Upper Tribunal
(Immigration and Asylum Chamber)

KK and RS (*Sur place* activities: risk) Sri Lanka [2021] UKUT 0130 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7, 8, 9, 10, and 11 September 2020	
With further written submissions on 7 December 2020 and 12 January 2021	**27 May 2021**

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

KK
RS
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants or members of their families. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We make this order owing to the content and nature of the proceedings.

Representation:

For the appellant KK:	Mr A Mackenzie and Ms A Benfield, of Counsel, instructed by Birnberg Peirce Solicitors
For the appellant RS:	Mr A Mackenzie and Mr A Bandegani, of Counsel, instructed by the Joint Council for the Welfare of Immigrants
For the respondent:	Ms N Patel, Mr T Tabori, and Ms H Higgins, of Counsel, instructed by the Government Legal Department

COUNTRY GUIDANCE

In broad terms, GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) still accurately reflects the situation facing returnees to Sri Lanka. However, in material respects, it is appropriate to clarify and supplement the existing guidance, with particular reference to sur place activities.

The country guidance is restated as follows:

(1) The current Government of Sri Lanka ("GoSL") is an authoritarian regime whose core focus is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam.

(2) GoSL draws no material distinction between, on the one hand, the avowedly violent means of the LTTE in furtherance of Tamil Eelam, and non-violent political advocacy for that result on the other. It is the underlying aim which is crucial to GoSL's perception. To this extent, GoSL's interpretation of separatism is not limited to the pursuance thereof by violent means alone; it encompasses the political sphere as well.

(3) Whilst there is limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of avowedly separatist or perceived separatist beliefs.

(4) GoSL views the Tamil diaspora with a generally adverse mindset, but does not regard the entire cohort as either holding separatist views or being politically active in any meaningful way.

(5) Sur place activities on behalf of an organisation proscribed under the 2012 UN Regulations is a relatively significant risk factor in the assessment of an individual's profile, although its existence or absence is not determinative of risk. Proscription will entail a higher degree of adverse interest in an organisation and, by extension, in individuals known or perceived to be associated with it. In respect of organisations which have never been proscribed and the organisation that remains de-proscribed, it is reasonably likely that there will, depending on whether the organisation in question has, or is perceived to have, a separatist agenda, be an adverse interest on the part of GoSL, albeit not at the level applicable to proscribed groups.

(6) The Transnational Government of Tamil Eelam ("TGTE") is an avowedly separatist organisation which is currently proscribed. It is viewed by GoSL with a significant degree of hostility and is perceived as a "front" for the LTTE. Global Tamil Forum ("GTF") and British Tamil Forum ("BTF") are also currently proscribed and whilst only the former is perceived as a "front" for the LTTE, GoSL now views both with a significant degree of hostility.

(7) Other non-proscribed diaspora organisations which pursue a separatist agenda, such as Tamil Solidarity ("TS"), are viewed with hostility, although they are not regarded as "fronts" for the LTTE.

(8) GoSL continues to operate an extensive intelligence-gathering regime in the United Kingdom which utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media. At the initial stage of monitoring and information gathering, it is reasonably likely that the Sri Lankan authorities will wish to gather more rather than less information on organisations in which there is an adverse interest and individuals connected thereto. Information gathering has, so far as possible, kept pace with developments in communication technology.

(9) Interviews at the Sri Lankan High Commission in London ("SLHC") continue to take place for those requiring a Temporary Travel Document ("TTD").

(10) Prior to the return of an individual traveling on a TTD, GoSL is reasonably likely to have obtained information on the following matters:

i. whether the individual is associated in any way with a particular diaspora organisation;

ii. whether they have attended meetings and/or demonstrations and if so, at least approximately how frequently this has occurred;

iii. the nature of involvement in these events, such as, for example, whether they played a prominent part or have been holding flags or banners displaying the LTTE emblem;

iv. any organisational and/or promotional roles (formal or otherwise) undertaken on behalf of a diaspora organisation;

v. attendance at commemorative events such as Heroes Day;

vi. meaningful fundraising on behalf of or the provision of such funding to an organisation;

vii. authorship of, or appearance in, articles, whether published in print or online;

viii. any presence on social media;

ix. any political lobbying on behalf of an organisation;

x. the signing of petitions perceived as being anti-government.

(11) Those in possession of a valid passport are not interviewed at the SLHC. The absence of an interview at SLHC does not, however, discount the ability of GoSL to obtain information on the matters set out in (10), above, in respect of an individual with a valid passport using other methods employed as part of its intelligence-gathering regime, as described in (8). When considering the case of an individual in possession of a valid passport, a judge must assess the range of matters listed in (10), above, and the extent of the authorities' knowledge reasonably likely to exist in the context of a more restricted information-gathering apparatus. This may have a bearing on, for example, the question of whether it is reasonably likely that attendance at one or two demonstrations or minimal fundraising activities will have come to the attention of the authorities at all.

(12) Whichever form of documentation is in place, it will be for the judge in any given case to determine what activities the individual has actually undertaken and make clear findings on what the authorities are reasonably likely to have become aware of prior to return.

(13) GoSL operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself. This database is accessible at the SLHC, BIA and anywhere else within Sri Lanka. Its contents will in general determine the immediate or short-term consequences for a returnee.

(14) A stop list and watch list are still in use. These are derived from the general electronic database.

(15) Those being returned on a TTD will be questioned on arrival at BIA. Additional questioning over and above the confirmation of identity is only reasonably likely to occur where the individual is already on either the stop list or the watch list.

(16) Those in possession of a valid passport will only be questioned on arrival if they appear on either the stop list or the watch list.

(17) Returnees who have no entry on the general database, or whose entry is not such as to have placed them on either the stop list or the watch list, will in general be able to pass through the airport unhindered and return to the home area without being subject to any further action by the authorities (subject to an application of the HJ (Iran) principle).

(18) Only those against whom there is an extant arrest warrant and/or a court order will appear on the stop list. Returnees falling within this category will be detained at the airport.

(19) Returnees who appear on the watch list will fall into one of two sub-categories: (i) those who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention once the individual has travelled back to their home area or some other place of resettlement; and (ii) those who are of interest, not at a level sufficient to justify detention at that point in time, but will be monitored by the authorities in their home area or wherever else they may be able to resettle.

(20) In respect of those falling within sub-category (i), the question of whether an individual has, or is perceived to have, undertaken a "significant role" in Tamil separatism remains the appropriate touchstone. In making this evaluative judgment, GoSL will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam.

(21) The term "significant role" does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been "high profile" or "prominent". The assessment of their profile will always be fact-specific, but will be informed by an indicator-based approach, taking into account the following non-exhaustive factors, none of which will in general be determinative:

i. the nature of any diaspora organisation on behalf of which an individual has been active. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it;

ii. the type of activities undertaken;

iii. the extent of any activities;

iv. the duration of any activities;

v. any relevant history in Sri Lanka;

vi. any relevant familial connections.

(22) The monitoring undertaken by the authorities in respect of returnees in sub-category (ii) in (19), above, will not, in general, amount to persecution or ill-treatment contrary to Article 3 ECHR.

(23) It is not reasonably likely that a returnee subject to monitoring will be sent for "rehabilitation".

(24) In general, it is not reasonably likely that a returnee subject to monitoring will be recruited as an informant or prosecuted for a refusal to undertake such a role.

(25) 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 are associated with publications critical of the government, face a reasonable likelihood of being detained after return, whether or not they continue with their activities.

(26) Individuals who have given evidence to the LLRC implicating the Sri Lankan security forces, armed forces, or the Sri Lankan authorities in alleged war crimes, also face a reasonable likelihood of being detained after their return. It is for the individual concerned to establish that GoSL will be aware of the provision of such evidence.

(27) There is a reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to persecutory treatment within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR.

(28) Internal relocation is not an option within Sri Lanka for a person at risk from the authorities.

(29) In appropriate cases, consideration must be given to whether the exclusion clauses under Article 1F of the Refugee Convention are applicable.

APPLICATION OF THE PRINCIPLE IN HJ (IRAN)

It is essential, where appropriate, that a tribunal does not end its considerations with an application of the facts to the country guidance, but proceeds to engage with the principle established by HJ (Iran) [2010] UKSC 31; [2010] 1 AC 596 , albeit that such an analysis will involve interaction with that guidance.

When applying the step-by step approach set out in paragraph 82 of HJ (Iran), careful findings of fact must be made on the genuineness of a belief in Tamil separatism; the future conduct of an individual on return in relation to the expression of genuinely held separatist beliefs; the consequences of such expression; and, if the beliefs would be concealed, why this is the case.

CONTENTS **PARAGRAPHS**

DECISION AND REASONS

A: INTRODUCTION

1. These linked appeals provide the vehicle for country guidance on the following issue:

> "The extent of the risk in Sri Lanka to individuals on the basis of *sur place* political activities in the United Kingdom which are (or are perceived to be) in opposition to the government in Sri Lanka."

2. The appeals also involve the determination of protection claims made by two individuals. KK is of Tamil ethnicity and originates from the north of Sri Lanka. He arrived in United Kingdom in January 2009 with entry clearance as a student. Following an extension of leave to remain as a Tier 1 (Post-Study Migrant), he sought further leave as a Tier 1 Entrepreneur. This application was refused. On 6 March 2016 KK made his asylum claim. This was based on two elements: a claimed fear of the Sri Lankan authorities owing to previous detention and ill-treatment in consequence of suspected LTTE assistance; and activities undertaken in the United Kingdom. The claim was refused and an appeal against that decision was dismissed by the First-tier Tribunal. That decision was challenged and set aside by the Upper Tribunal. The appeal was remitted to the First-tier Tribunal and once again dismissed. A further appeal was brought before the Upper Tribunal. By a decision promulgated on 7 January 2020, Upper Tribunal Judge Rimington set aside the First-tier Tribunal's decision and retained the appeal in the Upper Tribunal for a resumed hearing to redetermine the issue on the appellant's *sur place* activities.

3. RS is a woman of Tamil ethnicity who lived in the eastern region of Sri Lanka. She entered the United Kingdom in October 2007 and claimed asylum on the same day. Her claim was that she had been detained and mistreated by the Sri Lankan army because of suspected LTTE assistance. Her claim was rejected by the respondent. An appeal was dismissed by the First-tier Tribunal in May 2008. Over the course of time, RS submitted further submissions which were rejected by the respondent. Eventually, the respondent accepted that further submissions put forward in 2018 constituted a fresh claim pursuant to paragraph 353 of the Immigration Rules. The claim was refused and RS appealed. The appeal was dismissed by the First-tier Tribunal in September 2019. On appeal, Upper Tribunal Judge Rimington set the First-tier Tribunal's decision aside and ordered that the decision be re-made by the Upper Tribunal.

4. These two appeals were considered to be appropriate cases in which the Upper Tribunal could address the existing country guidance on Sri Lanka and the specific issue set out in paragraph 1, above. There followed intensive case management over the course of several months involving a very substantial amount of correspondence between the parties and with the Upper Tribunal. A series of case management directions were issued and hearings conducted with the aim of ensuring that both parties had a fair opportunity to obtain relevant evidence and present their respective cases in a thorough and efficient manner.

5. Before moving on, we wish to express our gratitude to the legal teams on both sides for the enormous amount of work put into the preparation and presentation of these cases. At any other time their collective effort would be commendable. However, in light of the exceptional circumstances brought about by the Covid-19 pandemic, what they have done deserves all the more appreciation.

6. It is also appropriate, perhaps unusually, to offer a word of gratitude to the administrative staff of the Upper Tribunal for the exceptional effort that they put into the processing of correspondence and in respect of the logistical issues involved in the hearing itself.

B: GLOSSARY

7. As in other country guidance cases, we deem it appropriate to set out a glossary of the terms and abbreviations that we have employed most often when referring to the evidence presented and the arguments made thereon.

Abbreviation	Full description
2012 UN Regulations	The United Nations Regulations Nos. 1 and 2 made respectively on 13 May and 30 May 2012 by the Sri Lankan Minister of External Affairs under section 2 of the United Nations Act 1968
BIA	Bandaranaike International Airport, the only international airport in Sri Lanka and the point of return for all failed-asylum seekers
BTC	British Tamil Conservatives
BTF	British Tamil Forum
CID	Sri Lankan Criminal Investigation Department
CPIN	Country Policy Information Note Sri Lanka: Tamil Separatism, version 6.0, May 2020
DFAT	Australian Department of Foreign Affairs and Trade report entitled Country Information Report on Sri Lanka, dated 4 November 2019

DIE	Department of Immigration and Emigration
FCO	The United Kingdom's Foreign and Commonwealth Office
FFM	Report of a Home Office fact-finding mission to Sri Lanka, conducted between 28 September and 5 October 2019 and published on 20 January 2020
GoSL	The current Government of Sri Lanka
GTF	Global Tamil Forum
ICPPG	International Centre for the Prevention and Prosecution of Genocide
IOM	International Organisation for Migration
ITAK	Illankai Tamil Arasu Kachchi (also known as the Federal Party)
LLRC	Lessons Learnt and Reconciliation Commission set up by former President Mahinda Rajapaksa, in 2010.
LTTE	Liberation Tigers of Tamil Eelam
President Gotabaya	President Gotabaya Rajapaksa: for ease of reference, as his brother, Mahinda Rajapaksa, had previously been President
Proscribed	The status of an individual or organisation formally designated under the 2012 UN Regulations. Proscription is the act of proscribing under those Regulations
PTA	Prevention of Terrorism (Temporary Provisions) Act, originally enacted on 24 July 1979.

SIS	Sri Lankan State Intelligence Service
SLHC	Sri Lankan High Commission in London
Tamil Eelam	A proposed separate and independent Tamil State on the island of Sri Lanka
TFL	Tamils for Labour
TFLD	Tamils Friends of Liberal Democrats
TGTE	Transnational Government of Tamil Eelam
The Constitution	The Constitution of the Democratic Socialist Republic of Sri Lanka, as amended up to 15 May 2015.
The Gazette	The Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary
TID	Sri Lankan Terrorist Investigation Department
TMTK	Thamizh Makkal Tesiya Kootani (Tamil People's National Alliance)
TNA	Tamil National Assembly
TNPF	Tamil National People's Front
TS	Tamil Solidarity
TTD	Temporary Travel Document (formerly known as an ETD or Emergency Travel Document)
UN OISL	The Office of the High Commissioner for Human Rights Investigation on Sri Lanka, established in 2014.
UN Resolution 1373	United Nations Security Council Resolution 1373 (2001), adopted on 28 September 2001.

