



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

SECOND SECTION

CASE OF VENKADAJALASARMA v. THE NETHERLANDS

(Application no. 58510/00)

JUDGMENT

STRASBOURG

17 February 2004

FINAL

17/05/2004

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 Venkadajalasarma v. the Netherlands,

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

Mr J.-P. COSTA, *President*,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mrs A. MULARONI, *judges*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 27 January 2004,

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

PROCEDURE

1. The case originated in an application (no. 58510/00) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Sri Lankan national, Mr Ramachandraiyer Venkadajalasarma (“the applicant”), on 7 April 2000.

2. The applicant was initially represented by Ms E.H.F. van 't Hoff, a lawyer practising in The Hague, and subsequently by Mr M.J.A. Leijen, a lawyer practising in Alkmaar. The Netherlands Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker of the Ministry of Foreign Affairs.

3. The applicant alleged that his expulsion to Sri Lanka would place him at risk of torture or inhuman or degrading treatment. He relied on Article 3 of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

6. By a decision of 9 July 2002 the Court declared the application partly admissible. It invited the Government to comment on the information on the situation in Sri Lanka, as set out in the decision on admissibility and to state their position on the applicant's complaint in the light of that information. The parties were further invited to submit relevant, more recent, information on the situation in Sri Lanka.

7. The applicant and the Government each submitted the information requested, as well as observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1958 and currently resides in Heerlen.

9. On 2 November 1995 the applicant arrived in the Netherlands, where, on 3 November 1995, he applied for asylum or, alternatively, a residence permit for compelling reasons of a humanitarian nature (*klemmende redenen van humanitaire aard*). In support of his claim for asylum he submitted the following.

10. He belonged to the Tamil population group, was married with two children and lived in the town of Jaffna on the Jaffna peninsula. This area was controlled by the Tamil Tigers (the "LTTE"), a Tamil terrorist organisation, engaged in an armed struggle for independence.

11. The applicant owned a minibus which was his livelihood. From January 1994 the LTTE forced him to transport foodstuffs as well as its members two or three times a month. The LTTE would pay for his petrol. In March 1995 the LTTE confiscated his minibus because he had refused to transport bombs for them. They subsequently forced him to work in their kitchens and to help dig trenches. On 21 September 1995 some LTTE members came to his house and told his wife that the applicant had to report to their camp, which meant that he was expected to fight alongside them and to transport their weapons. Upon hearing this, the applicant immediately went into hiding. Since two friends of his, who had also driven his minibus, had recently been shot dead by the LTTE when they had refused to join the LTTE's ranks, the applicant decided to flee to the national capital Colombo.

12. On 1 October 1995 he went to the army camp at Vavuniya to apply for the required travel pass. He was apprehended and held until 3 October 1995 as he was suspected of being an LTTE supporter. He was taken to a mill where he was undressed and beaten with a small iron rod. This left a horizontal scar of about five centimetres in length on the heel of his right foot. He was also stabbed with a knife, leaving a number of scars on the underside of his forearms, and a cigarette was put out on his left arm, leaving a round scar. His hands were tied and he was strung up and beaten. After two days he was made to stand in a line. A man wearing a black mask walked past the people in the line, indicating the moment he recognised somebody. This man was an informant. The applicant was not recognised.

He was released and issued with a travel pass on condition that he return from Colombo within one week.

13. He travelled to Colombo by train. In Colombo he stayed at the house of an acquaintance for one month without leaving the house as he feared arrest by the army. A doctor came to the house to see to his injuries. As he was not allowed to settle in Colombo, and he could not go back to Jaffna because of his problems with the LTTE, he decided to leave the country. An acquaintance of his father's arranged for his flight to Amsterdam via Bombay. He left the country using his own passport, but the "travel agent" kept his passport in Bombay.

14. After his arrival in the Netherlands on 2 November 1995, he was interviewed by an official of the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*) on 6 December 1995. According to this official, the scars which the applicant showed him were much more than two months' old, and the round scar on the applicant's left forearm was bigger than the diameter of a cigarette.

15. On 5 January 1996 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the applicant's requests. It was noted that it had not appeared that the Sri Lankan authorities had such grave presumptions against the applicant that he could be said to have a well-founded fear of persecution. Although he had once been detained for a short period, there had been no evidence against him of any LTTE involvement. The fact that the applicant had been able to leave his country using his own passport also did not suggest that the applicant had to fear persecution. Finally, according to a country report (*ambtsbericht*) of the Ministry of Foreign Affairs of 15 December 1995, Tamils coming from the Jaffna peninsula were able to find safety in the centre, south and west of Sri Lanka.

