



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/11499/2014

THE IMMIGRATION ACTS

Heard at Field House

On 3 March 2016

**Decision & Reasons
Promulgated
On 19 April 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

TT

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr N Kotas, Home Office Presenting Officer
For the Respondent: Mr A Mackenzie, instructed by TRP Solicitors

DECISION AND REASONS

1. The appellant before me is the Secretary of State. However, it is convenient to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Sri Lanka, born on [] 1982. He became subject to deportation proceedings pursuant to the UK Borders Act 2007 ("the 2007 Act") by reason of his conviction for an offence of arson with intent to endanger life on 6 August 2007, resulting in a sentence of ten years' imprisonment.
3. The respondent's decision was made on 18 November 2014 and within it is certification under section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") (presumption of particularly serious crime and danger to the community). The result of the certificate, if upheld, is that the appellant is excluded from the protection of the Refugee Convention.
4. The appellant appealed against the respondent's decision and his appeal came before a panel of the FtT on 23 July 2012 whereby the appeal was dismissed. However, the FtT's decision was found to have involved the making of an error on a point of law and its decision was set aside for the appeal to be heard afresh in the FtT.
5. The appeal then came before First-tier Tribunal Judge Keane ("the Ftj") on 5 October 2015. He found that the appellant had rebutted the presumption of particularly serious crime and danger to the community (the s.72 certificate) and allowed the appeal on asylum grounds, and on human rights grounds with reference to Article 3 of the ECHR.
6. The basis of the appellant's claim is best illustrated with reference to the decision and reasons of the Ftj

The decision of the First-tier Tribunal

7. The Ftj summarised the appellant's case to the following effect. In 1994 he became a member of the LTTE, agreeing to undertake training as a Black Tiger. In 1996 and 1997 he took part in raids on the Sri Lankan army with a number of soldiers having been killed. The appellant was detained in the summer of 1997, and was interrogated and tortured. He disclosed some information about the LTTE, and was released after signing a blank piece of paper and agreeing to report. The LTTE concluded that he had betrayed them, and started looking for him.
8. As a result, the appellant went to Colombo with his father. He was detained by the police in a stop-and-search but released after a short while after payment of a bribe.
9. He then went to Thailand to avoid the Sri Lankan authorities, and in his absence his parents were questioned in 1998 as to his whereabouts. He came to the UK and claimed asylum in 1999.
10. During 2002 he was visited by the LTTE in London and accused of having given information about them to the authorities. In October 2010 his parents were arrested in Sri Lanka following their return from India. In 2013 the appellant became involved with the British Tamil Forum ("the BTF"), attending meetings and collecting signatures on petitions. He also

became involved in the Transitional Government of Tamil Eelam (“TGTE”), attended and spoke at meetings, and was involved in the preparation of petitions. He also worked for the Tamil Coordinating Committee (“the TCC”), helping at a protest that took place in 2012, amongst other things.

11. At the hearing before the FtT the appellant did not give evidence, although witnesses were called on his behalf.
12. In his conclusions, the Ftj at [18] of his decision, started his consideration of the issues with reference to the determination of an Adjudicator, Mr C. Buckwell, who heard the appellant's first appeal on 13 August 2004. The Ftj noted that the Adjudicator had found that the appellant's account was “consistent” and that the Adjudicator’s finding that the appellant “had not been involved with the Black Tigers” derived from the Adjudicator’s concern as to the weight to be attached to certain documents.
13. The Ftj found that the expert report of Dr Chris Smith supported the appellant's account of his involvement with the Black Tigers. In relation to the respondent’s concerns that the appellant had not at an earlier stage mentioned his involvement with the Black Tigers, the Ftj stated that on that issue he gave the benefit of the doubt to the appellant who said that his previous representatives had told him not to mention involvement with the Black Tigers on the basis that he might be excluded from Refugee Convention protection.
14. The Ftj decided that he was entitled to come to different conclusions from those of the Adjudicator, finding that the appellant had been a member of the Black Tigers and that the activities that he referred to in his account were true. He found that the appellant had been detained and tortured by the Sri Lankan authorities, and that he was “for an indeterminate period of real and adverse interest” both to the authorities and to the LTTE who believed that he had betrayed them.
15. Furthermore, at [20] he found that the appellant had given a credible account of his political activities in the UK and allegiances, including in terms of work carried out for the TGTE and the BTF. He found that the witnesses called on behalf of the appellant were “palpably truthful and honest”. He concluded that there was “not a shred of evidence” to support a conclusion that the appellant's support for those organisations was “contrived or the product of an ulterior motivation”. He found that the appellant was deeply devoted to the cause of the Tamil Communities of Sri Lanka.
16. It is also worth noting that the Ftj did not find that there was any basis for drawing an adverse inference from the appellant's decision not to give evidence “if indeed he personally evinced a decision in such regard”.
17. Applying the country guidance decision in *GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC) he concluded that the appellant fits into one of the risk categories, as someone who is, or would

