Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03794/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 6 January 2014	**On 8 May 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

PARAMALINGAM KIRITHARAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Mackenzie, Counsel instructed by A.J. Paterson Solicitor
For the Respondent: Mr C. Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Sri Lanka, born on 7 June 1970. He arrived in the UK on 6 April 2009 and applied for asylum later that month. His application was refused and a decision was made to remove him as an illegal entrant. His appeal against the decision came before First-tier Tribunal Judge Jhirad on 2 July 2013. She dismissed the appeal on

asylum and humanitarian protection grounds but allowed it under Article 3 of the ECHR.

2. The appellant sought permission to appeal in respect of the adverse decisions on asylum and humanitarian protection. Permission to appeal having been granted, the matter came before Deputy Upper Tribunal Judge Wilson sitting in the Upper Tribunal at Field House on 25 September 2013.

3. He found that the First-tier judge had erred in law. To summarise, he found that the judge erred in refusing to consider the Refugee Convention ground because of the appellant's mental health problems, and in declining to assess whether there was any correlation between his mental state and his assertions as to the cause of those problems. She also fell into error by reason of a failure to consider the interaction between the Article 3 ground and humanitarian protection.

4. Consequent upon the decision of the First-tier Tribunal to allow the appeal under Article 3 of the ECHR, the appellant was granted leave to remain. Although the period of that leave is not clear to me, and was at least initially not clear to the appellant's solicitors from the documentation sent by the Secretary of State, the error of law decision by Deputy Upper Tribunal Judge Wilson refers to the period of leave as being in excess of 12 months.

5. Ordinarily, pursuant to section 104(4A) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), this would mean that the appeal was to be treated as abandoned. However, the necessary statutory notice under s.104(4B) was given indicating the appellant's wish to pursue the appeal.

The basis of the appellant's claim

6. In broad terms, the appellant's claim is as follows. One of his brothers was killed by the Sri Lankan army in 1994. In 1997 the appellant was questioned in a ‘round-up’ by the Indian Peacekeeping Force (“IPKF”), but was actually arrested by the IPKF about a week later because his name was confused with that of a senior LTTE member. During his detention he was badly beaten but later released.

7. Occasionally the appellant's mother would give the LTTE money and food from their farms. The farms were run by his mother after his father’s suicide, although his mother later remarried. The appellant and his brothers dug bunkers for the LTTE on a few occasions. During the course of the conflict he and his family were displaced more than once. In 1997 he was stopped at a checkpoint by the army and assaulted. He was later arrested from his home following an LTTE attack, detained for three days and ill-treated during that detention. He was made to sign a false confession, photographed and had his fingerprints taken.

8. He was arrested again in June 1998 by the Sri Lankan army. He was again photographed and fingerprinted. He was severely tortured, including being sexually abused and raped. After five days he was released, his mother having paid a bribe. Before being released he was made to sign a false confession.

9. In 2006 when he was on his way home he saw two soldiers carrying a body. He was taken to an area away from the road and questioned about whether he had seen the soldiers killing the man. The appellant said that he had not and told them that he was a farmer and where his farm was. He was hit on the head which knocked him unconscious, the blow resulting in his having hearing problems ever since. He regained consciousness to find himself back at home, having been brought there by a local farmer. He found that he had a large wound to his left thigh and numerous other injuries, including cigarette burns, all of which he believes he sustained whilst he was unconscious.

10. It was later discovered that three men had been killed by the army and were lying dead at the place where the appellant had been taken to off the road. Those who were killed were known to the appellant.

11. In December 2006 the army came to the house the appellant had been staying at and questioned two farm labourers as to the appellant's whereabouts, beating them in the process. Many soldiers came to the farm and searched the house and land, apparently for weapons and ammunition. The soldiers later claimed to have found weapons, ammunition and communications equipment. The appellant was not there when the search was conducted. Subsequently the army were searching for the appellant who was in hiding. Eventually, arrangements were made for him to leave the country.

12. Because the appellant was, in effect, a witness to a murder by the army in 2006 and is implicated in the hiding of weapons on his land he fears that he would be at risk from the security forces on return. He believes that the authorities are still looking for him.

Submissions

13. Mr Avery relied on the refusal letter in which some aspects of the appellant's account were accepted. However, if the army had wanted to kill him in 2006, at the time when he says he was beaten, they had plenty of opportunity to have done so. There was no reason for them to have burned him with cigarettes whilst he was unconscious. Notwithstanding the medical evidence, his account does not make sense and even the appellant is not really sure how his injuries occurred.