8. Other terms of less frequent occurrence will be explained as and when they arise.

C: GENERAL APPROACH TO COUNTRY GUIDANCE CASES

9. The parties are in broad agreement on the general approach to be adopted where the Upper Tribunal is considering whether to re-affirm, amend, or entirely depart from existing country guidance. That guidance is the starting point for the Tribunal's assessment, a position consistent with the status afforded to such decisions, as identified in Direction 12 of the Practice Directions (Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal), dated 10 February 2010:

> "12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determined the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
>
> (a) relates to the country guidance issue in question; and
> (b) depends upon the same or similar evidence."

10. The effect of Direction 12 was considered and confirmed by the Upper Tribunal in EM and Others (returnees) Zimbabwe CG [2011] UKUT 98 (IAC) (hereafter, "EM"), at paragraph 71 (this decision was subsequently quashed by the Court of Appeal for reasons not affecting the issue set out below):

> "71. The proposition that a country guidance case should provide the "starting point" for a subsequent case that relates to the country guidance issue is inherent in the Practice Direction (and its AIT predecessor). Whether the subsequent case is being "set down to review existing country guidance" or not, the effect of Practice Direction 12 and section 107(3) of the Nationality, Immigration and Asylum Act 2002 is to require the existing country guidance case to be authoritative, to the extent that the requirements in Practice Direction 12.2(a) and (b) are met. This is fully in accord with what the House of Lords (per Lord Brown) held in R (Hoxha) v Special Adjudicator [2005] UKHL 19. If the existing country guidance is such as to favour appellants (to a greater or lesser extent), it will in practice be for the respondent to adduce before a subsequent Tribunal "sufficient material to satisfy them" that the position has changed" (Paragraph 66)."

11. In a passage subsequently approved by the Court of Appeal in MP (Sri Lanka) [2014] EWCA Civ 829, at paragraph 72 of EM the Tribunal observed that:

> "…where a previous assessment has resulted in the conclusion that the population generally or certain sections of it may be at risk, any assessment that the material circumstances have changed would need to demonstrate that such changes are well established evidentially and durable."

12. As made clear in CM (EM country guidance; disclosure) Zimbabwe CG [2013] UK UT 59 (IAC), at paragraph 118, what was said in EM did not constitute a rule of law, but simply an appropriate method of approaching changes in the evidential landscape which was consistent with "…an application of the precautionary principle relating to the assessment of reasonable likelihood of harm…"

13. In TK (Tamils - LP updated) Sri Lanka CG [2009] UKAIT 00049, the Tribunal made the point that where existing country guidance was being reviewed, the process is "incremental" in the sense that the guidance was valid at the time given, but that it may be altered in light of current evidence and there is no place for the wholesale reiteration of evidence which was before the previous Tribunal (see paragraph 13(ii)).

14. We have taken account of the matters set out above and sought to abide by them when assessing the evidence in these appeals.

15. In the context of the present cases and the way in which they have been presented to us, there arises the slightly unusual issue of whether we should simply "clarify" the meaning of aspects of the existing country guidance, or, in the alternative, actually amend and/or add to it. Where the line is to be drawn between clarification on one hand and amendment and/addition on the other, is a question with which we shall have to grapple.

D: THE CURRENT COUNTRY GUIDANCE

16. The current country guidance on risk on return to Sri Lanka is contained within GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) (hereafter "GJ"). GJ replaced the previous country guidance contained in LP (LTTE area – Tamils – Colombo - risk?) Sri Lanka CG [2007] UKAIT 00076 and TK (Tamils, LP updated) Sri Lanka CG [2009] UKAIT 00049.

17. The Tribunal in GJ set out its country guidance at paragraph 356:

> "356. Having considered and reviewed all the evidence, including the latest UNHCR guidance, we consider that the change in the GOSL's approach is so significant that it is preferable to reframe the risk analysis for the present political situation in Sri Lanka. We give the following country guidance:
>
> (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."

18. Inevitably, a number of other passages in GJ have been referred to by the parties and we shall set them out at the appropriate points in our analysis and conclusions, below.

19. The country guidance given by GJ was subsequently found to have accurately reflected the evidence considered by the Tribunal in that case (see KK (Application of GJ) Sri Lanka [2013] UKUT 512 (IAC)) and it then survived a challenge to the Court of Appeal in MP (Sri Lanka) and NT (Sri Lanka) [2014] EWCA Civ 829.

E: PROCEDURAL MATTERS

20. As mentioned previously, much case management was undertaken in the run-up to the hearing. It would serve no useful purpose for us to set out the details of this. One issue, however, does bear mentioning.

21. One of the expert witnesses, Professor Gunaratna, gave oral evidence from Singapore, where he lives and works. During the course of the hearing and prior to his scheduled evidence, we raised a procedural issue arising from the decision of the Upper Tribunal in Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC). This case dealt with the situation in which evidence is proposed to be given by electronic means. There is a discussion of general principles relating to such evidence, with reference to CPR 32.3 and 32PD.33. At paragraph 21, the Tribunal provided guidance as to the processes to be adopted. Although ten points are set out, for present purposes, only what is said at paragraph 21d is relevant:

> "If the proposal is to give evidence from abroad, the party seeking permission must be in a position to inform the Tribunal that the relevant foreign government raises no objection to live evidence being given from within its jurisdiction, to a Tribunal or court in the United Kingdom. The vast majority of countries with which immigration appeals (even asylum appeals) are concerned are countries with which the United Kingdom has friendly diplomatic relations, and it is not for an immigration judge to interfere with those relations by not ensuring that enquiries of this sort have been made, and that the outcome was positive. Enquiries of this nature may be addressed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division). If evidence is given from abroad, a British Embassy, High Commission or Commonwealth may be able to provide suitable facilities."

22. The guidance as a whole was subsequently cited without disapproval or qualification in the Kiarie and Byndloss litigation (see the judgment of the Court of Appeal [2015] EWCA Civ 1020; [2016] 1 WLR 1961, at paragraph 56, and that of the Supreme Court [2017] UKSC 42; [2017] 1 WLR 2380, at paragraph 69). The latter was quoted in the subsequent decision of the Upper Tribunal in AJ (s94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 115 (IAC)).

23. Whilst it was not brought to our attention at the hearing, we note too the Presidential Guidance Note No.2 of 2013 on the subject of video link hearings. Among the various matters to be addressed by a party seeking to have video link taken from overseas is the need to ensure, where appropriate, that there are no objections by the foreign government to this procedure being conducted from its jurisdiction (see paragraphs 13(g) and 14).

24. It was apparent that neither of the parties had approached the Singaporean authorities in order to ascertain whether or not they had any objections to Professor Gunaratna providing his evidence from within their jurisdiction. Ms Patel confirmed that enquiries would be made through the appropriate channels as to whether there were any objections or stipulations regarding this issue. Following what was no doubt a flurry of activity behind the scenes, we were duly informed that the Singaporean authorities had no objections, but had requested that Professor Gunaratna state for the record that he was not

speaking on behalf of its government and that he would be giving his evidence from his own private residence. At the outset of his oral evidence, Professor Gunaratna duly complied with these two requests.

25. This procedural matter did not ultimately result in any insuperable difficulties. The issues of another state purporting to refuse to permit a witness from giving evidence remotely from within its jurisdiction, or seeking to set conditions with which compliance is not possible, have not arisen and do not require consideration here. However, this is a timely reminder that in a landscape in which technology permits easier access to evidence provided remotely from overseas, parties must be fully cognisant of the relevant procedural steps which may accompany such trends.

26. The second procedural issue which arose related to confidentiality. In drafting his report for these proceedings, Dr Smith included a number of case studies concerning individuals said to have encountered problems from the Sri Lankan authorities by virtue of their sur place activities. Six of these individuals were named. The respondent undertook enquiries and subsequently sought to adduce decisions of the First-tier Tribunal relating to three of the named individuals, together with relevant evidence which had been relied on in the appeals. These matters raised obvious difficulties as regards the need to protect the anonymity of the named individuals. Dr Smith's disclosure of the names and other relevant information was dealt with by the production of an amended version of his report with appropriate redactions. It is this version which was included in the main hearing bundle. The First-tier Tribunal decisions and accompanying evidence were admitted and made subject to a confidentiality ring; that being a list of named individuals directly involved in these proceedings who signed an undertaking confirming their obligations of non-disclosure of the confidential material.

27. The unredacted version of Dr Smith's report and the confidential material were placed into separate bundles, subject to the confidentiality ring. At the hearing, this evidence was considered in closed sessions during the course of Dr Smith's oral evidence and at the submissions stage.

28. The confidentiality ring remains in place.

F: THE EVIDENCE

29. We have been presented with a vast amount of evidence in these appeals. That is not to be taken as a criticism of the parties; it is simply a reflection of the variety of issues with which we are concerned. We have considered with care all of the evidence to which we have been specifically referred, together with any other materials before us we deem to bear relevance to these appeals.

30. Given the time taken to produce our decision, it is perhaps inevitable that further country information will have been published since the hearing. In the event, additional evidence in the form of the annual report on the situation in Sri Lanka from the United Nations High Commissioner for Human Rights was served on the Tribunal on 3 March 2021. We have of course borne in mind the need to conduct our assessment on the basis of current evidence. However, this must be balanced against the importance of achieving finality and avoiding extending these proceedings yet further by admitting additional country reports put forward by one party which do not disclose a significant change in the issues with which we are concerned and would entail responses and potentially yet more evidence from the other party. In light of these considerations, we declined to address the recent report.

31. One matter involving new evidence of some factual significance has arisen. On 25 February 2021, GoSL published a new Gazette in which certain diaspora organisations were proscribed (or, to put it more accurately, re-proscribed) under the 2012 UN Regulations. Two of the organisations, GTF and BTF, have featured in the evidence and submissions before us. By an application made on 31 March 2021, the appellants sought to have further evidence consisting of the Gazette itself and two online media articles admitted in evidence. On 1 April 2021, the respondent consented to that application. In light of the common ground between the parties and the need to ensure factual accuracy in our decision in so far as is possible, we admitted the evidence. The effect of that evidence will be considered at the appropriate points in our decision.

32. What follows is a summary of the key aspects of the evidence which has informed our analysis and conclusions on the country guidance issues and our findings of fact and conclusions on the appeals of KK and RS.

Dr Chris Smith

33. Dr Smith is well-known to the Tribunal, having provided expert evidence in a number of previous country guidance cases including of course GJ. For the past two decades he has worked on conflict, security, and development issues, both as an academic and a consultant. There is no dispute between the parties as to his suitability and experience as an expert in respect of the issues upon which he has been asked to provide his opinion.

34. Dr Smith's original report is dated 9 June 2020. Following changes made to that report, an amended report was provided on 6 August 2020. In addition, Dr Smith, like the other two experts, was asked to respond to supplementary questions put by the parties. The responses to these questions are also dated 6 August 2020. It is the amended report (referred to by the parties as the "main report") and the responses to the questions which Dr Smith expressly sought to rely on before us.

The main report

35. Although Dr Smith's main report pre-dates the outcome of the Sri Lankan parliamentary elections in August 2020, he correctly predicts that the party of President Gotabaya would obtain a significant majority. In the section of his report entitled "country update", Dr Smith states that in light of the current political landscape in Sri Lanka, the outlook for the country (and the Tamil population in particular) is "bleak". The presence of the Rajapaksa family at the apex of power indicates a move away from any conciliatory tendencies which the previous regime may have displayed and towards what Dr Smith describes as "disconcerting" steps towards "authoritarianism and militarisation". It is likely that the President and Prime Minister will "develop a regime whose excesses lie beneath the radar that will prompt international concern and sanction."

36. Dr Smith's view is that the "politicised elements of the Tamil diaspora" were still viewed by the government through "a lens of both profound enmity and intense suspicion." Notwithstanding the end of the civil war in May 2009 and what is described as a "veneer of co-operation" with the international community as regards accusations of war crimes by political and military leaders, the current political hierarchy has a populist, nationalist agenda which does not bode well. In light of this and the history of conflict over the decades, the government fears a return to violence. Whilst the LTTE were comprehensively defeated, there is a sharp focus on the Tamil diaspora as a known, or perceived, source of support for the resurgence of support and action for Tamil Eelam. The government believes that the separatist network remains in place in one form or another and that this national security threat must be addressed both within Sri Lanka and overseas. Dr Smith cites sources (including former President Sirisena) which in his view show that there is a factual basis for the government's concern that diaspora activities represent a "nascent threat" from the remnants of the LTTE. In the perception of the government, the Tamil diaspora constitutes a "holistic entity" and raises a "commensurate security concern to the territorial integrity of the Sri Lankan state." Dr Smith acknowledges that there are few examples of an LTTE revival within Sri Lanka itself.

37. Dr Smith emphasises the government's concern with identifying, monitoring, and seeking to suppress any resurgence of the LTTE. This has manifested itself in the growth and refinement of intelligence-gathering. There is reference to the use of "catchers" or informants within Sri Lanka, recruited from, amongst others, rehabilitated LTTE cadres and those disabled as result of the civil war. Informants may be paid for their "services". Dr Smith reports that all police stations within Sri Lanka appear, as of 2016, to have become electronically networked. SIS has developed its own parallel electronic network. The state's overall intelligence sector is described as "vastly improved", with this process

ongoing during and since the end of the civil war. In summary, Dr Smith states that:

> "Both within Sri Lanka and further afield, intelligence gathering is now at the heart of security policy and posture. The primary aim is, without doubt, to identify and thwart any attempt by the LTTE to rebuild its capacity for armed insurgency within Sri Lanka. Thus far, it seems, it has succeeded. However, any attempt to rebuild the LTTE and the networks necessary to support an insurgency revival will require the support of the diaspora. As such, GoSL remains extremely focused on diaspora activities and will likely remain so in the future."

38. As to whether an individual falling within the first risk category under GJ (para 356(7)(a)) is still at real risk of persecution or serious harm on return to Sri Lanka, Dr Smith cites evidence relating to the treatment of detainees by the authorities. Dr Smith states that, based on a source within the SIS, the electronic database which underlies the stop and watch lists contains many thousands of names. That database can be consulted at the airport and, if appropriate, an individual could be handed over to the SIS, the TID, or the CID. The latter two maintain a permanent presence at the airport, with the CID controlling the database in relation to arrivals. Dr Smith's view is that the wider database will not necessarily have information on every individual, but will do so if they have previously been "arrested or informed upon". Information can easily be obtained from other districts within Sri Lanka itself, given the networked capability referred to previously.

39. Tamil returnees who have been "active in the diaspora" would be high, if not top, of the "list", and if on the government's radar, would be detained and at risk of ill-treatment. Such detention would be permitted by the PTA, and its wide-ranging powers would be used to cover "[a]nybody whom the authorities believe might be returning to assist the revival of the LTTE…". Dr Smith's report goes on to state:

> "The Sri Lankan authorities therefore possess the wherewithal to identify and detain members of the Tamil diaspora who they perceive to be of potential or existing adverse interest. Once identified they have the legal right under the PTA to detain almost whomsoever they wish. Once detained, Tamils associated with the diaspora are vulnerable and at risk of extreme ill-treatment that will violate their civil liberties and their human rights."