be perceived to be, a threat to the integrity of Sri Lanka as a single State because he has or would be perceived to have had a significant role in relation to post-conflict Tamil separatism within the diaspora.

18. At [24] he found that the Sri Lankan authorities would know of the appellant, his political allegiances and affiliations and his ardent support for the cause of ordinary Tamils resident in Sri Lanka. He noted that the BTF and TGTE are both proscribed organisations, and according to the Operational Guidance Note, individuals belonging to those organisations would face arrest under anti-terrorism laws when travelling to Sri Lanka.
19. In relation to the s.72 certificate, he decided that the appellant had rebutted the presumption that he constituted a danger to the community. He referred to the OASys report of 2012 which said that the risk of the appellant reoffending was low. He also took into account that the appellant had not reoffended since his release from prison in March 2012.

The grounds of appeal and submissions before the Upper Tribunal

20. The respondent's grounds contend that the Ftj, having found that the appellant was a member of the Black Tigers and carried out activities such as being a potential suicide bomber, planned killings, attacks using grenades, ambushes, planting mines, setting roadside bombs, and was involved in shootings and killings, he erred in law by not carrying out the process "as stated at part 3 of the Article 1F Process instruction". The grounds refer in this respect to the respondent's supplementary decision letter dated 7 September 2015.
21. At [15] of the grounds it is asserted that the Ftj's findings that the appellant was a member of the Black Tigers and carried out the activities referred to amounts to a finding that there are serious reasons for considering that the appellant is guilty of actions contrary to Article 1F.
22. The allied contention is that the Ftj had "fundamentally misread" the supplementary decision letter of 7 September 2015 in that there was no concession made by the Secretary of State in relation to exclusion under Article 1F.
23. In relation to the findings of the Adjudicator who dismissed the appellant's appeal in 2004, it is argued that the Ftj was wrong to find that the Adjudicator had found that the appellant had not been involved in the Black Tigers, when in fact the appellant did not claim at the time of that appeal to have been involved in the Black Tigers. That claim was only made after that appeal in 2004 had been dismissed.
24. Furthermore, it is contended that as a reason for departing from the findings in the previous appeal, it was irrational to conclude that Dr Smith's report about the appellant's possession of detailed information about membership of the Black Tigers was a sufficient basis to conclude that the appellant's knowledge of the Black Tigers could only have come

about because he was such a member. The grounds contend that the appellant could feasibly have obtained this information from another person who had been a member of the Black Tigers. Thus, it is asserted that the Ftj had failed to give “reasonable scrutiny” to Dr Smith’s conclusions. The related assertion is that the Ftj had failed to give any adequate reasons for departing from the findings of the Adjudicator bearing in mind the failure of the appellant to mention his involvement with the Black Tigers at that earlier hearing.