14. His claim that there was an attempt to ‘frame’ him in relation to the finding of weapons on his land was not credible. His account of the numbers of soldiers that were involved was inconsistent.

15. Although there had been no cross-examination of the appellant, it was accepted that it had previously been found that it was difficult for him to give evidence.

16. There was some difference in the medical reports as to how the burns were to be categorised in terms of causation, and again the appellant was not able to say how they had been caused. In any event, the injuries or scars could have been caused in a ways other than that described by the appellant.

17. In addition, those events occurred a good few years ago. In those circumstances he would not be someone of interest in terms of the current country guidance. Notwithstanding that permission to appeal had been granted in the case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC), that decision was still good law.

18. Mr Mackenzie submitted that the point made in the European cases, to which I was referred, is that it is not enough for a State to say that it does not believe that the scars were caused in the way described. The State has to put forward some positive case if there is clear *prima facie* evidence of torture. Although the Upper Tribunal is not bound by those decisions, where there is a consistent line of reasoning they should be followed in the sense that the Upper Tribunal should take account of them.

19. The appellant personally has not dealt with the issues raised in the refusal letter but they are dealt with in the skeleton argument submitted on his behalf. He does not know that the raid on his farm and the finding of the weapons are linked to the murders by the soldiers, but they followed quite closely. There is no reason for him to exaggerate or invent such a detailed and complicated account. It would be unlikely for him to have claimed that he was unconscious when he was tortured if that had not happened.

20. I was reminded of the factual basis of the appellant's claim. It was fortunate that the appellant was found. It is true that it is difficult to know why the soldiers treated him as they did in the first place but it was close to the road and there were people about. It was plausible that they would not have used a firearm and shot him because that would be heard. Perhaps the soldiers were in a panic and thought that they had killed him, or maybe they were disturbed. All this however, is speculation. It was difficult to put one’s mind in the place of people who had behaved in the way they had, having just killed three people.

21. It was accepted that it was not logical to torture the appellant with cigarettes when he was unconscious but that does not mean that it did not happen. One has to rely on the evidence that there is, and here there is medical evidence.

22. It is true that Dr Lim is more unequivocal about the cause of the injuries, but this is just a difference of emphasis between experts. Dr Lim is more qualified than Dr Botting and the reasons for his conclusions are clearer.

23. The appellant is very likely to be on a wanted or stop list which brings him within the fourth category of GJ. He would be mentally unable to give an account to deflect suspicion.

24. There was a detailed witness statement from the appellant's wife that was taken over the phone and the evidence of Professor Good and the media reports support his claim. There is therefore some support for the claim that there was a raid on a farm at that time, although it is true that the reports could be clearer.

25. Despite having been told that the asylum interview would not go into detail, the refusal letter relies on details that were not given by the appellant in the interview, which is grossly unfair. The appellant was clearly unwell at the time of the asylum interview. Mr Patterson's statement (the appellant's solicitor) says that it took 32 hours to compile the appellant's witness statement. Permission to appeal to the Court of Appeal has been given in GJ and it was submitted that the decision in GJ was wrong.

My assessment

26. It is plain that no adverse credibility findings, such as they are, made by the First-tier judge can stand, given the error of law that has been established. It was not suggested on behalf of the respondent that any such findings can be preserved.

27. In the error of law decision, Deputy Upper Tribunal Judge Wilson concluded that, on the basis of the unchallenged decision of the First-tier judge that the appellant's appeal under Article 3 of the ECHR was to be allowed, he is entitled to humanitarian protection. In relation to qualification for subsidiary protection ("humanitarian protection" under the Immigration Rules HC 395 (as amended)), Article 15(b) of Council Directive 2004/83/EC ("the Directive") provides that serious harm consists of, amongst other things, "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin."

28. As submitted on behalf of the appellant, it was decided by the European Court of Justice in Elgafaji Case C-465/07, that Article 15(b) of the Directive in essence corresponds to Article 3 of the ECHR.

29. However, because of Article 2 of the Directive and paragraph 339C of the Immigration Rules the appellant would not be entitled to humanitarian protection if he qualifies as a refugee. His entitlement to refugee status is essentially the issue in this appeal.