40. The next part of Dr Smith's report deals with the issue of proscribed organisations and the effect of this status. In Dr Smith's opinion, whilst it is "extremely difficult to calibrate the outcome of proscription", this classification "draws a line in the sand" as regards the government's perception that they are "front" organisations for the LTTE. Proscribed groups are not permitted to operate within Sri Lanka and known members might be stopped on arrival or placed under surveillance. Dr Smith asserts that even organisations that have never been proscribed or those that have been de-

proscribed may still be of adverse interest. Individuals considered to be working for the LTTE outside of Sri Lanka would not be deemed foreign terrorists, but rather a threat to the territorial integrity of the state.

41. Proscription allows the authorities to focus upon the group in question, together with its supporters. Relevant names can be placed inside what Dr Smith describes as "the institutional memory" of the state, with the consequence that "almost anyone" involved in relevant *sur place* activities is at risk of being detained.

42. Dr Smith considers organisations that have never been proscribed or, if they had been, had then been de-proscribed by the previous government in November 2015. All diaspora organisations are said to be in opposition to the government to a greater or lesser extent. Support for Tamil nationalism is said to be on a "sliding scale", ranging from confederalism to federalism. In terms of political organisations within Sri Lanka, the TNA has adopted a strategy of cooperation with the government, a move that has attracted criticism from the diaspora.

43. Whether membership databases of particular diaspora organisations could be accessed by GoSL would, in Dr Smith's opinion, depend upon infiltration and the means by which this was achieved. He was unable to provide evidence that access to such databases had in fact occurred.

44. Any relevant information gathered through intelligence-gathering is likely to be fed into the electronic database and then processed "according to the specifics of actual adverse interest."

45. Dr Smith then addresses the question of what level of activity or association with relevant organisations would give rise to a risk on return. In his opinion, all Tamil diaspora organisations (and in particular those currently proscribed) will be of actual adverse interest. They will be considered to be "either actively assisting or actively supporting the revival of the LTTE." Known members or supporters of such organisations would be of "actual adverse interest" if returned. "Anyone" suspected of links to the LTTE is at risk of being detained. Dr Smith's view was that "any" organisation or individual perceived to be threatening to the state will be of adverse interest.

46. In support of this position, Dr Smith provides a number of examples of individuals who, it is said, have experienced problems in Sri Lanka by virtue of their *sur place* activities.

47. Dr Smith remains of the view that the Sri Lankan authorities will be aware of all involuntary returnees prior to their arrival at Bandaranaike International Airport. The Secretary of State will inform the SLHC that an individual is to be returned and this information will be passed back to Colombo. The watch list is being used "extensively" and is used to facilitate monitoring/surveillance once a returnee has passed to the airport and returns to their home area.

48. In Dr Smith's opinion, "in all respects, all Tamil diaspora sur place activities are political and in opposition to GoSL." As an example of how the government views *sur place* protests, Dr Smith refers to a well-documented incident from February 2018 in London, in which the former Defence Attaché, Brigadier Priyanka Fernando, faced protesters and ostentatiously drew his finger across his throat whilst pointing towards the national flag on his uniform.

49. The procedures for identifying and "vetting" returning Tamils are said to be the same as when Dr Smith gave his evidence in GJ. In the absence of evidence to the contrary, he assumes that progress continues to be made to improve intelligence gathering.

50. On the basis of information provided to him by a security source in 2018 and again in November 2019, Dr Smith states that the authorities gather information on diaspora activities by the use of infiltrators, informants, and other forms of surveillance such as taking photographs at demonstrations. All such intelligence is sent back to the Ministry of Foreign Affairs and then on to relevant intelligence sections within the SIS, TID, CID, and the Ministry of Defence. Information gathered by informants is handed over to the Defence Attaché in the SLHC whose job description specifically includes, amongst other things, the monitoring and notification of anti-government activities in the United Kingdom. The Defence Attaché files a weekly report back to the Chief of National Intelligence in Sri Lanka whereupon further analysis is conducted. Dr Smith assumes that all information gathered by informants is provided to the Defence Attaché who then sifts it prior to transmission to Sri Lanka. In this respect, Dr Smith believes that the SLHC is much more than a "post-box". As regards facial recognition technology, Dr Smith is unable to provide a clear picture and he accepts that such a capability may have some distance to travel. In light of his recent trip to Sri Lanka, he confirms that there are no obvious cameras in the airport. However, there is a manual face recognition process by which hardcopy photographs of individuals previously identified can be matched to the faces of those detained at the airport. He was unable to provide further details.

51. Dr Smith's security source informed him that the database of information on individuals remains robust. The information contained on the electronic database remains in place for life.

52. In respect of what takes place at the airport upon return, Dr Smith states that a failed asylum-seeker will be questioned, whether they have been removed from the host country under escort or not. There is a stop list and a watch list maintained at the airport: the former ensures that those in whom the authorities have "an existing adverse interest" are detained upon arrival; the latter is used to trigger surveillance once an individual has passed to the airport and returns to the home area.

53. Dr Smith takes the view that it would be "very unlikely" for an individual to engage in political separatist activities within Sri Lanka without being detained and ill-treated.

54. Dr Smith ends his report by citing examples of case-studies in which it is said that family members in Sri Lanka had been harassed (or worse) by the authorities on account of a relative engaging in diaspora activities.

Answers to supplementary questions

55. When asked to clarify the meaning of "adverse interest" in his report, Dr Smith confirmed that is linked to whether someone is seen as a potential or actual threat to the existence of the Sri Lankan state. Relevant activities might include "planning for a resurgence of terrorism and/or insurgency, fundraising or material procurement and shipping, and alerting the international community to the ethnic problems that endure within Sri Lanka." The term also refers to individuals who are already known to the authorities through previous detentions and/or a presence on the electronic database.

56. In Dr Smith's view, the majority of the Tamil diaspora are sympathetic to the aims of Tamil nationalism and, in broad terms, the objectives of the LTTE, at least in respect of the ultimate goal, if not the means to achieve this. The views of the diaspora are on a spectrum, ranging from committed separatists at one end to confederalists at the other.

57. Dr Smith clarifies his position on risk and states that those on the watch list will not be detained, but rather placed under surveillance. He questions whether only those considered to have a "significant role" are at risk. In respect to those included on the electronic database, Dr Smith confirms that there is no hierarchical list as such, and that the stop list and watch list are derived from that wider pool: "people overseas who are of existing adverse interest, people affiliated to organisations that support the LTTE are bound to be included."

58. When asked about non-proscribed diaspora organisations, Dr Smith is of the view that the BTF believes in working with GOSL towards self-determination, rather than seeking Tamil Eelam. The BTC do not take any stand on the separatist issue. It is unlikely that the government would differentiate between a person advocating federalism and one who urged confederalism.

59. Tamil nationalism and separatism are said to be "two sides of the same coin."

60. Asked to comment on paragraph 2.4.33 of the CPIN, wherein a number of factors relevant to establishing risk are listed, Dr Smith recognised that they appeared to be "plausible assumptions".

61. He considers the LTTE to be a spent force, especially within Sri Lanka. However, the perceived threat of its re-emergence is such that it is "axiomatic that any Tamil returning to Sri Lanka who is known to be sympathetic to the LTTE will be of adverse interest." The rehabilitation programme used to re-assimilate former LTTE cadres into society has "run its course."

62. Dr Smith is asked to clarify whether he believes that all *sur place* activities will be treated in the same way by the Sri Lankan authorities. In response, he says that the particular nature of activities will stand some individuals out for adverse attention. For others, perhaps those at a lower-level, activities may act as a trigger to encourage the authorities to examine them to find out more. Events such as sports days are, in Dr Smith's view, perceived as being in opposition to the GoSL; they provide opportunities for propaganda, fundraising, and networking amongst the Tamil diaspora.

63. Dr Smith was not clear at what point a TGTE member might be seen as "high profile" and whether the authorities would regard such a description as relevant in any event. His view is that the response to an individual's TGTE association would not vary according to profile; a known member would face being detained or placed under surveillance.

64. When asked to clarify his evidence on facial recognition technology, Dr Smith acknowledges that the poor rates of success in a pilot project conducted by the police in London suggests that the same would apply to any such technology that might exist in Sri Lanka.

65. If a returnee is in possession of their own Sri Lankan passport, they will be able to pass through the airport without being questioned unless they are picked at random due, for example, to suspicious body language. The possession of a valid passport does not preclude an individual from being on the database and relevant agencies will be alerted if that individual is of adverse interest. Relevant information on those returning on a TTD will have been sent to Colombo in advance.

Oral evidence

66. Since GJ, Dr Smith had visited Sri Lanka on four occasions, although the last of these, in March 2020, was for the purposes of holiday only. The two previous visits, in February 2018 and November 2019, involved information gathering.

67. Dr Smith accepted that the primary focus of GoSL is activities outside Sri Lanka in so far as the threat of an LTTE resurgence is concerned. With reference to a speech made by former President Sirisena in May 2018, the primary consideration related to extremist elements of the Tamil diaspora, although the net was widely cast. Speeches made by leading politicians were

very much for public consumption. GoSL believes that it is on top of the LTTE issue and expends a great deal of effort into ensuring that this remains the case. The main concern was to prevent international regrouping of the LTTE. When asked if GoSL would be interested in all groups described as "nationalist", Dr Smith stated that there were other considerations in play such as the desire to avoid political embarrassment on the international stage and the avoidance of accountability for past human rights abuses.

68. It was difficult, in Dr Smith's view, to say where GoSL drew the line in terms of interest in those with "nationalist" sympathies. He did not consider the BTC to be threatening, although particular individuals may have their own views that are regarded as such. The BTF was more complicated, as their position had changed over the years. In respect of other groups, Dr Smith stated that adverse interest would depend on what the group said and its affiliations. A group might not have strong views on Tamil Eelam, but individuals within it could hold their own opinions. GoSL spends a lot of time monitoring and infiltrating groups in a "major, major" way.

69. Dr Smith described interviews at the SLHC as "rigorous", and that he would be "very, very surprised" if questions about *sur place* activities were not asked as a matter of course. He believed that representatives of the United Kingdom authorities were sometimes present at interviews (on instructions, Ms Patel informed us that this was not routinely the case and that the respondent was not able to speak to the nature of questioning).

70. Dr Smith was asked about the proscription of organisations. He was not aware of the details of the legal effect of proscription under the 2012 UN Regulations, but believed that it was to close down opposition in Sri Lanka and send a message to the international community about its security concerns relating to the organisation in question.

71. A large number of questions related to the issues of intelligence gathering and what is made of the information obtained. Dr Smith was confident that infiltration of Tamil diaspora groups occurred, but could not say whether all such groups were subject to this method. Nor could he say whether the Sri Lankan authorities were able to access databases of relevant organisations. His views on infiltration were based upon interviews conducted in Colombo in 2019 and previously. The United Kingdom was a "major area of endeavour" for GoSL.

72. The electronic database operated by GoSL was "massive." Dr Smith accepted that there would be a hierarchy of interest, with some names attracting "red flags", whilst others being of "average" concern. An individual may have a low profile but be very effective for the separatist cause. Conversely, they may have a high profile but be ineffective. He believed that members of proscribed organisations would be detained on return if known about and of sufficient adverse interest to be on the stop list. Alternatively, they might be picked out

of the queue at the airport by the CID, who maintain a "roaming presence" there. Dr Smith was pressed as to what criteria might be used to place somebody on the stop list. He had never seen any document that lists the trigger factors, but believed that the following would be relevant:

i. whether they were a member of a proscribed organisation;

ii. any fundraising activities;

iii. whether they had travelled a lot in the West and/or South East Asia;

iv. what they had said and/or written.

73. Dr Smith maintained his view that the person would be on the stop list if there was an extant warrant against them. He appeared to go further and state that someone may still be on that list in the absence of a warrant and that he held that view at the time of this evidence in GJ. In respect of the watch list, an individual would still be allowed through the airport and their details would be sent on to the local police station in their area of residence. Local informants would be alerted. There would be reports on the surveillance conducted on the individual and further action would be taken if necessary. The watch list was used more than the stop list. His source for the lists issue was a security officer that he had last spoken to in November 2019. Dr Smith confirmed that he was unable to say who was on either of the lists.

74. Ms Patel gave Dr Smith an example of an individual in the United Kingdom who had attended a single protest and had handed out leaflets. Would this person be subject to surveillance and detention? Dr Smith responded that it would depend on what information was passed back to Colombo, what other acts the individual may have undertaken or be suspected of having undertaken, and whether they would be placed on the stop list or the watch list.

75. Dr Smith confirmed that, to the best of his knowledge, there were no cameras at BIA when he last went down in November 2019. He believes that whilst there is now a manual process for facial recognition, the authorities are working on an automated process. Names of individuals could be linked to photographs by virtue of the infiltration process in the United Kingdom.

76. As regards individuals returning to Sri Lanka on their own passports, whether they be questioned at the airport would depend on what happens when the passport is swiped at immigration control. The electronic database is connected to the passport scanning technology. Dr Smith could not recall an example of a person returning on their own passport and being detained at the airport.

77. Dr Smith was then questioned about the specific case-studies set out at certain passages of his report, the full details of which are contained in the confidential bundle. In very general terms, Dr Smith stated that a solicitor well-known to him had made contact with the individuals (many of whom were the solicitor's clients or former clients). Interviews were then conducted by telephone, with the solicitor acting as interpreter. Dr Smith accepted that he had not seen the decisions of the First-tier Tribunal in respect of three of the individuals, and that some of them appeared to have had previous links to the LTTE which might have impacted on the basis for any adverse attention from the authorities.

78. The panel then asked questions. Dr Smith stated that he had been monitored whilst in Sri Lanka. It was the case that people were very afraid of speaking to him when he was in the country. He could not comment on the TGTE's lack of record-keeping in respect of returnees.

79. He stated that the Defence Attaché analysed information provided to him and filtered it before passing it to Colombo, making an initial recommendation as to what names should be placed on the electronic database. This information then went through relevant Ministries and was ultimately considered by the National Security Committee. This process had been confirmed by Dr Smith's SIS contact whom he had last spoken to in November 2019. When asked for further clarification, Dr Smith stated that the information went from the Defence Attaché to the army in Sri Lanka who then farmed it out on a need to know basis to the Ministry of Defence, the Ministry of Internal Affairs, the Ministry of External Affairs, and other relevant agencies such as the SIS, TID, and CID. It was at this stage that the decision would be made as to whether a name should be entered onto the electronic database. Once this was done a further decision would be made as to whether the individual should be put onto the stop list or the watch list.