25. It is asserted that the Ftj had failed to take into account the decision in *BT (Former solicitors’ alleged misconduct) Nepal* [2004] UKIAT 00311 when accepting that the appellant had been told by his previous representatives to lie about his involvement with the Black Tigers.
26. As regards the appellant’s failure to give evidence, it is said that the Ftj had failed adequately to consider whether the appellant’s failure to adopt the contents of his interviews and statements is a matter that limited the weight to be attached to them, or whether an adverse inference should be drawn from the fact that he did not give evidence. Furthermore, it is asserted that undue weight had been attached to the appellant’s written evidence. Additionally, the Ftj appeared to have “entirely overlooked” [24]-[34] of the decision letter which is said to be of central relevance to the *Devaseelan* issue.
27. In terms of the s.72 certificate, it is contended that the Ftj appeared to have paid no regard to [10] of the decision letter where the respondent’s reasons for finding that the presumption of danger to the community had not been rebutted are set out. In addition, it is asserted that no consideration had been given to the fact that the appellant had only refrained from further offending while subject to significant restrictions, and in the knowledge that deportation action was pending. Reference is made in the grounds to an OASys Report dated 29 June 2002 (although both the grounds and the Ftj’s decision are in error in respect of the date of the OASys Report which is 2012).
28. Lastly on this issue, it is said that the Ftj had failed to take into account in terms of ‘danger to the community’ that he himself had found that the appellant was a committed terrorist whilst in Sri Lanka, as a member of the Black Tigers. It is suggested that the Ftj should have taken that fact into account in terms of whether the appellant represented a danger to the UK community, which includes a significant number of people of Sri Lankan nationality or origin. That claimed history of significant criminality, including military and terrorist training, was relevant to whether the appellant had rebutted the statutory presumption under s.72.
29. In a ‘rule 24’ response, on behalf of the appellant it is pointed out that the Ftj had accepted that the appellant was a refugee because of his extensive political activities within the Tamil diaspora in the UK, and that that placed him within one of the risk categories identified in *Gj*. There was no challenge on behalf of the respondent to those conclusions.

30. So far as exclusion is concerned, notwithstanding the appellant's claimed involvement in the Black Tigers, as part of the LTTE, there was no evidence that he had been involved in terrorism or war crimes. Although in the decision letter of 18 November 2014 the respondent had said that if the appellant's activities on behalf of the Black Tigers were accepted he fell to be excluded under Article 1F(a), no details were provided of what precise actions she considered gave rise to exclusion, or why any such actions might fall within the Rome Statute of the International Criminal Court ("the ICC Statute"). The decision in *R (on the application of JS) (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15 is referred to. The rule 24 response continues that in consequence of the respondent's failure to have set out her case on exclusion, a designated judge of the FtT directed the respondent to consider issuing a further refusal letter dealing with exclusion, along with any evidence to be relied on. That direction was reiterated when the hearing was adjourned, at the respondent's request, on 22 June 2015.
31. However, instead of filing submissions or evidence on the point the respondent wrote to the appellant on 7 September 2015 withdrawing the paragraphs of the refusal letter that dealt with exclusion, given that she did not accept that he had been in the Black Tigers. The letter went on to say that if it was concluded that the appellant had carried out activities that breach Article 1F, consideration would need to be given at the hearing to whether he should be excluded from the Refugee Convention. That approach is said on behalf of the appellant to have been entirely circular and did not set out the evidential or legal basis of any allegation which might give rise to exclusion.
32. Thus, having failed to take repeated opportunities to make a case for exclusion, the respondent, it is argued, is not entitled to criticise the Ftj for not dealing with the point.
33. It is further argued that the point was not in any event an obvious one which the Ftj was obliged to consider. All the actions set out in the respondent's grounds of appeal to the Upper Tribunal were of a military nature, as part of a civil war, and such activities do not per se lead to exclusion as is clear from the Court of Appeal's decision in *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292, in particular at [34].
34. The contention that the Ftj had erred in not applying the respondent's Article 1F Process instruction is rejected, on the basis that that process document is an internal document for the respondent in the context of her decision-making and is not capable of sustaining an argument that the judge made an error of law.
35. It is asserted further that any error on the part of the Ftj in terms of what the Adjudicator had earlier found in terms of the appellant's involvement in the Black Tigers was not material because the Ftj found that the appellant was a refugee because of his involvement in Tamil separatist

politics in the UK. The Ftj was impressed by the witnesses called on behalf of the appellant on that issue. It was therefore irrelevant as to whether the appellant was also at risk from having been a Black Tiger. The Ftj's conclusion on the issue of his membership of the Black Tigers was in any event one that he was entitled to come to.

