

FIFTH SECTION

CASE OF T. N. AND S. N. v. DENMARK

(Application no. 36517/08)

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 T. N. and S. N 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. 36517/08) 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 two Sri Lankan nationals, T.N. and S.N. ("the applicants"), on 1 August 2008. The acting President of the Chamber decided to grant the applicants anonymity (Rule 47 § 3 of the Rules of Court).

2. The applicants were 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 applicants allege that an implementation of the deportation order to return them to Sri Lanka would be in violation of Article 3 of the Convention.

4. On 4 August 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 10 September 2008 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 applicants were born in 1965 and 1979 in Sri Lanka. Currently they live at the Jelling Asylum Centre. They are of Tamil ethnicity.

6. On 14 September 2005, with valid passports and three month visas, the applicant spouses entered Denmark, where the applicant husband, TN's sister and brother lived permanently. His three other siblings lived elsewhere in Europe.

7. On 13 December 2005 the applicants requested asylum.

8. On 19 December 2005 they explained that they had never been arrested, politically active or involved in any conflict with the authorities. The applicants were married on 2 December 2004 and lived in Batticaloa on the east coast of Sri Lanka, where the applicant husband ran a fishing business and an electrical company, and had a good income. They lost their fishing boat and their house in the tsunami on 26 December 2004. Thereafter they lived with the applicant wife's parents. The applicants did not sympathise with the Tamil Tigers (LTTE) but the latter had sometimes forced the applicants to support them financially. After the applicants had left Sri Lanka, their motorbike had been confiscated by the Karuna group, which had stated that "they were waiting for the applicants". The Karuna group, later known as the Tamil People's Liberation Tigers, (TMVP), was led by Karuna, a previous commander in the LTTE. Initially it was a paramilitary group that helped the

Government fight the LTTE and later, in 2007, it became a registered political party.

9. On 22 December 2005 the applicant husband added that on 3 April 2005 he had been confronted by four unknown men, three of whom belonged to the Karuna group, who wanted information about his cousin, who was a member of the LTTE. Later in May 2005 two persons had tried to stop him on his motorcycle. On another day in May, he had been stopped on the street by two of the previously mentioned four persons, who again requested information about the cousin. This was the reason why the applicants had decided to go to Denmark.

10. On 16 January 2006 the applicant husband added that his home was searched on average once a month in a general way, whereby the whole village was surrounded and the whole population was gathered by the military who wanted to find out whether there were any LTTE members in the village. Every now and then he was taken away by the military. In 1988 he had been detained by the Indian Army for one night and his feet and hands had been tied. He was released after his eldest brother paid bail for him. In 1998 he was detained by the Sri Lankan Army for two nights, suspected of being a member of the LTTE. They hit his jaw, leaving a scar. Following mediation by members of Parliament, he was released together with nine other detainees. The applicant was not detained or ill-treated by the authorities up to his departure in 2005. In September 2005 two persons had tried to stop him and his wife on their motorbike in a forest area in order to kill them, but they had managed to escape.

11. By decision of 19 April 2006 the Aliens Authorities (*Udlændingestyrelsen*, now *Udlændingeservice*) refused to grant the applicants asylum.

12. On appeal, during a hearing before the Refugee Board (*Flygtningecævnet*) on 14 August 2006 the applicant husband stated that he had been approached by the LTTE and asked to pay them money for the first time around 1996. All fishermen were to pay money to the LTTE. The latter would come to his home at one to three month intervals. After he lost his fishing boat in 2004 they stopped asking him for money. On 3 April 2005 he had been confronted by three men from the Karuna group and a Sinhalese who beat him and forced him to admit that he had paid money to the LTTE. They also asked about the whereabouts of his cousin, who was a member of the LTTE at the relevant time. The last time he had seen his cousin was at his aunt's home in 2001, but only briefly, and they did not really talk to each other. The applicant did not like the cousin due to his connection with the LTTE. The applicant did not know where the cousin lived at the relevant time and the four men let him go. Later, in May 2005, two persons from the Karuna group, one of whom had taken part in the incident on 3 April 2005, stopped him and asked about his cousin's whereabouts and then let him go. In September 2005, two days prior to his departure, two unknown men had tried to stop him and his wife on their motorcycle, but they had managed to escape.

