Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of KS) v Secretary of State for the Home Department FCJR [2013] UKUT 00341 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Field House
On 19 February 2013

Before

UPPER TRIBUNAL JUDGE LATTER

Between

THE QUEEN
ON THE APPLICATION OF KS
(ANONYMITY ORDER MADE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Ms S Jegarajah, instructed by Birnberg Pierce, Solicitors.
For the Respondent: Ms L Busch, instructed by the Treasury Solicitors.

JUDGMENT

1. This is an application for judicial review of the respondent's decision set out in letters of 6 July 2012 and 18 July 2012 supplemented by a further letter of 18 February 2013

refusing to treat further representations by the applicant as a fresh claim and to maintain the decision to remove him from the United Kingdom.

Background

2. The applicant is a citizen of Sri Lanka, born in July 1983. He claims to have entered the UK on 13 September 2002 using false documents. He first came to the attention of the authorities on 14 March 2010 when he was arrested for road traffic offences. Fingerprint checks revealed that he had previous criminal records from 2006, 2007 and 2008. The police contacted UKBA on 15 March 2010 and he was served with a notice advising him of his liability to detention and removal as an illegal entrant. The applicant said that he intended to claim asylum and formally made a claim on 23 March 2010. His application was refused on 13 May 2010 and he appealed against that decision to the First-tier Tribunal.

3. The Tribunal (Judge Lester) heard his appeal on 29 June 2010. The applicant had based his claim on problems starting in 2000 after his sister had met and became engaged to R, an LTTE supporter. He asked the applicant to help him transport some goods, batteries and foodstuffs at night and the applicant undertook six journeys for him. He did not know at first that R was helping the LTTE but realised that this was the case after about the fourth journey but he continued to help because he was afraid of R. In September 2002 police came to the applicant's home where he and his parents were beaten and he was detained on suspicion of helping the LTTE. The army discovered some guns in their garden which had been buried under a tree by R. The applicant was released after two days and then ran away to another town where he lived with a friend for six or seven months. He was able to travel to Colombo and then on to the UK. He also claimed that after he left Sri Lanka his father was abducted by some men in a white van. He did not know who they were but thought they were a political group.

4. At the hearing the issue was raised about his delay in claiming asylum. He said that he had been advised that he had to register with a solicitor and had relied on advice given to him by friends. The judge said that it appeared that the applicant relied on his friends who must have given him the mistaken impression that if he went to a solicitor and paid him a large sum of money, the solicitor could register and obtain the necessary visa so that he could remain in the UK. The judge accepted that the applicant had no deliberate intention to deceive but that he was ill-advised and naïve. She noted some confusion in his evidence about the dates. She accepted that it was plausible that he carried goods for R although, if he indeed was his sister's fiancé and their parents approved of him, it was strange that the applicant did not know his full name and political affiliation. She also accepted that it was likely that he was questioned and beaten by police but commented that it was significant that the applicant was not taken to a police station, did not have his photograph or fingerprints taken and still had his ID card. It followed that there could be no record of this incident with the police and that the applicant was of no real interest to the authorities. The judge did not consider it plausible that his father had been abducted

by the police or that he had had no contact with his family over the previous six months as he claimed, having been in regular contact with them until then. In summary the judge was not satisfied the applicant was of any interest to the authorities and did not consider that he would be at risk of ill-treatment on return. There was no arrest warrant outstanding against him and he had an ID card. She concluded that he had nothing to fear from the procedure at the airport and his appeal was dismissed.

5. On 4 April 2011 the applicant sent further representations to the respondent claiming that he could not return safely to Sri Lanka because the brother of his cousin, KM, had been granted asylum in the UK due to his association with him (KM). He also said that he would be at risk because he had attended a demonstration outside the Sri Lankan High Commission. The respondent rejected these representations making the point that the applicant had not submitted any evidence in support of his contention that he was related to KM. It was not accepted that he would be in danger of being detained at Colombo Airport on return because he had attended a demonstration outside the High Commission.

