act may be issued with a residence permit for other reasons of a more humanitarian nature. Against that background and in accordance with the Board's decision of 13 June 2008, the Refugee Appeals Board still finds that it has not been rendered probable that, in case of return to Sri Lanka, your client would be at concrete and individual risk of persecution as covered by section 7(1) of the Aliens Act, or that your client would be at a real risk of outrages as covered by section 7(2) of the Aliens Act. It should be noted that your client's time-limit for departure is still suspended until further notice on the basis of the request of 11 December 2008 from the European Court of Human Rights. If the basis for your client's lawful stay in Denmark lapses, your client must leave the country immediately, see section 33 of the Aliens Act. As appears from the decision of the Refugee Appeals Board of 13 June 2008, your client may be forcibly returned to Sri Lanka if he does not leave voluntarily, see section 32a, cf. section 31, of the Aliens Act.

21. On 18 March 2010, the applicant's representative brought proceedings against the Refugee Appeals Board before the City Court *(Retten i Sønderborg*) claiming that the Board's decision of 16 March 2010 should be annulled. It appears that the proceedings are still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum proceedings in Denmark

22. By virtue of section 7 of the Aliens Act (*Udlændingeloven),* asylum is granted to aliens who

satisfy the conditions of the Geneva Convention. Applications for asylum are determined in the first instance by the former Aliens Authorities (now called the Immigration Service) and in the second instance by the Refugee Appeal Board.

23. Pursuant to section 56, subsection 8, of the Aliens Act, decisions by the Refugee Board are final, which means that there is no avenue for appeal against the Board's decisions. Aliens may, however, by virtue of Article 63 of the Danish Constitution (*Grundloven*) bring an appeal before the ordinary courts, which have authority to adjudge on any matter concerning the limits to the competence of a public authority.

24. By virtue of section 54, subsection 1, second sentence, of the Aliens Act the Refugee Appeals Board itself sees that all facts of a case are brought out and decides on examination of the alien and witnesses and procuring of other evidence. Consequently, the Board is responsible not only for bringing out information on all the specific circumstances of the case, but also for providing the requisite background information, including information on the situation in the asylum-seeker's country of origin or first country of asylum. For this purpose, the Refugee Appeals Board has a comprehensive collection of general background material on the situation in the countries from which Denmark receives asylum-seekers. The material is updated and supplemented on a continuous basis. The background material of the Refugee Appeals Board is obtained from various authorities, in particular the Danish Ministry of Foreign Affairs and the Danish Immigration Service. In addition, background material is procured from various organisations, including the Danish Refugee Council, Amnesty International and other international human rights organisations and the UNHCR. Also included are the annual reports of the US State Department (Country Reports on Human Rights Practices) on the human rights situation in a large number of countries, reports from the British Home Office, reports from the documentation centre of the Canadian Refugee Appeals Board, reports from the Swedish Ministry for Foreign Affairs, reports from EURASIL (European Union Network for Asylum Practitioners), reports from the authorities of other countries and to some extent articles from identifiable (international) journals. Moreover, the Board may request the Danish Ministry of Foreign Affairs to issue an opinion on whether it can confirm information from a background memorandum drafted in general terms. The Refugee Appeals Board also retrieves some of its background material from the Internet. Internet access also enables the Board to obtain more specific information in relation to special problems in individual cases.

25. Usually, the Refugee Appeals Board assigns counsel to the applicant. Board hearings are oral and the applicant is allowed to make a statement and answer questions. The Board decision will normally be served on the applicant immediately after the Board hearing, and at the same time the Chairman will briefly explain the reason for the decision made.

III. RELEVANT INFORMATION ABOUT SRI LANKA

Events occurring after the cessation of hostilities in May 2009

26. Extensive information about Sri Lanka can be found in *NA. v. the United Kingdom*, no. 25904/07, §§ 53-83. The information set out below concerns events occurring after the delivery of the said judgment on 17 July 2008 and, in particular, after the cessation of hostilities in May 2009.

27. Fighting between the Sri Lankan army and the LTTE intensified in early 2009, with the army taking a number of rebel strongholds in the north and east of the country. On 19 May 2009, in an address to the country's parliament, the President of Sri Lanka announced the end of hostilities and the death of the leader of the LTTE, Velupillai Prabhakaran. It was also reported that most, if not all, of the LTTE's leadership had been killed.

28. The previous day, the United Nations Office for the Coordination of Humanitarian Affairs had estimated that around 220,000 people had already reached internally displaced persons' camps, including 20,000 in the last two or three days. In addition, it was believed that another 40,000-60,000 people were on their way to the camps through the crossing point at Omanthai, in the northern district of Vavuniya.

