Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12614/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th March 2020	**On 28th April 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR K W
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Asanovic instructed by MTC & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

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 his 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.

DECISION AND REASONS

1. The appellant appeals against the decision of the Secretary of State dated 23rd October 2018 to refuse his claim for asylum, humanitarian protection and claim under the European Convention on Human Rights, specifically Articles 3 and 8. Ms Asanovic made clear the appellant was not making a 'separate' Article 3 claim but one that was part of the overall asylum claim. The appellant is a national of Sri Lanka, Sinhalese, and was born on 24th November 1985.

2. The appellant's first appeal hearing took place in 2018 and a decision promulgated on 31st December 2018 by First-tier Tribunal Judge L K Gibbs who dismissed the appellant's appeal but found him credible in respect of his account of past persecution and torture by the Sri Lankan authorities. A material error of law was found in that decision. The Upper Tribunal directed a rehearing before a different judge with the positive credibility finding in respect of his past persecution preserved. The matter was reheard by Designated Immigration Judge (DIJ) Manuell who promulgated a further decision on 26th July 2019 again dismissing the appellant's appeal on protection and human rights grounds. On 23rd December 2019 an error of law was found in the decision of DIJ Manuell and that decision was set aside. No direction was given as to the previously preserved finding and this was maintained. The error of law was found on the basis that the judge had failed to follow the country guidance in **GJ and others (post civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)**.

3. The finding of First-tier Tribunal Judge Gibbs finding which was preserved states as follows:

> *"I am therefore satisfied that although the appellant is Sinhalese, because of his friendship with Prabu, a Tamil who was suspected of LTTE, he was detained and tortured by the Sri Lankan authorities. I find that the appellant was released because a bribe was paid and thereafter left Sri Lanka. I find that he has limited contact with his friends and family in Sri Lanka but genuinely believes that the Sri Lankan authorities remain interested in him."*

4. Judge Mailer setting aside the decision of Judge Gibbs stated as follows:

> *"28. In that respect, it was incumbent upon the Judge to consider whether the appellant, having previously been released on the payment of a bribe, would be recorded as an escapee or an absconder resulting in absconder action being commenced against him – paragraph [146] and paragraph [13] of Appendix J, of GJ.*
>
> *29. Nor was there any consideration given as to whether the appellant would appear on a 'stop' or 'watch list' following his escape from detention. There was evidence which post dated GJ produced by Freedom From Torture dated 2017 regarding ongoing detention of those with imputed and low-level involvement with the LTTE after 2015. The question therefore*

was whether there has been a significant change in the focus of the authorities as referred to by the Judge at [36].

30. Moreover, she did not consider that there remains a computerised, intelligence led watch list. There was no evidence that the mere passage of time would lead to the removal of a person in the position of the appellant from these computerised records."

5. Judge Mailer observed that GJ had not been adequately followed and issues raised in the appeal had not been addressed.

Immigration History

6. The appellant entered the United Kingdom travelling on his own passport on 14th September 2009 with a Tier 4 (General) Student visa endorsed. He had leave to remain until 16th November 2011. On 15th November 2011 the appellant sought to extend his Tier 4 (General) Student leave but was refused on 3rd January 2012 and on 12th January 2012 applied for further leave to remain on Article 8 grounds but that was refused on 17th January 2013. He nevertheless remained in the United Kingdom without leave. He claimed asylum on 24th October 2017.

Documentation

7. The evidence before me comprised a Home Office bundle which included the screening interview dated 1st December 2017 and an asylum interview dated 14th May 2018. The appellant's bundle was that supplied to the First-tier Tribunal split into nineteen sections and included subjective and background material including the appellant's witness statement and medical evidence including a psychiatric report written by Dr Chiedu Obuaya, Consultant Psychiatrist, dated 20th November 2018. This latter report was included in the appellant's initial bundle. For the hearing before me Ms Asanovic helpfully supplied a skeleton argument together with an appellant's supplementary bundle in fifteen sections relating to background country information.

8. At the hearing Mr Tufan referred to a "Report of a Home Office Fact-Finding Mission to Sri Lanka" conducted between 28th September and 5 October 2019 and published on 20th January 2020.

