

FIFTH SECTION

CASE OF P.K. v. DENMARK

(Application no. 54705/08)

JUDGMENT

STRASBOURG

20 January 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of P.K. 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. 54705/08) 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, P.K. ("the applicant"), on 14 November 2008. The acting President of the Chamber decided to grant the applicant anonymity (Rule 47 § 3 of the Rules of Court).

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

3. The applicant alleged 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 17 November 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 5 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

5. The applicant was born in 1945 in Sri Lanka. He is of Tamil ethnicity. Currently he lives in a centre for asylum seekers in Denmark.

6. On 18 May 2007, with a valid passport and a Sri Lankan ID card, the applicant entered Denmark and requested asylum. His eldest son, his daughter-in-law, his grandchild and his brother-in-law already lived there and had permanent residence permits.

7. According to an asylum registration report of 23 May 2007 the applicant was born and grew up in the north of Sri Lanka. His wife died in 1978 and his two sons, born in 1975 and 1977, were brought up by their maternal grandmother. In 1995 the applicant and his eldest son moved to a refugee camp. They stayed there until 1998, when the eldest son was sent out of the country and the applicant went to Colombo. The applicant stayed in Colombo until 2002. Thereafter he lived in Jaffna. On 17 May 2007, with the help of an agent, he went by plane to Denmark. The agent had picked him up at the airport in Copenhagen and driven him to a centre where he could request asylum. He could not explain why he was in possession of a train ticket issued on 28 April 2007 for the town where his brother-in-law lived. The applicant wanted to live in Denmark with his son. It was better than living in Sri Lanka. The applicant had not had contact with his youngest son since 1995 and his brother remained in Sri Lanka.

8. In an asylum application form of 31 May 2007, the applicant added that while staying in the refugee camp his eldest son had been arrested five times and the applicant had been arrested twice. To leave the camp it had been obligatory to obtain permission from the military. In 1998 the applicant helped his eldest son leave the country. While in Colombo the applicant was arrested and detained three times by the authorities in order to check whether he had permission to stay there. When a peace agreement was concluded in 2002, the applicant went to Jaffna to live with his brother. The applicant's nephew in Jaffna had been killed by the authorities on 14 November 2006 because he was suspected of being an LTTE member. Thereafter the applicant was constantly harassed by the military forces and he also had problems with the LTTE.

9. According to an interview report of 29 November 2007 prepared by the Danish Immigration Service (*Udlændingestyrelsen, now Udlændingetjenesten*), the applicant stated that he had not been politically active or member of any political party or organisation. He had no previous convictions and had not been detained, charged, arrested or imprisoned, and was not a wanted person in his country of origin. In 1995 he wanted to get away from north Sri Lanka due to unrest there. He and his eldest son had to live in a refugee camp because they were unable to obtain an entry permit for Colombo. In February 1998 they received the entry permit and entered Colombo. At the end of 1998 the applicant's son went to Denmark. Thereafter, the applicant lived on the money his son sent him. Between 2002 and 2005 the applicant could freely travel between Colombo and Jaffna. He lived permanently in an apartment in Colombo, but often travelled to Jaffna. His brother died from an illness and during the last two years in Sri Lanka the applicant lived with his brother's widow and five children to save up money and to be with his family until his departure. After the nephew was killed, the military forces came to the house seven or eight times and interviewed the applicant about the LTTE. The military was mainly looking for his brother's other children, who were young, while he was an old man. He wanted to get away and live in peace with his son in Denmark. He had not had any contact with anybody in his country since his departure.

10. On 20 December 2007 the applicant's request for asylum was refused by the Immigration Service, which found that the applicant failed to fulfil the criteria under section 7 of the Aliens Act (*Udlændingeloven*), notably because his relationship with the LTTE was so remote that he would not be of sufficient interest to the authorities or in real and concrete danger of being subjected to treatment contrary to Article 3 of the Convention upon return to Sri Lanka.

11. The applicant appealed to the Refugee Appeals Board (*Flygtningeævn*) before which an oral hearing was held on 31 March 2008. It appears that the applicant maintained that his brother had moved to India (and not died from an illness as previously stated). Also, the applicant explained that he had in fact seen the nephew being shot. The other people in the village and the applicant's sister-in-law reported to the LTTE who had informed the authorities about the nephew's activities, and consequently the informer, a woman, was killed by the LTTE. The Refugee Appeals Board upheld the decision to refuse to grant the applicant asylum on the same day. It attached importance to the applicant's statement that the visits by the authorities concerned the young people of the household, and found that the applicant was not himself an object of interest to the authorities.