16. The Deputy Minister further informed the applicant that he would not be allowed to remain in the Netherlands pending the consideration of any objection (*bezwaar*) he might wish to submit against the decision to refuse his requests.

17. The applicant filed an objection on 10 January 1996 and, on the same date, also applied for an interim measure (*voorlopige voorziening*) to the President of the Regional Court (*arrondissementsrechtbank*) of The Hague. By letter of 10 May 1996, the applicant was informed that his expulsion would in fact be suspended while his objection was being considered. The applicant withdrew his request for an interim measure.

18. The applicant's objection was rejected by the Deputy Minister of Justice on 5 November 1996. He was also informed that he would not be allowed to remain in the Netherlands pending the examination of any appeal he might lodge. On 11 December 1997 the applicant lodged an appeal with the Regional Court of The Hague and at the same time requested an interim measure from the President of that court. By final decision of 9 July 1997, the acting President of the Regional Court of The Hague rejected the

applicant's appeal against the Deputy Minister's decision as well as his request for an interim measure.

19. Following this decision, an expulsion order was issued to the Aliens Police (*vreemdelingendienst*) in the applicant's place of residence on 16 July 1997. However, the applicant did not leave the country and neither was he forcibly expelled.

20. On 5 September 1997 he lodged a new request for a residence permit based on compelling reasons of a humanitarian nature. Finding that the applicant had not submitted any new facts or circumstances which invalidated the decision of the Regional Court of 9 July 1997, the Deputy Minister of Justice rejected this request on 24 April 1998. In his objection to this decision, the applicant argued that, according to information that had recently become available, some groups of Tamils in Colombo ran an increased risk of persecution or treatment contrary to Article 3 of the Convention. The applicant submitted that he belonged to one of these identified "risk categories", given that he came from Jaffna, spoke no Sinhalese, was suspected of LTTE membership, had already been detained for more than 48 hours on the basis of that suspicion and had been seriously ill-treated on that occasion.

21. The Deputy Minister rejected the objection on 8 December 1998. Referring to domestic case-law, the Deputy Minister held that merely belonging to one of the "risk categories" was an insufficient basis on which to accept that Article 3 of the Convention might be violated if the applicant was expelled. Since it had not appeared that, in addition to belonging to one of the "risk categories", any other special circumstances existed which could give rise to the assumption that the Sri Lankan authorities wished to apprehend the applicant, he was not eligible for residence in the Netherlands. As regards the applicant's argument that the Deputy Minister of Justice ought to have sought the advice of the Ministry's Medical Adviser to have his scars examined, it was held that such a step would only have been called for if doubts existed as to the truthfulness of the applicant's account, which was not the case. The Deputy Minister also informed the applicant that he would not be allowed to remain in the Netherlands pending the examination of any appeal he might lodge against this decision.

22. By letter of 5 January 1999, the applicant appealed to the Regional Court of The Hague against the decision of 8 December 1998. In order to prevent his expulsion, he also requested an interim measure from the President of that court.

23. In his appeal, the applicant argued that he did run an increased risk of being subjected to treatment contrary to Article 3 if expelled, because he had given practical assistance to the LTTE. His chances of being apprehended were also increased, given that he had no identity card, no fixed address and no accommodation. If he was arrested and detained for a second time, he would certainly not be treated well or released after only a

few days. There would, on the contrary, be a great likelihood that he would be killed. Moreover, arrested Tamils ran a real risk of being tortured if their bodies bore signs of military training or deployment, such as grazes or scars.

24. In addition, the applicant lodged a request for revision (*herziening*) of the Deputy Minister's decision of 8 December 1998, submitting that the fact that he bore scars increased the risk of being subjected to torture, and informing the Deputy Minister that a member of Amnesty International's Medical Examination Group was going to conduct an examination of his scars. In the applicant's submission, this development required the Deputy Minister to review the decision of 8 December 1998.

25. On 16 September 1999 the Regional Court of The Hague rejected the applicant's appeal of 5 January 1999 in a judgment delivered orally. The Regional Court found that the applicant had failed to adduce new facts or changed circumstances, and added that the matter of the applicant's scars had already been taken into account in the determination of his first requests. In view of this decision, the applicant's request for an interim measure was declared inadmissible.

26. Following the Regional Court's judgment, an expulsion order was issued to the Aliens Police on 28 October 1999.

27. By decision of 4 January 2000, the application for revision of the Deputy Minister's decision of 8 December 1998 was dismissed by that authority.