The appellant's case

9. The appellant did not give evidence at the hearing before me but relied on his witness statement which relayed that he was a Sinhalese Buddhist and worked as a store assistant in Sri Lanka and lived at home with his parents. In 2002 he met someone by the name of Prabu Selvaraj, the same age as him, and they became very good friends albeit he was Tamil. He did not suspect Prabu had political involvement because they were young at the time but the appellant was later detained because of his association with him and when he was taken from his home he found out

Prabu was an LTTE member. The last time he saw Prabu was around May 2009. In August 2009 the appellant's home was visited and he was removed for questioning. He stated he was accused of being a person who had helped the LTTE and he was beaten and tortured. He was shown a photograph of his friend Prabu in LTTE uniform which was when he realised that he was connected to the LTTE and that he must have been in custody.

10. The appellant disclosed he was forced to drink water from a lavatory, stripped naked and hung upside down and beaten. He was questioned two to three times a day and they took his fingerprints on a blank sheet of paper and another on a piece of paper which had writing in Sinhalese on it, but he did not read the contents of the document because he was in too much pain. After about a week he was removed in a vehicle and taken to a place where he was dropped off with his face covered. He was released with the money from his uncle who is wealthy and the influence of the monk and they were able to bribe the officials to allow him to escape from detention. The appellant stated that when he applied for his visa he did not know Prabu was a member of the LTTE but the monk told him that obtaining a visa would be a safe option and that he should leave the country. The monk told him he would not have any problems getting through the airport if he went to a specific person at the counter and he was told which person to ask for at the airport.

11. When he came to the UK he thought it would be temporary and that he would be able to return. He was not aware that he could explain his problems back home and get leave on that basis and when his visa was not granted he thought he would wait and return to Sri Lanka when things got better. He was scared to approach the Home Office because he thought he might be sent back.

12. In 2017 he was thinking about returning to Sri Lanka and had booked a ticket, which was evidenced, and decided he would go back but he called his friend who told him that his mother had said he should not come back because he was not safe and there had been three visits to his parents' home in 2016, the last being in December 2016 and that was when he approached his current solicitor who had advised him about claiming asylum. He had very little knowledge of the asylum process and it was only when he got legal advice in 2017 that he was told he should claim asylum at the Home Office.

13. The appellant claims that he will be arrested at the airport and physically, mentally and sexually abused by the police or the CID owing to his alleged association with the LTTE should he return.

The Secretary of State's refusal

14. The Secretary of State refused his claim on protection and Article 8 family/private life grounds and made a series of credibility points against the appellant which included that it was not credible that neither he nor

his uncle nor the Buddhist monk would seek immediate medical attention for his injuries, that he had assumed that he had escaped from detention because of the influence of the Buddhist monk having arranged for a bribe to facilitate his escape, that it was implausible that the specific person he was said to contact at the airport, he had not been able to corroborate as having significant influence, was able to breach immigration controls to allow him to move freely through the airport because in view of his physical appearance and injuries he would have been stopped and questioned.

15. Further, the booking of the flight ticket on 22nd March 2017 was indication of his intention to return to Sri Lanka showing that there was no risk and that by his own admission he was not charged with any offence whilst in Sri Lanka, AIR question 61.

16. Furthermore, he left Sri Lanka using his own passport and moved through the airport in Sri Lanka without encountering any difficulties.

17. The Secretary of State at paragraph 59 of the refusal decision cited its Country Policy and Information Note (CPIN) on Sri Lanka June 2017 at 2.3.35:

> *"Those on the 'watch list' are persons that are of interest to the authorities for minor offences or are former LTTE cadres; those on the 'stop list' are persons who have committed serious crime, have a warrant outstanding, or perceived to be connected to terrorism".*

18. It was concluded that based on his exit from Sri Lanka using his own passport and visa it was indicative of there being no motive or interest from the Sri Lankan authorities in him.

19. In relation to Section 8 he had only made the asylum claim after two previous failed applications for leave to remain and a failed Article 8 application despite having the assistance of a visa consultant in the UK. His credibility was damaged as a result and his claim rejected.