13. By decision of 14 August 2006 the Refugee Board confirmed the Aliens Authorities' decision of 19 April 2006 that the applicants failed to fulfil the criteria under section 7 of the Aliens Act (*Udlændingeloven*). It noted that the applicants' asylum motive was based mainly on fear of the Karuna group, which demanded the male applicant's cooperation to obtain information about his cousin. It did not rule out that it was possible, as stated by the applicants, that the Sri Lankan authorities cooperated with the Karuna group but it found that approaches from people related to the Karuna group in Batticaloa had to be considered geographically restricted and emphasized that in the present case the male applicant had a low profile and had been able to depart legally from Colombo in September 2005.

14. An anonymised summary of the applicants' case, together with thirty other cases involving Sri Lankan nationals, was published on the Refugee Appeal Board's Website.

15. By letter of 20 September 2006 the applicants' representative requested a re-opening of the case.

16. On 30 October 2006, in the light of a recommendation of 27 October 2006 from the UNHCR to the Ministry of Refugee, Immigration and Integration Affairs about the situation in Sri Lanka, the Refugee Appeals Board decided to suspend all cases concerning ethnic Tamils from Sri Lanka.

17. On 14 March 2007, and anew on 14 August 2007, finding that no essential new information or aspects had been submitted, the Refugee Appeals Board refused to reopen the applicant's case.

18. On 27 August 2007, the Ministry of Refugee, Immigration and Integration Affairs refused the applicants' application for a residence permit on humanitarian grounds.

19. On 26 September 2007 the Refugee Appeals Board received a letter by a named person, who

stated that the applicant husband was suspected by the security forces and the Karuna group of having cooperated with the LTTE. The Refugee Appeals Board understood the letter as a request for a reopening of the case. The applicant husband submitted a letter of 10 October 2007 repeating his previous statements, and adding that he had been forced to try to find the cousin who was a member of the LTTE.

20. On 29 October 2007, the Refugee Appeals Board refused once more to reopen the applicants' case.

21. On 31 October 2007 the UNHCR requested the Refugee Appeals Board to stay forced returns of ethnic Tamils from Northern and Eastern Sri Lanka with reference to a letter dated 23 October 2007 from the European Court of Human Rights to the British Government. On the same day the Refugee Appeals Board extended the time-limit for the applicants' departure.

22. On 6 November 2007 the Refugee Appeals Board replied to the UNHCR's request in general terms, refusing to introduce a general stay of forced returns of ethnic Tamils from Northern and Eastern Sri Lanka with reference to the general situation for this group.

23. On 2 July 2008 the latter decided to resume the forced deportation of the applicants.

24. The UNHCR repeated its request on 16 July 2008, to which the Refugee Appeals Board replied on 4 August 2008, again refusing to extend the applicants' departure date.

25. In the meantime, two daughters were born to the applicants on 28 September 2006 and 9 March 2008.

Subsequent events before the Court and domestic proceedings

26. On Friday 1 August 2008 the Danish Refugee Council (*Dansk Flygtningehjælp*), an NGO, requested that the Refugee Appeals Board reopen the case. It stated, *inter alia*, that the applicants had provided new information in the case at an interview held with the said NGO. The applicants had stated that, several times since their departure, persons from the Karuna group and Sri Lankan soldiers had contacted the applicant wife's parents, questioned them about the applicants and had their home searched. The parents had therefore gone into hiding. Due to recent developments the Karuna group had been able to operate in the Batticaloa area. The applicant husband had been imprisoned in 1988/1989 and again in 1998 on suspicion of affiliation with the LTTE. Both times he was subjected to ill-treatment, leaving scars on his body and face. Moreover, and differently from claims in previous statements, the applicant had carried out jobs for the LTTE, such as purchasing batteries, petrol, food and other goods in the Government controlled areas and bringing the products to the LTTE. In fact in 1998, the applicant husband had been released from prison at the request of the LTTE so that he could continue to work for them. He had avoided mentioning his work for the LTTE for fear of being expelled from Denmark.

27. On the same day, on the applicants' behalf, the Danish Refugee Council submitted a letter to the Court of Human Rights requesting that it stay the applicants' deportation.

28. On 4 August 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.

29. Consequently, on 7 August 2008 the Refugee Appeals Board extended the time-limit for the applicants' departure until further notice.