36. It is further contended that the Ftj was entitled to conclude that the appellant did not represent a danger to the community, taking into account the OASys Report of 29 June 2012 and the fact that he had not re-offended since his release from prison in March 2012. The argument that because the appellant had been involved in activities on behalf of the LTTE in Sri Lanka he was a danger to the community in the UK, was not an argument advanced before the Ftj. That argument is in any event speculative and lacks any basis in evidence.
37. The submissions on behalf of the parties before me largely reflected the grounds and the rule 24 response. Mr Kotas submitted that the Ftj had failed to take into account that the Adjudicator in 2004 had completely rejected the appellant's account. The Ftj had referred to the fact that the Adjudicator had found the appellant "consistent" but the Adjudicator had qualified that remark. Although the report from Dr Smith had been taken into account in *Devaseelan* terms, the Ftj had failed to take into account what is said in the decision letter about the inconsistency in the appellant's account of his involvement with the Black Tigers.
38. The appellant had not given evidence before the Ftj and ordinarily that would require an adverse inference, in terms of the weight to be afforded to his account.
39. So far as the risk of re-offending is concerned, there had not been any cross-examination on the appellant's attitude to his offence, his family, his community ties and so forth, all of which would have been relevant.
40. In terms of the impact of the appellant's previous activities in Sri Lanka on behalf of the LTTE on the issue of 'danger to the community', Mr Kotas was unable to say whether that issue had been raised before the Ftj.
41. As regards Article 1F, the respondent's case had always been that the appellant had not been involved in the Black Tigers. The supplementary decision letter dated 7 September 2015 at [7] indicated that that was a matter that would require consideration were the appellant's account to be accepted. Furthermore, in setting aside an earlier decision of the FtT, Upper Tribunal Judge Gleeson found an error of law on the part of the FtT in part in terms of its failure to consider Article 1F.
42. Mr Mackenzie relied on the rule 24 response. He reiterated that there had been no challenge to the Ftj's positive credibility findings in terms of the appellant's activities in the UK on behalf of the Tamil diaspora. There was similarly no challenge to the conclusion that the appellant fell within one of the risk categories in *GJ*.

43. In terms of the appellant's not having given evidence before the FtT, there is no authority for the proposition that an adverse inference needed to be drawn in those circumstances. It is also important to note that at the time of the hearing before the FtT, the appellant was suffering from mental health problems, as demonstrated by the evidence in the appellant's bundle before the FtT.
44. Although it is true to say that the issue of exclusion needed to be considered in appropriate circumstances, there was no evidence that the appellant was involved in war crimes or terrorism. Upper Tribunal Judge Gleeson invited the parties to make submissions on exclusion. The respondent's decision letter at [58] and [59] relied on Article 1F(a) but nothing in the evidence reveals that the appellant had committed a war crime or otherwise came within the exclusion clause and there is no reference by the respondent to the relevant law on the topic. The matter was raised at a Case Management Review on 12 March 2015. Further directions were given on 23 June 2015 on that issue and the only response from the Secretary of State was to produce the supplementary decision letter withdrawing [58] and [59] of the original decision letter.
45. The supplementary letter is tautologous in stating that if the appellant had carried out activities that breach Article 1F consideration would need to be given to whether he should be excluded from the Refugee Convention on those grounds. The ICC Statute is the starting point for such consideration. It has not been explained what the respondent's arguments are on this issue. It was opportunistic for the respondent to raise these issues now.
46. In relation to the appellant's involvement with the Black Tigers, the evidence before the Ftj included Dr Smith's report and the appellant's answers in interview. His interview gave a detailed description of events and his membership. The respondent's arguments are simply disagreement with the Ftj's conclusions. It is clear from [9] that the Ftj took into account the Adjudicator's findings.