20. The decision cited extensively from **GJ** but concluded that the appellant did not fall into the risk category as identified in that country guidance. The appellant did not play a significant role in relation to post-conflict Tamil separatism. The LTTE in Sri Lanka had not held any military or political authority since the end of the civil war in 2009 and in general a person who evidenced past membership in connection with the LTTE would not in itself warrant international protection unless they are perceived to have a significant role. The material facts of his claim were rejected in their entirety and he was not at risk on return to Sri Lanka.

21. Additionally, it was not accepted that the authorities would still be looking for him because the new government of Sri Lanka no longer perceived former LTTE members to be a threat not least because the LTTE in Sri Lanka was considered a spent force and there were no terrorist incidents

since the end of the civil war in May 2009. In particular, the Secretary of State cited the Country Policy and Information Note Sri Lanka: Tamil separatism, version 5, June 2017 at 2.3.15 stating:

> *"Being a non-Tamil perceived as having support for or involvement with Tamil separatist groups does not itself put a person more or less at risk or give rise to a well-founded fear of persecution or serious harm in Sri Lanka (as demonstrated in para 98 and Appendix F – para 22(vi) of **GJ and Others**)".*

Submissions

22. At the hearing before me Mr Tufan submitted that it was not clear which category of risk the appellant fell into. He was taken to the police station and mistreated and detained and tortured but the word 'arrest' was not used in the preserved findings of Judge Gibbs. At paragraph 61 of his asylum interview the appellant confirmed there were no charges against him and therefore he did not fall into the risk category of where there was a court order or an arrest warrant. It was perplexing that no attempt had been made to clear the appellant's name bearing in mind he was still in contact with his family and had a wealthy uncle who could instruct lawyers. He had engaged in no sur place activity and there was a considerable Section 8 point to take against him bearing in mind he had failed to claim asylum closer to the time the incidents had occurred.

23. Mr Tufan relied heavily on the Fact-Finding Mission Report stating that Sinhalese were not normally of interest. The report at page 14 stated that those who were prominent in their activism would be of interest and at 3.2.5 that there were changing attitudes within Sri Lanka. The appellant was not a prominent activist and at the time thousands of Tamils were arrested albeit temporarily. There was no suggestion there were outstanding criminal offences and he did not have a high profile. There was no suggestion that a summons had been given to the family albeit the police had gone to his home. Mr Tufan underlined the point that there were no criminal offences listed against the appellant and submitted that the appellant was Sinhalese, had not engaged in any sur place activity and had made no efforts to 'clear his name' since he had been in the UK despite having wealthy relatives in Sri Lanka who could help to access legal advice. Sinhalese were not normally of interest to the authorities. There would be no interest in him on return and he would not be stopped.

24. Mr Tufan relied on **KH (Afghanistan) [2009] EWCA Civ 1354**, particularly paragraph 33 which confirmed that the presence of mental illness amongst failed asylum seekers was not exceptional.

25. Ms Asanovic submitted that the Tribunal should not rely on the Fact-Finding Report for two reasons. First, the report was based on a visit last year at a time when a different government was in place, and the previous

government which was recognised as having made some progress and efforts at reconciliation had since been replaced with that of Gotabaya Rajapaksa in November 2019. Since November 2019 a Rajapaksa government had taken steps such as the increase in the use of surveillance. Secondly, Ms Asanovic criticised the methodology of the compilation of the Fact-Finding Report as it did not identify the sources used and did not consider the fact that some of the sources did not wish to be identified. Many remained anonymous. Alternatively, the sources had a clear stake in painting a more positive picture of the situation in Sri Lanka, for example the Commissioner General of Rehabilitation at section 3.3 and the CID. The anonymity claims masked the identity and thus the integrity of the sources and Ms Asanovic was unclear that the sources such as the IOM had a mandate to monitor enforced return (although she clarified at the end of the hearing that there was some limited role). The history of the regime was one of paranoia and the sources gave contradictory information and she invited me to "read between the lines".