28. On 11 January 2000 the applicant was examined by a physician belonging to Amnesty International's Medical Examination Group. The applicant's lawyer had put the following questions to the physician:

- could the applicant's scars be linked to the torture he had undergone?
- was the applicant traumatised as a result of his experiences in Sri Lanka?

29. In his report, the physician described, *inter alia*, the scars he had noted on the applicant's body. There were a number of horizontal scars, three to six centimetres in length and differing in width, on the underside of the forearms (four on the left and one on the right), consistent with unsutured, open wounds, possibly caused by knives. There were also two round scars on the right forearm and one round scar on the left forearm, with a diameter of 10 millimetres, consistent with burns, possibly caused by the putting out of a cigarette. Finally, there was a round scar, sensitive to pressure, 15 millimetres in diameter, and level with the Achilles tendon of the right foot, from which ran a three-centimetre scar outwardly with clear traces of sutures. In the conclusion to his report, the physician answered the questions put by the applicant's lawyer in the affirmative.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Entitlement to refugee status or residence permits on humanitarian grounds

30. Under Article 15 § 1 of the Aliens Act 1965 (*vreemdelingenwet*, hereinafter “the Act”), in force at the relevant time, aliens coming from a country where they have a well-founded reason to fear persecution on account of their religious or political conviction, or of belonging to a particular race or a particular social group, could be admitted by the Minister of Justice as refugees.

31. The expression “refugee” in this provision was construed to have the same meaning as in Article 1 of the Convention relating to the Status of Refugees of 28 July 1951 (decision of the Judicial Division of the *Raad van State* of 16 October 1980, *Rechtspraak Vreemdelingenrecht* – Immigration Law Reports – 1981, no. 1).

32. Aliens, other than refugees, wishing to reside in the Netherlands for any length of time had to hold a residence permit (Article 9 of the Act). Such a permit was to be requested from, and granted by, the Minister of Justice (Article 11 § 1 of the Act).

33. Given the situation obtaining in the Netherlands with regard to population size and employment, Government policy was – and is – aimed at restricting the number of aliens admitted to the Netherlands. In general, aliens are only granted admission for residence purposes if:

(a) the Netherlands are obliged under international law to do so, as in the case of citizens of the European Union or Benelux member States and refugees covered by the above-mentioned Geneva Convention; or

(b) this serves the “essential interests of the Netherlands”, e.g. economic or cultural interests; or

(c) there are “compelling reasons of a humanitarian nature”.

34. An alien not, or no longer, qualifying for admission to the Netherlands could be expelled (Article 22 § 1 of the Act). However, aliens claiming that their removal from the Netherlands would compel them to travel to a country where they have reason to fear persecution on one of the grounds set out in Article 15 § 1 (see paragraph 30 above) could not be expelled except by a specific order of the Minister of Justice (Article 22 § 2).

35. An objection (*bezwaar*) against the refusal to grant refugee status or a residence permit lay to the Deputy Minister of Justice (Articles 6:4 and 7:1 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), Article 29 of the Aliens Act). An appeal against the rejection of an objection lay to the Administrative Law Section of the Regional Court of The Hague

(Article 8:1 of the General Administrative Law Act; Article 33a of the Aliens Act). No further appeal was allowed (Article 33e of the Act).

B. Netherlands policy on asylum seekers of Sri Lankan nationality

1. General

36. At the time of the decision on the applicant's objection (8 December 1998), Netherlands policy was based on country reports issued by the Ministry of Foreign Affairs on 24 March and 6 November 1998.

37. To assess whether a person ran a real risk of being treated in a manner contrary to the provisions of Article 3 of the Convention, the following factors were taken into account:

- All young Tamils in Colombo who speak little Sinhalese and whose documents reveal that they were born in the north ran the risk of being taken to a police station for questioning following an identity check. Most were released within 48 to 72 hours once their identity had been established and they had explained their reasons for being in the city.

- People who had recently come to Colombo from a war zone and had no identity documents or "valid" reason for being in Colombo, ran the risk of being held for longer than 48 to 72 hours so that further enquiries could be made. People who failed to register on arrival also lay themselves open to suspicion.

- Tamils suspected of LTTE activities on the basis of police files or information from other sources ran the risk of being held for more than a week. This also applied to people whom the authorities believed could provide information on the LTTE, such as people known to have a relative who is an LTTE member.

- People could be detained for 3, 12 or 18 months under the Emergency Regulations or the Prevention of Terrorism Act if there was firm evidence that they were involved in the LTTE. Such evidence included arms caches or suspect documents.