6. The applicant was detained in immigration detention on 9 May 2012 and removal directions were set for 31 May 2012. These were cancelled following the filing of an application for judicial review. Meanwhile the Sri Lankan authorities had agreed to issue an emergency travel document on 28 May 2012 and on the following day further representations were sent on the applicant's behalf arising from what was said to have taken place when the applicant was interviewed by officials from the High Commission. It was asserted that he was specifically asked what problems he had in his native country and had truthfully replied that the army had arrested his sister's boyfriend and that he was considered an LTTE supporter. It was therefore argued that the Sri Lankan authorities had been alerted to the fact that the applicant was a person in whom they had an interest. He supplied a copy of his account of the questions asked by the officials from the High Commission (translation at B29). The relevant parts are:

> "5. What are the problems you face in your country?: The army have arrested my sister's boyfriend and it is therefore I cannot go back. They consider me as an LTTE supporter, it is because of this I cannot go back.
>
> 6. They advised me to contact my lawyer…
>
> 8. They asked my Sri Lankan address as well as the UK address.
>
> 9. I affirm that if I go to Sri Lanka my life would be in danger. Also I said that I fear for my life when I go to Sri Lanka."

7. These submissions were rejected the same day. Permission to apply for judicial review was refused on 26 June 2012 on the basis that the claim was academic as the respondent had undertaken to issue a fresh decision letter.

8. In the decision letter of 6 July 2012 the respondent dealt with this issue as follows:

> "6. Careful consideration has been given to your client's claim that in the course of his travel document interview on 22 May 2012 with officials from the Sri Lankan High Commission his responses to certain questions will have alerted officials that he 'is a person in whom they have an interest'.
>
> 7. In support of this claim you have submitted a copy of your client's statement of the questions he claims that he was asked along with a certified translation. There is no other or independent corroboration your client gave these answers to the questions posed.
>
> 8. However, similar questions are asked in each case by the Sri Lankan High Commission to establish applicants' identities before emergency travel documents are issued. This is a well-established process which has been in place for some considerable substantial length of time. There have been no issues arising as a consequence of questions posed by the Sri Lankan officials in any case.
>
> 9. Furthermore the UK Border Agency have a Migration Delivery Officer and staff in Sri Lanka who are responsible for receiving all returnees from the United Kingdom and aiding their transfer through the airport.
>
> 10. Returnees and their families are provided with numbers to call in confidence should any problems be experienced but, to date, there have been no problems experienced by any failed asylum seekers following their enforced removal – even though most will have made similar claims in their individual asylum applications.
>
> 11. Furthermore as noted in paragraphs 15-22 of the decision letter dated 24 May 2012, your client has failed to demonstrate he can be relied upon to provide consistent and credible evidence regarding his alleged activities in Sri Lanka and for the reasons given in that letter it is not considered his vague account of involvement with an LTTE member is one upon which any reliance can be placed. "

9. On 18 July 2012 removal directions were set providing for the applicant's removal to Sri Lanka on 3 August 2012. In a letter of 12 July 2012 the applicant's representatives asserted that there had been a breach of s.13 of the Immigration and Asylum Act 1999 which provides that in providing identification data the respondent must not disclose whether the person concerned has made a claim for asylum. In response by letter of 25 July 2012 the respondent refuted the assertions that there had been a breach of this obligation saying:

> "The Secretary of State in this case has not disclosed information that the person concerned has made a claim for asylum and has not therefore acted in contravention of section 13.

Your client has instructed you he made the alleged admission to the Sri Lankan authorities in relation to his asylum claim.

We are aware however there have been no matters of concern arising from the enforced return of Sri Lankan nationals to Sri Lanka and are content adequate measures are in place to minimise further any possible risk to applicants as a result of enforced removals taking place.

10. The applicant applied for judicial review on 1 August 2012 arguing that in the light of what had happened at the interview with the officials from the High Commission that the respondent's decision refusing to accept that there was fresh evidence amounting to a new claim was unjust and irrational. Permission was refused on the papers but granted following an oral renewal. When granting permission UTJ Jordan said:

> "6. In the granting of permission to argue this point I take the view there is an issue as to whether the Secretary of State's response provides the answer that the information a returnee provides to the High Commission officials will not place them at risk. The difficulty is that this is positive evidence that has to be established and there is no material before me at present to say what the arrangements are apart from the assertion by the Secretary of State that there have been no problems in the past. I grant permission because unless it is accepted (which it is not) by Ms Jegarajah that there have been no problems then it is in issue whether or not the applicant will face a risk on return.
>
> Mr Ormondroyd properly points out that this is an application for judicial review and the issue before me is whether the decision of the Secretary of State is Wednesbury unreasonable and that if the Secretary of State did indeed have the information that it is claimed in the letter she had such that there is no known risk as a result of those who have been returned to Sri Lanka, the decision cannot be classified as being unreasonable. It is at least arguable that this material has to be examined in order to determine whether the Secretary of State had a proper basis upon which that assertion in the letter was made. Where there is a positive assertion made by the Secretary of State that, notwithstanding a prima facie case of potential risk, the Secretary of State can adduce affirmative evidence that no problems have been experienced, this is a matter which has to be established by hearing the evidence and cannot simply be assumed to be correct by reason of its being asserted in the letter. It is on this basis that I grant permission."