29. In July 2009, the South Asia Terrorism Portal reported that the number of killings in Sri Lanka in the previous three years (including deaths of civilians, security forces and members of the LTTE) was: 4,126 in 2006; 4,377 in 2007; 11,144 in 2008 and 15,549 between 1 January 2009 and

15 June 2009. An estimated 75-80,000 people were reported to have been killed in total over the course of the 26 year conflict.

30. In July 2009, in a "Note on the Applicability of the 2009 Sri Lanka Guidelines", the United Nations High Commissioner for Refugees (UNHCR) observed that:

> "Notwithstanding the cessation of the hostilities, the current protection and humanitarian environment in Sri Lanka remains extremely challenging. In the North, nearly the entire population from the territory formerly held by the LTTE in the North (285,000 Tamils) has been confined to heavily militarized camps in the Northern region. Although the government has gradually reduced the military presence in the camps and has pledged to start the progressive return to their villages of origin of the majority of those in the camps, it is clear that this may take a considerable amount of time. The lack of freedom of movement remains the overriding concern for this population restricting its ability to reunite with family members outside the camps, access employment, attend regular schools, and ultimately choose their place of residence."

31. A Human Rights Watch [HRW] press release, dated 28 July 2009, reported that:

> "The government has effectively sealed off the detention camps from outside scrutiny. Human rights organizations, journalists, and other independent observers are not allowed inside, and humanitarian organizations with access have been forced to sign a statement that they will not disclose information about the conditions in the camps without government permission. On several occasions, the government expelled foreign journalists and aid workers who had collected and publicized information about camp conditions, or did not renew their visas."

32. A further Human Rights Watch press release dated 26 August 2009 set out concerns that more than 260,000 Tamil civilians remained in detention camps without the freedom to leave.

33. In August 2009, the first post-war local elections were held in Northern Sri Lanka. The British Broadcasting Corporation reported that voter turn-out was low due to the number of people who were still displaced. The governing party, the United People's Freedom Alliance, took the majority of seats in the biggest city in the region, Jaffna. However, the Tamil National Alliance, a party sympathetic to the defeated LTTE, took the majority of seats in Vavuniya, the other town where polling took place.

34. On 7 September 2009, James Elder, the official spokesman for the United Nations Children's Fund in Sri Lanka was ordered to leave Sri Lanka because of adverse remarks that he had made to the media about the plight of Tamils in the government-run camps.

35. On 10 September 2009 the Sri Lankan Official Government News Portal announced that the motion to extend the State of Emergency (under which the authorities have extensive anti-terrorism powers and heightened levels of security including checkpoints and road blocks) by a further month had been passed by Parliament with a majority of 87 votes.

36. In a report dated 22 October 2009, the United States of America State Department published a report entitled "Report to Congress on Incidents During the Recent Conflict in Sri Lanka", which compiled incidents from January 2009, when the fighting intensified, until the end of May 2009. Without reaching any conclusions as to whether they had occurred or would constitute violations of international law, it set out extensive reports of enforced child soldiers, the killing of captives or combatants trying to surrender, enforced disappearances and severe humanitarian conditions during the hostilities.

37. On 21 November 2009, the Sri Lankan Government announced its decision that all internally displaced persons would be given freedom of movement and allowed to leave the detention camps from 1 December 2009.

38. In its Global Appeal 2010-2011, the UNHCR reported that:

> "The Government-led military operations in northern Sri Lanka which ended in May 2009 displaced some 280,000 people, most of whom fled their homes in the last few months of the fighting. The majority of these internally displaced persons (IDPs) now live in closed camps in Vavuniya district, as well as in camps in Mannar, Jaffna and Trincomalee. An additional 300,000 IDPs, some of whom have been displaced since 1990, are also in need of durable solutions.
>
> The IDPs originate mainly from the Mannar, Vavuniya, Kilinochchi, Mullaitivu and Jaffna districts in northern Sri Lanka, as well as from some areas in the east of the country. Though the end of hostilities has paved the way for the voluntary return of displaced people, some key obstacles to return remain. For instance, many of the areas of return are riddled with mines and unexploded ordnance. Not all are considered to be of high risk, particularly those away from former frontlines, but mine-risk surveys and the demarcation of no-go areas are urgently needed.
>
> Other key obstacles to return include the need to re-establish administrative structures in areas formerly held by the Liberation Tigers of Tamil Eelam; the destruction or damaged condition of public infrastructure and private

homes; and the breakdown of the economy - including agriculture and fisheries.

The Government of Sri Lanka is planning the return framework, and it has called on UNHCR for support with return transport, non-food items, return shelter, livelihoods support and assistance in building the capacity of local authorities.

With some progress having been recently achieved, it is hoped that a substantial number of IDPs will be able to return to their places of origin in the latter half of 2009, but a large portion of new IDPs are also likely to remain in the camps and with host families until well into 2010."