38. Persons held for longer than 48 to 72 hours for further questioning could be treated roughly (beatings). Where the person concerned was held for more than a week, and questioned about LTTE involvement, the risk of ill-treatment was considerable.

39. The mere fact that a Tamil belonged to one or more of the above categories of persons, who in theory ran the risk of longer detention did not necessarily mean that there was a real risk of their being subjected to treatment prohibited by Article 3 of the Convention. According to the country report of 6 November 1998, it could be assumed that, in any event, no such risk existed in the case of Tamils falling into the first two categories.

40. Netherlands policy in force when the Government submitted their observations on the admissibility of the present application was based on the country reports of 28 July and 22 August 2000. These reports indicated that Tamils fleeing the war could find an alternative place of residence in Government-controlled areas, including Colombo. Tamils were subject to frequent identity checks in such areas, especially on or around public holidays, after attacks and if the military position of Government troops had deteriorated. Tamils who could not identify themselves on the spot or who were believed to come from the north or east of Sri Lanka could be arrested. Most were released within 48 to 72 hours, after their identity and background had been checked. As to the factors which could occasion longer detention, the report of 28 July 2000 referred to that of 6 November 1998.

41. The country report of 15 May 2002 included information on the developments of the peace process that was started in 2000, stating that a formal cease-fire agreement (CFA) between the Government and the LTTE had been signed on 22 February 2002. It further stated that during the period under review one suicide attack had taken place in Colombo, which had not been followed by the usual round-ups, large-scale identity checks and arrests. After the installation of Ranil Wickremasinghe as prime minister in December 2001, the security situation in Colombo had improved considerably and the atmosphere in the city was relaxed and had normalised. Most roadblocks and checkpoints were removed. The number of identity checks had been drastically reduced and there were no reports of arrests of LTTE suspects.

42. The most recent country report, of 28 May 2003, confirmed that the security situation in Sri Lanka had significantly improved as had freedom of movement. Tamils were free to travel through the whole of the country without requiring prior permission to enter certain areas. As a result, it was now far simpler for Tamils fleeing LTTE-controlled areas to go to areas under Government control. In Colombo, no restrictions on freedom of movement applied. During the period under review, the Sri Lankan authorities had in general respected human rights, in line with the provisions of the CFA. No arbitrary arrests had been made. Ill-treatment and torture to which persons who had been arrested on suspicion of membership of, or involvement in, the LTTE had been subjected in the past, no longer occurred.

43. As of 2001, returning unsuccessful asylum seekers were for the most part allowed to leave the airport after their identity documents had been checked. In a few cases, returnees had been handed over to the Criminal Investigation Department (CID), usually within 24 but sometimes within 48 to 72 hours, and subsequently transferred to a Magistrates Court. The Magistrates Court judge had to decide whether, on the basis of the information provided by the CID, the person concerned should be remanded

in prison, released on bail pending the conclusion of the investigation, or simply released. During the period under review, all returnees were released the same day, either on or without bail.

2. Scarring

44. The country report of 30 September 1999 stated that persons who were suspected of LTTE membership because they bore scars ran a risk of detention for a period longer than 48 to 72 hours. According to the report of 27 April 2001, the presence of scars could constitute an indication for further questioning, but this element alone would not be a reason for such questioning. If a Tamil, when checked in the street or during a round-up, had valid identity documents and a credible explanation for his presence in Colombo, there would generally be no reason to question that person further. None of the sources interviewed by the Ministry of Foreign Affairs thought it likely that in that case the presence of scars would constitute an element of risk.

45. The report of 11 July 2001 stated that the presence of scars alone did not lead to an increased risk of detention longer than 48 to 72 hours. In the country report of 15 May 2002, it was stated that the presence of clearly visible scars of whatever nature generally did not by itself lead to a suspicion of LTTE-involvement, and this was even less so if the person concerned was in possession of correct identity papers. Such visible scars could nevertheless constitute a reason to stop a person. In practice, it was only on very rare occasions that a person would be taken to the police station for questioning solely because he or she bore scars. There were no indications that Tamils were ordered to undress during identity checks at checkpoints so that any scars might be detected. The report of 28 May 2003, finally, stated that the treatment of returning unsuccessful asylum seekers bearing scars of whatever nature was no different from the treatment of returnees without scars. Neither were there any indications that, during the 48 to 72 hour period that they were held by the CID, returnees with scars encountered an increased risk of suspicion of LTTE-involvement or longer detention.