80. Dr Smith drew a distinction between how safe people thought it was to contact the TGTE from Sri Lanka and how safe it actually was. The Sri Lankan authorities could monitor social media and tap telephones, but they did not appear to be able to hack into WhatsApp messages yet. Dr Smith was not surprised if Tamils were concerned about contacting organisations overseas.

81. In Dr Smith's view, attendance at a single demonstration would be unlikely to go onto the electronic database. If the individual was known as a Tamil separatist activist, the name would go on to the database, but he could not be sure what would then happen. He believed that actual members of the TGTE would be on the database and on either the stop list or the watch list. In this context, "members" meant the elected Members of Parliament. The presence on the watch list could lead to questioning, which in turn could lead to detention.

82. Dr Smith did not have any real knowledge about the BTC, but was of the view that they did not advocate for a separate Tamil state within Sri Lanka. They were "fully integrated" into British politics. As for TFL, they were more committed to Sri Lankan issues.

Dr Suthaharan Nadarajah

83. Dr Nadarajah is an academic, researcher, and consultant working on international security, development, and Sri Lankan politics. He is currently a Lecturer in International Relations at the Department of Politics and International Studies at the School of Oriental and African Studies, University of London. He was also one of the expert witnesses in GJ. As with Dr Smith, Dr Nadarajah's suitability to provide expert evidence on the relevant issues is not in dispute.

84. Dr Nadarajah produced an initial report followed by an amended report (referred to by the parties as the "main report"), dated 10 August 2020.

The main report

85. Dr Nadarajah begins by providing a summary of how he believes GoSL perceives the Tamil diaspora. The political activities of its members are seen as a "primary threat" to Sri Lanka's security and territorial integrity. Reference is made to the views publicly stated by leading governmental and military figures, to the effect that:

> "… while the Tamil separatist cause is seen to advance through the activities of specific Tamil diaspora organisations, their members and supporters, the capabilities of the transnational Tamil independence movement and thus its potency as a threat to Sri Lanka's territorial integrity and national security is seen to derive from the breadth and depth of Tamil nationalist sentiments ("separatist ideology") in the Tamil Diaspora community."

86. Tamil separatism is effectively seen as the same as diaspora support for a revival of the LTTE, and thus as a threat to the national security and territorial integrity of Sri Lanka. It is said that GoSL views the concept of terrorism in a broader sense than that employed by Western governments. The pursuit of separatism, even if by non-violent means, is enough. The Tamil diaspora is seen as increasingly effective in respect of its activities, both in respect of the separatist ideology and seeking to hold GoSL to account for past human rights abuses.

87. Dr Nadarajah places significant reliance upon a speech made by the then Defence Secretary (now President) Gotabaya in 2012 and a related 2013 article published in the United States military journal PRISM, together with other

pronouncements by military and intelligence officials, which portrays the Tamil diaspora as part of a wider transnational separatist threat to Sri Lanka. This includes renewed violence within Sri Lanka, but also the goal of a separate state, even if not pursued through armed struggle. Through public pronouncements, GoSL effectively treats Tamil diaspora groups advocating for self-determination/separatism interchangeably with a return to armed struggle by a potentially resurgent LTTE. A recurring theme in Dr Nadarajah's report is the concept of a separatist ideology, perceived by GoSL as representing an existential threat to Sri Lanka.

88. The Tamil population within Sri Lanka itself does not have an appetite for renewed armed conflict, but it does not follow that they have repudiated support for the nationalist/separatist cause. The TNA have vacillated between invocation of the struggle for Tamil liberation through non-violent means on the one hand and interactions with GoSL on the other. This has led to an erosion of its popular support amongst the Tamil population.

89. The decision of GoSL to withdraw from UNHRC Resolution 30/1 on 19 February 2020 was prompted by its view that a "false narrative" had been created in respect of the civil war.

90. In respect of the risk category described in paragraph 356(7)(a) of GJ, Dr Nadarajah's view is that GoSL "remain committed to a general mobilisation against potential LTTE resurgence and Tamil separatism… which… has also been conflated with Tamil and international advocacy campaigns which are perceived as serious threats to both Sri Lanka and its apex political and mid military leadership…" GoSL's "expansive view" of Tamil separatism fits in with the 6th amendment to the Sri Lankan Constitution and the view that "major" Tamil diaspora organisations involved in a range of advocacy campaigns are LTTE fronts or even integral parts thereof. In Dr Nadarajah's opinion:

> "… Tamils who participate, or are suspected to have participated, in a range of Tamil diaspora political activities that are perceived by the Sri Lankan authorities as working to advance the cause of Tamil separatism, and, therefore, as supporting or facilitating the LTTE's terrorism against the country, are at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise."

91. The recent consolidation of power by the Rajapaksa dynasty has led to a "significant increase in the real risk of persecution or serious harm on return to Sri Lanka for individuals who are, or are perceived by the Sri Lankan authorities to be, involved in Tamil diaspora activities that they consider to be in furtherance of Tamil separatism and therefore the LTTE."

92. On the issue of proscription, it is said that such status would exacerbate the potential risk to those with links to a relevant organisation. On the other hand de-proscription or no proscription at all does not necessarily mean that the Sri

Lankan authorities do not consider the group or its members to be a serious threat to national security. The example is given of the LTTE itself. The organisation was only proscribed between 1998 and 2002, and then from 2009 to the present day. The years when it was not proscribed did not preclude the authorities from having an obvious adverse interest in it.

93. In relation to diaspora organisations in general, GoSL perceives those that are engaged in "anti-Sri Lanka" activities as being "LTTE fronts". The BTF continues to be perceived as one such organisation. So too are the BTC, TFL and TFLD by virtue, for example, of their signing of a letter to the United Kingdom government calling for Brigadier Fernando to be expelled from this country following his "cut throat" gesture at a protest in 2018. The perception of GoSL may be distorted or simply wrong, but it is one that is genuinely held.

94. In respect of the ability of returnees to continue to engage openly in political activities once in Sri Lanka, Dr Nadarajah states that this would not be possible without a risk of persecution. This is to be seen in the context of the "repressive direction" engendered by the current regime.

95. Reference is made to social media mapping using algorithms and large amounts of accumulated data about individuals. Information gathered by this method represents "actionable knowledge" once it has been collated, organised, and analysed. The TID conducts surveillance of social media, in particular Facebook, in order to identify suspected separatists. It is the perception of intelligence officers which is important. The authorities have made efforts to expand the capability to monitor encrypted platforms such as WhatsApp with the assistance of technological assistance from China.

96. Dr Nadarajah addresses the issue of the use of informers in the diaspora and within Sri Lanka itself. Information from the sources is used extensively by GoSL. He expresses some concerns about the quality of information passed on, given the underlying pressures on individuals to provide something seem to be of value to their handlers, who in turn need to report to their superiors.

Answers to supplementary questions

97. When asked about perceived connections between the LTTE and the TGTE, Dr Nadarajah cites sources in which the latter has been described as a faction of the former.

98. Dr Nadarajah is asked to comment upon passages within the CPIN which relate to the risk profile of an individual. His response is that:

> "… Tamils with links or suspected links with the LTTE and former and suspected former LTTE members continue to be subject to surveillance and harassment by the Sri Lankan authorities; to be detained and sometimes

prosecuted under the Prevention of Terrorism Act (PTA); and to be subject to torture and ill-treatment in security forces' custody."

99. Those diaspora activities of which Dr Nadarajah is aware are non-violent in nature. Referring back to his main report, he emphasised that it is not simply the modality of activities, but their content: "it is their involvement in activities seen as promoting Tamil separatism, on the view of the Sri Lankan authorities, that leaves the authorities to view them as terrorists ("LTTE fronts")."

100. In respect of the effect of proscription of organisations, Dr Nadarajah states that this status enables the authorities to take action against suspected members or supporters under the PTA.

101. Dr Nadarajah is asked a number of questions about whether all members and/or supporters of a variety of diaspora organisations and all signatories to a particular petition would be considered a threat to the integrity of the Sri Lankan state. His answers all include the caveat that it would "depend on his or her own profile as perceived by the authorities".

Oral evidence

102. Dr Nadarajah stated that the Tamil population is viewed as hostile. The militarisation of the north of Sri Lanka indicated that the population there as a whole is viewed adversely. Whilst the Tamil diaspora does provide remittances, these normally go to relatives and community organisations. GoSL seeks to restrict land purchases to Sinhalese and applies pressure not to invest in Tamil businesses operating in the north of the country. Non-Tamil investment in the North and East is very limited.

103. With reference to the PRISM article from 2013, Dr Nadarajah stated that GoSL saw about 10% of the diaspora as active supporters of separatism, with the rest taking a passive approach. Given that the total diaspora constituted 1 million people, the active cohort was notable and represented the "tip of the spear". He accepted that the TGTE had renounced violence, but this was disputed by the Sri Lankan authorities: "the Tiger does not change its stripes". Dr Nadarajah saw the PRISM article as having the same effect as the 2012 speech by the then Defence Secretary. When asked if the public statements represented rhetoric that did not necessarily reflect reality, Dr Nadarajah stated that there had been "remarkable consistency" on the part of government and military officials as to the perceived links between diaspora organisations and the LTTE. The primary connection is that of a separatist ideology. Military units had been positioned in the north of Sri Lanka in order to change the mindset of the Tamil population there. In respect of three incidents concerning potential terrorist attacks within Sri Lanka and the absence of evidence to show a link between these and diaspora groups, Dr

Nadarajah stated that GoSL believe these were encouraged or instigated by individuals and/or organisations outside the country.

104. It was accepted that not all members of the diaspora will share the same ideas about Sri Lanka's future or, for example, the need for accountability for past war crimes. However, Dr Nadarajah emphasised his opinion that GoSL saw all such views as "part and parcel of one overall position", what the government had described as an "enabling environment for separatism".

105. Dr Nadarajah was of the opinion that the TNA had not necessarily rejected the aims of the LTTE. He was unable to say for sure whether any of the diaspora organisations described as "LTTE fronts" by the Sri Lankan authorities were in fact such. The absence of evidence provided by GoSL resulted in Western governments not accepting the allegation.

106. Dr Nadarajah was asked about diaspora organisations other than TGTE. He believes that the BTF campaigns for international pressure in furtherance of self-determination for the Tamil population. Even without advocating for Tamil Eelam, the BTF could still be seen to be challenging the territorial integrity of Sri Lanka. Support for a referendum may be seen in this way as well. Whilst the BTC is not separatist, GoSL perceive it as such because of its influence with the Conservative Party in the United Kingdom. TFL are also perceived as being separatist.

107. Asked about how an individual might be treated on return, Dr Nadarajah stated that it depended on a range of factors including the nature of the organisation with which they were connected. There would then be an assessment of various factors. This entailed an "indicator-based approach". In respect of a signatory of a petition on behalf of an organisation which was perceived as being anti-government, this act alone would not necessarily place the individual at any risk. The more indicators that were present, the greater the possibility of the individual being perceived as a threat. Dr Nadarajah stated that pieces of data would be stored electronically without human involvement. Subsequent cross-checking with other information would be automated. This opinion was based on his view of technological capabilities of companies who could provide services to governments around the world. He acknowledged that country information on the use of the PTA to detain people did not provide details of their profiles.

108. Dr Nadarajah did not believe that the rehabilitation programme had run its course.

109. As to political activity within Sri Lanka, Dr Nadarajah restated his view that the TNA does not espouse separatism as such, and that it has been seen to have a tacit agreement with the government. When asked by the panel if an avowedly separatist organisation could operate within the country, he said that there was "zero" possibility of this.

110. On the issue of information gathering, the harvesting of open source material was possible. Social network mapping could bring together existing information through an automated process. The monitoring of social media was not, in Dr Nadarajah's view, a manual process. He inferred this from his knowledge of companies such as Google and their ability to collect and collate statistics.

111. As to whether GoSL could monitor encrypted communications such as WhatsApp, it was presumed that technological assistance had in fact been given by the Chinese government in order to facilitate this. Whilst there were no cameras at BIA, facial recognition software could be well-advanced in Sri Lanka. Chinese companies such as Huawei were involved in the Sri Lankan technological infrastructure.

112. The use of informants by the authorities was described as "standard practice".

113. The panel asked Dr Nadarajah if he had knowledge of any returns to Sri Lanka where the individual had been detained solely because of *sur place* activities. He had no such knowledge and told us that no data was available.

114. In answer to questions from Mr Mackenzie, the witness was clear that various electronic databases would be integrated. Basic information on individuals would be integrated with intelligence obtained covertly. This could be connected to open source material as well. Dr Nadarajah's view was that there were separate databases which were linked together, with one that sat on top of all the others. This view was based upon his sources, although he accepted that he was not an information technology expert. As to the monitoring of social media, he believes that analysis of this information went into the social network mapping process.

115. Returning to the issue of when an individual would be considered a threat and therefore at risk on return, Dr Nadarajah accepted that it was very difficult to give any precise answer. He stated that "some level of profiling" was inevitable and that there was always an element of judgment involved. There would be a human assessment following any automated processing of information. This might involve assessing the role of the individual in the broader Tamil movement; the benefit to GoSL of preventing that individual from continuing their activities for the separatist movement; the level and nature of social media activity; attendance at protests; the signing of petitions; and whether there is a family history of involvement with the LTTE.

Professor Rohan Gunaratna

116. Professor Gunaratna is Professor of Security Studies at the Nanyang Technology University, Singapore. He has a long history of researching the LTTE and played a central role in designing the rehabilitation programme for

ex-cadres following the end of the civil war in 2009. Along with Dr Smith and Dr Nadarajah, Professor Gunaratna provided evidence in GJ, although he was not called at the hearing. As with the other two experts, his suitability to provide evidence on relevant issues is not in dispute.

The main report

117. Professor Gunaratna's main report is dated 1 May 2020. By way of background, he provides information on the genesis of the TGTE and its connections to the LTTE. The TGTE is described as "one of the four factions of the LTTE". It is said to have "promoted the separatist ideology, glorified violence against India and Sri Lanka, and hailed Prabhakaran [the former leader of the LTTE] as its central icon." Following the defeat of the LTTE within Sri Lanka, the centre of gravity of the threat shifted overseas and the authorities' attention was focused on monitoring the remnants of the organisation and what are described as its "front, cover and sympathetic organisations". The proscription of sixteen groups in 2014 had the effect of prohibiting Sri Lankan nationals from maintaining links with members of the relevant organisations. Whilst eight organisations were de-proscribed in 2015, this was done for political reasons and monitoring of these groups persisted. The "LTTE front, cover and sympathetic organisations" exposed the Tamil youth to an ideology of extremism, and de-proscription of certain groups reduced the effectiveness of the government's ability to combat separatism. GoSL was reviewing the organisations that had been de-proscribed by the previous government (that review has since concluded, with the result that several organisations have now been re-proscribed). Professor Gunaratna states that the United Kingdom remains a "major hub" for LTTE reorganisation and revival.