39. In a Human Rights Report 2009, dated 11 March 2010, the United States of America State Department stated that the Sri-Lankan Government accepted assistance from NGOs and international actors for the IDP camps but management of the camps and control of assistance were under the military rather than civilian authorities. Food, water, and medical care were all insufficient in the first few weeks after the end of the war, but by July the situation had stabilised and observers reported that basic needs were being met. In June the military withdrew from inside the camps but continued to provide security around the barbed wire-enclosed perimeter. The IDPs in the largest camp, Manik Farm, were not given freedom of movement until December, when a system of temporary exit passes was implemented for those who had not yet been returned to their districts of origin. Some observers said that this exit system still did not qualify as freedom of movement.

40. Human Rights Watch, in their report, World Report 2010, estimated that six months after the main fighting ended, the Government continued to hold more than 129,000 people (more than half of them women and girls) in the camps. Over 80,000 of these were children. The camps were severely overcrowded, many of them holding twice the number recommended by the UN. As a result, access to basic requirements such as food, water, shelter, toilets and bathing, had been inadequate. These conditions imposed particular hardships on the elderly, children and pregnant women. The camps were under military administration, and effective monitoring by humanitarian agencies was lacking. The authorities failed to provide camp residents with sufficient information about the reason for their continued detention, the whereabouts of relatives, or the criteria and procedure for their return home.

41. The United Kingdom Border Agency Country of Origin Information Report on Sri Lanka of 11 November 2010 ("the November 2010 COI Report") stated as follows:

4.23 The International Crisis Group (ICG) report *Sri Lanka: A Bitter Peace*, 11 January 2010, also referred to "extra-legal detention centres" maintained by the military and observed: "These detained have had no access to lawyers, their families, ICRC or any other protection agency, and it is unclear what is happening inside the centres. In addition, 'the grounds on which the ex-combatants have been identified and the legal basis on which they are detained are totally unclear and arbitrary'. Given the well-established practice of torture, enforced disappearance and extra-judicial killing of LTTE suspects under the current and previous Sri Lankan governments, there are grounds for grave concerns about the fate of the detained. The government has announced that of those alleged ex-combatants currently detained, only 200 will be put on the trial; most will detained for a further period of 'rehabilitation' and then released."

...

4.25 Referring to the "at least 11,000 people" detained "in so-called 'rehabilitation centers" because of their alleged association with the LTTE, the HRW [document *Legal Limbo, The Uncertain Fate of Detained LTTE Suspects in Sri Lanka*, released on 29 January 2010, observed: "The government has routinely violated the detainees' fundamental human rights, including the right to be informed of specific reasons for arrest, the right to challenge the lawfulness of the detention before an independent judicial authority, and the right of access to legal counsel and family members. The authorities' consistent failure to inform families of the basis for the detainees' arrest and their whereabouts raises serious concerns that some detainees may have been victims of torture and ill-treatment, which are more likely to take place where due process of law is lacking and which have long been serious problems in Sri Lanka. Given the lack of information about some detainees, there is also a risk that some may have been 'disappeared'."

4.31 The UNHCR '*Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka'*, 5 July 2010 reported that "In the wake of the conflict, almost 11,000 persons suspected of LTTE links were arrested and detained in high-security camps" adding that "According to a Government survey, as of 1 March 2010, 10,781 LTTE cadres were being held at 17 centres. Among the detainees were 8,791 males and 1,990 females." and noted that "Some of the adult detainees have...been released after completing rehabilitation programmes or because they were no longer deemed to present a risk, including some persons with physical disabilities."

42. The November 2010 COI Report also set out:

4.09 The EIU [The Economist Intelligence Unit], Country Report, Sri Lanka, July 2010 reported: “The EU has warned that Sri Lanka faces losing trade advantages under the Generalised System of Preferences-Plus (GSP-Plus) scheme from August 15th, unless the Government commits itself in writing to improving its human rights record. The EU has put forward 15 conditions that it says the Government needs to promise to meet within the next six months. These include: ensuring that the 17th amendment to the constitution, which requires that appointments to public positions be impartial and reflect the country's ethnic and religious mix, is enforced; repealing parts of the Prevention of Terrorism Act that are incompatible with Sri Lanka's covenants on political and human rights; reforming the criminal code to allow suspects immediate access to a lawyer on arrest; and allowing journalists to carry out their professional duties without harassment. However, the Government has rebuffed the EU, stressing that the issues that it has raised are internal political matters that should not be linked to trade. “The EU is not the only international body currently putting pressure on the government. Sri Lanka has also rejected the UN's appointment of a three-member panel to examine possible human rights violations during the island's civil war. The Sri Lankan authorities have warned that they will not provide visas for panel members to enter the country.”