26. Ms Asanovic cited her skeleton argument which in turn referred to recent country background material highlighting increased tension and surveillance by security services and human rights breaches since the terrorist attack and particularly in the last part of 2019. She referred to the abduction of an employee of an embassy which was a particularly serious matter which illustrated the current attitude of the authorities.

27. She emphasised that **GJ** made no distinction between an arrest warrant and no arrest warrant and the reference was to 'unlawful detention', that which had occurred to the appellant. Criticism of the legislation was precise because it allowed detention without charge and the distinction being drawn by the Secretary of State in relation to arrest was artificial. It was unknown if there was a summons because the last direct contact the appellant had with his family was in 2017. Indeed, at paragraph 7.2.1 of the Fact-Finding Mission it was confirmed that arrest warrants were not given to families. The asylum interview showed that at question 62 the appellant did state that he signed some type of form and he did not know what it was. Furthermore, he left on a payment of bribe and that was part of a preserved finding.

28. Ms Asanovic submitted that it was very difficult to come to a different conclusion that if a person was released on payment of bribe they would be subject to an arrest warrant because it was a criminal offence. The appellant's passport had expired and he would have to go to the authorities to renew it. If sophisticated surveillance and stop and watch lists were extant there was no reason to assume there would be no knowledge of someone's background and he was not expected to lie.

29. The appellant would be perceived as a threat to the Sri Lankan state as he was arrested post-cessation of hostilities and he fell into the subcategories of the headnote of **GJ**.

Analysis and Discussion

30. I reiterate the critical part of the findings of the First-tier Tribunal Judge which have been preserved as follows:

> *"I am therefore satisfied that although the appellant is Sinhalese, because of his friendship with Prabu, a Tamil who was suspected of LTTE, (sic) he was detained and tortured by the Sri Lankan authorities. I find that the appellant was released because a bribe was paid and thereafter left Sri Lanka. I find that he has limited contact with his friends and family in Sri Lanka but genuinely believes that the Sri Lankan authorities remain interested in him".*

31. It is correct to state that the bulk of the criticism made of the appellant's account by the Secretary of State in the refusal decision related to implausibility rather than tangible discrepancies in the appellant's evidence and indeed his account remained consistent throughout. He provided a detailed description of his torture at the hands of the Sri Lankan authorities and also presented supporting medical evidence from a range of sources including a report from a community psychiatric nurse dated 13th March and from Dr Obuaya, the Consultant Psychiatrist. The expert psychiatric report was not disputed and the report did credibly support his account of torture and explain the appellant's delay in seeking treatment for his mental health problem. As the Consultant Psychiatric recorded in his report at paragraph 35:

> *"35. Mr W is known to Barnet, Enfield & Haringey NHS Mental Health Trust, his local secondary care mental health provider, where he has been diagnosed with a delayed onset post traumatic stress earlier this year. He has been treated with the antidepressant drugs fluoxetine and sertraline, as well as the hypnotic agent zopiclone.*
>
> *36. It is documented that Mr W described flashbacks to his traumatic detention in 2009, having 'brushed aside' his symptoms between then and 2017, when he saw his GP. He also had nightmares and complained of a low mood, poor concentration, insomnia and hypervigilance. He was also anhedonic.*
>
> *37. I base my opinion on my objective clinical observations of Mr W's behaviour, speech and demeanour and not merely on the symptoms he described to me.*
>
> *38. The onset of depressive illnesses is often multifactorial and Mr W's symptoms had an onset in 2017. It is not possible to state which single factor(s) in isolation could account for the onset of his depressive symptoms as described above, though his traumatic detention in Sri Lanka, coupled with a fear of return to Sri Lanka could account for this".*

32. I acknowledge that **KH** identifies that failed asylum seekers frequently experience mental health issues but it is a factor which I regard as

supporting rather than detracting from the appellant's account. The report also explains that medically there can be a delay in the onset of mental health issues owing to previous trauma.