12. On 23 June 2008 the applicant's request for a residence permit on humanitarian grounds under section 9 b, subsection 1, of the Aliens Act was refused by the Ministry of Refugee, Immigration and Integration Affairs. In its decision the Ministry took account, *inter alia*, of the applicant's age and health and found that, according to the information available, the applicant did not suffer from any physical or mental illness of a very serious nature, and that no circumstances otherwise provided any basis for granting a residence permit on humanitarian grounds.

Subsequent events before the Court and domestic proceedings

13. On 14 November 2008 the Danish Refugee Council (*Dansk Flygtningehjælp*), an NGO, requested that the Refugee Appeals Board reopen the case. It referred to the applicant's previous explanations and the general deterioration of the security situation in Sri Lanka. It also added that, according to the applicant's eldest son, it was in fact the applicant who had reported to the LTTE who it was that had informed the authorities on the nephew's membership. Allegedly, the authorities were therefore interested in the applicant. The eldest son had also informed the applicant's representative that the killed nephew's brother had stated that the authorities were looking for the

applicant after his departure. Moreover, the eldest son had been granted asylum status in Denmark due to his affiliation with the LTTE and because he had been tortured during an investigation in 1998. Thus, according to the applicant's eldest son, the applicant had been detained because of him.

14. On 14 November 2008, on the applicants' behalf, the Danish Refugee Council also submitted a letter to the Court of Human Rights requesting that it stay the applicants' deportation.

15. On 17 November 2008, 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.

16. Consequently, on 19 November 2008 the Refugee Appeals Board extended the time-limit for the applicants' departure until further notice.

17. On 9 January 2009 the Refugee Appeals Board again refused to reopen the applicants' asylum case finding that no essential new information or aspects had been submitted. It rejected the information added by the applicant's son as fabricated for the occasion.

18. On 16 June 2009 the Refugee Appeals Board decided to suspend the examination of asylum cases concerning ethnic 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:

"... The Refugee Appeals Board still finds that your client's fear of the LTTE and the Sri Lankan authorities does not warrant a residence permit under section 7 of the Aliens Act. In that connection, the Refugee Appeals Board refers to the fact that your client stated during the asylum procedures that he had not been a member of or sympathised with the LTTE and that he had not been sought by or had problems with the LTTE at any time prior to his departure. He stated that the family had no contact with the LTTE while he lived with his brother. On the contrary, the LTTE supposedly avenged the murder of your client's nephew by killing the woman who had allegedly informed on your client's nephew to the authorities. The Refugee Appeals Board thus finds itself unable to accept the supposition that your client has outstanding issues with the LTTE which, in fact, was defeated in May 2009. Your client has also referred to fear of persecution by the Sri Lankan authorities. In this connection, the Refugee Appeals Board refers to the fact that during the asylum procedures your client stated that personally he was not an object of interest to the authorities, that he was solely questioned about his knowledge of other LTTE members in connection with the murder of his nephew which took place three or four years ago, and that personally he has not been persecuted or threatened in his country of origin. Your client also left his country of origin without any problems using his own genuine passport. Thus, the Board finds that it has not been rendered probable that your client would be of interest to the Sri Lankan authorities or suspected of supporting the LTTE. The possibility that as an ethnic Tamil from northern Sri Lanka your client risks being questioned and investigated by the authorities upon entry into his country of origin does not lead to a revised assessment of the case under asylum law. 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 ID; those not resident or employed 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. Regardless of whether it is accepted as a fact that the Sri Lankan authorities have suspected your client of supporting the LTTE, it does not lead to a revised assessment. In this respect, the Refugee Appeals Board refers to the fact that it appears from the background material available to the Board that, in general, individuals who have supported the LTTE on a lower level are not of interest to the authorities. Thus, generally, only high profile members of the LTTE who are still active and wanted, or individuals wanted for serious criminal offences are of interest to the authorities, see Home Office, Operational Guidance Note, Sri Lanka, August 2009, and Home Office, Report of Information Gathering Visit to Colombo, Sri Lanka 23 - 29 August 2009. Your client has also referred to a fear of the general situation of insecurity in Sri Lanka and the fact that he is old and wants to live in Denmark where there is peace and quiet. Moreover, he has no family in his country of origin to take care of him, but he has agreed with his son living in Denmark that he can stay with the son and be provided for. As in the previous decisions in the case, the Refugee Appeals Board still finds that the general situation for ethnic Tamils in Sri Lanka is not of such nature that it in itself warrants a residence permit under section 7 of the Aliens Act. Thus, the Refugee Appeals Board fully relies on the decisions of 31 March 2008 and 9 January 2009. Against that background, the 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. The Refugee Appeals Board further states that the Board has no authority to decide whether your client could be granted a residence permit under other provisions of the Aliens Act. Such authority lies with the Danish