...

4.11 The EIU, Country Report, Sri Lanka, August 2010 noted that: “The decision by the UN secretary-general, Ban Ki-moon [on 22 June 2010], to appoint a panel to examine accountability issues stemming from the final stages of the island's civil war, which ended in May 2009, has prompted a strong reaction in Sri Lanka ...

4.12 On 17 September 2010 the UN News Service reported that “Secretary-General Ban Ki-moon has held his first meeting with the panel of experts set up to advise him on accountability issues relating to alleged violations of international humanitarian and human rights law during the final stages last year of the conflict in Sri Lanka.” The source also noted that the role of the experts was to examine “the modalities, applicable international standards and comparative experience with regard to accountability processes, taking into account the nature and scope of any alleged violations in Sri Lanka.”

The treatment of returned failed asylum seekers at Colombo airport

United Kingdom Government Reports

43. The United Kingdom Border Agency Country of Origin Information Report on Sri Lanka of 18 February 2009 (“the February 2009 COI Report”) sets out a series of letters from the British High Commission – hereafter “BHC”, Colombo, on arrival procedures at Colombo airport. In its letter of 28 August 2008, the BHC observed:

“[T]he correct procedure for [Department of Immigration and Emigration [DIE]] officers is to record the arrival of these persons manually in a logbook held in the adjacent Chief Immigration Officer's office. The name, date and time of arrival and arriving flight details are written into the log. It records why the person has come to their attention and how the case was disposed of. I have had the opportunity to look at the log, and it appears that the only two ways of disposal are to be passed to the Criminal Investigations Department [CID], or allowed to proceed.

The office of the State Intelligence Service [SIS] is in the immigration arrivals hall and an officer from SIS usually patrols the arrivals area during each incoming flight. Invariably, if they notice a person being apprehended they approach IED [Immigration and Emigration Department] and take details in order to ascertain in [sic] the person may be of interest to them. Their office contains three computer terminals, one belonging to the airport containing flight information and two stand-alone terminals. If an apprehended person is considered suitable to be passed to CID, they are physically walked across the terminal building to the CID offices. A CID officer should then manually record the arrival of the person in a logbook held in their office...often persons shown in the DIE logbook to have been handed to CID are never actually recorded as being received in the CID logbook. It is believed that CID has allowed these persons to proceed and no action has been taken against them.”

44. The same letter also noted that CID offices at the airport contained two computers, which were not linked to any national database. Any checks on persons detained or apprehended were conducted over the phone with colleagues in central Colombo. There were no fingerprint records at the airport. One computer contained records of suspects who had been arrested and charged with offences, and court reference numbers. It continued as follows:

“Were a Sri Lankan national to arrive at Colombo Airport having been removed or deported from the United Kingdom, they would be in possession of either a valid national Sri Lankan passport, or an emergency travel document/temporary passport, issued by the Sri Lankan High Commission in London. The holder of a valid passport would have the document endorsed by the immigration officer on arrival and handed back to him/her. A national passport contains the national ID card number on the laminated details page. I have made enquiries with the DIE at Colombo Airport, and with the International Organisation for Migration who meet certain returnees at the airport, and both have confirmed that a person travelling on an emergency travel document is dealt with similarly. They too have the document endorsed by the immigration officer on arrival and returned to them. Before issuing an emergency travel document, the Sri Lankan High Commission in London will have details of an

applicant confirmed against records held in Colombo and will thus satisfactorily confirm the holder's nationality and identity. If a returnee subsequently wishes to obtain a national identity card, they have to follow the normal procedures."

45. In a letter dated 22 January 2009, the BHC reported that an official had spent several hours observing the return of failed asylum seekers from the United Kingdom, including those who were in possession of emergency travel documents, issued by the Sri Lankan High Commission in London. In the official's opinion, the fact that certain returnees had been issued with emergency travel documents by the Sri Lankan High Commission in London did not seem to make any difference to their treatment upon arrival.

46. The Report of Information Gathering Visit to Colombo on 23 to 29 August 2009, conducted jointly by the Foreign and Commonwealth Office Migration Directorate and United Kingdom Border Agency Country of Origin Information Service ("the Report of Information Gathering Visit, August 2009"), concluded that all enforced returns (of whatever ethnicity) were referred to the CID at the airport for nationality and criminal record checks, which could take more than 24 hours. All enforced returns were wet-fingerprinted. Depending on the case, the individual could also be referred to the SIS and/or the Terrorist Investigation Department for questioning. Anyone who was wanted for an offence would be arrested.

