**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: AA/11895/2015
PA/10965/2017

**THE IMMIGRATION ACTS**

**Heard at Field House** **Decision & Reasons Promulgated**

**On 6th November 2018** **On 29th November 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**SK (FIRST APPELLANT)**
**KG (SECOND APPELLANT)**
**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Mr R Toal instructed by Birnberg Peirce & Partners
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The first Appellant (SK) and the second Appellant (KG) are married and both are nationals of Sri Lanka. The first Appellant appealed to the First-tier Tribunal against a decision of the Secretary of State dated 13th March 2015 and the second Appellant appealed to the First-tier Tribunal against a decision of the Secretary of State of 10th October 2017. Both appeals were heard together in the First-tier Tribunal on 12th January 2018. In a decision promulgated on 17th April 2018 First-tier Tribunal Judge I A Ross

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dismissed the two appeals. The Appellants now appeal to this Tribunal with permission granted by Upper Tribunal Judge McWilliam on 18th September 2018.

2. The background to these appeals is that the Appellants both claim to have a history of involvement with the LTTE in Sri Lanka. The second Appellant claims that he was arrested, detained and tortured and that he left Sri Lanka on 23rd November 2010 and, after travelling through a number of countries, he arrived in the UK on 12th January 2010. He applied for asylum and his appeal against the refusal of that application was dismissed on 2nd June 2010. He lodged further submissions which were rejected and, following judicial review, his further submissions were reconsidered. The first Appellant, who also claims to have had a background of involvement with the LTTE, claims that she was arrested and detained in November 2009 and again in 2013. She claims that she was released from detention and left Sri Lanka along with her children, arriving in the UK on 3rd January 2014 when she claimed asylum.

3. The First-tier Tribunal Judge dismissed both appeals in the determination promulgated on 17th April 2018. He found the Appellants' claims were not credible and that their *sur place* activities did not put them at risk upon return to Sri Lanka.

4. At the hearing before me Mr Toal submitted that there were errors in relation to the judge's general approach which led to the errors set out in the Grounds of Appeal. The thrust of his submissions were that the judge erred at paragraph 31 of the decision where he found that the first Appellant's claim to have been arrested, detained and tortured on two occasions in 2009 and 2013 "is dependent substantially on the credibility of her husband's claim".

5. The First-tier Tribunal Judge found that the findings made by Immigration Judge Rimington in 2010 in the second Appellant's previous appeal were central to credibility. At paragraph 33 of the decision the judge had regard to the guidance in **Devaseelan [2002] UKIAT 00702** and concluded at paragraph 34 that, based on Judge Rimingtons' findings, his starting point was that the Appellant's husband was not an LTTE member. The judge concluded that the evidence put forward by the second Appellant now had to be treated with the greatest circumspection. In Mr Toal's contention this reflected an error of approach which undermined the rest of the decision.

6. Mr Toal made a number of submissions in relation to specific errors, in particular he submitted that the judge erred in his approach to the medical report from Dr Martin in relation to the first Appellant; that the judge erred in the assessment of the evidence of Francis Harrison, founder of the International Truth and Justice Project – Sri Lanka; that the judge ignored and failed to deal with a number of pieces of evidence including letters and statements in bundle A; that the judge erred in his approach to the medical evidence in relation to the second Appellant; and that the judge

erred in his assessment of the *sur place* claim contrary to the decision in **UB (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 85**.

7. Dealing with the medical evidence, Mr Toal highlighted that the judge made a mistake of fact at paragraph 49 of the decision. At paragraphs 48 and 49 the judge dealt with Dr Martin's report on the first Appellant. Dr Martin found scarring which in his opinion is consistent/highly consistent with injuries caused by a third party, and, as acknowledged by Judge Ross, the scars in Dr Martin's opinion "are highly consistent with her account of torture and assault". The judge assessed the report of Dr Martin along with the psychiatric report from Dr Dhumad at paragraph 49 where he said that the medical reports could not be considered in isolation but had to be considered along with the evidence given in the 2010 appeal;

> "… in particular that both the Appellant and her husband were part of a group of Tamils who were shelled by the army and that their family members were killed. Dr Martin does not seem to have been made aware that the Appellant had suffered deliberate injuries as a result of shelling and not as a result of being detained and tortured".

8. The judge also made reference to the first Appellant being caught up in a shelling attack at paragraph 52 in his analysis of the evidence of Francis Harrison where he said "Mrs Harrison was also unaware of the Appellant being caught up in a shelling attack and injured there". It is apparent that the weight attached by the judge to the medical evidence and the evidence of Francis Harrison in relation to the first Appellant was significantly reduced by his finding that both were undermined by the fact that they were unaware that the first Appellant had been injured in a shelling attack.

9. However, as accepted by Mr Kandola, this is a mistake of fact. In Judge Rimington's decision promulgated on 7th June 2010 it is recorded at paragraph 18 that the second Appellant said that he and his father and two brothers-in-law were caught in heavy shelling on 2nd April 2009, that some people were killed and that he was injured. Mr Kandola accepted that there did not appear to be any reference in the papers to the first Appellant having been involved in that incident. This appears to be consistent with the Appellant's account as put to Judge Ross where it stated at paragraph 6 that the Appellant did not see her husband after he failed to return home in 2006 and that, when the war ended in 2009, she discovered that her father, brother and brother-in-law had been killed.

10. I accept that this is a mistake of fact which had a material impact on the judge's assessment of the evidence as a whole. It is this mistake of fact which led the judge to attach little weight to the medical evidence as and to that of Ms Harrison. Mr Kandola accepted that those findings were unsafe in light of the mistake. He also accepted that those findings were inextricably linked to the decision in relation to the second Appellant given

that the first Appellant's account could lend credence to that of the second Appellant and vice versa.

11. I agree with this assessment. It is clear that this mistake on its own, regardless of the other errors alleged by the Appellant, is capable of rendering the entirety of the findings unsafe. The credibility of both Appellants is a central aspect of this decision and this mistake and the subsequent treatment of the medical evidence in particular renders the findings unsafe. For this reason I set aside the decision of the First-tier Tribunal Judge.

12. Mr Kandola contended that in light of these errors that credibility is still at large. He contended that this was particularly the case in light of the previous determination of 2010 and the potential conflicts within that decision and the treatment of that decision under the guidelines in **Devaseelan**.

13. Both representatives agreed that it was appropriate in these circumstances to remit the appeal to the First-tier Tribunal to be reheard.

14. In light of the Presidential Practice Statements the nature or extent of the judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the case to the First-tier Tribunal.

## Notice of Decision

The decision of the First-tier Tribunal Judge contains a material error and I set it aside.

I remit the appeal to the First-tier Tribunal for the decision to be made afresh.

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

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

Signed Date: 24th November 2018

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**
**FEE AWARD**

As the appeal is being remitted to the First-tier Tribunal the issue of a fee award is to be considered by the First-tier Tribunal Judge remaking the decision.

Signed Date: 24th November 2018

Deputy Upper Tribunal Judge Grimes