30. Before undertaking an assessment of the facts, it is convenient to deal with an important argument advanced on behalf of the appellant. Summarising the point, it is submitted that where there is clear *prima facie* evidence of torture, it is not enough for a State considering a claim to refugee status to say that the cause of the marks/scars/injuries indicating the case for torture, as advanced by an appellant, is not believed. It is not enough for the State to say that it is not known how those scars were caused; the State must provide some explanation. The appellant's skeleton argument at [13] puts the matter in this way: the burden is on the Secretary of State to show that the appellant has not been tortured.

31. Two cases are relied on, RC v Sweden (App. No. 41827/07, 9 March 10) and RJ v France (App. No. 10466/11, 19 September 2013) and extracts from those decisions are quoted in the appellant's skeleton argument.

32. I am not satisfied that those decisions can be relied on as requiring the approach contended for on behalf of the appellant. If that approach is to be adopted, it would undermine the established principle that a holistic assessment of evidence is required. Further, the requirement for an appellant to establish his claim would similarly be undermined. In addition, in so far as RC v Sweden suggests or implies that the "appellate courts" in that case ought to have directed that a medical report be obtained, I do not see how the UK Immigration and Asylum Tribunals could be required to direct that a report be obtained in these circumstances, or to commission one for itself. The Tribunal does not itself have evidence gathering powers and the resource implications of requiring the Secretary of State to obtain a report are potentially very far reaching, aside from the observation I have already made about the burden of proof.

33. In support of the appeal a number of medical reports have been provided. There is also a witness statement from the appellant's wife, an expert report from Professor Good, and newspaper articles. I refer to these aspects of the evidence in more detail below. I bear in mind that it is essential not to compartmentalise any aspects of the evidence but to undertake a holistic assessment, bearing in mind all the evidence. Whilst I have rejected the submissions made in relation to the significance of the European cases in terms of the medical evidence, the medical evidence remains a significant feature of this appeal.

34. Some aspects of the appellant's account are accepted by the Secretary of State in the refusal letter. At [49] of the refusal letter there is a further summary of the appellant's claim to the effect that he was arrested twice in 1997 by the Indian IPKF and detained and ill-treated on the second occasion, he and his family were displaced, and that in 1997 he was stopped and beaten by the army and on a second occasion ill-treated and detained. The refusal letter states that "These events are accepted" because of their consistency with objective material.

35. However, numerous credibility issues are raised in relation to the appellant's account, which to some extent were reflected in Mr Avery's submissions to me.

36. The appellant underwent screening and asylum interviews. Some of the credibility issues relate to answers the appellant gave in the asylum interview. I note that at the start of the asylum interview the appellant said that he was mentally disturbed and he referred to the anti-depressant medication that he was taking.

37. Prior to the asylum interview a detailed witness statement from the appellant had been provided to the Secretary of State. It is dated 8 December 2009 and consists of 32 typed pages. It is a statement that was taken by the appellant's solicitor, Mr A.J. Paterson, whose witness statement in relation to the taking of the witness statement and other matters is dated 25 June 2013.

38. On behalf of the appellant complaint is made about the Secretary of State's reliance on inconsistency between the appellant's asylum interview and in particular his detailed witness statement. A number of points are made in relation to the Secretary of State's approach in this regard. One of the matters raised is highlighted in Mr Paterson's witness statement. He states at [22], in summary, that the appellant was told by the interviewer that because he had provided a "very, very detailed [witness] statement" there was no need to go into too much detail during the interview. Mr Paterson has provided his manuscript notes of that interview (and indeed the originals of those notes are in the appellant's bundle).

39. That comment to the appellant during the interview is not reflected in the Secretary of State's record of interview. I make that observation not as a criticism of the caseworker; it may not at the time have seemed an important matter to be recorded. It is also to be noted that the interviewing caseworker was not the same person who wrote the refusal letter. In any event, I accept that Mr Paterson's record of what transpired at the interview in this respect is accurate.

40. However, that is not to say that the respondent is not entitled to rely on matters that are *inconsistent* as between the asylum interview and the appellant's account elsewhere. However, in circumstances where the appellant was likely to have been given the impression that he did not need to go into too much detail, I do not consider that it is legitimate for him to be criticised, in credibility terms, for having failed to give details that perhaps otherwise might have been expected. Putting the matter in a way that reflects the task I have to undertake, I am not satisfied that any adverse credibility issues arise because of any alleged or perceived failure on the part of the appellant to give a more detailed explanation of his account in interview than appears elsewhere, for example in his initial witness statement.