11. Directions were issued for the filing of further evidence and witness statements have been filed by Rachel Green, a Senior Executive Officer with the Detained Expedited Team, Judicial Review Unit, and from Malcolm Lewis, Country Manager of the Returns Team in the Migration Directorate of the Foreign and Commonwealth Office. The forms and documents used when an application is made for an emergency travel document have been disclosed. On 14 February 2013 the applicant's solicitors wrote to the respondent enclosing information disclosed under a Freedom of Information Request relating to the grant of asylum to returnees to Sri Lanka post-conflict. It also refers to a pending country guidance case saying that the applicant's Counsel, who is also acting in that appeal, is aware that the respondent has disclosed further

information relating to the grant of asylum to returnees to Sri Lanka. The information supplied in response to the request is set out in a letter dated 6 February 2013 from UKBA to the effect that in the period from May 2009 to September 2012 a total of fifteen Sri Lankan nationals were granted refugee status who had previously been removed from the United Kingdom; all fifteen claimed to have been subjected to torture or inhuman or degrading treatment following their return, five were granted asylum following the initial consideration of their claim by the UKBA and ten following the successful determination of their appeal.

12. The respondent responded by letter dated 18 February 2013 referring to what the applicant said had happened at interview. The letter says:

> "13. The Secretary of State does not accept that your client told the Sri Lankan authorities at his re-documentation interview that he was a failed asylum seeker or that the police thought he was an LTTE supporter. She considers that the applicant has previously not been found to be a credible witness and this undermines any future accounts. Notwithstanding this, even if it was accepted that he had given this information to the authorities, it is considered that any checks made as a result of this would not put him at risk as there is no record of him being of adverse interest in Sri Lanka.
>
> 14. A representative of the Secretary of State has made enquiries with the UKBA's Country Returns, Operations and Strategy Department (CROS). They have in turn checked with the Sri Lankan High Commission who confirmed that they do not record any interviews for documentation purposes. Therefore we do not accept your submissions that the interviews are recorded."

13. The letter then goes on to deal with the Freedom of Information data saying that analysis revealed that there were in fact thirteen cases and not fifteen, the data had been rounded up and not all were enforced UK returns as two were returns from a third country and two had made voluntary returns. In respect of later asylum claims being successful the respondent said:

> "21. Each case was dealt with on its merits. To put the figures into context we would note that in the eighteen month period between January 2011 and June 2012, the total number of Sri Lankan nationals who returned to Sri Lanka from the UK was 1,416. The FOI figures demonstrate that in a longer period (between 2009-2013) only thirteen returned were subsequently granted asylum.
>
> 22. The Secretary of State maintains her position that there is no risk on return for failed asylum seekers to Sri Lanka simply by virtue of the fact that they are failed asylum seekers. She contends that failed asylum seekers do not face problems immediately upon return and certainly not simply by virtue of the fact that they are failed asylum seekers returning from London.
>
> 23. The Secretary of State is not prepared to reverse the decision to enforce your client's removal to Sri Lanka, and does not accept that the issues raised puts your

client at increased risk on return and does not accept that an immigration judge would allow an appeal on the same grounds."

Submissions

14. Ms Jegarajah adopted her submissions set out in a document headed "Amended Grounds and Response to Decision of the SSHD 18 February 2013". She referred to the findings of fact made by Judge Lester in the First-tier Tribunal in [25] and [28] and to the risk assessment at [30] of her determination. The findings as accepted by the judge had to be looked at, so she submitted, in the context that at the time of that hearing there was a ceasefire but the findings would now be of importance in the light of the current position and what the applicant had said when interviewed by the officials from the High Commission. She accepted that it was open to the respondent not to believe that the applicant had made any such statements when interviewed but argued that she had failed properly to consider what a judge would make of that evidence when considering whether there was a realistic prospect of success before the First-tier Tribunal.