47. The report set out that those with a criminal record or LTTE connections would face additional questioning and might be detained. In general, non-government and international sources agreed that Tamils from the north and east of the country were likely to receive greater scrutiny than others, and that the presence of the factors below would increase the risk that an individual could encounter difficulties with the authorities, including possible detention:

- Outstanding arrest warrant
- Criminal record
- Connection with the LTTE
- Bail jumping/escape from custody
- Illegal departure from Sri Lanka
- Scarring
- Involvement with media or NGOs
- Lack of an ID card or other documentation

48. The United Kingdom Border Agency Country of Origin Information Report on Sri Lanka of 11 November 2010 set out the following:

33.20 The BHC letter of 30 August 2010 went on to observe that: "At the beginning of 2010, partly due to the large numbers of Sri Lankans being returned from around the world and causing logistical problems, CID procedures were relaxed in that they no longer had to detain returnees until written confirmation was received from the local police. All returnees are still interviewed, photographed and wet fingerprinted. The main objective of these interviews is to establish if the returnee has a criminal record, or if they are wanted or suspected of committing any criminal offences by the police. The photographs are stored on a standalone computer in the CID office at the airport. The fingerprints remain amongst paper records also in the CID office at the airport. Checks are initiated with local police, but returnees are released to a friend or relative, whom CID refers to as a surety. This surety must provide evidence of who they are, and must sign for the returnee. They are not required to lodge any money with CID. "The main CID offices at Colombo Airport, which are housed on the ground floor adjacent to the DIE embarkation control, are currently undergoing a complete refurbishment funded by the Australian government. The one completed office suite has three purpose built interview rooms, and facilities where returnees can relax and eat meals."

...

33.22 A British High Commission letter of 14 September 2010 reported: "There is strong anecdotal evidence that scarring has been used in the past to identify suspects. Previous 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. More recent claims from contacts in government ministries suggest that this practice has either ceased or is used less frequently. At the very least it appears that the security forces only conduct these when there is another reason to suspect an individual, and are not looking for particular scars as such, but anything that may indicate the suspect has been involved in fighting and/or military training. There is no recent evidence to suggest that these examinations are routinely carried out on immigration returnees."

Other Sources

49. On 19 October 2009, Tamilnet reported that twenty-nine Tamil youths were taken into

custody by the State Intelligence Unit of the Sri Lanka Police at the International Airport in two separate incidents whilst trying to leave Sri Lanka. It was also reported that since July 2009, special teams of the State Intelligence Unit and police had been deployed in the airport to monitor the movement of Tamils who try to go abroad.

The treatment of Tamils in Colombo

United Kingdom Government Reports

50. The Report of Information Gathering Visit, August 2009, stated that the frequency of cordon and search operations had not reduced significantly in recent months, though there were fewer large-scale operations than in previous years. In general, young male Tamils originating from the north and east of the country were most at risk of being detained following cordon and search operations, with the presence of the risk factors set out above increasing that risk. Those without employment or legitimate purpose for being in Colombo were also likely to be seen as suspect. The same report also noted that most sources agreed that there had been few, if any, abductions or disappearances since June 2009. There was not a great deal of available information about the profile of Tamils targeted for abduction, although it appeared that people linked to the media might be more vulnerable. Police did not generally carry out effective investigations. It went on to note that most sources agreed that there had not been any significant reduction in the number of checkpoints in Colombo, whose stated purpose remained to detect and prevent terrorist activity. In general those most likely to be questioned were young Tamils from the north and east; those without ID; those not resident or employed in Colombo; and those recently returned from the West. However, most sources said that arrests at checkpoints were rare and none had been reported since June 2009. It was reportedly fairly likely that someone would be stopped at a checkpoint *en route* from the airport to Colombo city. Finally, it clarified that people who wished to live in Colombo but did not originate from there must register with the local police station with a national ID card or full passport, and details of planned length and purpose of stay. In theory, whilst anyone was entitled to register to stay in Colombo, some sources suggested that young Tamil men originally from the north or east of the country could encounter difficulties and face closer scrutiny. The presence of any of the risk factors set out above would also attract greater attention from the police.

The treatment of Tamils in general

United Nations Reports

51. The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, April 2009 (“UNHCR 2009 Sri Lanka Guidelines”) observed that:

> “The significant majority of reported cases of human rights violations in Sri Lanka involve persons of Tamil ethnicity who originate from the North and East...In Government-controlled areas, Tamils who originate from the North and the East, which are, or have been under LTTE control, are frequently suspected as being associated with the LTTE. For this reason, Tamils from the North and the East are at heightened risk of human rights violations related to the implementation of anti-terrorism and anti-insurgency measures. While this risk exists in all parts of Sri Lanka, it is greatest in areas in which the LTTE remains active, and where security measures are heaviest, in particular the North and parts of the East, and in and around Colombo.”