41. When considering what are said to be adverse credibility points I bear in mind the evidence in relation to the appellant's mental state. There is more to this point than the fact that the First-tier Tribunal Judge accepted that he suffers from adverse mental health, and that his appeal was allowed on Article 3 grounds. Prior to his asylum interview a medical report dated 22 December 2009 by Dr Gunam Kanagaratnam was sent to the Home Office. As has already been indicated, there was reference to his mental state at the time of the asylum interview. Dr Kanagaratnam concluded that the appellant was suffering from complex PTSD and a major depressive disorder.

42. In assessing the credibility of the appellant's account it is important to bear in mind his mental state at the time of his recounting of events, most particularly in the asylum interview.

43. In relation to the credibility issues that are raised in the refusal letter, I do not consider it necessary to deal with each and every one of them although I have considered them all. I have also considered the very detailed response to the points raised, in the initial grounds of appeal to the First-tier Tribunal and in the skeleton argument before me. Where I do not expressly refer to an issue raised on behalf of the respondent it is because either I do not consider that there is merit in the point, or I am satisfied that the response on behalf of the appellant deals satisfactorily with the matter.

44. The appellant has not given oral evidence in the proceedings, either before the First-tier Tribunal or before the Upper Tribunal. However, it was at least implicitly accepted by the First-tier judge that the appellant was not fit to give evidence and there was medical evidence in support of that position. It has not been suggested on behalf of the respondent that the medical evidence did not support the suggestion that the appellant was not fit to give evidence.

45. Whilst the appellant's credibility could not be said to damaged purely by reason of his having failed to give evidence, it does mean that there is no oral evidence from him to explain or contradict a particular credibility point, and his account necessarily has not been tested in cross-examination.

46. Having said that, some of the credibility issues raised in the refusal letter are in fact anticipated in the appellant's witness statement. For example, in the refusal letter at [53] it is said that the appellant had not explained why, if the soldiers that had murdered the three men wanted to prevent the appellant revealing what they had done, they did not simply shoot him, rather than knocking him unconscious. However, in the witness statement, dated well before the refusal letter, the appellant stated at [171] that the soldiers injured him so badly perhaps intending to leave him for dead. At [172] he suggests that they would not have wanted to shoot him in case of attracting attention, and taking into account that the three men who had been killed were beaten to

death (although I refer below to evidence which is inconsistent with this claim as to the cause of their deaths).

47. The refusal letter suggests that the appellant's account is inconsistent in relation to his alleged rape during his detention in June 2008. His (main) witness statement refers to one incident of rape yet in the psychiatric report of Dr Kanagaratnam it refers to his having been repeatedly raped. The witness statement is said clearly to differentiate between the sexual assault by one army officer and the rape by the second.

48. The response to this in the grounds of appeal starts with the contention that the appellant has no recollection of telling Dr Kanagaratnam that he was raped more than once. This however, is not evidence from the appellant on the issue. Other matters relied on in the grounds of appeal do not explain the inconsistency and I do not regard the reliance on the dictionary definition of rape as helpful. Likewise, I do not consider that the skeleton argument's reference to the definition of rape in the Sexual Offences Act 2003 is helpful. The point made by the Secretary of State is that the appellant made a distinction in his account, between sexual assault and rape. It does seem to me that to state in the grounds of appeal that this potentially adverse credibility point is "feeble" itself overstates the case for the appellant.

49. I note what Professor Good says about this issue in his report at [46]. At [29] he states that he reads Tamil. However, with respect to Professor Good, regardless of his otherwise undoubted expertise, I am not satisfied that it is established that he is qualified to give expert evidence in relation to the Tamil language and the use or otherwise of the word 'rape'.

50. Nevertheless, it is important to bear in mind the evidence in the psychiatric report of the difficulty that the appellant had in providing an account of his "trauma-related experiences" because, in part, of his emotional distress.

51. I do not consider that there is much merit in the matter raised in the refusal letter at [52] in relation to the appellant's account of the circumstances of his release from detention in 1998, in the light of the observations I have made about the asylum interview and what could have been expected of the appellant.

52. I have already adverted to the point made in the refusal letter at [53] about why the appellant was not simply shot by the soldiers who are said to have already killed three other people. This is a matter that the appellant deals with, in so far as he can, in his first or main witness statement. The response on behalf of the appellant in the grounds of appeal contains a good deal of speculation in some respects, for example suggesting that the soldiers may have had twinges of conscience and may not have wanted to kill a fourth person, or would

have been too exhausted to beat the appellant to death as they had done with the others.