33. The psychiatric report also lends credence to the explanation by the appellant of his delay in claiming asylum and when considering whether the delay should detract from his credibility. Indeed, **JT Cameroon v SSHD** [2008] EWCA Civ 878 confirms that it is the duty of the judicial decision maker in every instance to reach his own conclusion upon the credibility of the claimant. Section 8 of the Asylum and Immigration Treatment of Claimants) Act 2004 should be taken only as part of a global assessment of credibility and is not the starting point. The appellant advanced that he feared approaching the Home Office in part thinking that his problems might be temporary and realising, after he had booked his ticket, that the interest in him from the authorities had not abated. He himself produced his return ticket which he did not have to do. His mental health difficulties as evidenced may have contributed to his fear and thus the delay. I also accept that he may be afraid to contact his family in Sri Lanka should this attract them unwanted attention and that he has little contact with them. The information regarding the 'visit' by the authorities emanated from his friend. In the circumstances it is possible that he hoped the situation in Sri Lanka would improve over time. The appellant has not sought in any way to 'elevate' his claim by sur place activity. It therefore find that the delay in claiming asylum should not be held against him and I further accept his account of his contact with his friend.

34. Credibility findings have been made and preserved in relation to the actual detention and torture but having accepted that part of the claim there is no reason to reject the appellant's claims that the Sri Lankan authorities have visited his family home in 2016 and their interest in him has continued.

35. I also accept that there is a fine line between detention and arrest and that the distinction may be artificial. The question is the perception of the authorities. Although the appellant's response to Q61 in his AIR indicated that he had not been charged with an any offence, his response to the following question, Q62, was that he had signed a blank piece of paper the contents of which he was oblivious because he was in too much pain. Bearing in mind his claim of torture has been accepted, he may well have been in pain, and that he may have been shown a charge sheet or signed a confession, unbeknown to him, is logically possible.

36. His claim of bribery in relation to his escape was accepted and the appellant gave responses over a series of questions that he was released because he thought a bribe had been paid and this was in response to the questions at AIR Q47 and AIR Q55 – "Do you know for certain that you were released because of a bribe"? "Yes, that's how the Buddhist monk told me but I would not have any problems now". Indeed, the appellant was pressed on this particular question. The appellant maintained that the same Buddhist monk assisted him to navigate the airport even on his

own passport. He recounted in his asylum interview at Q66 that he was told to go to 'specific people on the counter' at the airport. Given the appellant has to be treated as a vulnerable witness and bearing in mind the psychiatric report, it is unsurprising that he has forgotten the name of the individual at the airport who helped him, and it is not inconceivable that having been treated for six days by the monks that he would not necessarily have to seek formal medical attention or would be identified at the airport in Sri Lanka because of his injuries. Indeed, his case is that he was ushered through the airport with the assistance of the Buddhist monk who is likely to have smoothed his path in that respect.

37. The real question is what interest the Sri Lankan authorities would have in the appellant on his return.

38. **GJ** is country guidance and sets out the risk categories in relation to returns to Sri Lanka. At the headnote **GJ** sets out the risk categories as follows:

> "*(1) This determination replaces all existing country guidance on Sri Lanka.*
>
> *(2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.*
>
> *(3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.*
>
> *(4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.*
>
> *(5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.*
>
> *(6) There are no detention facilities at the airport. Only those whose names appear on a "stop" list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.*

(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:

(a) 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.

(b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.

(c) 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.

(d) 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.

(8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.

(9) The authorities maintain a computerised intelligence-led "watch" list. A person whose name appears on a "watch" list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that

monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.

(10) Consideration must always be given to whether, in the light of an individual's activities and responsibilities during the civil war, the exclusion clauses are engaged (Article 1F of the Refugee Convention and Article 12(2) of the Qualification Directive). Regard should be had to the categories for exclusion set out in the "Eligibility Guidelines For Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", published by UNHCR on 21 December 2012".