15. In her written submissions she refers to the Treasury Solicitors' public guidance in respect of the duty of disclosure and to the request made on 13 February 2013 inviting the Treasury Solicitors to consider their client's position in the light of the recent FOI request. She referred to a recent judgment in the High Court disclosed to the Tribunal with the permission of the High Court judge but only on the basis that there would be no reference to or disclosure of its substance or contents in open court or any open judgement. She submitted that the assertions made in the respondent's decision letters and in the witness statement from Malcolm Lewis do not sit easily with that judgment or with the response to the FOI request.

16. She submitted that there was an issue about whether officials from the High Commission asked questions about any previous asylum claims or went beyond issues of nationality and no evidence of any kind had been produced of the questions that would be asked. The respondent's evidence included a reference to the Freedom from Torture Report at 3.2.3 of the Sri Lanka policy document of October 2012. It was not her submission that all Tamils were at risk on return but she argued that there was at least a more than fanciful prospect of success before the First-tier Tribunal even if the respondent did not believe the applicant's evidence. It was not open to the applicant to say in [16] of the letter of 18 February 2013 that the evidence demonstrated that returned failed asylum-seekers were not at risk on return. In this application reliance was not being placed on an assertion that all failed asylum-seekers were at risk but that the applicant in his particular circumstances would be. That issue had to be assessed in the context of the view the Sri Lankan authorities would take not simply about failed asylum-seekers but about the applicant. She submitted that there must be a realistic prospect that a judge of the First-tier Tribunal would find that the conversation had taken place as claimed and this would put him in a position of risk on return.

17. Ms Busch submitted that when assessing whether there would be a realistic prospect of success before the First-tier Tribunal, the respondent was entitled to take into account the very long delay in making an asylum claim and the finding of the Tribunal in 2010 that there would be no record of any incident involving the applicant and that he would be of no adverse interest to the authorities. The applicant could not be relied on to provide consistent or credible evidence about his activities in Sri Lanka. There was no good reason to believe that he had made the statements he claimed to the Sri Lankan officials. There was evidence that he had previously made untrue allegations. The witness statement of Rachel Green confirmed that the questions asked by the Sri Lankan High Commission followed a pro forma (form D) and this had been the position since 2005. She submitted that there was no evidence at all to support a contention that a person in the position of the applicant would be at risk on return. She accepted that the situation was volatile in Sri Lanka but the evidence produced in relation to appeals subsequently being successful following return to Sri Lanka referred to a miniscule proportion: 13 out of about 1,400 returns. She submitted that the High Court judgment referred to did not take the matter any further and essentially turned on its own facts. In summary, in the light of the serious concerns about the veracity of the applicant's statements, the respondent had been entitled to conclude that there was no realistic prospect of success before the First-tier Tribunal.

Assessment of the Issues

18. The respondent's decision that the further submissions did not constitute a fresh claim can only be reviewed on Wednesbury unreasonableness grounds. In WM (DRC) v Secretary of State [2006] EWCA Civ 1495 Buxton LJ said that when considering whether an independent Tribunal might realistically come down in favour of the applicant's asylum or human rights claim, two questions arose: firstly, had the respondent asked herself the correct question, whether there was a realistic prospect of an immigration judge applying the rule of anxious scrutiny thinking that the applicant would be exposed to a real risk of persecution on return, and secondly, in addressing that question, had the respondent herself satisfied the requirement of anxious scrutiny.

19. Ms Jegarajah accepted that it had been open to the respondent not to believe the applicant's evidence about what had occurred at the interview with the officials from the Sri Lankan High Commission but submitted that the respondent's decision that a claim had no realistic prospect of success before an independent Tribunal was irrational. Ms Busch's submitted that the respondent's decision had been properly open to her for the reasons she had given.

20. The starting point for a judge hearing an appeal would be the previous decision of the First-tier Tribunal following the hearing on 29 June 2010. Judge Lester accepted that it was plausible that the applicant had carried goods for someone identified as R, these incidents taking place on his account in 2000-2002 leading to the police coming to his home in September 2002. She also accepted that he was questioned and beaten

by the police but went on to find that he did not have his photograph or fingerprints taken, he still had his ID card, there was no record of the incident with the police and he would be of no real interest to the authorities.

21. Ms Jegarajah argues that the position has now changed in the light of the fact that the applicant, when interviewed, told the High Commission officials that he feared returning to Sri Lanka because the authorities would be interested in him. She also submits that there is evidence that some returnees have been tortured by the Sri Lankan authorities and that the respondent's analysis of whether an appeal would have any realistic prospect of success is flawed by a failure to assess that issue in the light of evidence of such ill-treatment.