118. As to which organisations and/or individuals will be viewed as a threat by GoSL, Professor Gunaratna's opinion is that the scope is wide-ranging: "any person" associated with "any terrorist organisation" and activities including, but not limited to, the dissemination of propaganda, lobbying, participation in demonstrations, and the raising of funds, would fall within its ambit. "Anyone belonging to the TGTE or perceived to be associated with the TGTE will be arrested, detained and investigated."

119. On the issue of returns, Professor Gunaratna states that the security and intelligence services maintain a robust presence at BIA. Two forms of lists are maintained at the airport: an arrest (stop) list and a watch (surveillance) list. Proscribed individuals or "suspected terrorists" are interviewed at the airport. An arrested returnee will be remanded in custody, whilst others will be permitted entry to the country and then monitored. Each case is considered carefully and the decision taken as to whether to prosecute under the PTA or enlist the person as an informant. It is said that the authorities will "always"

take action against a returnee that has either "engaged or planned to engage in a terrorist operational or support activity." In Professor Gunaratna's view, "terrorist support activity" included: disseminating propaganda; lobbying; participating in demonstrations; displaying of terrorist paraphernalia; raising funds; procuring supplies; and organising similar activities. Further, "leadership, membership or association of a listed, delisted or unlisted terrorist organisation is taken seriously by the Sri Lankan authorities." Those who left Sri Lanka illegally are no longer produced before a magistrate.

120. Whilst the LTTE is not currently a viable force in Sri Lanka, GoSL is aware of the potential for it to be revived. It is said that twelve LTTE plots have been dealt with by the authorities since May 2009. These plots were directed from abroad. In light of this, GoSL has built a "powerful" intelligence capability to monitor threats. There is capability to monitor a variety of forms of communication, both online and offline. It is said that the technology includes facial recognition capability. Sources are recruited through overseas missions in order to gather intelligence. Interviews of failed asylum-seekers are conducted at the SLHC prior to return. The intelligence gathered is "verified and validated and integrated with other related information…" All details are then sent back to Sri Lanka. Those who work against the territorial integrity of Sri Lanka are investigated and, "depending on their disposition" they would be prosecuted if uncooperative, or recruited as informers if cooperative.

121. Professor Gunaratna notes that a number of commemorative events are celebrated in the diaspora, including Great Heroes Day, Mullivaikkal Day, and Black Tigers Day. These "apex events" and other events said to be on behalf of the LTTE are monitored by the Sri Lankan authorities. Whilst such "terrorist support activities" are permitted in this country, "they would not be tolerated in Sri Lanka."

122. With reference to the rehabilitation programme, those former LTTE cadres who have been through that system are no longer the subject of continuing animosity. The "anger" of the security forces is instead directed towards the "LTTE front, cover and sympathetic organisations operating from overseas masquerading as diaspora organisations and exploiting the liberal/human rights systems in the Western countries."

123. Professor Gunaratna refers to the establishment of a political party in Sri Lanka, Crusaders for Democracy, and the willingness of GoSL to permit this. The party was set up by ex-LTTE cadres who, in the eyes of the authorities, no longer posed any threat to the territorial integrity of the country. This, states Professor Gunaratna, indicates that Tamils living in Sri Lanka do not support the revival of separatism, contrary to the "pressure" from "LTTE front, cover and sympathetic organisations overseas".

Answers to supplementary questions

124. Aside from the TGTE, the other three claimed factions of the LTTE are said to be the GTF, the LTTE group led by "Nediyavan", and the LTTE group (also known as the Headquarters Group) led by "Vinayagam". GoSL does not accept that the TGTE is non-violent in its aims. The justification for describing the TGTE and other organisations as "LTTE fronts" is that "any entity fronting for a terrorist organisation is a terrorist front". Further information is given about the effect of proscription, going beyond simply the freezing of assets. It is said to be a deterrent to individuals to have any association with the relevant organisations.

125. A list of the twelve attempted LTTE plots is provided in an annex to the main report. Professor Gunaratna highlights an additional attempt in July 2020, where the putative attacker was killed when the bomb exploded prematurely.

126. Clarification is provided as to what is meant by the terms "terrorist operational activity" and "terrorist support activity". Whether those engaged in the latter would have action taken against them would depend on the profile of the individual. There is a preference on the part of the authorities to recruit Tamils who have been engaged in activities at a lower level as informants and community sources. The rationale for this is that sympathisers would monitor supporters, supporters would monitor members, and members would monitor leaders. It is not the case that only "prominent activists" would be monitored or prosecuted. Professor Gunaratna did not accept that only those with a known profile would be at risk.

127. In Professor Gunaratna's view taking part in demonstrations organised by a proscribed terrorist organisation amounts to involvement with a terrorist organisation. TID has responsibility for handling counterterrorism matters, not the CID. The level of interest from GoSL would vary according to an individual's profile. When asked what level of profile would be necessary, Professor Gunaratna's view is that "anyone" connected with the organisation would be arrested and interviewed "regardless" of the level of their involvement.

Oral evidence

128. Professor Gunaratna revealed that he had asked a person described as a "colleague" in the United Kingdom to review his report before it was submitted. This individual turned out to be a member of the Bar known (and was known by Professor Gunaratna at the time) to have acted for Tamil asylum-seekers in numerous cases over the years. He stated that this individual had not made any significant comments on the draft report and

that he had not made any changes on account of anything that the barrister had said or written.

129. Professor Gunaratna disagreed with the suggestion that he had overplayed the threat of an LTTE revival. The attempts to mount attacks in Sri Lanka since 2009 were genuine, and the threat was not a figment of GoSL's imagination. He was not aware of evidence that the TGTE had sought to direct any of the attempted attacks, nor that they had provided funding for these. However, in his view, the TGTE would be treated in the same way as other factions of the LTTE. It is perceived as radicalising Tamil people and following the same narrative path as Prabhakaran. He accepted that none of the United Kingdom-based TGTE MPs had been proscribed, but noted that the organisation's listing had been maintained following the de-proscription of others in 2015. The BTF was described as a "key organisation" until it was wound up in the United Kingdom. The TGTE was described as currently the most active political separatist organisation on British soil. He described the BTF as continuing to advocate for a separate Tamil state, and that they wanted to revive the LTTE.

130. With reference to the risk on return, Professor Gunaratna stated that there were two lists: the first was described as the "UN Resolution list" and was publicly available (we took that to mean the list of proscribed organisations and individuals); the second was held by the intelligence services and was based on information gathered from various sources. This list is not public. Both lists are used at the airport. The wider database was described as "detailed and elaborate". Attendance at a single demonstration could place an individual on that database. However, not all would be placed in the same category: there was a difference in the "gradient of activities". Those suspected of procuring weapons and suchlike would be treated more harshly than those engaged in the dissemination of propaganda. Nonetheless, even those at a low level would not be tolerated and the authorities would act against them. What this meant would depend. He went on to state that if a person was on the database they would "certainly" be detained and if they were a member of the TGTE they would be arrested. The TGTE was described as a "very high priority" in the eyes of GoSL.

131. When asked about whether GoSL could access membership lists for relevant diaspora organisations, Professor Gunaratna referred to the use of infiltrators and suggested that "British services" engaged in joint operations against such organisations.

132. In respect of interviews at the SLHC, what was asked would depend on the individual interviewing officer. Questions could go beyond simply establishing nationality and identity. An officer may obtain further information if the interviewee was content to give it. People would be asked about LTTE links. Whether an interviewee was asked about political views would depend on a number of factors including whether GoSL deemed there

to be a high threat period. Unless there was a specific instruction from the SLHC to the contrary, anyone returning would be referred for questioning at the airport. A person returning on their own passport would not be scrutinised unless they were on the database. Those known to be TGTE members would be arrested and either recruited as an informant or prosecuted.

133. Informants could be at a high-level or not. Information on such individuals would never be made public. Professor Gunaratna gave an example of a senior LTTE member who had been recruited by the authorities.

134. Professor Gunaratna confirmed that he was unaware of any specific individuals connected to the TGTE who had been ill-treated or monitored on return to Sri Lanka. He stated that such information would be kept confidential by the relevant agencies.

135. When asked what factors would be relevant when deciding whether an individual would be sent for rehabilitation or punishment, Professor Gunaratna said that the assessment would be undertaken by the authorities based upon whether the individual would be likely to reoffend or constitute a threat to security. There would be a detailed assessment and the police would check with CID, TID, and the SIS. If an individual was cooperative, they might be sent for rehabilitation or no further action taken. If they were perceived to be a risk or hiding information, they would be prosecuted.

Mr Sockalingam Yogalingam

136. Mr Yogalingam has been a Member of Parliament for the TGTE since 2011 and is a former Deputy Minister for Sports and Community Health. He is also the Assistant Director of Act Now, and Executive Committee Member of Nations Without States, and a National Councillor of the National Liberal Party (the United Kingdom-based political party promoting self-determination of ethnic minorities who have been forced from their homelands).

Written evidence

137. Mr Yogalingam had previously provided letters of support for both KK and RS, dated 16 May 2019 and 4 November 2019, respectively. They provide a brief summary of the TGTE and confirm that the appellants had "joined" the organisation as volunteers and subsequently been involved in "organising several public events in the UK." It states that the appellants had attended meetings and events, with KK having also taken an active role in organising public demonstrations. Mr Yogalingam describes witnessing both appellants' "true commitment and dedication to the Tamil Freedom Struggle", and that as

a consequence they had been given "responsible roles" in terms of organisation and fundraising. A number of specific events in which it is said that each appellant played a "key role" are then set out. In respect of RS, it is said that "[h]er activities goes far beyond mere attendance in these events. She continues to express her political aspiration publicly." Both appellants are described as "ardent" supporters of the TGTE mission and that they hold a desire for an independent Tamil homeland.

138. Mr Yogalingam provided a witness statement in these proceedings. Having set out his own background, he gives details of each appellants' activities in the United Kingdom. KK is described as having worked "closely" with a former TGTE MP and with Mr Yogalingam himself in respect of campaigning, leafleting, organising meetings, and fundraising. He is said to have shown "sincere commitment" to the cause. In 2017 and 2018, he worked as a coordinator for security for the media team at the annual TGTE National Sports meeting. He was an organiser of the demonstration during which Brigadier Fernando made the well-documented cut-throat gesture to protesters, and at subsequent events. KK has been involved in organising commemorative events in the Tamil diaspora calendar since 2017.

139. RS first made contact with the TGTE in 2014. She and ST became increasingly active from 2017 and they have both subsequently shown their "commitment and dedication to the Tamil Freedom Struggle". Although RS is quieter than ST, her role as a female activist is said to be "particularly significant", as there are fewer women attending events and she can be seen as an example to others. RS is part of the TGTE WhatsApp group for women. A number of "responsible roles" undertaken by RS are listed, including: membership of the sub- committee in her local area; contributing to meetings and the organisation of events; informing people in the local area, inviting them to events, and selling tickets; and leafleting.

140. Mr Yogalingam explains that the TGTE began issuing "Tamil Eelam National identity cards" in 2014 and although they stopped being issued at the beginning of 2015, this restarted at the end of 2017. These cards state that the bearer is a "Citizen of Tamil Eelam". They are issued to anyone who applies and pays the appropriate fee. One does not have to be a member of the TGTE to be issued with a card, nor are all members in possession of a card. The TGTE is the only organisation that provides a card of this type. Mr Yogalingam goes on to state the following:

> "27. To my knowledge there have not be [*sic*] any TGTE members or supporters returning to Sri Lanka without problems.
>
> 28. I have heard of a small number of TGTE members of [*sic*] supporters being forcibly removed from the UK who I did not hear from since, they would not make contact anyway as that would increase the risk to them."

141. Mr Yogalingam avoids trying to speak to TGTE members about matters such as relatives being at risk in Sri Lanka. People are afraid of imparting information in case GoSL finds out. He gives an example of a TGTE activist whose brother was arrested and ill-treated on return to Sri Lanka. Whilst the authorities claimed that he was an LTTE member, the TGTE activist believed that his detention was down to her activities in the United Kingdom as her brother was not linked to the LTTE.

Oral evidence

142. Mr Yogalingam provided further details about the TGTE National Sports meeting, stating that in addition to the sporting activities, political activities were also undertaken. Tamil Eelam flags and a large statue of the territory were displayed at the event.

143. It was accepted that not all Tamils supported the TGTE. However, Mr Yogalingam believed that all Tamils did want a separate homeland, but that some would not openly state this. Approximately 63,000 members of the diaspora had voted for this in a referendum held in 2010. When asked to clarify what was meant by being a "member" of the TGTE, it was said that this related to MPs: a normal member of the public would be regarded as a supporter. There is no formal application process for membership of the organisation, although volunteers needed to complete a form at the office. Mr Yogalingam accepted that neither he nor any of the other United Kingdom-based TGTE MPs had been proscribed. An individual has to pay £15 for an identity card.

144. Mr Yogalingam disagreed that his letters of support for KK and RS were identical and were based on similar templates. He asserted that the appellants had been treated separately. He could not say why KK had not been named in a 2019 brochure for the TGTE Sports Day meeting. KK has been involved in selling raffle tickets and tickets for a fundraising dinner. He could not recall whether KK's name and mobile number had ever been on TGTE literature. The details of "main" coordinators are normally stated. Mr Yogalingam initially stated that KK had been a member of a local sub-committee, but when asked to clarify this in re-examination he confirmed that this was not the case and that it was RS who was involved. In respect of RS, Mr Yogalingam was sure that she had attended the Sports Day meeting. RS was described as "quiet and very disturbed". Her role on the sub-committee was not an elected one. Mr Yogalingam could not recall if her name had ever been included on brochures. She had been involved in selling raffle tickets and other fundraising.

145. Mr Yogalingam stated that returnees would not want to contact him because they feared that the telephones would be tapped. When asked if an individual could use another telephone or purchase a separate SIM card, Mr Yogalingam

stated that someone known to him (who was not involved with the TGTE) had had his number "tagged" at the airport when he went back to Sri Lanka.

146. Mr Yogalingam confirmed that the TGTE does not hold any records of returnees who are associated with the organisation. There was no mechanism to collect such information. The explanation for this was that people's lives should not be put at risk. Mr Yogalingam could not provide any information as to the numbers of TGTE supporters who had returned (involuntarily or voluntarily) to Sri Lanka. When asked why his organisation would not have been told by individuals about their imminent removal/return in advance, he stated that perhaps they would not be able to make contact at that time. Mr Yogalingam had not thought it necessary to include examples of returnees connected to the TGTE in his witness statement. He did refer to the single example set out in his statement of the brother of a TGTE activist who had been detained when he went back to Sri Lanka.