39. That the appellant is of Sinhalese ethnicity does not mean he will be exempt from the attention of the Sri Lankan authorities. It may not be a specific risk factor to be Sinhalese and associated with the LTTE over and above those risks normally associated with the LTTE, but because an appellant is Sinhalese does not mean he would be exempt from interest. GJ refers to '*individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state'.*

40. Mr Tufan placed heavy reliance on the Fact-Finding report but as Ms Asanovic pointed out this was conducted at a time under a different regime and subsequently Gotabaya Rajapaksa, the brother of Mahinda Rajapaksa the former president who led Sri Lanka in its defeat of the Tamil forces in 2009, has taken over and appointed his brother Mahinda as prime minister. The current situation in Sri Lanka shows increased suspicion and activity of security activity and heightened security. The new president Rajapaksa was described as committed to reinforcing the intelligence service and increasing surveillance. Human Rights Watch reported on 16th February 2020 that security forces and intelligence agencies have intensified surveillance and there have been threats against families of victims of enforced disappearance and activists supporting them since Mr Rajapaksa became president in November 2019.

41. Even prior to 2019, there is evidence that tensions had been increasing. At the conclusion of his official visit on 14th July 2017, the UN Special Rapporteur on human rights and counter-terrorism stated that "any person suspected of association, however indirect with the LTTE remains at immediate risk of detention and torture".

42. As pointed out in the Freedom for Torture Report dated 26th February 2020, Sri Lanka under Gotabaya Rajapaksa has withdrawn from the Human Rights Council resolution which showed commitment to reconciliation, accountability and human rights. The Human Rights Council in a report entitled "Promoting reconciliation, accountability and

human rights in Sri Lanka" a report of the UNHCR dated 18th February 2020, the report at paragraph 34 states that:

> *"Very little action has been taken to remove individuals responsible for past violations, to dismantle structures and practices that have facilitated torture, enforced disappearances and extrajudicial killings, and to prevent their recurrence. The High Commissioner is deeply concerned about the appointment of several military officers to senior command positions, both before and after the presidential elections, despite the serious allegations that troops under their command committed gross violations of international human rights and humanitarian law during the war, as documented by the United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka and the OHCHR Investigation on Sri Lanka".*

43. **GJ** at paragraph 262 specifically states that "release through payment of a bribe was extremely common" and that "release did not necessarily indicate a lack of further adverse interest". It is a preserved finding that the appellant was released by payment of a bribe. In the context of increasing tensions, even within the framework of **GJ,** it might be inherently likely that the authorities would retain an interest in the appellant and do so by issuing an arrest warrant. **RS (Sri Lanka) [2019] EWCA Civ 1796** held

> *"25. I have no reason to doubt that the sequence of events from escape to arrest warrant to stop list was not specifically articulated before the FTT judge. Further, I have already explained that the judge did not have the Country of Origin Information Report because of a failure by the Secretary of State to draw it to the court's attention. It also seems likely that the passages from GJ on which **RS** relies were not specifically brought to the judge's attention either. Notwithstanding these points, I consider that the FTT judge made an error of law. In looking for positive reasons to find that an arrest warrant had been issued, the judge has, in my judgment, completely overlooked the inherent probabilities of the case. **RS** had been arrested after the end of the war (although I would accept only shortly after) and remained of sufficient interest to the authorities to be detained for some 18 months thereafter during which time he was tortured. This period extended up to and beyond the commencement of the release of LTTE detainees. He had not been released but had escaped from custody with the help of a visiting contractor. **It seems to me, based on those facts, to be inherently likely that the authorities would seek to recapture him and do so by issuing an arrest warrant"**.*

44. I accept that there are distinctions between the facts in this case and that of **RS** but it is inherently possible that this appellant is on a watch list and may be at risk not necessarily at the airport but once he returns home. He

states that the Sri Lankan authorities have visited his family home, which I accept, and that it has been accepted that he was released on a bribe which as Ms Asanovic pointed out is an offence. As set out in **GJ** the electronic database was available at the airport in Sri Lanka and if a person is on a watch list on the electronic database they will be allowed to proceed but the authorities will be notified.

45. The word significant in relation to LTTE activism has not necessarily been defined but I note at 4.2.1 of the Fact-Finding Report that it states

"if returning failed asylum seekers were found to have links to the LTTE they would likely face further questioning although it would depend on the case".