My conclusions

47. I deal with the *Devaseelan* and credibility issue first. The respondent's arguments contain several facets. At [18] the Ftj said that the Adjudicator (in 2004) had found that the appellant had not been involved with the Black Tigers. However, Mr Buckwell, the Adjudicator, did not make any finding in relation to the appellant's involvement with the Black Tigers; the case was not advanced before him on that basis.
48. This issue in itself however, contains further subtleties or difficulties. The Ftj had plainly considered the Adjudicator's determination, and in which there is no reference to the Black Tigers. It may be that the Ftj simply made a mistake at that part of his decision or wrongly used the term Black Tigers synonymously with the LTTE.

49. In addition however, the question of the appellant's involvement with the Black Tigers and his not having mentioned it expressly before, is perhaps not as clear-cut as might previously have been supposed. I say this because at [7] of Mr Buckwell's determination it states that the appellant claimed to be a member of an "umbrella organisation" for the LTTE and that he had been trained in arms and had participated in small-scale attacks but had refused to take part in heavy combat. At [10] there is reference to the appellant having said that he had been involved in grenade attacks on the army. Whether this was a veiled reference to what he later claimed to be his membership of the Black Tigers was not explored at the hearing before the Ftj, or indeed before me. It is not appropriate to speculate as to what had gone before, in the absence of submissions on the point, and I proceed on the footing that the Ftj was indeed mistaken when referring to the Adjudicator's findings on this issue.
50. It is however evident that the Ftj recognised that the Adjudicator did not find the appellant had given a credible account of events, referring at [9] to the agreed position between the parties before him which was that the appellant had not been found credible by the Adjudicator. At [18] he referred to the decision in *Devaseelan* [2002] UKIAT 00702, recognising that the decision of the Adjudicator was to be the starting point in his credibility assessment. He referred to the general basis upon which the Adjudicator found the appellant not to be credible.
51. The expert report of Dr Smith was a significant feature of the evidence before the Ftj which was not before the Adjudicator. Although the Ftj did not quote from Dr Smith's report it is worth referring to Dr Smith's specific conclusions. At [54] of his report dated 19 July 2012 he said as follows:
- "After a total of four hours with the Appellant I am convinced that he was recruited as a Black Tiger. His accounts of his time with the LTTE have been consistent with his witness statement. His attention to detail is noteworthy, even extending to drawing maps to illustrate his points."
52. Dr Smith went on to refer to the appellant's description of his training as a Black Tiger and the equipment he used, stating that the appellant's knowledge of the workings of a suicide vest were detailed and more than he had personally seen in open source material. He concluded that it was "unlikely that he could have acquired this information from anything other [than] first hand experience." He gave other examples supporting his emphatic conclusions about the appellant's involvement with the Black Tigers.
53. In addition, as the Ftj stated at [19], the appellant gave the respondent a detailed account of his involvement in the Black Tigers when interviewed. The Ftj referred in particular to questions 52-64.
54. Although the Ftj did not refer to the decision in *BT*, relied on by the respondent in terms of what information needed to be before a Tribunal in relation to allegations against former representatives, I do not consider

that his failure to do so is 'fatal'. The FtJ was alive to the point that the respondent questioned why the appellant had not previously mentioned his involvement with the Black Tigers, prior to the latest claim. I do not read *BT* as meaning that a failure to adduce evidence of contact with previous representatives who are said to have been responsible for some misconduct (here, telling the appellant to lie) means that an appellant's explanation along those lines had to be rejected.

