

**IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR  
JUDICIAL REVIEW**

**IN THE MATTER OF AN APPEAL AGAISNT THE JUDGMENT OF MR JUSTICE  
MITTING**

**AND IN THE MATTER OF AN APPLICATION FOR A STAY ON REMOVAL SET  
FOR THE 15<sup>TH</sup> DECEMBER 2011**

**GROUND UPON WHICH PERMISSION IS SOUGHT**

**GROUND UPON WHICH A STAY IS SOUGHT**

1. This is an appeal against the judgment of Mitting J who gave an *ex tempore* judgment this morning. The application was opposed by Mr Tim Eicke QC on behalf of the Defendant.
2. The Order will be supplied in 7 days but the nature of the judgment is described in these grounds.

Background:

3. The Claimant is a well known NGO active campaigning for the prosecution of the Sri Lankan authorities for war crimes and crimes against humanity.
4. The UN Committee against Torture concluded its examination of submissions from lead NGOs concerning the prevalence of torture on the 25<sup>th</sup> November 2011.
5. One of the reports submitted was from Freedom from Torture, formerly the Medical Foundation for the Care of Victims of Torture. It was produced in November 2011.
6. Out of a sample of 35 clients from the FTT , 14 were tortured after returning having spent time abroad including the UK. 3 had been subject to enforced removal by the UK. [p7, FTT report]. None of those who returned had a well founded fear of persecution. These reports were between 2009 and 2011.

7. A later report from the FTT refers to the case of Rohan who was tortured on his return to Sri Lanka from the UK in early 2011. He was referred to Freedom from Torture (formerly the Medical Foundation for the Care of Victims of Torture) several months ago when he escaped – on payment of a bribe by his family – and flew back to the UK.

*“After I arrived in Sri Lanka and tried to leave the airport, two men stopped me, asked for my passport and asked me to come with them. They showed me their IDs – two people from CID[Criminal Investigation Department]. They took me out of a different entrance and pulled me inside a van. They started to ask questions about why I had come back to Sri Lanka – saying that I had escaped the first time but not this time. They tied my hands and legs and kicked me very badly.*

*“I was taken to a building. They asked questions like ‘why have you come back again?, ‘what did you do in the UK?’, ‘where is your brother?’ [an LTTE member]. I said I had no contact with him. They tortured me inside the room by removing my clothes and hitting me with burning irons. I was feeling a burning sensation all over my body. They kept me for two days and I found my body was all swollen. On the third day they put me inside the van. I thought they were going to shoot me. Later I realised that my family had given them some money and because of that I was released.”*

8. If this claim is true then the UKBA should review its policy.
9. Freedom from Torture [ formerly Medical Foundation] submission to the CAT, November 2011:

Return to Sri Lanka from abroad:

Fourteen of the 35 cases report periods of residence or travel abroad preceding detention and torture: 5 travelled for educational purposes, 3 for family reasons and **4 for the purpose of seeking refuge outside of Sri Lanka**. In the remaining 2 cases, the purpose of travel was not stated.

*Of the 4 who sought refuge abroad, 3 were forcibly returned to Sri Lanka. In one case the individual had claimed asylum unsuccessfully in the UK a number of years earlier but was returned to Sri Lanka from another European state whilst en route to a non-European state where a new asylum claim was to be lodged. The second case involves a similar scenario –an individual who had*

*claimed asylum unsuccessfully in a European state was returned by a second European state whilst en route to a non-European state where a new asylum claim was to be lodged. The third was returned from another European state after two years of residence, having been refused asylum there. In each of these cases, the person was tortured on return.*

*Of those 10 cases involving individuals who travelled abroad for non-asylum purposes, 9 returned voluntarily to Sri Lanka (all from the UK). Five returned voluntarily for temporary visits for a variety of family reasons including family sickness, child custody issues, to visit family and attend family celebrations. Two individuals returned due to the disappearance of their fathers and 2 others returned voluntarily. The remaining individual was en route to a non-European state for family reasons, but was returned en route due to the use of false documents.*