52. The Guidelines also noted that the Government had been heavily criticised for the high number of Tamils who have been subjected to arrest and security detention, particularly on the basis of information gathered in registration exercises and questioning at cordons and road checkpoints in and around the capital.

53. The UNHCR 'Note on the Applicability of the 2009 Sri Lanka Guidelines', dated July 2009, observed:

> “The country of origin information that UNHCR has considered indicates that Tamils from the North of Sri Lanka continue to face a significant risk of suffering serious human rights violations in the region (and elsewhere in the country) because of their race (ethnicity) or (imputed) political opinion. Tamils in the North are still heavily targeted in the security and anti-terrorism measures described in the Guidelines. Wide scale detention and confinement of Tamils from the North remains a serious concern. Pro-Government paramilitary elements also continue to operate with impunity against Tamils in the North.”

54. The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka of 5 July 2010, which superseded the April 2009 Guidelines contained information on the particular profiles for which international protection needs may arise in the current context. It was stated that:

> "given the cessation of hostilities, Sri Lankans originating from the north of the country are no longer in need of international protection under broader refugee criteria or complementary forms of protection solely on the basis of risk of indiscriminate harm. In light of the improved human rights and security situation in Sri Lanka, there is no longer a need for group-based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country. It is important to bear in mind that the situation is still evolving, which has made the drafting of these Guidelines particularly complex."

55. In summary, the following were UNHCR's recommendations: All claims by asylum seekers from Sri Lanka should be considered on the basis of their individual merits according to fair and efficient refugee status determination procedures and up-to-date and relevant country of origin information. UNHCR considered that, depending on the particular circumstances of the case, some individuals with profiles similar to those outlined in the Guidelines require a particularly careful examination of possible risk. These risk profiles, while not necessarily exhaustive, are set out below:

(i) persons suspected of having links with the Liberation Tigers of Tamil Eelam (LTTE);

(ii) journalists and other media professionals;

(iii) civil society and human rights activists;

(iv) women and children with certain profiles; and

(v) lesbian, gay, bisexual and transgender (LGBT) individuals.

It was also stated that in the light of Sri Lanka's 26 year internal armed conflict, and a record of serious human rights violations and transgressions of international humanitarian law, exclusion considerations under Article 1F of the 1951 Convention Relating to the Status of Refugees may arise in relation to individual asylum seeker claims by Sri Lankan asylum seekers.

Other Sources

56. The BBC reported in March 2010 that the Colombo Police force had opened four special units in Colombo suburbs able to take statements in Tamil, with plans for more. Previously, Tamil-speaking Sri Lankans had to rely on a friend to translate their complaints into Sinhala.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

57. The applicant complained that implementation of the deportation order to return him to Sri Lanka would be in violation of Article 3 of the Convention, which in so far as relevant read as follows:

Article 3

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

The Government contested that argument.

A. Admissibility

58. The Court finds that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant

59. The applicant maintained that in case of his return to Sri Lanka he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention.

60. He submitted that in general returning ethnic Tamils from the Jaffna peninsula to Sri Lanka would be contrary to Article 3 of the Convention.

61. Moreover, having regard to his assistance to the LTTE for many years and his numerous arrests by the Sri Lankan authorities, he would be at particular risk of persecution and of being subjected to outrages by the Sri Lankan authorities if returned to Sri Lanka, including in connection with his arrival at Colombo airport.

62. In addition, in case of return, the applicant would become an object of interest to the authorities as a result of his family's membership of the LTTE.

2. The Government

63. The Government maintained that no violation of Article 3 would occur if the applicant were to be returned to Sri Lanka.

64. From the outset they pointed out that there were reasons to doubt the credibility of the applicant's divergent and contradictory statements, including about his detentions by the Sri Lankan authorities and about his relations with the LTTE and that on this point the case deviates materially from *NA. v. the United Kingdom* (cited above).

65. Nevertheless, even if they disregarded the fact that the applicant made divergent statements, he did repeat that the last detention took place in 1991, which was five or six years prior to his departure; that it took place as part of a mass arrest; that he was released in connection with a peace agreement; that he was released unconditionally without being charged or sentenced; and that he had not subsequently and up to his departure in 1997 been questioned, detained or otherwise subjected to actions on the part of the authorities that might indicate that the authorities suspected him of being a member of the LTTE. As, moreover, the applicant departed lawfully from Sri Lanka in 1997 on the basis of a passport issued by the authorities, the Government finds it unlikely that the Sri Lankan authorities would know of the applicant with the effect that, upon his return to Sri Lanka via Colombo airport, there would be a real risk that he would be subjected to treatment prohibited by Article 3 of the Convention.