22. The witness statement of Rachel Green says that in the eighteen month period between January 2011 and June 2012 the number of Sri Lankan nationals returning to Sri Lanka from the UK was 1,416. She refers to the Sri Lankan Policy Bulletin issued in October 2012 and to the fact that the FCO follows the human rights situation through its network of posts around the world including the countries to which any unsuccessful asylum-seekers are returned. If UKBA receive any specific allegations that a returnee has experienced ill-treatment on return, these will be checked including through the FCO who, where necessary, would make discreet enquiries. She records that the government believes that the right approach is to consider the protection needs of individuals in their own particular circumstances and refers to the various sources of information taken into account when decisions are made on return. It notes that information from public resources such as human rights organisations and NGOs regarding the treatment of failed asylum-seekers from the UK or other countries on return is incorporated into COI service material. She says at [13]:

> "The UK Border Agency's Country Policy Bulletin for Sri Lanka of October 2012 confirms their policy on returns to Sri Lanka following the allegations of mistreatment, amounting to torture, of returnees from the UK. The UK Border Agency does not accept that the evidence published by Human Rights Watch, Freedom from Torture and Tamils against Genocide, supports their assertion that a change in the agency's policy on returns to Sri Lanka is warranted. The Country Policy Bulletin for Sri Lanka is available on the UK Border Agency's website…"

and at [15]:

> "The UK Border Agency when applying for an emergency travel document for a subject, have to as a minimum requirement submit an ETD bio-data application form, form K, form D, four photographs and if available supporting evidence. (The forms used in relation to this applicant have been disclosed to the court). There is a mandatory requirement for the individual to be interviewed by the Sri Lankan High Commission and the High Commission have confirmed to us that the interview questions used are taken from form D and that this has been the position since 2005."

23. These forms disclosed are in the agreed bundle. The bio-data information supplied includes the information available about the applicant's identity, last known address, his parents, any brothers or sisters and any known dates of employment. Form D contains particulars to be furnished by an applicant who has lost his passport. In his form the applicant has given the details sought and his national identity card number. The allegation made that the respondent had disclosed the fact that an asylum claim had been made was not pursued at the hearing and rightly so as it had no substance. There is nothing to indicate that anything other than the information given on the forms disclosed was provided by the respondent to the Sri Lankan authorities.

24. The witness statement of Malcolm Lewis gives further details about the process of return including the fact that the British High Commission in Colombo has a good working relationship with the Sri Lankan authorities with regard to the return of Sri Lankan nationals who have no leave to enter or remain in the UK. They assure BHC officials that no arriving passengers are subject to ill-treatment at Colombo Airport and this is supported by the experience of BHC officials. The statement goes on to say:

> "7. The BHC engages with a wide range of interlocutors which include both government and non-government organisations, civil society and human rights organisations. Throughout these engagements they have not been presented with any conclusive evidence to substantiate these allegations of ill-treatment of returnees. They also have access to UNHCR Refugee Returnee Monitoring Reports. These indicate that many returning refugees do not express safety and security amongst their main concerns since returning to Sri Lanka."

Annexed to his witness statements are the observations of the UK Government in two Sri Lankan cases currently pending before the European Court of Human Rights.

25. References have been made in the submissions to the current country guidance determination pending before the Upper Tribunal but if further evidence has been produced in that appeal relevant to the applicant's circumstances and to the decision under challenge, it has been open to the applicant's representatives to produce it. Ms Jegarajah has made it clear that it is not part of her submissions in the present case that all Tamils or all failed asylum-seekers would be at risk on return to Sri Lanka. The issue therefore is whether the respondent properly considered the applicant's particular circumstances in the context of the background evidence and the current country guidance when reaching her decision on whether there was a realistic prospect of success before the First-tier Tribunal.

26. I am satisfied that the respondent asked herself the correct question. In [3] of the letter of 6 July 2012 the respondent set out the provisions of para 353 of HC 395 and referred in [5] to the question of whether the submissions taken with the material previously considered would have created a realistic prospect of success. In [26] of the letter of 18 February 2013 the respondent said:

> "26. Having rejected your client's submissions, it has further been concluded that there is no realistic prospect that his submissions will, when taken together with all the previously considered material, lead an immigration judge, applying the rule of anxious scrutiny to decide that your client should be allowed to stay in the United Kingdom due to a real risk that your applicant's human rights would be breached on return to Sri Lanka and accordingly it does not amount to a fresh claim under paragraph 353."