46. I was also referred to 4.2.2 of the Fact-Finding Report which stated:

> *"The Attorney General's Department and the Criminal Investigation Department told the FFT that former LTTE cadres would only be of interest if there was a pending criminal case against them and that mere membership of the LTTE would not make someone of interest, this was also confirmed by an NGO".*

47. As Ms Asanovic pointed out the sources for this report, the compilation of which predated the ascension of Rajapaksa, were largely anonymous or stakeholders. Such views given by government associates should according to Ms Asanovic be taken with a "pinch of salt". There is some force in this argument and that the focus of the Fact-Finding Mission was also in particular the Transnational Government of Tamil Eelam and the government's attitude to that organisation.

48. Indeed, as the Fact-Finding Mission stated on page 6 "all sources and information provided needs to be critically assessed and considered against other publicly available material". That other publicly available material would indeed include other country material provided by the appellant and the extant country guidance. As stated in the methodology section of the FFM "a number of sources requested varying degrees of anonymity to protect their professional privacy and/or to protect their safety".

49. As stated in the Executive Summary of the Fact-Finding report, however, "returnees are likely to be questioned by immigration officials especially where they arrive on an emergency travel document". Mr Tufan observed that the appellant would arrive with a passport and therefore would not be of interest but the use of the word 'especially' does not preclude the interrogation or questioning of those returning from abroad and this appellant will return having been out of Sri Lanka for over ten years and in the United Kingdom. It is thus possible that he will be questioned and he would not be expected to lie if he was questioned about any previous detentions in relation to links to the LTTE.

50. At 1.12 and 1.13 of the Fact-Finding report it is recorded that following the bombings of Easter 2019 intimidation and monitoring had increased and that several sources noted that whilst a general feeling of more personal freedom prevailed there remained a fear that things could change at any time as influenced by the government in power and "some people were anxious about a change of power in the (then forthcoming) November 2019 presidential elections". The report also noted, presumably added after the authors' return following the interviews, that the elections in November saw the return of the power of the Rajapaksa family, some of whom had been implicated in alleged war crimes and human rights abuses.

51. In the Fact-Finding report at section 4.1.1 this was said:

> *"Returning failed asylum seekers would likely be questioned at the airport by immigration officials and may be passed to the Criminal Investigation Department (CID) based at the airport. CID would make additional checks with the local police in the area where the person claimed to be from. These checks can take a long time to conduct as there is no central police database. Once released it is not unusual to experience a further check at home although the period of monitoring can vary".*

And at 4.1.4 :

> *"IOM also noted that claiming asylum aboard is not an offence and as such when someone returns to Sri Lanka who has been absent for a number of years or has an expired visa, they would not be questioned on this and there were no media reports of returnees being interrogated on such grounds. IOM have some presence at the airport and are based before immigration control to receive passengers returning on IOM programmes and they stated that in the last couple of years they have not witnessed the intense questioning of the past where returnees may have been asked what they had been doing in the UK. The police would only be interested in an individual if there were outstanding criminal offences".*

52. There are two points to note about this. First, Ms Asanovic maintained that IOM had a very limited mandate in terms of monitoring returnees but secondly, as discussed above, it was the appellant's assertion that he had escaped detention on a bribe which is indeed a criminal offence and as indicated by **RS** it is possible an arrest warrant may be in existence and thus satisfying thus, on the lower standard of proof, placing him at risk.

53. The Fact-Finding report continued at 4.2:

> *"4.2.1 <u>If returned failed asylum seekers were found to have links to the LTTE they would likely face further questioning although it would depend on the case.</u> Representative from UNHCR stated that the level of security screening at the airport has*

decreased since 2015 and that if you are a high profile LTTE cadre you would be subjected to additional questioning, but this would not necessarily mean you would be detained.

4.2.2 The Attorney General's Department and the Criminal Investigation Department told the FFT that former LTTE cadres would only be of interest if there was a pending criminal case against them and that mere membership of the LTTE would not make someone of interest, this was also confirmed by an NGO.

4.2.3 Two sources told the FFT that former LTTE cadres returning to Sri Lanka would be able to undergo rehabilitation if they requested it, although this would not apply if they had crimes outstanding".