53. Having said that, I do consider that there is merit in the contention that the Secretary of State's point overlooks that the appellant said in the interview that he found out that the soldiers thought he was dead, and that they did inflict wounds on him (the blow to the head, and the cut to his thigh which bled heavily) which may have been intended to kill him. In addition, I bear in mind that there is medical evidence which supports the claim that the appellant was injured in the way that he describes.

54. It is as well at this point to refer to an inconsistency in the evidence in relation to the three men that the soldiers are said to have killed. The appellant's case is that they were beaten to death. Information came from the man, Arul, who found the appellant (see [172] of the main witness statement). The appellant relies on a news report from a newspaper called Valampurii dated 22 September 2006 relating an incident in which three men are said to have been killed (translated at page 229 of the appellant's bundle). That report does not state how the individuals were killed. In his report Professor Good refers to the article from Valampurii but also states that he has located a further report from Tamilnet dated 22 September 2006. In that report it refers to three men with gunshot injuries.

55. I accept that news reports are not always accurate, and that the appellant was relying on what he was told by another as to the cause of death of the three men. Nevertheless, their cause of death (not having been shot) is a matter that he relies on. The news report in Tamilnet is inconsistent with his account as to how they died.

56. Mr Avery suggested that it makes no sense for the soldiers to have inflicted a number of cigarette burns, and other injuries, on the appellant whilst he was unconscious. To some extent I agree with that suggestion. On the other hand, I consider that one has to be cautious in trying to interpret the actions of an abuser, particularly in the context of a country and a conflict in which gross human rights abuses are known to have occurred. The context of the appellant's account does not make this aspect of his account impossible to accept as has been suggested, given that the claim is that soldiers beat three apparently innocent men to death.

57. I do not consider that the appellant's credibility is undermined because of apparent inconsistency in terms of the number of soldiers that are said to have attended the farmhouse, ostensibly to search for weapons. The main point here, it seems to me, is that the appellant was reporting what he had been told. The grounds of appeal suggest that the appellant had been given a different figure for the number of soldiers by his wife, with whom he had re-established contact prior to the asylum interview. However, that does not take the place of evidence from the appellant on the issue, and he does not deal with the

inconsistency in his witness statements. Having said that I bear in mind the observations I have already made in relation to the appellant's mental state and the effect that is said to have had on his ability to give his account of events.

58. The refusal letter at [62] expresses scepticism about the ability of three soldiers who were responsible for killing the three men, to mobilise hundreds of soldiers to search the appellant's farm and farmland. The appellant's account is that the army wanted to silence him for what he witnessed. In his witness statement at [197]-[198], and [163], he makes an arguably credible case for the suggestion that the killing of the three men was ordered by more senior officers, thus explaining the presence of, or the ability to mobilise, a large number of soldiers. In passing, I note that the appellant explains why only a relatively small number of soldiers were involved in the physical search of the farmland, they having brought with them some sort of ploughing vehicle.

59. It is said in the refusal letter that there is inconsistency in the appellant's account in terms of whether the soldiers actually found anything during the search of the appellant's farm. In his main witness statement at [202] he said that as far as he knew the soldiers did not find anything during their search because there was nothing to find. However, in the asylum interview at question 69 he said that they found weapons, communication equipment, guns and “rounds”.

60. In fact, the appellant also said in answer to question 69 that there was nothing to find, before then stating what was shown to the workers. I also note that in the witness statement at [205] he stated that there was a story that appeared in a newspaper (a copy of a newspaper report is produced), which refers to the findings of weapons and so forth. It seems to me that the real point that could be made in favour of the respondent here is that the appellant's witness statement does not refer to the soldiers presenting to the workers what they had ‘found’, albeit that on the appellant's account there was nothing to find. The absence of that part of the narrative must be seen in the context of a witness statement that is extremely detailed.

61. The various medical reports support the appellant's account to varying degrees. I have already referred to the report from Dr Kanagaratnam. There is a further psychiatric report, from a Dr Mala Singh, dated 24 June 2013. She diagnosed the appellant as suffering from PTSD and Severe Depression with psychotic symptoms. She states that her diagnosis is no different from that of Dr Kanagaratnam, although I note that the latter diagnosed Complex PTSD. There may be some clinical significance in these diagnoses of PTSD but it is not explained in the report of Dr Singh. It would not be appropriate for me to speculate as to the potential significance, if any, of this apparent difference, in the absence of expert evidence on the point.