30. On 17 December 2008 the Refugee Appeals Board again refused to reopen the applicants' asylum case finding that no essential new information or aspects had been submitted. As regard the new and extended information, for example about having scars on his body as opposed to his previous explanation about having "only" a scar on his jaw as a result of his detention in 1998, and about his alleged work for the LTTE, the Refugee Appeals Board noted that in view of the numerous times he had been requested to provide all relevant information, and the fact that he had on his own initiative requested a reopening of the case several times with reference to new information, he had not provided a reasonable explanation as to why he had not furnished this information before. The Refugee Appeals Board therefore rejected the new information as fabricated for the occasion.

31. 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.

32. On 16 March 2010 the Refugee Appeals Board refused to reopen the applicants' 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, if returned to Sri Lanka, your clients will not risk persecution or outrages as covered by section 7 of the Aliens Act by the Sri Lankan authorities, including in connection with arrival at Colombo Airport. In this connection, the Refugee Appeals Board emphasises that your male client stated during the asylum proceedings that he has not been politically active or otherwise been involved in conflicts with the Sri Lankan authorities or the LTTE. The Board thus emphasises that your male client appears not to stand out in any way at all as he has exclusively been the subject of money demands from the LTTE like other fishermen in Batticaloa. In that connection, the Board refers to the fact that your clients left Sri Lanka lawfully using their own Sri Lankan national passports. The Refugee Appeals Board also refers to the fact that it appears from the background material available to the Board that, in general, individuals who have previously 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 United Kingdom: 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. Also against that background, the Refugee Appeals Board finds that your clients will not be at a real risk of persecution or outrages as covered by section 7 of the Aliens Act on the part of the Karuna Group or the TMVP, which are in the factual control of Batticaloa according to United Kingdom: Home Office, Operational Guidance Note, Sri Lanka, August 2009. In that connection, the Refugee Appeals Board observes that your clients' incidents with the group took place in 2005. Likewise, on the background of the above, the Refugee Appeals Board finds that the fact that your male client's cousin has been a member of the LTTE for fifteen years cannot warrant a residence permit under section 7 of the Aliens Act according to the background material now available. It should be noted that your male client stated at the Board hearing on 14 August 2006 about his cousin, V, that he last saw V in 2001 at his mother's sister's house and did not otherwise have any contact with him. The fact that as ethnic Tamils from eastern Sri Lanka your clients may risk being questioned and investigated by the authorities upon entry into the country does not 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, from which it appears that 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. In that connection, the Board refers to the fact that your clients appear not to stand out at all. Against that background, the Refugee Appeals Board finds that it has not been rendered probable that the Sri Lankan authorities would take a special interest in your clients upon return. This also applies regardless of the fact that your male client may have scars on his face or on his body. In that respect, please see the Danish Government's further observations of 20 May 2009 to your pleading of 6 April 2009 in the complaint T.N. and S.N. v. Denmark before the European Court of Human Rights. As in its decision of 14 August 2006, 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. The Board observes in that connection that it is a condition for a residence permit under section 7 that, upon a specific and individual assessment, the alien is deemed at risk of persecution or outrages. The authority of the Refugee Appeals Board is restricted to determining asylum-relevant issues, and it is thus outside the Board's authority to determine whether an alien who does not meet the conditions of Article 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 its decision of 14 August 2006, the Board still finds that it has not been rendered probable that, in case of return to Sri Lanka, your clients would be at a concrete and individual risk of persecution as covered by section 7(1) of the Aliens Act, or that your clients would be at a real risk of outrages as covered by section 7(2) of the Aliens Act. It should be noted that your clients' time-limit for departure is still suspended until further notice on the basis of the request of 4 August 2008 from the European Court of Human Rights. If your clients' basis of lawful residence in Denmark lapses, your clients must leave Denmark immediately, see section 33 of the Aliens Act. As appears from the decision of the Refugee Appeals Board of 14 August 2006, your clients may be forcibly returned to Sri Lanka if they do not leave voluntarily, see section 32a, cf. section 31, of the Aliens Act. The decision also comprises your clients' two children."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum proceedings in Denmark

33. 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.

34. 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.

35. 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.

36. 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

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.”

42. 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.”

43. 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.

51. 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.

52. 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."

53. 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

54. 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."

55. 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."

56. 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.

57. 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.

58. 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

59. 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

60. 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

61. 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

62. 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."

63. 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.

64. 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."

65. 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.”