*All of the 14 individuals who had returned to Sri Lanka after a period abroad, whether they left Sri Lanka through a legal route or otherwise, were subsequently detained and tortured.*

In 5 of the 14 cases, the episode of detention and torture documented in the MLR occurred over a year and up to 7 years after return. However in 9 cases the individual was detained within days, weeks or a month of their return. Of these 9 cases, 6 were detained in Colombo, either from their home or at checkpoints or from a lodging house. Two were detained at checkpoints elsewhere in the country and 1 was detained directly from the airport on arrival.

Four of the 6 cases detained in 2010 report being arrested from their own home or that of their family, in locations including Kandy and Colombo. One was taken at a checkpoint and the other from his workplace in Colombo. Two of these individuals report being taken by plain clothed 'officials' and transported to the detention facility in unmarked 'white vans'. Four of these 6 individuals had recently returned from abroad, 3 for family or health reasons and 1 due to a refused asylum claim (from the UK and another European state respectively). Five of the 6 cases report detention due to an imputed association with the LTTE through a family member or friend. The sixth case was associated with the political opposition during the 2010 presidential elections.

Of those 8 cases detained in 2009 after the ceasefire (June onwards), the majority report being taken from their homes in Colombo, Batticola and Kalmunai. These individuals were taken in some cases by plain clothed 'officials', and in others by uniformed police. One individual was visiting Sri Lanka from the UK and was accused of having fundraised for the LTTE. Three others had an imputed

association with the LTTE through family members or their own history of detention and 1 was a supporter of an opposition party.

The remaining 3 cases were taken at a checkpoint in Omanthi, at the airport (removed to Sri Lanka following a refused asylum claim) and during a round-up of Tamils in Vavuniya following LTTE activity in the area.

7. TAG [Tamils Against Genocide] Tamils Against Genocide Inc. is a non-profit litigation advocacy organization incorporated in the United States. TAG are involved in evidence gathering and in bringing litigation on behalf of victims of war crimes, crimes against humanity and genocide against perpetrators from Sri Lanka under universal jurisdiction provisions in countries including the United States and in submissions to International bodies such as the International Criminal Court.

10. The Claimant submits that the policy of removal is flawed because:

- (i) The policy of removal breaches a legitimate expectation of review ,
- (ii) The policy of removal is inconsistent with a recent judgment of the Administrative Court of another EU state,
- (iii) The policy of removal is inconsistent with UKBA policy on assisting with the prosecution and apprehension of war criminals and those who have committed crimes against humanity and genocide.

11. POLICY GIVING RISE TO LEGIMITATE EXPECTATION OF REVIEW:

- a. *'We will continue to investigate any credible and relevant allegations and review our policy in light of any findings'.*

**Alistair Burt** (Parliamentary Under Secretary of State (Afghanistan/South Asia, counter terrorism/proliferation, North America, Middle East and North Africa), Foreign and Commonwealth Office; North East Bedfordshire, Conservative. Sri Lanka: Deportation Foreign and Commonwealth Affairs ... Hansard source (Citation: HC Deb, 28 November 2011, c685W),

- b. [We] *"constantly monitor the country situation, and issues of safety on return have not arisen. There is no evidence that those who were previously removed to Sri Lanka have been mistreated. All those who returned to Sri Lanka last week passed through border control procedures and were allowed to proceed without incident."*

Chris Dix: The South Asia Regional Director of the UK Border Agency interviewed by the Ratmalana-based newspaper *The Sunday Leader*. (27 June 2011).