62. There is no dispute about the fact of the appellant suffering from mental disorder. The psychiatric reports attribute the appellant's state of mental health to the traumatic experiences that he describes. I bear in mind however, that to a degree the reports rely on the appellant's account of events, not so much in terms of making the diagnoses, but in terms of the attribution of his mental disorder to the events that he describes. In this context however, I note that at page 11 of her report Dr Mala states that over the two sessions and three and a half hours with the appellant, she concluded that he had been frank and honest about his mental state and symptoms. His presentation given was consistent with the history he gave.

63. I nevertheless bear in mind that even on what is accepted of the appellant's account he had experienced traumatic events even prior to 2006; he comes from a country which has suffered from years of armed conflict; he was displaced, and had been detained and beaten. His immigration status is still not settled and he is separated from his wife and children. It seems to me that these are features of his life which could be potentially relevant to his mental state, and which are to a greater or lesser extent referred to in the psychiatric reports.

64. There are two medical reports in relation to the appellant's physical condition and scarring that he has. The first is from Dr J. Botting and is dated 25 August 2009 and was sent to the respondent prior to the asylum interview and as part of his asylum claim. The report details a number of scars that the appellant has. In summary, Dr Botting concludes that the scars are variously consistent, highly consistent or in one case typical, of the mechanism of injury described by the appellant.

65. The refusal letter at [58] suggests that that report has not explored other possible causes for the scarring, noting that the appellant had been a farmer for many years. I consider that there is some merit in that observation. Dr Botting’s consideration of other possible causes for the scars in the penultimate paragraph of his report is rather scant. In addition, his comment that it is difficult to work out how else the scars could have been caused seems to relate only to what are said to be cigarette burns. I do take the view that the weight to be attached to the report of Dr Botting is reduced in the light of his not having given more detailed consideration to the possible causes of the scars other than the cause ascribed to them by the appellant.

66. There is a further medical report, from Dr Soon Lim, dated 22 June 2013. His report states that he specialises in the field of skin surgery. His report details the marks or scars that he found on the appellant, including colour photographs within the report and commenting on the scars. In passing, I note that he states on page 14 that there are no scars on the appellant's abdomen whereas Dr Botting describes five scars over the left mid-abdomen.

67. I summarise Dr Lim's conclusions as follows. He describes a scar to the scalp behind the left ear (which the appellant says was caused when hit with a gun butt during the incident in September 2006) as being typical of the blunt injury described although there are other possible but less likely causes. In relation to an 80mm thin curved scar on the appellant's left thigh he concludes that this is diagnostic of a full thickness laceration of the skin. He states that self-infliction is unlikely. Deliberate infliction by consent by a third party cannot be completely ruled out but is less likely given the depth and length of the injury required to cause the scar. It is not clear what Dr Lim is referring to when he states that infliction by a third party by consent is "less likely"; i.e. less likely than what? I infer that he means that it is less likely than self-infliction. In any case, he does not appear to consider infliction by consent as a reasonably likely cause of the injury.

68. In terms of what the appellant says are cigarette burns Dr Lim states that most of these scars are on the appellant's back, which are not therefore accessible for self-infliction. There are a large number of these scars which are said to be third degree burns and which therefore cannot be the result of natural causes. Infliction by consent by a third party is ruled out because of the large number of scars. Dr Lim does not explain why the large number of these scars makes infliction by consent "very unlikely", although it is reasonable to assume that this is because of the pain that it would cause. He concludes that these scars are diagnostic of cigarette burns that have been deliberately inflicted by another person for the purposes of maltreatment or torture.

69. Dr Lim expresses some disagreement with Dr Botting, for example in relation to the 'cigarette burns', with Dr Lim finding the 'diagnostic' attribution more appropriate than Dr Botting's highly consistent, and he gives an explanation as to why he comes to that view. He also states that the overall pattern of the cigarette scarring is diagnostic rather than Dr Botting's "entirely in keeping". On the other hand, in relation to a scar on the appellant's right knee, his view is that this is consistent with the suspected injury of a burn that subsequently became infected rather than the "typical appearance of a superficial injury such as a burn", giving his reasons.

70. Mr Avery sought to highlight differences between the views of Drs Botting and Lim. Mr Mackenzie submitted that these were not different views but simply differences in emphasis.