III. RELEVANT INTERNATIONAL MATERIAL

A. General

46. In its Annual Report 2003, covering events from January to December 2002, Amnesty International noted with respect to Sri Lanka:

“There was a major improvement in the human rights situation in the context of a cease-fire and peace talks between the Government and the LTTE. However, torture in police custody continued to be reported frequently...

Unilateral cease-fires declared by both the Government and the LTTE in late 2001 were followed by a formal cease-fire agreement (CFA) that came into force on 23 February. Peace negotiations, facilitated by the Norwegian Government, started in September in Thailand. A Sri Lanka Monitoring Mission (SLMM) consisting of representatives of Nordic countries was set up to verify the implementation of the agreement through on-site monitoring. By November, about 180,000 of the estimated 800,000 internally displaced persons (IDPs) had returned home. ...

As part of the CFA, the Government made a commitment not to arrest anyone under the PTA. ...

Especially in the first part of the year, there were numerous complaints of hostage-taking and recruitment of children by the LTTE.”

47. On 31 March 2003 the US Department of State released the Sri Lanka Country Report on Human Rights Practices for 2002. It stated:

“In the past, arbitrary arrest and detention were problems; however, there were no reports of arbitrary arrests or detentions during the year. ...

Unlike in previous years, there were no large-scale arrests of Tamils during the year. ...

The ... reports of regular mistreatment by security forces largely ceased. ...

The reconciliation also has led to a sharp reduction in roadblocks and checkpoints around the country, the return of approximately 150,000 IDPs to their points of origin in the north and east, and to the opening of numerous investigations into actions by security force personnel. ...

The Government restricted the movement of displaced Tamils due to possible security, economic, and social concerns. These restrictions have been lifted with the onset of the peace process. ...

The LTTE continued to commit serious human rights abuses. The LTTE reportedly committed several unlawful killings, and was responsible for disappearances, torture, arbitrary arrest, detentions, and extortion.”

48. The Operational Guidance Note on Sri Lanka, issued on 23 July 2003 by the Immigration and Nationality Directorate (Asylum and Appeals Policy Directorate) of the United Kingdom Home Office reported:

“The authorities in Sri Lanka will no longer be concerned with those individuals with past low-level support for the LTTE (e.g. digging trenches, providing food/shelter to LTTE fighters), those with no police/criminal record or those who may have been arrested in the past and subsequently released. Those individuals who may be of continuing interest to the authorities would be ... 'those wanted in a relatively serious fashion'. This could mean high-profile members of the LTTE who are still active and influential, and wanted by the authorities.”

B. Scarring

49. A letter dated 1 September 1999 from the Netherlands section of Amnesty International to the applicant's representative stated:

“Amnesty International are aware that the presence of scars suggestive of LTTE-training may cause army and police to suspect him or her of LTTE-membership. Police look for traces on the body of an arrested person, such as grazes or scars, which may point to military training or deployment as a fighter for the LTTE.”

50. A report by the Medical Foundation for the Victims of Torture entitled “Caught In The Middle: A study of Tamil torture survivors coming to the UK from Sri Lanka” dated June 2000 stated:

“The evidence available to the Medical Foundation suggests that any sort of scar can be interpreted by the Sri Lankan security forces as linking that person to the LTTE. ... Nor is it the presence of easily visible scars alone that leads the security forces to the conclusion that the person arrested is an LTTE supporter. Several of our clients have reported that their bodies were actively searched for scars, which, when discovered, were taken as evidence of LTTE support. Thus we maintain that any sort of scar can be and has been taken by the Sri Lankan security forces as 'evidence' of LTTE support and the bearers of such scars detained and tortured. ... It is our view therefore that whether an asylum seeker has the type of scars described as 'battle' or 'combat', whether the scars are 'significant and visible' is not relevant to an assessment of the likelihood of further persecution if returned. What is relevant is simply whether or not they have scars.”

One of the recommendations made in the Medical Foundation's report mentioned above read:

“That it is not safe to return to Colombo Tamils with scars, or who do not have proper identity documents until the Sri Lankan Government ends its torture of many of the Tamils arrested.”

51. In a letter of 15 April 2002 to a solicitor in London, the UNHCR (United Nations High Commissioner for Refugees) noted:

“Although steps towards peace have been taken in Sri Lanka recently, it is still premature to advocate that the situation has reached a satisfactory level of safety to warrant the return of all unsuccessful asylum applicants to Sri Lanka. In this regard, UNHCR has been aware that returning Tamils are potentially open to risk of serious harm similar to those generally encountered by young male Tamils in certain circumstances. ... In UNHCR's view, the presence of torture-related scars on the body of a returnee should be a relevant consideration in assessing the likelihood of danger upon the return of Sri Lankan Tamil asylum seekers. Where such scars are related to human rights abuses, they would likely be seen as evidence of the security forces' previous interest in the particular individual. This could in turn serve to trigger further adverse attention to that individual. While every case should be assessed on its own merits, UNHCR would reiterate its view that special care must be taken in relation to the return of failed asylum seekers to Sri Lanka.”