- c. The UKBA's Chief Executive, Rob Whiteman – on behalf of Immigration Minister Damian Green – stated that: *“The return of individuals is not enforced unless we and the courts consider that it is safe to do so.”*
12. There is no evidence or statement to indicate that the UKBA have considered whether the removal of failed asylum seekers by way of charter flight on the 15<sup>th</sup> December 2011 is appropriate given public statements by the UKBA that the policy on removal will be reviewed.
13. It is submitted that it is almost certain that the decision to remove failed asylum seekers was taken without any review of policy in the light of the new reports and the observations of the UNCAT.
14. The Court is asked to make an Order for discovery of documents to show that it had reviewed its policy on removal in the light of the UNCAT's observations and the FTT reports before the decision to remove.

Ground Two:

15. In the last few days the UNHCR has reported the judgment of the Swiss Federal Administrative Court in Urteil E-6220/2006 on the 27<sup>th</sup> October 2011.
16. It is submitted that the current decision under review dated the 15<sup>th</sup> July 2011 is flawed because the policy on removal should be reviewed in the light of this judgment .
17. This decision by the Federal Administrative Court updates the Court's decision of 14 February 2008 (Tribunal administratif fédéral ATAF 2008/2). It states that political opponents, critical journalists, human rights activists, critical NGO representatives, as

well as *victims of or witnesses to serious human rights violations* and persons who are presumed to have close contacts to the LTTE represented groups are still at risk of persecution in Sri Lanka. *In general, returns to Sri Lanka including the East and North are considered reasonable, with the exception of Vanni region where no returns should take place. For persons who left the northern province some time ago, the existence of social network and chances for securing minimal living conditions should be considered.*

18. Given the harmonization of asylum procedures in the EU, as a result of the EU directive on minimum standards in asylum procedure, this judgment is highly persuasive. Further, the last country guidance in the UK was heard on the 27<sup>th</sup> and 28<sup>th</sup> December 2009 so this is the most recent judicial assessment of risk on return to failed asylum seekers.
19. The new risk category applicable to many of the returnees is that of victims or witnesses or war crimes.
20. The context of the assessment of this risk category is the report of the *United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka* was published on the 31<sup>st</sup> March 2011:

*“ [the] government shelled on a large scale in three consecutive No Fire Zones, where it had encouraged the civilian population to concentrate, even after indicating it would cease the use of heavy weapons ..it shelled the United Nations hub, food distribution lines and near the ICRC ships that were coming to pick up the wounded.. It shelled despite its knowledge of the impact, provided by its own intelligence systems and through notification by the United Nations, the ICRC and others. Most civilian casualties in the final phase of the war were caused by government shelling”*

21. The report characterizes the systematic shelling of civilians and intentional deprivation of access to food and medicine as *“calculated to bring about the destruction of a significant part of the civilian population”*. This characterization

- meets the definition of genocide in Article 2(c) of the UN Convention on the Prevention and Punishment of Genocide.
22. The UN Panel's report forms an expert opinion on the alleged crimes against humanity and recommends the establishment of an independent international investigation into the allegations. The Panel found the allegations credible.
  23. However such investigation has not commenced pending United Nations deliberations following the outcome of Sri Lanka's domestic investigation due in November 2011.
  24. TAG is authorised by the plaintiffs in *Manoharan, Lavan & Aiyathurai v Rajapaksa* [case 1:11-CV-00235] to instruct counsel, obtain evidence and identify witnesses and TAG also work with UNRow to identify evidence and witnesses for their case.
  25. It is submitted that it is unlawful for the Defendant to remove survivors and witnesses of war crimes, crimes against humanity and genocide in Sri Lanka and places the Defendant in breach of the Geneva Convention and her own policy in respect of war crimes.
  26. TAG has furnished the defendant with collated evidence to show that those with knowledge of war crimes and other serious human rights violations who are actual or perceived witnesses face risk from the Sri Lankan authorities.
  27. The UK government has pledged a commitment to an independent international investigation in the event that Sri Lanka does not adequately remedy faults within its own domestic process, including the lack of safeguards to witnesses.