Immigration Service and the Ministry of Refugee, Immigration and Integration Affairs. It should be noted that your client's time-limit for departure is still postponed on the basis of the request of 18 November 2008 from the European Court of Human Rights. If your client's lawful stay in Denmark lapses, he must leave the country immediately, see section 33(1) and (2) of the Aliens Act. As appears from the decision of the Board of 31 March 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."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum proceedings in Denmark

21. 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 Appeals Board.

22. 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.

23. 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 up-dated 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.

24. 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

25. 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.

26. 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.

27. 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.

28. 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.

29. 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."

30. 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."

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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."

38. 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.

39. 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.

40. 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 be 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."

41. 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

42. 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."

43. 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.”

44. 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.

45. 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.

46. 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

47. 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

48. 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

49. 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

50. 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."

51. 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.

52. 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."

53. 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."

54. 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

55. 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

56. The applicant complained that an 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.”

57. 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 general, returning ethnic Tamils from the north and east of Sri Lanka would be contrary to Article 3 of the Convention.

60. Moreover, the applicant would be particularly exposed to being subjected to treatment contrary to Article 3 of the Convention by the Sri Lankan authorities or the LTTE upon return due notably to the following risk factors: a) the applicant has been detained twice by the authorities due to his son's membership of LTTE and it is likely that a record thereof exists. He has also been interrogated seven or eight times because the authorities suspected that the applicant and his family were LTTE supporters or members of the LTTE and the authorities searched for him after his departure; b) the applicant has made an asylum claim abroad; c) his son and nephew were members of the LTTE; and d) the applicant was specifically involved with the LTTE when he reported to them who had informed the authorities about the nephew's membership.

61. In addition, on arrival at Colombo airport the applicant would be at risk of persecution and of being subjected to outrages by the Sri Lankan authorities, which have the technological means and procedures in place to identify failed asylum seekers and those who were wanted by the authorities.

2. *The Government*

62. The Government maintained that no violation of Article 3 would occur if the applicant were to be returned to Sri Lanka and that he had failed to demonstrate that he would be of sufficient interest to the authorities to warrant his detention or interrogation upon return.

63. Referring to the decisions by the Refugee Appeal Board, the Government maintained that the applicant had not been subjected to actions on the part of the authorities reflecting that he was of interest to them prior to his lawful departure in 2007. In this respect, they attached importance firstly to the applicant's own statement of 29 November 2007 in which he declared that the military forces were mainly after his brother's other children, who were young, while he was an old man; that he wanted to live in peace and quiet as he was old; that the military forces were not looking for the applicant personally; and that the applicant wanted to go to Denmark as his son lived there. Secondly, the Government emphasized that the applicant was able to leave Sri Lanka lawfully in November 2007 on a passport issued by the authorities and that up until then, he had not been detained, photographed, fingerprinted or otherwise subjected to actions on the part of the authorities that might indicate that they suspected him of being affiliated with the LTTE.

64. The Government pointed out that it was only in connection with the applicant's request for a reopening of the case on 14 November 2008 that he alleged that it was he who had reported to the LTTE who had informed about his nephew's activities. Similarly, it appears undocumented and contrary to the applicant's former statements that he had been detained twice and questioned about his son's flight. Accordingly, the Government found that those statements could not be accepted as facts and should be disregarded altogether.

65. As regards the risk of detention on arrival at Colombo airport due to the applicant's asylum application, the Danish authorities had not disclosed any information to the Sri Lankan authorities in this respect and the applicant had failed to substantiate that the Sri Lankan authorities have any information thereon from other sources.

66. 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

67. 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).

68. 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).

69. 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).

70. 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.

71. 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)).

72. 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.

73. 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

74. 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.

75. 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.

...”

76. 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 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. 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.

77. 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.

78. 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.

79. Finally (§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.

80. On the basis of the objective information set out above (see paragraphs 25 - 55) 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.

81. 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).

82. 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 deterioration in the general situation in Sri Lanka.

(c) The applicant's case

83. 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.

84. 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, according to the applicant's own statements, he has not mentioned having any previous problems with the LTTE.

85. 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.