71. I consider that there is nothing in the reports of Drs Botting or Lim which undermines the appellant's account. To varying degrees both reports support his claim to have been subjected to ill-treatment in the ways that he described. Similarly, whilst on the basis of the reports some of the scars could have been caused accidently, taking an overall view of the medical evidence it does support the appellant's account. Dr Lim rules out infliction by consent by a third party, but in any event I do not have evidence before me as to how such infliction by consent could

have been undertaken in terms of opportunity or mechanism. In addition, that issue is not the subject of detailed medical evidence in this appeal.

72. There are two newspaper reports that are relied on by the appellant. The first is from a newspaper, Valampurii, dated 22 September 2006, to which I have already referred. It refers to three men having been abducted and killed. It gives the names of the men and where they were from. It does not state how they were killed. In the refusal letter at [59] it is observed that the news report does not state how the bodies were discovered or make any reference to the army.

73. The second news report comes from “Uthayan” dated 5 December 2006. It refers to the finding of weapons, ammunition and other items by the army in Periyavilan, Kalviyankadu and the Siruppiddy areas in the Jaffna peninsula. Again, in the refusal letter it is said that the article does not mention specific details about the locations and does not mention the appellant or his farm.

74. In relation to Valampurii, the appellant refers at [181] in his main witness statement to that news report, and explains the relationship between the three people he knew and those named in the report. The appellant also gives the shorter version of the names earlier in the witness statement at [131]. The witness statement also explains the locations from which the men are said to have originated.

75. As regards the Uthayan news report, contrary to what is said in the refusal letter, it does mention the locations of the finds, although it is true to say that it does not refer to the appellant or expressly reveal any connection to the appellant.

76. I have referred to inconsistency between the Tamilnet report referred to in the report of Professor Good and the Valampurii report. This has the potential to undermine the appellant's account.

77. On the other hand, in varying degrees both the Valampurii and Uthayan news reports are mainly consistent with the appellant's account and thus support it. It is the case that in relation to both reports it could be said that more detail would have further supported the appellant's claim but that does not detract from the value of the reports.

78. Professor Good’s report is dated 24 June 2013. I have already expressed my view as to the extent to which regard can be had to his report in so far as it concerns the Tamil language. In addition, it does seem to me that in many instances Professor Good does stray into the illegitimate territory (in relation to his field of expertise) of commentary on subjective matters of interpretation of the appellant's account and its credibility. An example of this occurs at [47] of his report where it is said that the Secretary of State has misquoted the appellant's witness statement.

79. As regards the general background situation in Sri Lanka, the appellant's account is consistent with it, Professor Good concludes. The ill-treatment that the appellant describes is also consistent with the information that Professor Good provides in the report.

80. There is a witness statement from the appellant's wife, Vijayakumari Kiritharan, dated 7 June 2013. The statement refers to her now living in India. At [78] it says that the statement was given to the appellant's solicitor, Mr Paterson, over the phone with the assistance of Tamil interpreters in Mr Paterson's office. The statement consists of 8 pages and is consistent with the appellant's account of events. At [88] it states that her husband's uncle, Sivasubramaniam, lives in Manipay in Sri Lanka and sees neighbours of theirs from Siruvilan, where the appellant is from. She states that Sivasubramaniam has reported to her that he had been told by neighbours that the army still goes to their house from time to time to make enquiries about where the appellant and the family have gone.

81. The witness statement of the appellant's wife, again, supports his account although the weight to be attached to her evidence is less than it would be were her evidence tested in cross-examination. Having said that, given that she is living in India it would not have been possible for her to give evidence in person.

82. I also note the written statement of the appellant's sister-in-law, Yashoda Ragutharan. Her evidence however, does not deal directly with events that occurred in Sri Lanka, and concerns the appellant's situation in the UK, his mental state and some evidence of what the appellant has told her as to events in Sri Lanka. It also refers to the circumstances in which the appellant re-established contact with his wife. In relation to events in Sri Lanka it does not carry any significant weight, given that it relies on an account given to her by the appellant and about which she has no first hand knowledge.

83. I have referred to aspects of the evidence that have the potential adversely to affect the credibility of the appellant's account, for example in relation to his claim to have been raped whilst detained; inconsistency between the Tamilnet news report referred to by Professor Good and that in Valampurii, and whether the arms find was or was not shown to the workers.

84. However, taking into account the supporting evidence from various sources which I have referred to in detail, and applying the lower standard of proof, I am satisfied that the appellant has given a credible account of events in Sri Lanka and of the circumstances which led him to come to the UK. Accordingly, highlighting what could be said to be the most significant features of his account (but not rejecting the other aspects of it) I accept that the appellant was detained by the IPKF and by the Sri Lankan security forces on the occasions that he describes. I am satisfied that he has given a credible account of the ill-treatment

that he was subjected to, that he was photographed and fingerprinted and that he was forced to sign 'confessions'.