28. The Defendant ought to grant survivors and witnesses of war crimes, crimes against humanity and genocide in Sri Lanka, discretionary leave to facilitate the provision of evidence in respect of ongoing US civil proceedings against the Sri Lankan President and US resident General Silva for international offences, ongoing criminal investigations into the last phase of the Sri Lankan war by government authorities including the Department of Justice in the United States and the ongoing decision making process within the United Nations with respect to an independent international investigation into war crimes in Sri Lanka.
29. The Defendant ought to defer enforcement measures against the witnesses to facilitate the provision of such evidence.
30. Applicable UK Government policy: Chapter 7, Secure Borders, Safe Havens:

‘War criminals:

*7.17 Crimes against humanity can be committed at any time and the international community regards these, and war crimes, as amongst the most serious crimes which can be committed.*

*The Government is determined to ensure that those who are guilty of committing such atrocities are called to account for their actions wherever possible.* In cases where criminal proceedings, either in the UK or abroad, are not practicable, the Government is intent on making more effective use of its immigration and nationality powers to prevent suspected war criminals from entering the country or from establishing themselves here.

7.19 In recent years, the international community has had to grapple with the consequences of new generations of war criminals, born out of the conflicts in the former Yugoslavia, Rwanda and elsewhere. **The Government has strongly supported international efforts to bring the perpetrators of war crimes to justice through the establishment of ad hoc criminal tribunals and the International Criminal Court.** The International Criminal Court Act 2001 also gives the UK jurisdiction to prosecute in its domestic courts both British citizens and others who are resident here even where they are suspected of having committed atrocities abroad. This jurisdiction applies only to events which occur after the date of its introduction (1 September 2001). 7.20 The UK should not provide a safe haven for war criminals or those who commit crimes against



humanity. *Action should be taken to bring such individuals to justice wherever possible within the rule of law and depending on the sufficiency of the evidence available. However, our experience, and that of a number of other countries which have been very active in this field, is that an effective response cannot be founded solely on criminal prosecution.*

Frequently, evidence will be insufficient to meet the high standard of proof required to convict a particular individual. *Governments must be prepared to use their full range of powers, including the selective use of immigration and nationality provisions, to make it clear that those who are suspected of involvement in atrocities are not welcome in a civilized society. All of this needs to be balanced against our obligations to individuals who are in genuine need of protection.*

7.21 The Government intends to strengthen its ability to deal with suspected and convicted war criminals by:

- Up-dating relevant immigration and nationality legislation.
- Ensuring better co-ordination between the Home Office and all the other Departments and agencies who have an interest in this area

31. Threats to witnesses of war crimes, crimes against humanity and/or genocide in Sri Lanka:
32. On or around the 27<sup>th</sup> October TAG produced a collated report of threats to survivors and witnesses of human rights abuses and in particular war crimes, crimes against humanity and/or genocide. This report was made available to the defendant in the context of another judicial review application around the 27<sup>th</sup> October and the first week of November.
33. The TAG report includes the following citations:
  - a. 'Twenty Years of Make Believe' by Amnesty International, June 2009
  - b. 'No war, No peace' by Minority Rights Group International, Jan 2011

Amnesty says (at p2 ‘ Twenty Years of Make Believe) ‘**State agents have intervened directly in some cases to eliminate witnesses through bribes, threats, harassment, intimidation and violence, including murder, to discourage police investigations, and to mislead the public.**

The Minority Rights Group (at p6 ‘No war no peace’) refers to : ‘**the threat to people in Sri Lanka who are seen to be critical of the government, especially on human rights issues. The threat is exacerbated when people in Sri Lanka provide information to international organizations.**’

The MRG also says: ‘**Activists seen talking to foreigners fear being questioned and threatened**’

34. The US Embassy in Sri Lanka believed ‘*responsibility for many of the alleged crimes rests with the country's senior civilian and military leadership, including President Rajapaksa and his brothers and opposition candidate General Fonseka.*’
35. The United States Government has begun an [criminal] investigation into these allegations. Evidence collection is actively taking place.
36. While proceedings at the International Criminal Court (ICC) have not yet been initiated following INGO and UN Panel’s recommendations, there is a likelihood that the recommendations will be implemented in time.
37. Meanwhile, Human rights groups acting on behalf of victims have brought civil proceedings in national courts under universal jurisdiction.
38. Two such civil proceedings are in process and others are pending.