55. Likewise, I am not satisfied that there is any error of law in the FtJ's not having drawn an adverse inference from the appellant's failure to give evidence before him. Although Mr Mackenzie referred in his submissions in passing to the appellant's mental health problems evidenced at the hearing before the FtJ, that does not appear to have been the basis of any explanation or submission before the FtJ in terms of why the appellant had not given evidence. My view in that respect is reinforced by the fact that the Presenting Officer before the FtT questioned witnesses as to why the appellant was not giving evidence. It seems to me that no explanation was proffered to the FtJ in terms of why the appellant had not given evidence.
56. However, I was not referred to any authority to the effect that a judge must draw adverse inferences from the failure of an appellant to give evidence in an asylum and human rights appeal. Although in criminal proceedings for example, an adverse inference can be drawn in certain circumstances, I was not referred to any authority in support of the respondent's argument on this point. The standard of proof in asylum appeals is also to be borne in mind. An appellant has the burden of proving his or her case. The FtJ was required to consider the appellant's credibility on the basis of the available evidence. The fact that the appellant's account was not tested in cross-examination is plainly a factor to be borne in mind but it is evident that the FtJ considered that there was sufficient evidence before him, from the appellant's witness statements, asylum interview and expert's report, such as to mean that he had established his claim to the appropriate standard.
57. I do consider that the FtJ's decision would have benefited from some reference to the weight to be attached to evidence that is not tested but I am not satisfied that the FtJ erred in law by reason of his failure to have done so. He said at [20] that he was not prepared to speculate as to why the appellant did not give evidence and that he was to decide the relevant issues of fact by reference to the evidence actually presented to him. He clearly took into account the fact that the appellant had not given evidence.
58. The reference in the grounds to [24]-[34] of the decision letter appears to refer to the decision dated 18 November 2014. There is an earlier undated decision which has no paragraph numbers. However, although not highlighted at the hearing before me, it is apparent that the 18 November 2014 decision is missing pages 9 and 10. There is no complete copy of that decision letter in the Tribunal file, either in the respondent's

bundles or in the appellant's bundle. Indeed, it appears to me that there was no complete copy of that letter before the FtJ. However, the relevant paragraphs on the *Devaseelan* point would appear to be [29] onwards. The missing pages appear from the context to be a recitation of the appellant's circumstances and history up until the proceedings before the Adjudicator. Nothing turns on this omission from the decision letter.

59. I next deal with the exclusion point. There is no merit in the contention that the FtJ erred in not following the respondent's 'Process Instruction', for the reasons advanced on behalf of the appellant, as set out at [34] above.
60. There is some confusion and/or disagreement between the parties about the respondent's position before the FtJ in relation to exclusion. The FtJ's decision does not make the matter completely clear. In the decision letter of 18 November 2014 at [58] the respondent said that even if it was accepted that the appellant had been involved as a Black Tiger, he had committed a crime against peace, a war crime or a crime against humanity and would therefore fall for exclusion under Article 1F(a) of the Refugee Convention. Paragraph [59] sets out the terms of Article 1F(a).
61. Following a hearing on 26 February 2015 before a Designated Judge of the FtT, directions were issued which included a direction that the respondent "do forthwith consider the issue of a supplemental refusal letter dealing with issues of exclusion from the Refugee Convention in the event that the Panel find the appellant to be a member of the Black Tigers". After an adjourned hearing on 22 June 2015 further directions were issued which reiterated the previous directions.
62. There then followed the supplementary decision letter dated 7 September 2015, which itself referred to the earlier directions. That letter set out the terms of Article 1F and referred to Home Office guidance contained in asylum instructions, providing a web-link. At [4] of that later decision letter (there are two paragraphs numbered 4), it is stated that the Secretary of State has not accepted the appellant's claim in respect of his involvement with the Black Tigers, going on to state that:

"Consequently [Mr T] should not have been excluded from the Refugee Convention under Article 1F(a) of the Refugee Convention and the findings that he is in paragraphs 58 and 59 of the deport decision dated 18 November 2014 are withdrawn."
63. At [5] it states that the Secretary of State needed to give full consideration to the specific reasons for the exclusion "as stated from part 3 onwards of the guidance document referred to above". At [7] it states as follows:

"In the event at appeal the Immigration Judge determines [Mr T] has carried out activities that breach Article 1F of the Refugee Convention consideration would need to be given at the hearing as to whether [Mr T] should be excluded from the Refugee Convention on those grounds."

64. The FtJ referred at [10] to the supplementary decision letter, saying that in that letter the respondent “explicitly withdrew” the contention that the appellant was excluded from protection. At [15] he referred to the submissions made to him on behalf of the respondent to the effect that the Presenting Officer referred to the respondent’s supplementary letter

“In which an unequivocal concession was made that, as the respondent had not accepted the appellant’s claims made in respect of his role as a Black Tiger, he should not have been excluded from the Refugee Convention under Article 1F(a)”.