52. The Sri Lanka Country Report of October 2003, drawn up by the Immigration and Nationality Directorate (Country Information and Policy Unit) of the United Kingdom Home Office, noted:

“The UNHCR has indicated [in January 2000] that Tamil asylum seekers with scars, should they be returned to Sri Lanka, may be more prone to adverse identification by the security forces and taken for rigorous questioning and potential ill-treatment. However, in discussions in Sri Lanka in July 2001, respondents including local NGOs rarely mentioned scarring, and then generally only when the subject was brought up by members of the UK Home Office fact-finding mission team. The views of many of the NGOs, and indeed the police, was that scarring was not likely to be an overriding reason for arresting or suspecting someone, but if a person had been stopped or arrested for some other reason, the presence of certain types of scars could be a reason for holding or questioning them further. Most respondents felt that scarring was only one of many factors which could play a part in the authorities' decision to detain someone...

On a more recent visit to Sri Lanka between 14 and 23 March 2002 a Home Office delegation discussed the issue of scarring with the Director of the CID. The Director explained that if a returnee was not wanted they would not be stopped at the airport. However, when the CID are certain that the individual has committed or been convicted of an offence then they would be stopped. A computer holds the name, address and age of a wanted person. The police purely go on records – scars would not make a difference, and the authorities would not make a decision only on that basis.”

IV. RECENT DEVELOPMENTS

53. On 4 November 2003, Sri Lankan President Chandrika Kumaratunga suspended parliament and sacked three senior ministers. The President accused the Government of making too many concessions to the LTTE. On 14 November 2003, Norwegian mediators said, after talks with the LTTE, that the peace process was on hold until the country's political crisis was resolved. The mediators had passed on to the LTTE guarantees from both the President and the Prime Minister that they would abide by the terms of the CFA. The LTTE stated that they would be patient during the political upheaval.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

54. The applicant complained that he would be exposed to a real risk of torture or inhuman or degrading treatment contrary to Article 3 of the Convention if he were expelled from the Netherlands to Sri Lanka.

55. Article 3 of the Convention provides:

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

A. The parties' submissions

1. The applicant

56. The applicant submitted that a number of cumulative elements particular to his situation militated against his return to Sri Lanka. Firstly, having transported foodstuffs for the LTTE in his minivan, he had been more closely involved in them, and in a more noticeable manner than other Tamils who had been forced to carry out low-level activities. Moreover, if the van had been spotted or seized by the army, or by paramilitary groups linked to the army, it could be traced back to him. Secondly, when arrested in Vavuniya, he had been accused of LTTE involvement and his picture and fingerprints taken. There thus existed a file on him, and this fact alone was enough for a new detention to be of a longer duration, with the concomitant increased risk of being tortured. His failure both to return from Colombo and to register with the authorities in the capital would also not have gone unnoticed. Thirdly, the presence of scars was often seen by army and police as a confirmation of other factors that, in their opinion, pointed in the direction of LTTE involvement.

57. The applicant further asserted that he did not only fear the Sri Lankan authorities, but also the LTTE: he would not be safe in areas under LTTE control given that he had refused to transport bombs for them and had not gone to their camp when told to do so. It would be inhumane to expose him to a situation where he would be forced to join an organisation which commits crimes against humanity and which has been proscribed as a terrorist organisation by a number of foreign countries. Colombo could not be considered an “internal flight alternative” in view of the manner in which the authorities there operated. In addition, those authorities were institutionally linked to the authorities responsible for torturing him at the time of his detention in Vavuniya.

58. Finally, although he conceded that the situation in Sri Lanka had improved, the applicant submitted that it was far from stable and that many attempts to bring about peace in the past had come to nothing.

2. The Government

59. The Government maintained that the applicant did not face a particular risk of being subjected to treatment prohibited by Article 3 of the Convention upon his return to Sri Lanka. In this connection they contended that the applicant was unlikely to attract the suspicions of the Sri Lankan

authorities, given that he had never been politically active, had worked for the LTTE under duress and had carried out peripheral tasks only. Furthermore, and by his own admission, the applicant had been released by the soldiers in September 1995 when they were unable to confirm their suspicions that he was involved in the LTTE. He had also been given a travel permit to visit Colombo. Although the applicant had stayed in Colombo for longer than the prescribed seven days, he had nevertheless been able to leave the country by air – a means of travel subject to particularly strict controls – using a passport in his own name. There was, therefore, no reason to suggest that the Sri Lankan authorities harboured any particular suspicions about the applicant.