66. 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

67. 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 Karuna group and the Thamir Makkal Viduthalai Pulikal (TMVP) political party

68. The United Kingdom Border Agency’s Operational Guidance Note on Sri Lanka from August 2009 stated as follows:

3.6.5 In March 2004, the LTTE’s eastern commander, Colonel Karuna, broke away from the mainstream LTTE. Much of the breakaway “Karuna/TMVP” (Tamil National Party) group was wiped out and disbanded during 2004 in a military counter-offensive by the mainstream LTTE. However, it was rebuilt during 2004-05 by Karuna and his close associates. Initially a paramilitary group supported by the Sri Lankan authorities in its fight against the LTTE, the TMVP was registered as a political party in 2007. Between late 2006 and early 2007, the TMVP group fought together with the Sri Lankan armed forces against the LTTE in the Eastern Province. Under deputy leader Sivanesathurai Chandrakanthan (a.k.a. Pillayan), the TVMP contested their first provincial elections in 2007, winning a majority in the Eastern Provincial Council. Pillayan was named Chief Minister for the East and is now the leader of the TVMP.

3.6.6 In May 2007, the TVMP was reported to have become further factionalised when the deputy leader of the Karuna group, Pillayan, became involved in a dispute with Karuna. The dispute escalated into violence and Karuna reportedly ordered his loyalists to hunt down and kill Pillayan. In November 2008, Human Rights Watch reported deepening tensions and violent infighting within the TVMP, particularly between the Karuna and Pillayan factions. It was later reported that Karuna had joined the Sri Lanka Freedom Party as MP Vinayagamoorthy Muralidharan with a large following of Tamils from the East. Most recently, he was appointed Minister of National Integration and Reconciliation.

3.6.7 The ICG (Internal Crisis Group) has reported that during the second half of 2008 and early 2009 there was a growing number of LTTE attacks in the east, both against the TMVP, including some apparently successful attempts to infiltrate TMVP offices, and against the police, army and civil defence personnel. However, there was also credible evidence to suggest that many of those killed were targeted by the TMVP and government security forces as LTTE members or supporters, either as part of the government’s general counterinsurgency strategy or in

response to specific LTTE attacks on, or infiltration of, the TMVP.

3.6.8 According to UNHCR, while the immediate impact of the LTTE on the lives of civilians in the East has been greatly reduced, the TMVP, which now effectively controls Batticaloa and other parts of the East, is reported to engage in terror and crime. Incidents of TMVP involvement in abductions, child recruitment, robberies and repression of dissent are widely documented. It is also reported that TMVP forces are responsible for extrajudicial killings, deaths in custody and abductions, which have apparently been carried out with the knowledge and tacit agreement of Government actors and local authorities. Abductions and forced recruitment by the TMVP group have occurred in IDP camps in Batticaloa and Trincomalee districts. A series of abductions of young women in Batticaloa district were believed to be the work of local TMVP cadres.

69. The United Kingdom Border Agency Country of Origin Information Report on Sri Lanka of 18 February 2010 set out, *inter alia*:

4.26 With regard to the Eastern Province the same source [The BHC letter of 12 January 2010] reported that: "Security restrictions in Trincomalee district have markedly relaxed during 2009...The security situation in Batticaloa has also improved, although the town is not yet as calm as Trincomalee and there is still a high military presence. To emphasise this, in July 2009 a crowd of approximately 300 people gathered to watch a performance from the British Council forum theatre in a Batticaloa suburb with no military presence. This would not have been possible a few months ago. "The police presence is comparable to Colombo but encouragingly, some do not carry weapons despite being on duty. "The Senior Superintendent of Police (SSP) for Batticaloa was proud of the fact that there had been a marked improvement in the security situation in the district which allowed his officers not to carry weapons. He was not aware of any remaining LTTE cadres in the area and considered that most of the cached weapons had now been seized or could no longer be found as the land was now overgrown. Reported abductions and low level crime were minimal. "Church Elders in the Diocese of Trincomalee and Batticaloa have provided grass roots assessment. They opined that there was no longer a LTTE presence in the Batticaloa district. During the latter stages of the conflict, the few remaining LTTE cadres, mainly youths, had thrown away their weapons and returned to their families. The community knew who they were but had no concerns about them re-arming. Community level engagement both with the police and SLA over the last 9 months had improved considerably. There were now regular meetings between the various community leaders and the Deputy Inspector General (DIG) Police and SLA commanders which allowed them to voice any concerns they had about the paramilitaries, abductions, harassment by the security forces. As a result, the paramilitaries were no longer carrying weapons, abductions were low (and once reported to the community leaders, they were able to raise it immediately with the DIG) and security check points were no longer a problem."