54. These sections refer to the possibility of questioning if either links to the LTTE were discerned or there were 'crimes outstanding' and this is information from the Attorney General's Department itself.

55. What has to be considered is that it has been accepted that the appellant has escaped detention, whether formally arrested or not on payment of a bribe which is a criminal offence and possibly recorded, and that it is conceivable that his name would be recorded on a watch list in which case he may well be intercepted not necessarily at the airport but when at home because according to 7.6.1 of the document of the Fact-Finding Mission:

"According to CID a watch list exists and is maintained by the police. Where someone returns to Sri Lanka and is on a watch list they would be arrested if there were outstanding criminal offences against them. SIS have their own watch list and will screen returning passengers against the list, where a person is of interest they would be interviewed and handed to CID if further action was needed".

56. Although it was asserted by the Secretary of State that the appellant had no significant role in the LTTE even the CPIN *acknowledged, as cited above, that those on the 'watch list' 'are persons that are of interest to the authorities for minor offences or are former LTTE cadres'.*

57. It was the appellant's case that his family had been harassed and indeed the Fact-Finding report at page 38 identified that "some family members may be harassed if the police are looking for someone who has fled abroad" and further that arrest receipts are not always issued.

58. I note at page 42 of Fact-Finding report it is stated

"*returning failed asylum seekers will be questioned if they've overstayed their visa. If a person is identified as a failed asylum seeker they will be questioned, then passed to CID"*.

59. Also at page 42, bearing in mind that this appellant will need to supply his out of date passport to the Sri Lankan immigration authorities to issue him with a new passport or obtain an emergency travel document, there is confirmation that "Immigration works closely with SIS and shares information". This clearly relates to departments within Sri Lanka but there is no reason to suppose that the Sri Lankan immigration authorities operating in the United Kingdom would not share information with the Sri Lankan government in a similar way.

60. Annex D notes the meetings with sources and ranges from page 33 to 59. The Annex notes included a question which stated "Is there torture in detention?" and the response was:

> *"In police custody ... They may assault detainees to extract information even if they are innocent ... And police custody torture is not targeted against any particular group – it's random, widespread and across the board. There is a saying 'without assault you won't get the truth'".*

61. I have considered the evidence in the round noting that there were hundreds of pages of evidence and have taken into account the recent country guidance and Fact-Finding Report when finding that the appellant albeit Sinhalese would remain at risk of ill-treatment on return to Sri Lanka. The indications are that the authorities might have retained an interest in the appellant owing to his release on the bribe and may have issued an arrest warrant. His previous detention is a possible factor putting him at risk as being on a watch list and may have increased the likelihood of ill-treatment.

62. In all the circumstances and bearing in mind the preserved findings that were made in respect of this appellant, I conclude, in line with **GJ** and indeed the Fact-Finding report, despite some of its contradictions, that the appellant would indeed be at risk on return to Sri Lanka. I note paragraph 26 of **KK (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 172** not least paragraph 26 which re-states guidance in **R (SG (Iraq) v Secretary of State for the Home Department [2012] EWCA Civ 940** that "decision makers and judges are required to take country guidance determinations into account, and to follow them unless very strong grounds, supported by cogent evidence, are adduced justifying their not doing so".

63. I am not persuaded that the Fact-Finding Mission Report justifies a departure from the country guidance in **GJ**, and indeed sections of the report support reliance on **GJ** and **RS** and support the appellant's claim of risk on return, particularly when read in conjunction with **RT (Zimbabwe)** [2012] UKSC 38 such that the appellant would not be expected to lie as to his previous detention/connection with the LTTE. The appellant's mental health problems may exacerbate any engagement and difficulties with authorities at interview.

64. In view of my findings in relation to the protection claim I find that the appellant would be at risk on return to Sri Lanka and there would be significant obstacles to the appellant's return to the Sri Lanka and therefore would allow the appeal on asylum, and on Article 8 grounds accordingly.

Order

Appeal Allowed

Signed Helen Rimington Date 22nd April 2020

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award.

Signed Helen Rimington Date 22nd April 2020

Upper Tribunal Judge Rimington

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email