Mr T Uthayasenan

147. Mr Uthayasenan is the International Coordinator for TS, an organisation established (originally under the name Stop the Slaughter of Tamils) shortly before the end of the civil war in May 2009.

Written evidence

148. Mr Uthayasenan explains the aims of TS: to bring to the attention of a wider audience the past alleged wrongdoings of GoSL and the authoritarian nature of the regime; and to achieve freedom for the Tamil people "through a separate state of Tamil Eelam". The organisation is committed to encouraging activism within the movement. To date, no TS activists have been removed to Sri Lanka.

149. Mr Uthayasenan provides details of threats and actions taken against TS in Sri Lanka. Whilst he is unable to state categorically that these emanated from GoSL, his belief is that this is the case. Such incidents include: their website being taken down; threats being made to individuals and their families in Sri Lanka; and an aborted attempt to set up an office in the north of Sri Lanka which failed due to threats from the CID. Mr Uthayasenan himself was arrested at BIA airport in 2015, despite the fact that he is a British citizen. With the help of contacts he was eventually allowed into the country but was monitored and "intimidated" throughout. An attempt to visit Sri Lanka the following year was initially met with refusal by the authorities. Again, following interventions, the visit was permitted, but Mr Uthayasenan was kept under surveillance. He states that he would not go to Sri Lanka under the current regime.

150. Mr Uthayasenan confirms that RS and ST have been attending TS events since 2019 and that they have attended most of the protests held during the last year. Whilst not yet a formal member of the organisation, RS is described as a "regular supporter and activist" and that the membership process is underway.

Oral evidence

151. In oral evidence, Mr Uthayasenan confirmed that he was on TS' National Coordinating Committee. The names and photographs of certain individuals referred to in his witness statement had been published on the organisation's website, but these do not include RS or ST. He confirmed that the membership process for TS was lengthy, involving discussions with the candidate and an assessment of their knowledge and understanding of relevant issues. A final decision on full membership is taken by the National Committee. Currently, there are approximately 80-100 members and "a few hundred" volunteers/supporters.

152. TS have not been proscribed by GoSL. Mr Uthayasenan speculated that it might be because the organisation's initial profile was relatively low. He is aware that the government is currently reviewing the proscribed list. Mr Uthayasenan is not himself a proscribed person.

153. Mr Uthayasenan confirmed that TS sometimes organised events in conjunction with the TGTE, although they mostly operated independently. The organisation did not collect figures on the return of individuals connected to TS either as full members or supporters. To the best of his knowledge, there have been no such returns.

The TGTE evidence

154. The TGTE provided a letter from its current Prime Minister, Mr Visvanathan Rudrakumaran, dated 27 July 2020.

155. Mr Rudrakumaran confirms that he is currently serving a third term as Prime Minister following his re-election in May 2019. He and the TGTE, are based in New York. During the civil war he acted as Coordinator of the Constitution Affairs Committee of the LTTE and was a legal advisor for that organisation during the peace process in the early 2000s.

156. The TGTE was formed on 17 May 2010 in response to the "act of genocide" perpetrated against the Tamil population. There was a need to articulate the political aspirations of Tamils and to "realise their right to self-determination". The TGTE currently has 132 MPs based in a number of countries. 20 MPs are

based in the United Kingdom. The total Tamil diaspora consists of over 1 million people, with 300,000 of them living in this country. Members of this community provide "substantial support" to achieve the aim of freedom for Tamil people in Sri Lanka.

157. The aims and objectives of the TGTE are stated to be:

> (i) "… to realise the political aspirations of Tamils through peaceful, democratic, and diplomatic means, and its Constitution mandates that it should realise its political objectives only through peaceful means;
>
> (ii) that the international community holds the perpetrators of war crimes, crimes against humanity, and genocide against the Tamil people to account;
>
> (iii) that a referendum be held to decide the political future for Tamils;
>
> (iv) that the State of Sri Lanka is referred to the International Court of Justice under the Convention Against Genocide."

158. Details are provided about the overall structure of the TGTE, both internationally and in the United Kingdom. Mr Rudrakumaran explains that "supporters can join in projects, teams or tasks if they accept the aims and objectives of the TGTE." There are no membership fees, although members and supporters can make voluntary donations. As regards participation in TGTE activities, it is said that any member or supporter can be involved. As the TGTE is not proscribed outside of Sri Lanka, there is no legal obstacle in the way of participation in activities within the diaspora. In response to a request for his view of how the TGTE is perceived by GoSL, Mr Rudrakumaran refers to several historical events relating to human rights abuses by the Sri Lankan government against the Tamil population. He goes on to state that Sri Lanka "is not a democratic state but an ethnocratic state", and that it is a "cultural vessel of rigid and entrenched Sinhala Buddhist hegemony."

Mr Martin Stares

159. Mr Stares is currently the Head of the Country Policy and Information Team at the Home Office and has held this position since March 2014 when the team was formed. Prior to this he worked for the Home Office in the field of immigration and asylum.

160. Mr Stares provided written and oral evidence in these proceedings in response to detailed criticisms of the FFM made by the appellants in their skeleton argument.

Written evidence

161. Mr Stares confirmed that a standardised approach to the undertaking of fact-finding mission had been adopted in conjunction with a number of other European countries, and set out in Common Guidelines on (Joint) Fact Finding Missions, published in November 2010 under the auspices of the European Country of Origin Sponsorship programme. The Home Office internal guidance ("Guidance: conducting fact-finding missions in countries of origin, version 0.1, published internally in March 2018) is predicated upon the Guidelines. Both the Guidelines and the internal guidance are referred to in the FFM. It is said that the approach undertaken does not seek to provide analysis or interpretation of the source material, but is rather a summary of the information, grouped together thematically.

162. The team that visited Sri Lanka did not include Mr Stares, but he was involved in reviewing and editing the final version of the FFM.

163. Mr Stares deals with each of the criticisms levelled against the FFM by the appellants. As to the timing of the mission (which took place just before the presidential elections in November 2019), it would have been difficult to judge the length of any delay. Mr Stares acknowledged that the "main" drivers for undertaking the mission were a sudden and "seemingly inexplicable rise" in asylum applicants relying on TGTE activities as a basis for their protection claims, together with an increase in the number of appeals being allowed in which the judge had apparently departed from the country guidance set out in GJ.

164. The executive summary in the FFM was simply to assist decision-makers in assessing whether the document was relevant to the claim that they were considering. There was still a requirement to consider the contents in full. In terms of the selection of sources to be interviewed, the internal guidance had been followed. It was not possible to set up a mission that considered every angle, such as age, gender, religion, or ethnicity. It was the individuals'/organisations' expertise that was of most importance, along with practical issues such as availability. The aim was to include sources from each of five categories: government sources, local, national and international non-governmental organisations, media, diplomatic and international sources, and others such as lawyers or academics.

165. Sources were asked as to how they wished to be referenced in the report. There is a "loose hierarchy" of how sources are referenced, ranging from full name, role, and organisation to simply "a source". Advice is taken from the FCO as to whether they thought it would be in the interviewees' interests to be anonymised. In addition, placing an individual at risk might jeopardise the United Kingdom government's reputation.

166. In response to the assertion that a number of sources were "tainted", Mr Stares stated that they are generally understood to be giving the views of their organisations, unless specified otherwise. It is accepted that a third of the interviewees were connected to the Sri Lankan government in one form or another. Mr Stares was confident that every source was able to speak freely when interviewed.

167. As regards the specific questions put to sources, a number are standard, with the scope to follow-up. On the particular issue of the TGTE, the decision as to who to ask about this organisation had been a matter for the fact-finding team itself. There was no consideration given in advance as to whether a particular source did have knowledge of it. The TGTE had been a focus for the mission, but not its sole purpose.

168. As a matter of practice, interviewees were invited to review and approve the notes of interviews made by members of the team. A non-response to this request was interpreted as an approval of accuracy. Eleven of the sources interviewed had expressly approved the notes.

Oral evidence

169. The decision on the timing of the fact-finding mission had been justified. When asked about the lack of interviewees of Tamil ethnicity, Mr Stares stated that the primary focus was expertise. None of the interviewees had been asked about their ethnicity. He agreed that about a third of the interviewees were associated with the Sri Lankan state and that the figure might be around a half given that some of the interviews included multiple individuals. There was no suggestion that interviewees felt unable to speak freely about the TGTE.

170. As regards the gathering of information on the TGTE, Mr Stares said that it appeared as though few people are aware of the organisation and this was itself a useful indication. Whilst one journalist believed that torture in detention did not occur, this did not indicate a general lack of knowledge. Certain aspects of the information provided by the IOM relating to the position of returnees was "possibly" surprising and seemed "a little stark". However, he did not believe that this organisation was partial. When asked why the IOM had been considered a useful source on *sur place* activities, Mr Stares believed that it tried to interact with people and help them to reintegrate back into Sri Lankan society. UNHCR had been selected as a source after consultation with the FCO. Mr Stares confirmed that the FCO had been aware of the "main drivers" for the fact-finding mission at the time that potential sources were being discussed.

171. Mr Stares was unaware if the TID had been approached to provide information. With hindsight, it was accepted that the TID might have been a useful source. He agreed with the view of Professor Gunaratna that the

authorities would not disclose who they would be interested in in the context of what would be a publicly available document (i.e. the FFM). He also agreed that it was possible for fact-finding teams to ask for an *ad hoc* interview whilst in the country.

172. The basis for concluding that there had been a sudden rise in protection claims here relying on the TGTE was queries made by caseworkers and decisions made by Tribunals. No statistics were kept on the nature of *sur place* claims, their success rates or, to the best of Mr Stares' knowledge, on returns to Sri Lanka where *sur place* claims had failed. Those subject to involuntary returns were not monitored by the United Kingdom government. This was due to capacity and a responsibility to avoid raising the profile of an individual after return. Mr Stares accepted that no questions had been asked of the sources in relation to the agenda of separatist groups, although a representative of the northern community had been asked about diaspora groups. It was accepted that the team had not interviewed any lawyers or academics, and that only a single human rights activist had been met. This was likely down to availability. On the question of balance, Mr Stares believed that the ratio of government to non-government sources was appropriate. Any source could provide one-sided information and caution must be exercised.

173. Mr Stares did not know why some of the sources had requested anonymity. In respect of certain police and government sources, the names and specific roles had been taken out of the report on the basis of FCO advice, but he was unable to say why this advice had been given. It was accepted that the policy section of the CPIN involves filtering, whilst the FFM contains raw information.

174. In terms of interview notes being approved by sources, it is assumed that the record is accurate unless an interviewee says otherwise. Mr Stares was not aware of any source having refused an invitation to be interviewed.

175. The information gathered indicated that the TGTE does not have much of a profile in Sri Lanka. Even though it does not operate within the country, in Mr Stares' view, some level of awareness there would have been expected.

FFM

176. Certain aspects of the FFM have already been set out in the summary of Mr Stares' evidence. Following sections setting out the background to the visit and its purpose, the report's methodology is explained. This was addressed by Mr Stares. An executive summary is provided, followed by nine thematic sections:

    i. General situation;

ii. Treatment of Tamils;

iii. Tamil groups;

iv. Treatment of returnees in general;

v. Diaspora and *sur place* activities;

vi. Reports of torture and abductions;

vii. Arrests and police procedures;

viii. Airport procedures; and

ix. Medical facilities.

177. There then follow four annexes. Annex B lists the sixteen sources which provided evidence, together with visits made by the team to BIA and the National Mental Health Institute of Sri Lanka. Annex D includes the notes of the meetings held with the various sources. It is this annex which represents the actual evidence upon which the respondent in particular relies in the appeals before us and which has been the subject of much criticism by the appellants.

178. Speaking at a time prior to the election of President Gotabaya, a number of sources stated that the overall situation in the country has improved, although the security situation has worsened since the Easter bombings in April 2019. There was a sense of apprehension in respect of the forthcoming presidential elections in November 2019. Certain Tamils, including some returning from abroad, may be monitored depending on their overall profile. There continued to be discrimination against Tamils and continuing "Buddhist colonisation" of Tamil areas. The majority of sources were aware of the TGTE, but thought that it had little support within Sri Lanka itself. It received very little, if any, coverage in the Sri Lankan media. Most Tamils in Sri Lanka were more concerned with their economic well-being. One source regarded the TGTE as being associated with the LTTE. The CID stated that if one was active in a proscribed group or funded them, action may be taken, although not if the individual was "just a member".

179. Certain ex-LTTE members may still be subject to monitoring in the country. Many thousands had been through the "rehabilitation" programme and one source stated that it has now finished.

180. Several sources believed that returning failed asylum-seekers would be questioned at BIA. Some might be checked. Details of those being returned on a TTD would be provided to Immigration Officers in advance. Other sources stated that they were unaware of "ordinary Tamils" being targeted on return. Returnees with links to the LTTE would be likely to face further questioning,

although it would depend on the facts of the case. UNHCR believe that only those with a "high profile" link to the LTTE would be questioned.

181. There were mixed views as to whether those with TGTE links would have problems on return. Some sources thought that only "high profile" members of that organisation would be questioned and/or detained, others were of the view that "genuine members and supporters" might face difficulties on the basis that the TGTE is proscribed.

182. In terms of the Sri Lankan authorities' attitudes towards the diaspora, the general activists were probably monitored abroad and on return. One source stated that the main influence of diaspora groups within Sri Lanka related to remittances rather than any political aspect.

183. A number of sources stated that instances of torture in detention was less common.

184. In respect of procedures at BIA, those returning on an enforced removal are referred to a Chief Immigration Officer to be interviewed. Those appearing on a relevant list (described by various sources as a "stop list" and/or a "watch list") will be identified at this stage.

DFAT

185. The report provides what is described as the Department's "best judgment and assessment" of the country situation for the purposes of protection status determination only. It purports to give a general country overview and does not contain policy guidance for decision-makers. The information stated is informed by the Department's "on-the-ground knowledge and discussions with a range of sources in Sri Lanka."

186. The report highlights the large amount of money sent as remittances from working abroad. There are continuing economic challenges faced by those living in the north and east of the country and this has acted as a push factor for external migration. Limited improvements in the country's human rights records under the regime of former President Sirisena were thought to be at risk if Gotabaya Rajapaksa or a close associate gained power in the upcoming election (the report was published only a short period of time before this event took place in November 2019). The military maintains a significant presence in the north of the country and there have been reports of ongoing military occupation of land. DFAT is of the view that there is a degree of Tamil-based political activity within Sri Lanka and several political parties operate, mainly under the umbrella of the TNA. The Tamil community reports monitoring and surveillance by the authorities in the north and east and informants are used to obtain information. DFAT does not believe that a repeal of the PTA is likely in the near future.