27. Having identified the correct question, the issue is then whether the respondent applied anxious scrutiny to the assessment of this issue.

28. The respondent did not believe the applicant's evidence that when interviewed by the officials from the Sri Lankan High Commission he had told them that he was of interest to them and therefore brought himself directly to the authorities' attention. That was a finding of fact properly open to the respondent but the fact that she did not believe the applicant's evidence on this issue does not necessarily mean that it would also be rejected by a judge. When considering whether there would be a realistic prospect of success before the First-tier Tribunal, the respondent was also entitled to take into account the fact that the applicant had delayed from 2002 until 2010 before making an asylum claim and then only after he had been stopped by the police and that he had made a further claim on the basis of his relationship with MK when there was no evidence to support that relationship. However, the respondent's view of the merits is only a starting point in the consideration of whether there was a realistic prospect of success before the First-tier Tribunal: see [11] of WM (DRC) v Secretary of State.

29. It is clear from the documents produced that emergency travel documentation interviews are preceded by the supply of information on forms which simply set out background matters with no reference to the kind of questions which the applicant alleged were asked of him in his interview. In [8] of the letter of 6 July 2012 the respondent says that similar questions are asked in relation to establishing identity, there is a set procedure and that no issues have arisen in any case in consequence of questions posed by Sri Lankan officials. However, that does not mean that there might not be cases where officials ask questions in addition to those on the standard forms or take note of further information volunteered at interview, still less that they do not pass on information of potential interest to the authorities in Sri Lanka.

30. The applicant relies not only on what he claims was said at the interview with the High Commission officials but also on his previous, albeit limited, work for the LTTE. In the present case the issue whether the applicant would be at real risk on return has, according to the decision letters, been assessed on the broad assertions in [10] of the letter of 6 July 2012 that there have been no problems experienced by any failed asylum seekers following their enforced removal and in the letter of 25 July 2012 that the respondent is aware that there are no matters of concern arising from the enforced return of Sri Lankan nationals.

31. This does not take account of the fact that concerns have been raised in the Freedom from Torture Report and in the information supplied under the Freedom of Information Report. Even if only 13 out of a large number of returnees are accepted as being the victims of torture, this must be a matter of concern and indicates that there have been reports of problems faced by some failed asylum seekers and returnees even if a small number. It is clear from the statements of Rachel Green and Malcolm Lewis that considerable information is available to the respondent but in the present case the assessment of risk to the applicant has been on the basis that there have been no reports of matters giving rise to concern.

32. The respondent has placed reliance in [14] of the letter of 18 February 2013 on the confirmation from the Sri Lankan High Commission that interviews are not recorded for documentation purposes. The issue, however, is not so much whether records are kept or for what purpose but whether there is a real possibility that matters of interest to the Sri Lankan authorities at home might be reported back by High Commission officials. The respondent appears to have accepted assurances from Sri Lankan officials without considering the weight to be attached to them in the light of the reports of ill treatment following return. Further, when assessing what weight a tribunal might attach to the applicant's evidence the respondent has failed to acknowledge that he was found be at least partially credible by the immigration judge who heard his appeal in June 2010. In [13] of the letter of 18 February 2013 the respondent says that the applicant has previously been found not to be a credible witness and this undermines any future accounts. This does not take into account the fact the Judge Lester accepted that the applicant had been involved in helping the LTTE and was questioned and beaten by the police and that his delay in claiming asylum had not involved deliberate deception on his part.

33. When these factors are taken together I am satisfied that the applicant has shown that sufficiently anxious scrutiny has not been given to whether an appeal would have realistic prospects of success before the First-tier Tribunal and that the evidence produced has not answered the concerns highlighted by UTJ Jordan when granting permission about the evidence relied on when reaching the conclusion that there had been no problems in the past. In reaching this decision I have not taken the High Court judgment I was referred to into account as it seems to me that it turned on its own particular facts.

34. I grant this application for judicial review. I quash the decision finding that the applicant's further representations did not amount to a fresh claim. As accepted at the hearing before me, the question of costs should follow the event. I therefore order the respondent to pay the applicant's costs to be assessed on the standard basis if not agreed. The applicant's publicly funded costs are to be subject to detailed assessment in accordance with the Community Legal Service (Funding) Order 2000.

35. I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the applicant. No report of these proceedings shall directly or

indirectly identify him. This direction applies to both the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

H J E Latter

Upper Tribunal Judge Latter