85. I accept as reasonably likely that in 2006 he was encountered by soldiers who had been responsible for killing three men and that he was beaten and knocked unconscious. It is reasonably likely that the injuries he is found to have sustained when he regained consciousness were inflicted whilst he was under the control of those soldiers.

86. I am satisfied that his land was searched and that he was accused, or held responsible for, what were said to have been weapons, ammunition and other equipment ostensibly 'found' on his land. That the authorities in the form of the security forces had searched for him is reasonably likely to be true and that his wife has been told by her husband's uncle that he has been told that the army still go to their house from time to time to make enquiries about the appellant. Whilst this is not direct evidence of continuing interest in the appellant by the authorities, no basis for rejecting that evidence has been suggested on behalf of the respondent, aside from the implicit suggestion that it should be rejected because the appellant's account is not credible.

87. It is against those findings therefore, that I assess the question of risk on return. In relation to the decision in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC), the "alternative" position on behalf of the appellant is that that decision is wrongly decided. I deal with that contention first.

88. It is true that permission to appeal to the Court of Appeal has been granted to appellants in the case of GJ but it nevertheless remains authoritative country guidance. Furthermore, as is acknowledged in the appellant's skeleton argument, the reported case of KK (Application of GJ) Sri Lanka [2013] UKUT 00512 (IAC) considered the arguments now advanced (in the alternative) in relation to the correctness of GJ and rejected them, including in relation to the significance of the UNHCR guidelines. Accordingly, it is with reference to the existing country guidance of GJ that I assess the potential risk to the appellant.

89. In his report Professor Good considers that it is almost certain that no record exists of the appellant's detention by the IPKF in 1987 and that there would be no record on a national database of his detentions in 1997 or 1998.

90. In terms of the events of 2006 however, he concludes that it is almost certain that there would be a record of the search for weapons by hundreds of soldiers, although the details contained in such records "would not routinely be known to all relevant personnel at the airport."

91. It is contended that the appellant comes within the first of the risk categories set out in GJ, namely "Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because

they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the Diaspora and/or a renewal of hostilities within Sri Lanka."

92. It is not suggested that the appellant has undertaken any role in terms of post-conflict separatism whilst in the UK. However, he has been implicated in a large arms find on his land in 2006. The fact that the authorities still make enquiries as to the appellant's whereabouts indicate that he is still of interest to them. Although he has not taken part in any Tamil separatist activities since leaving the country, because of his mental state he would not be able to give a coherent account of himself when questioned so as to avoid suspicion, as is evident from the report of Dr Mala on page 23. I am satisfied that he is reasonably likely to be questioned when he returns to his home area, given the continuing interest in him. In his case that would bring with it the risk of detention and ill-treatment.

93. Naturally, any country guidance decision requires to be applied taking into account the particular circumstances of each appellant. In relation to this appellant there is sufficient evidence to establish a reasonable likelihood that he would be at risk, coming within this first category of risk set out in GJ.

94. It is submitted that the appellant would be on a 'stop list', and thus comes within the fourth of the risk categories in GJ, namely "A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant".

95. However, there is no evidence that there is a court order or arrest warrant for the appellant. Accordingly, he does not come within that risk category.

96. When dealing with the correctness of the decision in GJ, the appellant's skeleton argument at [53] suggests that the appellant comes within the risk category of persons who are witnesses to war crimes. Reliance is placed on the evidence of Professor Good in his report from paragraph [87]. However, the risk category described in GJ is:

> "Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses."

97. The appellant has not given evidence to the Commission and has not identified himself by giving such evidence, although I accept that he has been identified as someone who is a witness to the killing of one, if not three, men by the army. Nevertheless, I am not satisfied that he does come within this risk category.

98. For the reasons I have given however, I am satisfied that the appellant has established that there is a real risk of persecution on return on account of an imputed political opinion.

99. In the light of that conclusion, he is not entitled to humanitarian protection, which he would otherwise have been entitled to for the reasons explained in the opening paragraphs of my assessment.

Decision

100. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal in relation to the asylum ground of appeal is set aside and the decision re-made, allowing the appeal on asylum grounds.

Upper Tribunal Judge Kopieczek

25/04/14