4.27 The BHC letter of 12 January 2010 further observed: "It is apparent that recent security improvements in the Eastern Province are starting to make tangible improvements to the people living there. "The Divisional Secretary (DS) spoke of the extent of development taking place in the Province with new roads, electricity and telephone lines, much of which being already visible. There is now a low police and military presence, and no LTTE. ..."

70. The United Kingdom Border Agency Country of Origin Information Report on Sri Lanka of 11 November 2010 stated *inter alia*:

10.10 A letter from the British High Commission (BHC) in Colombo, dated 1 September 2010 referred to a programme in the east related to: "...the rehabilitation and reintegration of many cadres loyal to the TMVP. This programme was conducted through the Ministry of Defence who provided lists of former TMVP cadres to the IOM office in Batticaloa. Technical support for the project was provided by the UK and IOM conducted a community perception survey to assess the impact these cadres would have within the local community."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

71. The applicants complained that an implementation of the deportation order to return them 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."

72. The Government contested that argument.

A. Admissibility

73. 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 applicants

74. The applicants maintained that, in general, returning ethnic Tamils from the north and east of Sri Lanka would be contrary to Article 3 of the Convention.

75. Moreover, the applicant husband and his wife would be particularly exposed to being subjected to treatment contrary to Article 3 of the Convention by the Sri Lankan authorities or the Karuna group or the TMVP or the LTTE upon return due notably to the following risk factors: a) the male applicant was detained by both the Indian Army and the Sri Lankan Army, suspected of membership of LTTE; b) the male applicant has several scars: one on his jaw, one on the back of the head, one on his right leg and one on his left arm; and he has lost six teeth due to the ill-treatment to which he was subjected during the said detentions; c) he has made an asylum claim abroad, d) his cousin was a member of the LTTE; and e) the applicant was affiliated to the LTTE via his work for them and his payments to them.

76. In addition, on arrival at Colombo airport the male applicant would be at risk of persecution and of being subjected to outrages by the Sri Lankan authorities. In this respect the applicant pointed out that he had a visible scar on his jaw and that the Sri Lankan authorities would have the technological means and procedures in place to identify failed asylum seekers and those who were wanted by the authorities. Moreover, the applicants were exposed on the website of the Refugee Appeal Board and in the media in Denmark, for instance in connection with the Court's application of an interim measure in the case, and the applicants would therefore be at even greater risk of detention and interrogation upon return.

2. The Government

77. The Government maintained that no violation of Article 3 would occur if the applicants were to be returned to Sri Lanka and that they had failed to demonstrate that they would be of sufficient interest to the authorities as to warrant their detention or interrogation upon return.

78. Firstly, in the Government's view it could not be considered a fact that the applicants had been subjected to actions on the part of the authorities reflecting that they were of interest to the authorities prior to their lawful departure in 2005. Repeatedly, the male applicant explained that he had been detained only in 1988 and 1998 and that thereafter he did not have any problems with the authorities, but for the regular incidents where he, like the rest of the village, had his house searched and was questioned in general by the authorities about his affiliation with the LTTE.

79. Moreover, the male applicant explained repeatedly that the purpose of the interrogation by the Karuna group in 2005 had been to question him about his knowledge of his cousin who was a member of the LTTE. The male applicant maintained that he had not seen the cousin since 2001 and that he was allowed to leave after the interrogations by the Karuna group.

80. Furthermore, the male applicant consistently maintained that his involvement with the LTTE had been limited to forced contributions from around 1996 until the tsunami in 2004. This information was taken into account in various decisions by the Refugee Appeal Board and it was only in connection with the applicants' request for a reopening on 1 August 2008 that the male applicant submitted, as opposed to his previous statements, that he had carried out jobs for the LTTE and that in 1998 he had in fact been released from prison at the request of LTTE so that he could continue to work for them. The Government found, like the Refugee Appeal Board in its decision of 17 December 2008, that the latter information had to be considered fabricated for the occasion and that the applicants' involvement with the LTTE had been very limited.

