CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Applications no. 38267/07 and 14293/07
by M.H. and A.S.
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 16 December 2008 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar*,

Having regard to the above applications lodged on 3 September 2007 and 2 April 2007,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of each case together,

Having regard to the interim measures indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to the decision to grant the applicants anonymity,

Having deliberated, decides as follows:

THE FACTS

The first applicant, M.H., is a Sri Lankan national who was born in 1970 and lives in Middlesex.

The second applicant, A.S., is a Sri Lankan national who was born in 1988. He is represented before the Court by Ms N. Mole, a lawyer practising in London with the AIRE Centre. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office.

A. The circumstances of the cases

The facts of the case, as submitted by the parties, may be summarised as follows.

1. M.H.

The first applicant, a Tamil, arrived in the United Kingdom on 4 March 2003. He claimed asylum on the same date on the basis that he would be at risk of torture and ill treatment as a result of his association with the Eelam People's Revolutionary Liberation Front ("EPRLF"). His asylum application was refused on 16 April 2003 and his subsequent appeal against that refusal was dismissed by an Adjudicator on 1 September 2003, who found that his removal would not breach Articles 2 and 3 of the Convention. The applicant submitted a fresh application for asylum on 28 November 2006, which was refused on 5 June 2007. The applicant applied for judicial review on 11 June 2007. Permission was refused on 9 July 2007. Removal directions were set for 13 August 2007. Further representations were made on 9 August 2007. On 13 August 2007 the further representations were rejected and the applicant disrupted his removal, which was then cancelled. On 31 August 2007 further representations were made, which relied on the general deterioration of the security situation in Sri Lanka. The representations were rejected on 1 September 2007. Further removal directions were set for 17 September 2007. On 3 September 2007 the applicant lodged an application with this Court and on 9 September 2007 requested an interim measure under Rule 39 of the Rules of Court. On 17 September 2007 the Acting President of the Fourth Section of the Court to which the application was allocated decided to apply Rule 39 and indicate to the Government of the United Kingdom that the applicant should not be expelled until further notice. The application was formally communicated to the Government for their observations on the same day. On 6 November 2007 the Court decided to adjourn the proceedings pending the Court's judgment in *NA. v. the United Kingdom*, no. 25904/07, 17 July 2008.

2. A.S.

The second applicant, also a Tamil, arrived in the United Kingdom on 25 August 2004 and claimed asylum on 27 August 2004 based on his fear of

persecution at the hands of the LTTE and the Sri Lankan authorities. On 6 October 2004 the Secretary of State refused his asylum claim. The applicant's subsequent appeal was dismissed by an Adjudicator on 22 March 2005. On 21 April 2005 the Asylum and Immigration Tribunal ("the AIT") refused his application for reconsideration of the Adjudicator's decision. The applicant filed further representations, which the Home Office refused on 7 March 2006. The applicant again filed further representations which were refused on 27 October 2006. The Home Office issued the applicant with removal directions to Colombo, Sri Lanka, for 12 April 2007. The applicant lodged an application with this Court and, on 11 April 2007, the Acting President of the Fourth Section of the Court to which the application was allocated decided to apply Rule 39 and indicate to the Government that the applicant should not be expelled until further notice. The application was formally communicated to the Government for their observations on the same day. On 6 November 2007 the Court decided to adjourn the proceedings pending the Court's judgment in *NA.*, cited above.

B. Proceedings after *NA.*

By a letter dated 1 August 2008, following the Court's judgment in *NA.*, the Agent of the Government wrote to the Court to set out the Government's views as to the "practical arrangements that should be put in place to ensure that the *NA.* judgment is applied to other cases as appropriate". In respect of cases pending before the Court, the letter stated that:

> "The Government consider that where an application challenging removal to Sri Lanka is pending before the Court and the application is based on more than simply the applicant's Tamil ethnicity, it would be appropriate to consider whether the reasoning of the Court in the *NA* judgment has any impact on the decision to remove that individual. In light of the significant number of such cases pending before the Court, the Government propose that the following procedure be put in place to accomplish this task.
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> a) The Court would inform applicants contesting removal to Sri Lanka, whose applications are based on the existence of 'risk factors' rather than on mere Tamil ethnicity of whom the Court has previously applied Rule 39, that the following procedure would apply in their case. The Court would lift Rule 39 in each such case in order to allow the procedure to be followed; and would inform the applicant that any new application for Rule 39 would not normally be considered until such time as the procedure and any consequent judicial remedies, including application for judicial review, had been exhausted;
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> b) The Court would notify the Government of those applicants to whom it had written in these terms;
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> c) Upon receipt of such notification, UKBA would write to the applicant or his or her representative, inviting them to submit further representations in their case in light of the Court's judgment in *NA*;

d) UKBA would assess each such claim in light of any representations submitted, applying new guidance that takes account of both the *LP* decision of the domestic courts and the judgment of the Court in *NA*;