#### Witnesses of Relevance

39. Tamil asylum seekers living in the Vanni/Mullaithivu region in the final phase of the war, which includes those on the charter flight, from mid 2008 to May 2009 are

- witnesses to the alleged intentional widespread, systematic shelling of civilian areas and infrastructure including hospitals, as well as to other crimes against humanity including the alleged intentional deprivation of food and medicine, and the deliberate under reporting of population figures.
40. The personal knowledge of Tamil refugees who meet the criteria in constitutes an evidentiary source relevant and necessary to proving war crimes allegations in the complaints set forth in the ongoing cases against President Rajapaksa and General Shavendra Silva.
  41. Lawyers and NGOs representing litigants in the US cases have requested a stay of deportation to allow these witnesses to testify in the ongoing cases.
  42. On the 27<sup>th</sup> and 28<sup>th</sup> September 2011 US special interest group TAG and Lead Counsel of Devi & Sivam v Silva, Ali Beydoun, on behalf of special interest UNROW had written to the UKBA asking that deportations be deferred so that they could secure potential witnesses.
  43. On the 22nd September 2011, Justice Oetken of the US District Court issued a witness summons against US resident former General Silva to respond to the complaint made by Sivam and Devi, relatives of victims of war crimes.
  44. UNROW attorneys initiated a lawsuit against Sri Lankan General Shavendra Silva last Friday, September 23<sup>rd</sup> in the Southern District of New York (SDNY).
  45. General Silva was the Commander of the 58<sup>th</sup> Division of the Sri Lanka Army, and it is alleged by the complainants was directly responsible for deliberate shelling of civilians contrary to the Protocols to the Geneva Convention, in Mannar, Puthukudiyiruppu, and other areas in northern Sri Lanka.

46. Complaint filed at the US District Court, Southern District of New York:

‘This is a civil action for declaratory relief and compensatory and punitive damages for torts in violation of international and domestic law. Plaintiffs VATHSALA DEVI and SEETHARAM SIVAM, through their undersigned attorney, hereby file this Complaint against Defendant SHAVENDRA SILVA, in his individual capacity as a commander in the armed forces of Sri Lanka for his role in the torture and wrongful death of a hors de combat detained under his command and for his role in the fatal shelling of civilians taking no active part in hostilities.

Plaintiffs allege that SILVA conspired with, aided and abetted and alternatively exercised command and control over the perpetrators of torture, extrajudicial execution and fatal shelling of civilians. The perpetrators belonged to military, security, or paramilitary forces that were directed by and operated with SILVA’s express, implicit, or delegated uthorization and practical assistance or encouragement.

Moreover, SILVA had knowledge of these acts, or had information at the time that should have enabled him to conclude such attacks were occurring or were going to occur, and in these instances he either failed to prevent or stop the attack or waived any punishment for the perpetrators. The Plaintiffs state claims arising under the Torture Victim Protection Act of 1991, Pub. L. 102–256, 106 Stat. 73 (Mar. 12, 1992), and customary international law, which are actionable under the Alien Tort Claims Act, 28 U.S.C. § 13504 (2006).

This action seeks declaratory relief as well as compensatory and punitive damages for torture; cruel, inhuman or degrading treatment; arbitrary detention; summary execution; forced disappearance; and crimes against humanity as violations of international, Sri Lankan, and domestic law, including the Alien Tort Claims Act, 28 U.S.C. § 1350, and Torture Victim Protection Act of 1991, Pub. L. 102–256, 106 Stat. 73 (Mar. 12, 1992).