66. Furthermore, in view of the very few details provided by the applicants during the domestic proceedings as to his family's involvement with the LTTE, including that of his brothers and his spouse, in the Government's opinion, such an element does not in the present case increase the risk that the applicant will be detained upon his return to Sri Lanka.

67. In sum, the Government were of the opinion that the present case is clearly distinguishable from *NA. v. the United Kingdom* (cited above) and that all the possible risk factors identified by the applicant taken cumulatively, also in the light of the current situation in Sri Lanka, do not constitute a sufficient basis for concluding that, upon return to Colombo airport or at a later date, the applicant would be of sufficient interest to the authorities in their efforts to combat the LTTE to warrant his detention and interrogation.

3. The Court

(a) General principles

68. The 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).

69. 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).

70. The assessment of 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).

71. 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.

72. 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 since the final decision taken by the domestic authorities (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, ECHR 2007-I (extracts)).

73. 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.

74. The Court has never ruled out 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. 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. 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 the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question. 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 (*NA. v. the United*

Kingdom, no. 25904/07, §§ 115- 117, 17 July 2008).

(b) Assessing the risk to Tamils returning to Sri Lanka

75. In *NA. v. the United Kingdom* (cited above), the Court made a number of general findings relating to the assessment of the risk of Tamils returning to Sri Lanka.

76. It noted, among other things, that the United Kingdom Asylum and Immigration Tribunal had recognised a number of factors (§§ 30 - 42) which might increase the risk of serious harm to Tamils from the Sri Lankan authorities in Colombo. The factors were set out in a headnote as follows:

> "(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.
>
> ..."

77. The Court stated (§§128-130) that while account had to be taken of the general situation of violence in Sri Lanka at the present time, it was 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. Therefore, the Court considered that it was 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, had drawn up. It noted that the United Kingdom Asylum and Immigration Tribunal AIT had been careful to avoid the impression that the risk factors were a "check list" or exhaustive, and did not consider it necessary to identify any additional risk factors, which had not been duly considered by the domestic authorities. The Court emphasised, however, that the assessment of whether there was 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.

78. Moreover, on the basis of the evidence before it, the Court found (§133) 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.

79. In respect of returns to Sri Lanka through Colombo, the Court found (§§134-136) that there was a greater risk of detention and interrogation at the airport than in Colombo city since the authorities would have greater control over the passage of persons through an airport than they would over the population at large. In addition, the majority of the risk factors identified by the United Kingdom Asylum and Immigration Tribunal would be more likely to bring a returnee to the

attention of the authorities at the airport than in Colombo city. It was also at the airport that the cumulative risk to an applicant, arising from two or more factors, would 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. Furthermore, although noting that the objective evidence before it contained different accounts of the precise nature of the procedures followed at Colombo airport and the nature of the information technology there, the Court considered at the very least that 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 found that it was a logical inference from those 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.

80. Finally, in the Court's view (§137) it could not be said that there was a generalised risk to Tamils from the LTTE in a Government controlled area such as Colombo. The Court accepted the findings of the domestic authorities that individual Tamils might be able to demonstrate a real and personal risk to them from the LTTE in Colombo. However, it also accepted their assessment that this would only be to Tamils with a high profile as opposition activists, or those seen by the LTTE as renegades or traitors. The Court therefore considered that it also had to examine any complaint as to the risk from the LTTE in the context of the individual circumstances of an applicant's case.

81. On the basis of the objective information set out above (see paragraphs 26 – 56) concerning Sri Lanka after the passing on 17 July 2008 of the judgment in *NA. v. the United Kingdom* (cited above), the Court finds that since the end of hostilities in Sri Lanka and the death of the leader of the LTTE in May 2009, there has been progress *inter alia* on the reintegration of internally displaced persons and on the treatment of Tamils in Colombo. However, there is no evidence of an improvement in the human rights situation of Tamils suspected of having or recently having had links with the LTTE.

82. The Court therefore maintains its conclusion in *NA v. the United Kingdom (cited above)* that there is not a general risk of treatment contrary to Article 3 to Tamils returning to Sri Lanka. The protection of Article 3 of the Convention will enter into play only when an applicant can establish that there are serious reasons to believe that he or she would be of sufficient interest to the authorities to warrant his or her detention and interrogation upon return (*NA. v. the United Kingdom*, ibid, § 133).

83. The assessment of whether there is a real risk must therefore continue to be made on a case by case basis considering all relevant factors, (as set out in the United Kingdom Asylum and Immigration Tribunal Country Guidance case of *LP* and endorsed in *NA. v. the United Kingdom*, ibid, § 129-130) which may increase the risk of ill-treatment, 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; and having relatives in the LTTE. The Court would also reiterate that due regard must continue to be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk, but may do so when taken cumulatively (*NA. v. the United Kingdom*, ibid, § 130) bearing in mind any heightened security measures that may be in place as a result of any increase in the general situation in Sri Lanka.