187. It is said that the authorities "remain sensitive" to the potential re-emergence of the LTTE. What are described as the "stop" and "watch" electronic databases continue to be used and that those on the latter are likely to be monitored. There have been reports that some Tamils with imputed LTTE links are monitored and harassed in order to guard against a re-emergence of the LTTE, although this took a more subtle form than had previously been the case. The report suggests that "high-profile leaders of pro-LTTE diaspora groups, particularly diaspora groups banned under Sri Lankan law" may attract the attention of the authorities due to their participation in demonstrations. The government believes that elements of the diaspora are committed to a separate Tamil state. Sri Lankans living abroad have been encouraged to return to the country or invest in its economy. Returnees may be monitored, "depending on their risk profile." Such persons likely to be of "particular interest" include those holding leadership positions in diaspora groups; those who were formerly part of the LTTE; and those who "actively advocate for Tamil statehood." There is a suggestion that family members of former LTTE operatives may face discrimination on a societal and official level.

Other relevant country information

188. We have been presented with a very substantial amount of country information on Sri Lanka. It would be both near-impossible and undesirable for us to attempt to summarise all, or even the majority, of this evidence. What follows is a very brief summary of the reports most commonly referred to by the parties in their respective submissions.

189. The United States State Department Human Rights report on Sri Lanka for 2019 describes torture as being "endemic". The Tamil population reported that security forces regularly monitored and harassed activists, journalists, and former or suspected former LTTE members.

190. The Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, dated 14 December 2018, confirms the presence of torture in Sri Lanka as "endemic and systematic" and that impunity for abuses in detention persists.

191. A 2019 report from the Office of the United Nations High Commissioner for Human Rights concludes that, amongst other problems, an unwillingness to pursue the perpetrators of abuses existed, as did the surveillance and intimidation of human rights activists and victims.

192. A number of reports from the International Truth and Justice Project, Human Rights Watch, and the International Crisis Group have been relied on by two of the experts, in particular Dr Nadarajah. In essence, these materials consider the issue of returnees said to have faced problems, in some cases as a result of

alleged diaspora activities. Some of the examples stated appear to relate to individuals who had previous links with the LTTE.

CPIN

193. The CPIN draws heavily on the FFM, DFAT, and a variety of other country information. Given our summaries of these sources, above, it serves no useful purpose to re-state the general points raised in the evidence as it pertains to the issues before us.

The evidence of KK

194. In light of the undisputed medical evidence relating to KK, the parties were agreed that he should be treated as a vulnerable witness within the meaning of the Joint Presidential Guidance Note No.2 of 2010.

Written evidence

195. KK's most recent statement sets out a brief summary of the struggle of the Tamil people in Sri Lanka and KK's own family background, including his parents' support for the LTTE and the death of three cousins in the conflict. His past experiences in Sri Lanka are said to have informed his desire to undertake political activities in the United Kingdom, in particular in relation to the aims of the TGTE. Prior to the start of his involvement with this organisation in September 2014, he began attending political events soon after his arrival in the United Kingdom in 2009. KK describes his initial contact with the TGTE and his understanding of their objectives, namely the aim of achieving a separate state for Tamils "carved out within Sri Lanka within the parameters of the International Law and getting justice for the genocide committed against Tamils through an internationalised mechanism."

196. He has committed himself to working with the TGTE towards its objectives, having worked "closely" with a particular TGTE MP, Nimalan Seevaratnam, between 2014 and the middle of 2017. This included attending political meetings, distributing leaflets, meeting people to inform them of the TGTE's aims and participation in the campaign for the Sri Lankan government to be referred to the International Criminal Court.

197. Since 2017 he has been involved in organising events for the TGTE by, for example, distributing leaflets; fundraising; making placards; promoting events; and communicating with people with a view to encouraging their attendance. He goes on to say that he got to know Mr Yogalingam over the

course of time and has assisted him. Mr Yogalingam assigned him to organisational and fundraising responsibilities within the TGTE.

198. Between 2014 and 2020 KK has been involved in numerous activities: attending demonstrations and commemorative events; the distribution of TGTE literature; involvement in the annual Sports Day meeting; and campaigning during the TGTE Parliamentary elections in 2019. Reference is made to photographs and Internet-based images provided to support the claimed activities.

199. KK asserts that the Sri Lankan authorities have been looking for him ever since he left the country in 2009. A number of relatives have been questioned about him. In February 2020, his brother was arrested by the police and questioned about his (KK's) activities in the United Kingdom. The brother was shown photographs of KK attending TGTE events in this country. The police demanded that KK ceased his activities and surrender himself. The brother was released with reporting conditions following the intervention of the Mayor of Jaffna.

Oral evidence

200. KK gave his oral evidence remotely. Whilst there were some technical difficulties at the outset, these were resolved and we were satisfied that, having regard to the method by which his evidence was given and his vulnerability, KK had been able to present his evidence to us without any material restrictions.

201. He agreed that he had not previously mentioned that his parents had supported the LTTE and that he had not previously mentioned that three of his cousins had died fighting in the civil war. He asserted that these claims were true. He stated that he had supported and helped the LTTE himself.

202. KK accepted that he had no photographs of events attended between 2014 and mid-2016. There was some confusion as to the meaning of the term "role" when questions were put as to the nature of his involvement, but it was accepted that he had not been an officer or committee member of the TGTE.

203. KK accepted that his brother's letter of October 2016 did not specifically state that the CID were aware of his (KK's) political activities in the United Kingdom. The brother had told him that the family were aware that this had not been included in the letter. He accepted that his name or telephone number were not included in TGTE literature. He accepted that those involved in TGTE security would normally be listed in the relevant brochure for the Sports Day meeting, but that his name was not included in respect of the 2017 and 2018 events. He accepted that he had not been a "main coordinator" when helping to organise TGTE events.

204. KK confirmed that he wanted to fight for a separate Tamil Eelam and would "do something" in Sri Lanka if returned. He did not agree that he could undertake political activities on behalf of the TNA. His aim was to fight for Tamil Eelam. He regarded the TNA as a "Sinhala-supporting" party. He regards Tamil Eelam as his "only option".

The evidence of RS and ST

205. In light of the uncontentious medical evidence relating to her mental health, RS was not called to give oral evidence. We did hear from RS' long-term partner, ST. Although he describes RS as his "wife", they have not entered into a legally recognised marriage.

RS's written evidence

206. RS's statement details her poor mental health and the impact this has had on her ability to recall relevant events. She confirms that she attempted suicide in 2016 and was then sectioned under the Mental Health Act 1983 from July to October of that year. She has been admitted to hospital on two further occasions.

207. A relatively detailed account is given of the various activities in which she has engaged whilst in the United Kingdom over the course of time, including her involvement with the TGTE since 2014, her attendance at commemorative events and protests organised by that group, and other activities. She has distributed leaflets, been involved with her local sub-committee, and undertaken *ad hoc* organisational duties. RS goes on to state that she has been involved with TS, BTF, and, to a more limited extent, TFL. She asserts that she had provided a statement to the ICPPG in 2014, which was to be passed to UN OISL.

208. RS states that her support for the establishment of Tamil Eelam is genuine and that she would wish to express her political views if returned to Sri Lanka. However, she believes that to do so would place her and her family in danger.

209. Contact with her mother is said to be very limited due to the fear that the Sri Lankan authorities will listen in. It is said that the mother changes her place of residence regularly, and that the CID had specifically asked about RS' whereabouts twice in the last year.

ST's written evidence

210. ST stated his commitment to what he described as the "Tamil separatist campaign" in the United Kingdom. He explained that RS' involvement in protests could alleviate her health difficulties. She had experienced atrocities committed by the Sri Lankan army as a child when living in the eastern province. He always accompanies her. He states that he also suffers from mental health problems, although these are not as severe as those afflicting RS.

211. ST and RS first attended the TGTE offices in 2014, but were not "really active" until 2017. This was because of their poor mental health, ST's immigration detention, and the fact that RS had been moved around the United Kingdom and at one stage was sectioned in hospital. He believes that they have attended approximately fifty protests. He has protested holding posters, banners, a Tamil Eelam flag, and wearing clothing showing the Tamil Eelam symbol. He led the chanting at two protests, using a loudspeaker. RS led the chanting for a brief period on one occasion. He states that he and RS are "members" of the local TGTE sub-committee.

212. ST joined the BTF in 2014 and attended a single meeting. He and RS ceased their involvement because they regarded this organisation as being "too close to the Sri Lankan regime." ST states that they have volunteered for TFL and, since 2019, have become involved with TS, attending a number of protests organised by that group. In 2014 they attended the TGTE offices and provided a statement to the ICPPG.

213. In approximately April 2020, the CID approached ST's family in Sri Lanka asking about him. He claims that his relatives were shown photographs of him at a protest outside the SLHC. According to his mother, the authorities have enquired after him on two or three occasions.

ST's oral evidence

214. ST could not precisely remember the date on which he had provided the statement to the ICPPG. He accepted that a copy of the statement had not been produced in evidence and that had not been asked to give any oral evidence to the UN Investigator. He accepted that he had not been active on behalf of the TGTE between 2014 and the end of 2017.

215. Whilst there may be between fifteen and twenty people on the local TGTE sub-committee, ST stated that only five or six normally attended. He accepted that anybody could join the sub-committee as a volunteer. He acknowledged that he was not a full member of TS, but was simply a volunteer. When asked about whether he and RS had been named in any online articles and/or Facebook, ST stated that photographs and names appeared in all of the articles and photographs appeared everywhere.

216. He confirmed that he maintains contact with his mother in Sri Lanka notwithstanding the CID visits. He stated that his mother is unaware of his political activities in the United Kingdom. He did not accept the suggestion that if returned RS would not need to undertake political activities in order to find support. In his view, RS would commit suicide if she had to return alone. When asked whether he would get involved with the TNA if returned, ST stated that that group could not provide "success".

217. Following the completion of ST's evidence, an issue arose as to the status of his Facebook account. In oral evidence he confirmed that specific posts could be read by anyone because they were on a public setting. Members of the respondent's legal team brought up the Facebook page but were unable to see the specific post referred to, or indeed a number of others. In witness statements provided by the two solicitors concerned, they explained that the only publicly viewable posts on the account were before September 2019 and then from June 2020 onwards. The witness statements asserted that when the Facebook account was viewed later that same evening, it appeared as though ST had changed his settings so that posts between September 2019 and June 2020 were now publicly viewable: the implication being that ST changed his settings from private to public during the course of the hearing, and that this was an indication of bad faith on his part. A witness statement from RS' solicitor in response asserted that she had seen all of the relevant posts on ST's Facebook account because they were publicly accessible (there appears to have been a misapprehension on her part as regards a number of the posts appearing in the main bundle which in fact post-date the time at which she states that she viewed them on ST's Facebook account). In saying this, we are not suggesting that the solicitor has in anyway sought to mislead the Tribunal.

G: THE PARTIES' SUBMISSIONS

218. Both parties provided detailed skeleton arguments, covering all aspects of the wider country guidance issues, together with specific matters relating to each of the appellants. As a result of the amount of evidence presented at the hearing, the oral submissions too were detailed. We have summarised the submissions here, but confirm that we have taken them all fully into account.

The appellants' written submissions

219. The appellants submitted that there was no basis for a significant change in the country guidance set out in GJ. At the same time, they contended that decision-makers would benefit from "greater clarity" as to who was and was not reasonably likely to be at risk on return by virtue of diaspora activities. In particular, it was said that the term "significant role" used in paragraph 356(7)(a) of GJ should be understood to encompass "any actual or perceived

involvement in or linked to diaspora activism of which the authorities are aware" and that "known membership of, affiliation to or involvement with any diaspora organisation" would lead to risk (we note that this is later qualified in the skeleton argument by the insertion of "separatist" between "any" and "diaspora"). The term was not limited to activists with a "high profile", those regarded as "prominent", or those with a "leading role" in diaspora activities. It is accepted that an extremely low level of involvement in activities, described as "the most trivial level" (defined as, for example, a brief attendance at a single demonstration or making a token financial donation), would not place an individual at risk.

220. The evidence of the three experts was commended to the Tribunal, it being said that their respective reports should be afforded significant weight.

221. The body of reliable evidence goes to show that GoSL is an "authoritarian, chauvinist Sinhalese/Buddhist entity in which the military plays a significant role." It has held, and continues to hold, a fundamental opposition to the concept of Tamil separatism, regards such an aim as terrorism, and is determined to quash any possibility of it gaining traction within Sri Lanka. In this regard there is a view that Tamil diaspora organisations operate as "fronts" for the LTTE and are working towards a resurgence of violent separatism. It is submitted that the presidential election in November 2019 and the parliamentary elections in August 2020 indicate a hardening of these views.

222. The rhetoric from political and military leaders over the course of time was not empty, but reflective of the profound hostility felt by the authorities towards the Tamil diaspora and in particular those individuals and/or organisations perceived to be criticising the government and working to undermine the territorial integrity of Sri Lanka. There is evidence to show that a number of potential attacks by the LTTE within Sri Lanka since GJ was decided have been thwarted, including one as recently as July 2020 in which the attacker's bomb detonated prematurely. In this sense, it was said, the Sri Lankan authorities' concerns are not baseless.

223. A number of named diaspora organisations were referred to by the appellants including TGTE; TS; BTF; GTF; the ICPPG; the Tamil Coordinating Committee; and the World Tamils Historical Society. The TGTE is said to be of particular significance given its proscription in 2014 under the UN Regulations and the Sri Lankan authorities' perception that it is one of the "four factions of the LTTE" (it is to be noted that BTF and GTF were re-proscribed by GoSL on 25 February 2021).

224. The appellants submitted that the authorities continue to infiltrate diaspora organisations in the United Kingdom and conduct surveillance by way of photographing and videoing protesters and monitoring the Internet and social media. All relevant information is passed by the SLHC back to Colombo

where it is stored on an electronic database. It was the appellants' case that individuals will be interviewed at the SLHC prior to removal and at BIA at the point of return. At that stage, the authorities will know all they need to about the returnee. Based upon the information obtained, "any actual or perceived link to diaspora activities of which the authorities are aware of give rise to a real risk of persecution". Whilst it is accepted that "attending a single event or very infrequent events may not necessarily attract attention unless the individual plays a particular role or is featured in the media or online", anything above and beyond that will, it is submitted, attract the authorities' attention.

225. As regards the relevance of a person's motivation to the risk on return, there is said to be no basis to suggest the Sri Lankan authorities would be able or willing to establish whether an activist was genuine or not.

226. The written submissions include a detailed critique of the FFM, the CPIN, and the DFAT. It is said that the FFM in particular is flawed in several respects, including its reliance on the prevalence of interviews with government-related sources; a failure to speak to those who may have knowledge of, for example, the TGTE; and failure to identify sources. In light of these alleged shortcomings, little weight should be accorded to the report unless the evidence contained therein is corroborated by other sources.