This action also seeks declaratory relief as well as compensatory and punitive damages for assault and battery; false imprisonment; wrongful death; and intentional infliction of emotional distress as violations of state law’.

47. In view of ongoing and imminent investigations and legal actions relating to war crimes, crimes against humanity and genocide in Sri Lanka, the defendant has an

obligation to assist in preserving evidence and protecting witnesses, and to refrain from deporting them to jurisdictions where they will be silenced.

Mitting J's judgment:

48. The sole reason for refusal of permission was on the ground that a claim can only succeed on the grounds of individualised applications based on profile and not on the grounds of a challenge to the failure to review policy in the light of credible allegations of torture of failed asylum seekers on return.

49. But that is what happened in AA (Involuntary returns to Zimbabwe) Zimbabwe [2005] UKAIT 00144 :

‘That determination was given on 11 May 2005. Rumours of ill-treatment of returned asylum seekers persisted. A number of individuals threatened with removal sought permission for Judicial Review of the arrangements made for their removal, on the basis that, given the allegations of ill-treatment, rejected asylum seekers could not lawfully be removed to Zimbabwe without a proper consideration of whether their status as failed asylum seekers gave rise to a claim under the Refugee Convention. A number of those applications were stayed pending directions to be given by Collins J on 4 August 2005. On that date, by arrangement, consent or order, it was decided that further proceedings in all the Judicial Review applications should await the determination of a suitable appeal by this Tribunal. The reason why that arrangement was so obviously right is that the Tribunal can and must consider and determine the underlying facts in a way that is not open to the High Court in Judicial Review proceedings.

50. The SSHD is under a continuing duty to evaluate risk on return to failed asylum seekers.

51. In *R v Home Secretary ex p Launder* [1997] 1 WLR 839 from paras 860 to 861, Lord Hope said that:

"The situation has changed since 1995 when the decisions were taken. So it is necessary first to mention the situation at that time and then to examine the situation at the present stage. Although we are concerned primarily with the reasonableness of the decisions at the time when they were taken we cannot ignore these developments. We are dealing in this case with concerns which have been expressed about human rights and the risks to the respondent's life and liberty. If the expectations which the Secretary of State had when he took his decisions have not been borne out by events or are at risk of not being satisfied by the date of the respondent's proposed return to Hong Kong, it would be your Lordships' duty to set aside the decisions so that the matter may be reconsidered in the light of the changed circumstances." (p 860-1)

52. The Courts have considered risk to failed asylum seekers *per se*, before.
53. In *Turgut* [2000] HRLR 337, [2000] EWCA Civ 22, [2001] ACD 12, [2000] Imm AR 306, [2000] UKHRR 403, [2000] INLR 292, [2001] 1 All ER 719 , the Court of Appeal were considering risk to an Appellant who was found to be wanting in credibility at his appeal , but who had made an Article 3 claim on the generalized basis of being a draft evader and failed asylum seeker from Turkey. Lord Justice Schiemann stated that:

‘ The very fact that the applicant has been found so hopelessly wanting in credibility is what turns this challenge into the test case which both parties now recognise it to be. It has to be put, and is put, on the unvarnished basis that any young male Turkish Kurd draft evader who is returned to Turkey as a failed asylum seeker without travel documents, will, by virtue of those facts alone, face a real risk of being subjected on return to Article 3 ill-treatment. Although precise statistics are not available, it seems clear that many thousands of such claims for exceptional leave will turn upon its outcome; the 60-odd challenges stayed in the Crown Office List pending its resolution represent but the tip of an iceberg’ .

51. For these reasons, Mitting J's reasons for dismissing the application are wrong in law. Mitting J made no comment in respect of the evidence submitted.

Permission is respectfully sought

A stay is respectfully sought.

**Signed: Attorney for Tamils Against Genocide**

**Renaissance Chambers**