60. The Government further argued that, prior to the announcement of the CFA in February 2002, it was as a rule only a combination of factors which might prompt suspicions of involvement in the LTTE, incurring an increased risk of arrest. The most significant of these factors were an inability to produce identity papers, a failure to register with the police or to provide a valid reason for his or her stay in Colombo, the presence of scars, or nervous or frightened behaviour suggestive of LTTE involvement. Bearing in mind that there had been no large-scale round-ups in Colombo since the summer of 2001, and that after the CFA took effect not a single report had been received of Tamils arrested in Colombo after being stopped and asked for their identity papers at a checkpoint, the risk of arrest must now be deemed to have declined considerably. Furthermore, Sri Lankans awaiting repatriation from the Netherlands were issued with an identity certificate by the Sri Lankan embassy, which document could be used as proof of identity when subjected to checks by the security services.

B. The Court's assessment

61. The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see, for example, *Hilal v. the United Kingdom*, no. 45276/99, § 59, ECHR 2001-II, and *Ahmed v. Austria*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2206, §§ 38-39).

62. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

63. In determining whether it has been shown that the applicant runs a real risk, if expelled to Sri Lanka, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*. Further, since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215, p. 36, § 107, and *H.L.R. v. France*, 29 April 1997, *Reports* 1997-III, p. 758, § 37). In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, pp. 1856 and 1859, §§ 86 and 97, *Reports* 1996-V, and *H.L.R. v. France*, cited above).

64. The Court observes that it is not disputed that the applicant left Sri Lanka in 1995 following his refusal to join the ranks of the LTTE and after he had been detained for two days by the Sri Lankan army on suspicion of LTTE involvement, during which detention he was subjected to torture or ill-treatment. For these reasons, in the submission of the applicant, it would not be possible for him to settle either in areas controlled by the LTTE or in areas under Government control.

65. The Court notes that the applicant went to the army camp in Vavuniya to apply for a travel pass to Colombo. It would appear, therefore, that he had no reason to believe that he was under any kind of suspicion of LTTE involvement. He was nevertheless arrested and detained by the army on suspicion of being an LTTE supporter, tortured and ill-treated, and confronted with an informant. Not having been recognised by the informant, he was released without charge two days later. In view of the fact that he was also issued with the requested travel pass, the Court considers it unlikely that the army were aware of the applicant's activities for the LTTE or that a file drawn up on the applicant would contain a mention of any

suspicion of involvement in the LTTE. In these circumstances, the Court finds that it has not been established that the applicant is known to the authorities as a (suspected) LTTE supporter and that, therefore, they would have an interest in him. The Court is further not persuaded that the applicant's failure to return from Colombo within the prescribed one-week period would have resulted in him being regarded with suspicion by the authorities.

66. Even assuming that the Sri Lankan authorities are, or were to become, aware of the applicant's activities for the LTTE, or if he were to be apprehended upon his arrival at the airport in Colombo or subsequently in the course of an identity check, the Court considers that in the current climate in Sri Lanka it is unlikely that he would run a real risk of being subjected to ill-treatment. In this connection, the Court has noted the considerable improvement in the development of the security situation in Sri Lanka in recent years as set out in various reports referred to in paragraphs 41-43 and 46-48 above. The Court thus observes that, for some time now, no round-ups and no large-scale and/or arbitrary arrests of Tamils have taken place and that Tamils no longer require prior permission before travelling to certain areas (see paragraphs 41-42 and 47 above). In addition, the fact that a person bears scars does not, by itself, engender an increased risk of suspicion of LTTE-involvement, of arrest or of detention longer than 48 to 72 hours (see paragraphs 45 and 52 above). It is further reported that persons who are arrested on suspicion of membership of, or involvement in, the LTTE are not subjected to ill-treatment and torture as has occurred in the past (see paragraph 42 above).