65. It does seem to me that those references to the supplementary decision letter do not accurately portray its contents, although the inaccuracy is in some senses not significant. It appears that the Presenting Officer suggested to the FtJ that the issue of exclusion was not relied on by the respondent (see [15]). That is not exactly what the supplementary decision letter said. Its import is that it was not accepted that the appellant was a member of the Black Tigers and on that basis exclusion did not apply. However, the letter continued that if the FtJ thought that he had carried out activities in breach of Article 1F, then consideration would have to be given to exclusion.

66. That is in a way circular, as Mr Mackenzie suggested. The real point however, it seems to me, is that it does not appear that any case was advanced on behalf of the respondent before the FtJ on exclusion, even on an alternative basis (if the appellant’s account was found to be true).

67. Furthermore, despite having been given repeated opportunities to set out the respondent’s case on exclusion in the event that the appellant’s account was accepted, the respondent did not take up that opportunity. As Mr Mackenzie rightly pointed out, the ICC Statute is the starting point for considering whether a person is excluded from asylum by virtue of Article 1F(a), but the respondent has done little if anything to articulate her case on this issue. In *KJ* the court expressed the view, albeit *obiter*, that acts of a military nature committed by an independence movement such as the LTTE against the military forces of the government are not themselves acts contrary to the purposes and principles of the UN (a reference to Article 1F(c)).

68. I should also point out that the appellant’s representatives wrote to the respondent on 18 June 2015 asking for the respondent’s position on exclusion to be confirmed, should the appellant’s account of being a Black Tiger be accepted.

69. The appellant’s skeleton argument that was before the FtT at [4]-[6] referred to the issue of exclusion, the history of the appeal on that issue, and suggested that the respondent had withdrawn the allegation that the appellant was excluded and had not provided any reasons for concluding that any of his actions would fall within the exclusion clauses. It is stated at [6] of the skeleton argument that in the circumstances no further

submissions in writing were to be made on the point, and that no evidence would be called on the issue and that if the respondent now sought to rely on the exclusion clauses the FtT would be invited to prohibit her from doing so or to grant an adjournment for the matter to be explored more fully. I refer to those aspects of the appellant's skeleton argument because they dovetail with what appears to have happened at the hearing before the FtT, that is, that exclusion was not actively argued on behalf of the respondent, even on an alternative basis.

70. Accordingly, I am not satisfied that there is any error of law on the part of the Ftj in this respect.
71. The last issue raised in the grounds concerns the Ftj's conclusion that the appellant had rebutted the presumption that he constitutes a danger to the community of the United Kingdom. In relation to the contention that the Ftj had failed to take into account the appellant's claimed activities with the Black Tigers, it is not apparent that this was an argument advanced before the First-tier judge. If, as suggested in the respondent's grounds, it was irrational or a misdirection for the Ftj to fail to consider that claimed history, one would have thought that what is said to be such a compelling argument would have been advanced at the hearing before the Ftj. In any event, it is to be borne in mind that the appellant's activities on behalf of the LTTE occurred in specific circumstances relating to a particular political objective prior to his arrival in the UK, about 17 years ago.
72. The grounds at [10] refer to an OASys assessment dated 29 June 2002. As already indicated, that is an error; the OASys assessment is dated 2012. It was clearly relevant to the Ftj's assessment of the risk that the appellant posed.
73. I am satisfied that the Ftj was entitled to conclude that the appellant did not constitute a danger to the community, having regard to the OASys assessment of the risk of re-offending being low and the fact that the appellant had not committed further offences since his release from prison in March 2012. It could also be added that the probation officer's assessment dated 20 September 2013 at page 410 of the appellant's bundle before the Ftj, stated that since his release from prison in March 2012 he had been fully compliant with his licence conditions and his compliance in the 17 months that she had supervised him had been exemplary. The fact that the appellant did not give evidence and was thus not cross-examined, for example on his attitude to his offending, could not be said to involve any error of law on the part of the Ftj in the light of the information that was before him on the issue of the risk of reoffending.
74. In conclusion therefore, having considered the respondent's arguments in detail with reference to the material that was before the Ftj, I am not satisfied that there is any error of law in the Ftj's decision in any respect.

Decision

75. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision is to stand in all respects.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek

15/04/16