81. As regards the risk of detention on arrival at Colombo airport due to the male applicant's scars or lost teeth, the Government pointed out that scarring would only have significance when there were other factors that would bring the authorities' attention to the applicant, and they pointed out that the male applicant had scars and was missing teeth also at the time of issue of his passport and his lawful

departure from Sri Lanka in 2005.

82. Finally, the Danish authorities had not disclosed any information to the Sri Lankan authorities about the applicants' asylum application, and the applicants have failed to substantiate that the Sri Lankan authorities have any information thereon from other sources.

83. 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 applicants 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 applicants would be of sufficient interest to the authorities in their efforts to combat the LTTE to warrant their detention and interrogation.

3. The Court

(a) General principles

84. 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).

85. 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).

86. 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).

87. 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.

88. 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)).

89. 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.

90. 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

91. 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.

92. 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.

...”

93. 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.

94. 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 LTTE as to warrant his or her detention and interrogation.

95. 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.

96. 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.

97. On the basis of the objective information set out above (see paragraphs 37 – 70) 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, on the treatment of Tamils in Colombo, and on the security situation in Batticaloa and the Trincomalee district. 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.

98. 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).

99. 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 applicants' case

100. On the basis of the foregoing observations, the Court will examine the applicants' particular circumstances in order to determine whether there would be a violation of Article 3 if they were to be expelled to Sri Lanka.

101. In so far as the applicants' submissions entail that they 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 first applicant's own statement, he only assisted the LTTE, as opposed to being a member, and he has not mentioned having any previous problems with the LTTE.

102. In assessing the risk to the applicants from the Sri Lankan authorities, including the former Karuna group or the TMVP, the Court will examine the strength of the applicants' claim to be at real risk as a result of an accumulation of the risk factors identified.

103. The applicants are of Tamil ethnicity and have Tamil features. They are from Batticaloa in the east of Sri Lanka.

104. The applicant husband is approximately forty-five years old. The applicant wife is approximately thirty-one years old.

105. On 14 September 2005, with valid passports and three month visas, the applicants left their country lawfully and entered Denmark, where the applicant husband's sister and brother lived permanently.

106. In his request for asylum of December 2005, the applicant husband explained that he did not sympathise with the LTTE, but that he had sometimes been forced to support them financially. On 14 August 2006 he added that all fishermen had to pay money to the LTTE. He had contributed financially from 1996 at one to three month intervals. After he lost his fishing boat in the tsunami on 26 December 2004 the LTTE stopped asking him for money.

107. He also explained that in 1988 he had been detained by the Indian Army for one night and his feet and hands had been tied. He was released after his eldest brother paid bail for him. In 1998 he was detained by the Sri Lankan Army for two nights suspected of membership of LTTE. They hit his jaw and left a scar. Following mediation by members of Parliament, he was released together with nine other detainees. The applicant was not detained or ill-treated by the authorities up to his departure in 2005.

108. After the applicant had been refused asylum by a final decision of 14 August 2006 by the Refugee Appeal Board, there was a series of decisions: reopening of those proceedings was refused on 14 March and 14 August 2007; a residence permit on humanitarian grounds was refused on 27 August 2007, and a request for reopening of the asylum proceedings was refused on 29 October 2007. Subsequently, on 1 August 2008, in a new request for a reopening of the asylum proceedings, the applicant husband alleged that, contrary to what he had said in previous statements, he had in fact carried out jobs for the LTTE, such as purchasing batteries, petrol, food and other goods. Moreover, on both occasions when he had been detained in 1988 and in 1998, it had been due to suspicion of his affiliation with the LTTE and he had been ill-treated, leaving scars on his body and face, and on the latter occasion it had been the LTTE which requested his release from prison so that he could

continue to carry out work for them. The applicants also added that several times since their departure, persons from the Karuna group and Sri Lankan soldiers had contacted the applicant wife's parents, who had been questioned about the applicants and had their home searched.