e) If UKBA conclude that, in light of the new guidance and any representations made, the removal should not be ordered, appropriate leave to remain in the United Kingdom will be granted; if in light of the new guidance removal to Sri Lanka is appropriate, the application will be refused and new removal directions may be set;

f) In the event of a decision to refuse an application, the applicant will have the following remedies. If the representations submitted are considered to amount to a fresh claim, any decision to refuse the application will, in most cases, attract, an in country right of appeal to the AIT. If the representations are considered to amount to further submissions, any decision to reject those submissions would not attract a right of appeal. It would, however, be open to the applicant to apply to the High Court to have the decision of the Secretary of State for the Home Department judicially reviewed. An application for judicial review would normally suspend removal; and the High Court would consider any review on the basis of the current state of the law, including the Court's decision in *NA*. There is also a further option to apply to the High Court for an injunction to prevent removal.

The Government's assumption is that, in light of the judgment in *NA*, Rule 39 measures will be lifted in respect of those applications currently pending before the Court that challenge removal to Sri Lanka solely on the basis of Tamil ethnicity; and these applications will be declared inadmissible or otherwise disposed of by the Court. However, in the event that the Court informs the Government that such an applicant has provided further information to suggest that claim goes beyond mere Tamil ethnicity, the Government would propose that the procedure set out above be followed."

By a letter dated 28 August 2008 the Section Registrar replied stating that:

"The Section has now considered the proposals set out in your letter. I am instructed to inform your Government that the Section decided that these proposals are acceptable and that in respect of all Tamil applications where Rule 39 was applied before 17 July 2008 it is prepared to lift the Rule 39 measure in place. This would be subject to an undertaking from your Government not to remove the applicants pending the conclusion of the domestic re-examination of their cases. If such an undertaking were received, the Court would then immediately initiate the procedure set out in your letter of 1 August 2008."

On 18 September 2008 the Agent of the Government gave the following undertaking:

"As proposed in your letter of 28 August, the Government undertake not to remove applicants of Tamil origin in respect of whom a measure under Rule 39 was applied before 17 July 2008 and is currently in place pending the conclusion of the domestic re-examination of their cases under the procedure set out in my letter of 1 August. The Government will take the measures set out in my letter of 1 August in respect of each applicant upon receipt of written confirmation from the Court that Rule 39 has been lifted in respect of that applicant."

COMPLAINTS

Both applicants complained that their removal to Sri Lanka would breach Articles 2 and 3 of the Convention.

THE LAW

I. ARTICLE 37 § 1 OF THE CONVENTION

Article 37 § 1 of the Convention provides:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
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> (a) the applicant does not intend to pursue his application; or
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> (b) the matter has been resolved; or
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> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
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> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

In order to determine whether the application should be struck out of the list pursuant to Article 37 § 1 (c) the Court must consider whether "the circumstances lead it to conclude" that "for any other reason....it is no longer justified to continue the examination of [it]". The Court recalls that it enjoys a wide discretion in identifying grounds capable of being relied upon in a strike out application on this basis; however, it also recalls that such grounds must reside in the particular circumstances of each case (*Association SOS Attentats and de Boery v. France* [GC], (dec.), no. 76642/01, § 37, ECHR 2006-...).

In the Court's view, the particular circumstances of these applications are such that it is no longer justified to continue their examination. The applicants' complaints under Articles 2 and 3 of the Convention are based on the consequences of their return to Sri Lanka. The applicants now benefit from the undertaking of the Government that they will not be returned to Sri Lanka pending the re-examination of their claims by the Government in the light of *NA.*

In accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the cases. Accordingly, it is appropriate to discontinue the application of

Article 29 § 3, lift the interim measures indicated under Rule 39 of the Rules of Court and strike the cases out of the list.

II. APPLICATION OF RULE 43 § 4 OF THE RULES OF COURT

Rule 43 § 4 of the Rules of Court provides:

> "When an application has been struck out, the costs shall be at the discretion of the Court...."

Rule 60 of the Rules of Court (on claims for just satisfaction) provides:

> "1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.
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> 2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise.
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> 3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part.
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> 4. The applicant's claims shall be transmitted to the respondent Government for comment."

Neither applicant claimed costs pursuant to Article 41 within the time-limit fixed for the submission of the applicants' observations. The second applicant's representatives, however, subsequently wrote on 19 December 2007, requesting that their claim for costs be admitted pursuant to Rule 60 of the Rules of Court.

The Court recalls the importance of the time-limits set for the submission of claims for just satisfaction and the clear terms of Rules 60 § 1 and 2 of the Rules of Court and declines to admit the claim for costs to the file.

For these reasons, the Court unanimously

Joins the applications;

Decides to strike the applications out of its list of cases.

Lawrence Early
Registrar

Lech Garlicki
President