(c) The applicant's case

84. 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.

85. In so far as the applicant's submissions entail that he would also be at risk of persecution by

the LTTE, the Court reiterates that the hostilities between the latter and the Sri Lankan Army ended on 19 May 2009. Moreover, it notes that according to the applicant's own statement, he only assisted the LTTE, as opposed to being a member, and that the last time he worked for them was in January 1997. He did not assist them thereafter, which apparently did not lead to any problems, and he left in December 1997 (see paragraph 14).

86. 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.

87. The applicant is of Tamil ethnicity and has Tamil features. He is from Jaffna in the north of Sri Lanka.

88. He is a man and approximately forty-three years old.

89. He left his country lawfully to join his Sri Lankan wife in Denmark after the couple had officially married in Sri Lanka. The applicant entered Denmark on 13 December 1997 with a valid passport and visa.

90. The applicant did not request asylum in Denmark until 14 June 2007, which was ten years after he entered the country legally.

91. The applicant gave divergent statements about his motive for asylum, notably about his involvement with the LTTE (compare, for example, paragraphs 11, 12 and 14).

92. Nevertheless, the applicant has maintained that he was never a member of LTTE. Moreover, as also stated by the Refugee Appeals Board, most recently in its decision of 16 March 2010, even if the applicant's divergent statements are disregarded, he did repeat that his last detention by the Sri Lankan authorities took place in 1991, which was five or six years prior to his departure; that it took place as part of a mass arrest; that he was released in connection with a peace agreement; that he was released unconditionally without being charged or sentenced. In addition, even if the applicant's photo was taken in connection with the arrest in 1991, from that year and until his departure in December 1997 he was not detained or questioned, no picture or fingerprints were taken, nor was he in any other way the object of interest from the Sri Lankan authorities. Furthermore, without any problems, the applicant departed lawfully from Sri Lanka in 1997 for the purpose of family reunification with his spouse on the basis of a passport issued by the authorities.

93. In the Court's view the present case is thus clearly distinguishable from *NA. v. the United Kingdom* (cited above), in which NA. left Sri Lanka clandestinely after having been arrested and detained by the army on six occasions between 1990 and 1997 on suspicion of involvement with LTTE. During one or possibly more of these periods of detention he was ill-treated and his legs had scars from being beaten with batons. Moreover, during his most recent detention, NA. had been photographed and his fingerprints had been taken. His father had also signed certain papers in order to secure NA.'s release.

94. In respect of the applicant's relatives in the LTTE, having regard to the few details provided thereon and the fact that there is no indication that the Sri Lankan authorities are aware of the applicant's siblings' and spouse's alleged previous affiliation with the LTTE, this carries little weight in the present case (see *NA. v. the United*, cited above, *§* 146).

95. The Court also observes that there are no grounds for believing that the Sri Lankan authorities are informed that the applicant made an asylum claim abroad and he will not be deported from a location which is considered a centre of LTTE fundraising.

96. Taking the above elements into account as well as the arrival procedures at Colombo airport (see paragraphs 43- 49), assuming that the applicant were to be removed through that airport, in the Court's view he has failed to substantiate that he will be of specific interest to the Sri Lankan authorities there.

97. In conclusion, having regard to the current general situation in Sri Lanka taken cumulatively with the risk factors identified above, the Court finds that there are no substantial grounds for finding that the applicant would be of interest to the Sri Lankan authorities if he were returned. In those circumstances, the Court finds that an implementation of the order to deport the applicant to Sri Lanka would not give rise to a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF OTHER ARTICLES OF THE CONVENTION

98. In his observations of 22 June 2009 the applicant also invoked Articles 6, 8 and 14 of the Convention and, it appears, in substance, also Articles 5 and 13 of the Convention.

99. The Court notes that in the criminal proceedings the applicant did not request leave to appeal to the Supreme Court and he did not subsequently bring any complaint relating to Article 8 before the domestic courts. As to the remainder, in the light of all the material in its possession, and in so far as the criteria set out in Article 35 § 1 have been complied with and the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the invoked Articles of the Convention. It follows that these complaints must be rejected in accordance with Article 35 § 4 of the Convention.

III. RULE 39 OF THE RULES OF COURT

100. The Court recalls that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

101. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above § 4) must continue in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that an implementation of the order to deport the applicant to Sri Lanka would not give rise to a violation of Article 3 of the Convention;

3. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to deport the applicant until such time as the present judgment becomes final or further order.

Done in English, and notified in writing on 20 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Renate Jaeger
Registrar President

N.S. v. DENMARK JUDGMENT