67. The Court would agree with the applicant that the situation in Sri Lanka is not yet stable, as is illustrated by the recent developments on the political front (see paragraph 53 above). Nevertheless, bearing in mind that the main parties to the conflict have emphasised their commitment to the peace process in spite of these developments, the Court cannot ignore the very real progress that has been made which has led to a substantial relaxation of the previously precarious situation of Tamils arriving or staying in Colombo, as confirmed by the most recent country report compiled on Sri Lanka by the Netherlands Ministry of Foreign Affairs (see paragraphs 42 and 45 above). As pointed out above (paragraph 63), the Court has to assess whether at the present time and in the present situation there exists a real risk of the applicant being subjected to treatment proscribed by Article 3 if he was returned to his country of origin. Whilst stability and certainty are factors to be taken into account in the Court's assessment of the situation in the receiving country, the fact that peace negotiations have not yet been successfully concluded does not preclude the Court from examining the individual circumstances of the applicant in the light of the current general situation (see *Vilvarajah and Others*, cited above, § 108).

68. In this context, the Court notes that the activities which the applicant was made to carry out for the LTTE consisted of the transportation of foodstuffs, kitchen-work and the digging of trenches (see paragraph 11 above). It considers that this kind of relatively low-level support, provided under duress, is unlikely to lead the Sri Lankan authorities to believe that the applicant could be a high-profile member of the LTTE in whom they might still be interested (cf. *Chahal*, cited above, § 106).

69. Having regard to the particular circumstances of the case, the Court finds that no substantial grounds have been established for believing that the applicant, if expelled, would be exposed to a real risk of being subjected to torture or inhuman or degrading treatment within the meaning of Article 3 of the Convention.

Accordingly, the expulsion of the applicant to Sri Lanka would not be in violation of Article 3.

FOR THESE REASONS, THE COURT

Holds by six votes to one that the expulsion of the applicant to Sri Lanka would not violate Article 3 of the Convention.

Done in English, and notified in writing on 17 February 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mrs Mularoni is annexed to this judgment.

J.-P.C.
T.L.E.

DISSENTING OPINION OF JUDGE MULARONI

I disagree with the majority's conclusion that there would be no violation of Article 3 of the Convention if the applicant were to be expelled to Sri Lanka.

The applicant belongs to the Tamil population group and was subjected to ill-treatment and torture in his country. As confirmed by a physician attached to Amnesty International's Medical Examination Group in January 2000, there are quite a number of scars on the applicant's body, some possibly caused by knives, others possibly caused by the putting-out of cigarettes. The applicant was traumatised as a result of his experiences in Sri Lanka (§ 29 of the judgment).

I do not question the current improvement of the human rights situation in Sri Lanka, even if the political situation is far from stable. However, in the light of the relevant international materials at our disposal, and especially NGO reports and statements, I consider that there is still a danger for the applicant that he will, if expelled, be exposed to a real risk of being subjected to inhuman or degrading treatment.

I have noted in particular the declarations made by the Medical Foundation for the Victims of Torture (§ 50 of the judgment) and by the United Nations High Commissioner for Refugees (§ 51 of the judgment). They both emphasise that torture-related scars on the body of a returnee should be a relevant consideration in assessing the likelihood of danger upon the return of Sri Lankan Tamil asylum seekers.

I find unconvincing the reasoning of the majority leading to the conclusion that there would be no violation of Article 3 if the applicant were to be returned. The Court had at its disposal quite a number of documents on the current human rights situation in Sri Lanka (see Part III - Relevant International Material - §§ 46-52 of the judgment), but, and I find this rather strange, only part of this material was used. In particular, no reference has been made to all the pertinent documentation of Amnesty International, the Medical Foundation for the Victims of Torture or the United Nations High Commissioner for Refugees (see in this respect § 66 of the judgment). I believe that reports or statements made by NGOs or by international entities as to human rights situations in particular parts of the world should receive greater consideration.

I have great difficulties in accepting the statements that, "given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case" and "it is the present conditions which are decisive for the solution of the case" (see § 63 of the judgment, quoting the *Chahal v. the United Kingdom* and the *H.L.R. v. France* judgments). The adoption of this principle (which I fully agree should be applied when the situation in the country of destination has deteriorated since the adoption of the final decision at national level) in a case like the present one seems to

me tantamount to rendering compatible with the Convention any national decision of expulsion, even to a country where the risk for the applicant of being subjected to inhuman or degrading treatment is extremely high, provided that the respondent State waits for the “right moment” to expel the applicant. However, even accepting this principle, which has been reiterated in some judgments of the Court, I nevertheless consider that there still exists for the applicant, if expelled, a real risk of exposure to torture or inhuman or degrading treatment within the meaning of Article 3 of the Convention.

Accordingly, I consider that the expulsion of the applicant to Sri Lanka would be in violation of Article 3 of the Convention.