86. The applicant is of Tamil ethnicity and has Tamil features. He is from the North of Sri Lanka.

87. The applicant is a man and sixty-five years old.

88. On 17 May 2007, with a valid passport, the applicant left Sri Lanka lawfully and entered Denmark where his son, daughter-in-law, grandchild and brother-in-law lived permanently.

89. In his request for asylum of May 2007 the applicant explained that while he and his eldest son were living in a refugee camp from 1995 to 1998, the eldest son had been arrested five times and the applicant had been arrested twice. In 1998 the applicant helped his eldest son leave the country and the applicant moved to Colombo. The applicant also explained that while living in Colombo, he was arrested and detained three times by the authorities in order to check whether he had permission to stay in Colombo. Finally, he explained that in 2002 he went to Jaffna to live with his brother and that after the killing of his nephew on 14 November 2006, the applicant was constantly harassed by the military forces.

90. According to an interview report of 29 November 2007, the applicant stated that he had not been politically active or a member of any political party or organisation. He had no previous convictions and had not been detained, charged, arrested or imprisoned, and was not a wanted person in his country of origin. After the nephew was killed, however, seven or eight times the military forces came to the house and interviewed the applicant about the LTTE. The military was mainly looking for his brother's other children, who were young, while he was an old man. He wanted to get away and live in peace with his son in Denmark.

91. Finally, having been refused asylum, in his request for a reopening of 14 November 2008, the applicant added that it was in fact he who had reported to the LTTE who had informed the authorities about the nephew's activities and that therefore the authorities were interested in the applicant. Moreover, allegedly the applicant had been detained twice and interrogated about his son after the latter had fled to Denmark in 1998.

92. The Court observes that the latter submissions contradict the statements made by the applicant in May and November 2007 and that the Refugee Appeals Board in its finding of 16 March 2010 pointed out that during the asylum proceedings the applicant had stated that he personally was not an object of interest to the authorities, that he was solely questioned about his knowledge of other LTTE members in connection with the murder of his nephew which had taken place three or four years ago, and that he personally has not been persecuted or threatened in his country of origin. Moreover, the applicant left his country of origin without any problems using his own genuine passport. Thus, the Board found that it had not been rendered probable that the applicant would be of interest to the Sri Lankan authorities or suspected of supporting the LTTE. The Court finds no grounds for concluding

that such finding was wrong.

93. The Court does not question that in the period from 1995 to 1998, when the applicant was living with his eldest son in the refugee camp, he was arrested twice by the authorities, and that in the period from 1998 to 2002, when he was living in Colombo, he was arrested by the authorities three times. However, he has not provided any reasons for the arrests that took place in the first period, except for mentioning that in order to leave the camp it was obligatory to obtain a permit from the military. As regards the arrests occurring during the second period, he explained that the authorities wanted to verify that he had permission to stay in Colombo. The applicant did have permission to stay in Colombo and there is no indication that any of the said arrests were registered or that in general the applicant had problems with the Sri Lankan authorities.

94. The Court does not question either that after the applicant's nephew was killed on 14 November 2006 the military forces came to the house seven or eight times and interviewed the applicant about the LTTE. However it points out the applicant's own statement that the military was mainly looking for his brother's other children, who were young, while he was an old man and that he wanted to get away and live in peace with his son in Denmark. Moreover, even if at the relevant time the military took some interest in the applicant in order to obtain information about the nephew or the LTTE in the area, there is nothing to indicate that upon return the applicant would be of interest to the authorities.

95. Furthermore, as regards the risk of being arrested at Colombo airport, the Court reiterates the arrival procedures there (see paragraphs 42-48) and repeats that there is no indication that the applicant has ever been recorded by the Sri Lankan authorities in connection with arrest or detention. Nor is there any indication that photographs, fingerprints or other means of identification have been stored by the Sri Lankan authorities in order to enable them to identify the applicant upon return.

96. 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.

97. 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.

98. 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. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

99. In his most recent observations of 13 June 2010 the applicant also submitted that it should be taken into account that he suffered from diabetes and numerous other medical conditions including severe depression and psychological trauma. It appears that the applicant invoked Article 3 in this respect. Moreover, if deported, he would be removed from his only family since he has had no contact with his other son since 1995. In this respect, the applicant invoked Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

100. The Court notes that the applicant failed to raise, either in form or substance, before the

domestic courts the complaint made to it under Article 8. Moreover, 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 Articles 3 or 8 of the Convention. It follows that this complaint must be rejected in accordance with Article 35 § 4 of the Convention.

III. RULE 39 OF THE RULES OF COURT

101. 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.

102. 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

P.K. v. DENMARK JUDGMENT

P.K. v. DENMARK JUDGMENT