109. The Court notes in this respect the Refugee Appeals Board's finding on 17 December 2008 that considering that numerous times the applicant husband had been requested to provide all relevant information, and that he had on his own initiative requested a reopening several times with reference to new information, he had not reasonably explained why he had not furnished the new information until 1 August 2008. Therefore, the new information had to be rejected as fabricated for the occasion. The Court finds no grounds for concluding that such finding was wrong. Accordingly, it does not find it established that the applicant husband had supported the LTTE on more than a lower level; that he had been detained by the authorities since 1998; that thereafter the applicants had problems with the authorities but for the regular incidents where they, like the rest of the village, had their house searched and were questioned in general by the authorities about their affiliation with the LTTE; and that upon return they would be of interest to the authorities due to the first applicant's previous financial support to the LTTE or due to his detention in 1988 and 1998.

110. The applicants submitted that several times in 2005 they were confronted and threatened by the Karuna group which wanted information about the first applicant's cousin, who was a member of the LTTE. Before the Refugee Appeal Board on 14 August 2006 the applicant husband explained that he had last seen his cousin at his aunt's home in 2001, but only briefly. They did not really talk to each other and the applicant did not like his cousin due to his involvement with the LTTE. The applicant did not know where his cousin lived. The applicant husband also explained that the men from the Karuna group allowed him to leave after the interrogations about his cousin in April and May 2005, and that he escaped in September 2005 when two men tried to stop him and his wife on their motorcycle.

111. In the Court's view the fact that the applicant husband's cousin was a member of the LTTE carries little weight in the present case (see *NA. v. the United*, cited above, § 146). Moreover, as mentioned above, the hostilities between the LTTE and the Sri Lankan Army ended on 19 May 2009. Thus even if at the relevant time the Karuna group took an interest in the applicants in order to get information about the cousin's whereabouts, there is nothing to indicate that upon return the applicants will be of interest to the authorities, including the TMVP, in their search for the cousin.

112. The applicants maintained that they were at great risk of being detained and interrogated on their arrival at Colombo airport and the applicant husband pointed out that besides the scar on his jaw, he also had scars on the back of the head, on his right leg and his left arm, and that allegedly he had lost six teeth due to the ill-treatment to which he was subjected in 1988 and 1998. The Court observes, however, that the applicant husband did not have any problems in obtaining a passport or in leaving the country in December 2005 (see also *NA. v. the United*, cited above, § 144).

113. Furthermore, as regards the risk of being arrested at Colombo airport, the Court reiterates the arrival procedures there (see paragraphs 54-60) and points out that there is no indication that the first 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 applicants upon return.

114. 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.

115. The applicants alleged that the various authorities in Sri Lanka were aware that they were refused asylum seekers because the applicants had been exposed on the website of the Refugee Appeal Board and in the media in Denmark, for instance in connection with the Court's application of the interim measure in their case. The Court notes in this respect that an anonymised summary of the Refugee Appeal Board's decision of 14 August 2006 in the applicants' case, together with thirty

other cases involving Sri Lankan nationals, was published on the Refugee Appeal Board's Website. In the Court's view, however, although the applicants' age, sex and home district were disclosed, the applicants' identity could hardly be traceable, notably since Batticaloa is a rather large town with many inhabitants. The Court also notes that in the proceedings before it, the applicants have not asked for anonymity. Nevertheless, even if anonymity has been granted ex officio by the Court relatively recently, there are no indications that due to access to the Court's internet site or due to earlier references in the Danish press, the Sri Lankan authorities have become aware that the applicants have been refused asylum and that they are therefore of special interest to the authorities upon return.

116. Accordingly, assuming that the applicants were to be removed through Colombo airport, taking the above elements into account as well as various factors such as age and gender, in the Court's view the applicants have failed to substantiate that they will be of specific interest to the Sri Lankan authorities at Colombo airport.

117. 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 applicants would be of interest to the Sri Lankan authorities if they were returned. In those circumstances, the Court finds that an implementation of the order to deport the applicants to Sri Lanka would not give rise to a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

118. In their most recent observations of 8 June 2010 the applicants also submitted that in the above assessment it should be taken into account that the female applicant was suffering from Post Traumatic Stress Disorder, which was confirmed by a psychologist in a declaration of 6 August 2007 and that this fact should be seen together with the right for her and her two children to a family life and a private life as protected by 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."

119. The Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

120. The applicants failed to raise, either in form or substance, before the domestic courts the complaint made to it. It follows that this part of the application is inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

III. RULE 39 OF THE RULES OF COURT

121. 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.

122. 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 applicants 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

T.N. AND S.N. v. DENMARK JUDGMENT

T.N. AND S.N. v. DENMARK JUDGMENT