227. Detailed written submissions have been provided in respect of KK's and RS' individual appeals.

The appellants' oral submissions

228. Mr Mackenzie began his submissions by re-iterating the issues upon which the parties were agreed. In particular, there was no dispute that GoSL monitored *sur place* activities in the United Kingdom; that the authorities would come to know all they needed to of any such activities prior to or at the point of return; that the authorities maintain a stop list and a watch list; and that an individual was at real risk of persecutory treatment if detained. It was confirmed that the appellants' case was not concerned with the risk categories set out at paragraph 356(7)(b)-(d) of GJ, although (b) may potentially overlap with the category set out in (a). It may be that what was described as a "tweak" to that first category could involve confirming that previous activities on behalf of the LTTE may be a relevant risk factor, although it would not of itself be sufficient for an individual to succeed.

229. Mr Mackenzie acknowledged the absence of direct evidence in respect of certain issues with which we are concerned. These included the particular type of questions put to interviewees at the SLHC; the precise method and criteria employed by GoSL when creating a profile on the electronic database; and where the line is drawn between those returnees deemed to be of

sufficient interest to warrant detention and those who should be subject to monitoring. In this regard, Mr Mackenzie emphasised the importance of what he described as the "positive role for uncertainty", by which reasonable inferences could be drawn from what evidence there is.

230. On the subject of individuals being interviewed at the SLHC prior to return, Mr Mackenzie submitted that the weight of the evidence indicated that this did occur and that relevant information about *sur place* activities would be sought at that stage. On any view, it was reasonably likely that the authorities would have relevant information on an individual and that this would be passed back to Sri Lanka.

231. Submissions were made on the storage of information gathered on individuals. It was reasonably likely that an electronic database existed in one form or another. Those placed upon the stop list or the watch list were drawn from this electronic database. A core question was what consequences would flow from the information held. Mr Mackenzie emphasised the importance of the GoSL's perception of an individual's *sur place* activities. Paragraph 351 of GJ refers to an activist being "committed", not necessarily of having a "high profile". Attendance at demonstrations is relevant, but so too is fundraising, recruitment, organisational roles, and the distribution of literature. It was acknowledged that "the most trivial level" of activity (as defined in the written submissions) might not come to the authorities' attention at all.

232. All three experts had given evidence in GJ and much, if not all, of the criticism put forward by the respondent now was unjustified. Seen collectively, their evidence was not that the entire Tamil diaspora was perceived as being actively engaged in separatist activities. However, it was submitted that GoSL is committed to preventing any resurgence of the LTTE or other separatist movements. The rhetoric of political and military leaders and the view taken of individuals involved in *sur place* activities should be seen in this context. In addition, evidence in relation to proceedings before POAC ("Proscribed Organisations Appeal Commission") in the United Kingdom indicated that the LTTE is seen as a continuing threat.

233. The upshot of the expert evidence was that it would not take very much by way of activity on behalf of a group perceived by GoSL to be separatist in nature for a returnee to be at risk. That risk increased if the individual had a higher profile, but this was not necessary in order to satisfy the relatively low threshold applicable in protection claims. A "precautionary approach" should be applied, having regard to the known attitudes of GoSL.

234. It was accepted that in "most cases" the monitoring of an individual post-return would not of itself constitute persecution. However, someone under such surveillance could be detained and that would be enough to create a real risk. Alternatively, an individual's particular vulnerabilities, such as poor

mental health, could mean that monitoring, and all that went with it, constituted serious harm.

235. The risk of being recruited as an informant gave rise to additional risks. If a person refused to undertake such a role, they risked being detained. If they accepted in order to avoid detention, they would still succeed under the principle established by HJ (Iran) [2010] UKSC 31; [2011] 1 AC 596, and affirmed in RT (Zimbabwe) [2012] UKSC 38; [2013] 1 AC 152, namely that a person who conceals or modifies the expression of a fundamental right in order to avoid persecution is entitled to protection under the Refugee Convention (hereafter, "the HJ (Iran) principle"). That principle would apply where an individual holding genuine political beliefs on the issue of Tamil separatism would, on return to Sri Lanka, be forced to conceal or modify the expression of those beliefs in order to avoid detention and thus persecution.

236. Additional written notes were provided by Mr Mackenzie on the following three issues: the evidence of returnees to Sri Lanka; the FFM; and the use of informants by the Sri Lankan authorities.

237. Specific submissions were made in relation to the individual appeals of KK and RS and set out below.

The respondent's written submissions

238. The respondent's primary position is that, save for one "slight departure", the country guidance in GJ should remain in place without any gloss or clarification. The issues in dispute are described as "relatively narrow", a position in line with that taken by the appellants. The respondent was at pains to emphasise the importance of retaining the phrase "significant role" in paragraph 356(7)(a) of GJ so that decision-makers could conduct risk assessments on the particular factual matrixes before them. The appellants' position is said to involve either an impermissible interpretation of the word "significant" or an unwarranted material expansion of the existing country guidance. In short, the appellants have overstated the position as regards the approach of GoSL to the diaspora in general, to particular organisations, and the class of persons at risk on return.

239. The "slight departure" is that a returnee travelling on a TTD who is not on the stop list or watch list will no longer be questioned at BIA about connections or sympathies with the LTTE or any wider diaspora activities. Questioning relates solely to establishing their identity to see if there are outstanding criminal charges or warrants against them.

240. GoSL does not view the entire Tamil diaspora as hostile to the integrity of the Sri Lankan state, nor are all diaspora organisations perceived as being separatist in nature. Those at risk on return are within a subset of the diaspora

comprising those who are, or perceived to be, "actively involved in seeking to destabilise the unitary Sri Lankan state". The respondent asserts that the rhetoric of Sri Lankan political and military leaders must be treated with a degree of caution: it may not reflect the reality in terms of who will be of sufficient interest to warrant detention on return. There should be a more nuanced approach. There is a "sliding scale" in respect of Tamil nationalism/separatism, and not every Tamil who supports a form of self-determination is, or would be perceived as, a separatist. Not all diaspora organisations are regarded by GoSL as "fronts" for the LTTE. It is submitted that "extreme caution" should be exercised before accepting any assertion that the situation in Sri Lankan is materially worse now than it was at the time of GJ, when the end of the conflict represented far more recent history.

241. Whilst acknowledging the joint instruction of the three experts and the acceptance of aspects of evidence previously given by them in GJ, Ms Patel submitted that there was no obligation on the respondent's part to accept every aspect of their evidence. Shortcomings in their evidence were highlighted. What the expert evidence did indicate is that whether an individual was at risk on return depended on their individual profile, and this favoured a re-affirmation of the category set out in paragraph 356(7)(a) of GJ.

242. The respondent accepts that the Sri Lankan authorities maintain a sophisticated network of intelligence gathering overseas, as found in GJ, but these capabilities have not materially increased in the intervening years. In any event, it is said that the amount of information on *sur place* activities enables GoSL to filter out those of real interest from those who are peripheral. Those who had attended only a few demonstrations simply would not come to the attention of the authorities. There is an acceptance that failed asylum-applicants who require a TTD will still be interviewed by the SLHC prior to return, that intelligence acquired will be stored on "an electronic database", and that the authorities will still know all they need to about an individual's *sur place* activities in the United Kingdom by the time of arrival at BIA.

243. The continued existence of a stop list and a watch list is accepted. The respondent maintains that the monitoring of an individual who appears on the watch list does not, of itself, lead to persecutory treatment or serious harm. Whether such a person is subsequently detained will depend upon what they might do next, in light of what was already known about their activities abroad.

244. As regards post-return political activities within Sri Lanka, the HJ (Iran) principle must be applied to the facts of any given case. In this regard, it is essential that the individual holds a genuine belief in Tamil separatism: those who had engaged in *sur place* activities in United Kingdom for purely opportunistic reasons would not hold a genuine desire to express political opinions, nor would any avoidance of such expression represent concealment of those opinions in order to avoid persecution or serious harm.

245. The respondent's skeleton argument contains specific sections relating to the cases of KK and RS.

246. Finally, there is a detailed rebuttal of the appellant's criticisms of the FFM, CPIN, and DFAT.

247. In addition to the skeleton argument, Ms Patel provided us with two written notes on reports from a variety of NGOs.

The respondent's oral submissions

248. Ms Patel cast doubt on some aspects of the expert evidence as regards the ability of GoSL to detect those undertaking *sur place* activities, or at least the extent of such activities. It was unclear how the authorities could intercept communications in the United Kingdom, when encrypted platforms such as WhatsApp could not yet be hacked into, and whether there was indeed facial recognition technology in use at BIA. There was no clear evidence of social media mapping. There was a lack of clarity as to the precise nature of the database operated by the Sri Lankan authorities and in respect of who might be placed on the watch list.

249. As to those subject to monitoring after return, this was not of itself persecutory and detention would not necessarily follow, as was held in GJ. More would be required; for example, signs of movement towards extremism and support for LTTE ideology. Wider support for nationalism or separatism would not be enough.

250. On the issue of recruitment as an informant, Ms Patel submitted that the expert evidence was insufficiently cogent to show that any low-level supporter of a diaspora organisation would be faced with the choice of either having to provide information or face prosecution under the PTA. Professor Gunaratna was the sole source for this assertion and his evidence on this particular point should not be accepted. Whilst Dr Smith had spoken about the use of "catchers" by the authorities to provide information in local communities, Ms Patel submitted that it was implausible that people refusing to undertake this work would actually be detained.

251. The appellants were casting the net too widely as regards GoSL's adverse view of individuals and diaspora organisations. Separatism should be understood in a relatively narrow way, namely the aim of creating an independent state on the island of Sri Lanka. It did not encompass all those seeking to criticise GoSL through human rights activism and/or campaigning for self-determination. The need to distinguish rhetoric from reality was re-emphasised, with the suggestion that political leaders were sometimes playing to the public and the risk of a resurgence of the LTTE had been overplayed. The Tamil diaspora was not a cohesive entity and many groups were simply

not of any material interest to GoSL. Whether an organisation was proscribed or not was a relevant consideration, but was never determinative of risk. The POAC proceedings took the appellants' case no further.

252. There was a lack of clarity as to what profile would render an individual liable to detention. The expert evidence disclosed differences of views on specific points, but all three appeared to accept that risk would depend upon various factors. This ran contrary to the appellants' argument which, on one view, effectively left no room for a fact-specific assessment of risk profile.

253. Ms Patel was critical of Mr Yogalingam's evidence. His explanation that returnees could not be contacted was unsatisfactory and it was "remarkable" that the TGTE did not have any records of returnees who had been associated with the organisation. A similar point was made in respect of TS and Mr Uthayasenan's evidence.

254. In respect of the confidential evidence, Ms Patel went through the various case-studies set out in Dr Smith's unredacted report. These contained very little information on what *sur place* activities had been undertaken, most of the individuals apparently had prior LTTE links, and that "extreme caution" should be taken before drawing any conclusions from this evidence as to risk on return.

255. It was submitted that paragraphs 356(7)(b) and (c) of GJ should not be the subject of specific consideration in these proceedings. The country information did not support the subsuming of journalists or relevant human rights activists into the primary risk category of those seen as having a "significant role" in the Tamil separatist movement. In terms of those who had given evidence to the LLRC, it was clear that UN OISL adopted measures to protect the identity of witnesses, and it was only those known to the Sri Lankan authorities who would be at risk.

256. The FFM, CPIN, and DFAT, were relied on in support of many of Ms Patel's submissions. These sources were said to be generally reliable.

257. On the application of the HJ (Iran) principle, there was a degree of "political space" in Sri Lanka in which individuals could express their opinions, albeit not in respect of separatism, as that term should be properly understood. What an individual had done in the United Kingdom would inform what they would wish to do on return. The question of whether the individual genuinely held relevant political beliefs was crucial.

258. Submissions were made on KK's and RS' individual cases and these are set out in detail at the appropriate juncture later in our decision.

Post-hearing matters

259. On 21 October 2020, POAC promulgated its open judgment in the proceedings referred to by the parties in argument and supporting evidence (Arumugam PC/04/2019). In addition, on 30 November 2020, the decision of the Upper Tribunal in PK and OS (basic rules of human conduct) Ukraine CG [2020] UKUT 00314 (IAC) ("PK") was published.

260. Both parties subsequently provided concise written submissions on these decisions. The appellants submitted that the respondent's argument to the effect that the LTTE was a spent force and GoSL's rhetoric should be treated with caution stood in tension with her position before POAC, where she had argued that the organisation was concerned in terrorism. PK was relevant because it strongly supported the argument that having to become an informant or refusing to cooperate would entitle an individual to succeed under the Refugee Convention. Providing information to the authorities may lead to the subject of that information being detained, which would in turn expose them to the risk of ill-treatment. Being an informant would, it is said, amount to complicity in torture. Any punishment arising from a refusal to cooperate would be persecutory.

261. In response, the respondent submitted that her positions before POAC and the Tribunal were consistent. It was accepted that the LTTE had elements of support outside of Sri Lanka and was concerned in terrorism. At the same time, the organisation remained inactive in Sri Lanka and GoSL's rhetoric had to be viewed in that context. The issue in PK did not arise in these appeals because the evidence on the recruitment of returnees as informants was weak. If it did, a fact-specific exercise would be required and the appellants' approach was too simplistic.

H: GENERAL COMMENTS ON THE EVIDENCE

The expert evidence

262. The duties of experts when providing evidence to courts and tribunals have been the subject of numerous judicial pronouncements over time. Their role in country guidance cases is of obvious significance. We reiterate the importance to be attached to the duties set out in paragraph 10 of the Senior President of Tribunal's Practice Directions 2010, as amended, and as cited in MOJ and Others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC), at paragraph 25 and AAW (expert evidence - weight) Somalia [2015] UKUT 673 (IAC), at paragraph 24:

> "(i) to provide information and express opinions independently, uninfluenced by the litigation;
>
> (ii) to consider all material facts, including those which might detract from the expert witness' opinion;

(iii) to be objective and unbiased;

(iv) to avoid trespass into the prohibited territory of advocacy;

(v) to be fully informed;

(vi) to act within the confines of the witness's area of expertise; and

(vii) to modify, or abandon one's view, where appropriate."

263. In general terms, the weight to be attributed to expert evidence will correlate to the experience, reputation and authority of the author; the methodology employed and the seriousness of investigations undertaken; the use of appropriate sources; the extent to which their conclusions are consistent, both internally and as regards external sources; and the impartiality and objectivity of the expert (see NA v United Kingdom [2011] ECHR 1272, at paragraph 120).

264. Whilst we accept that an expert is not simply the purveyor of raw data, the appellants' assertion that, by dint of appropriate experience, reputation, and authority, the expert may themselves be the source of the opinion evidence provided, should be seen in the context of what was said in LP at paragraphs 37 and 38 in response to a similar submission made by Mr Mackenzie then:

> "38. As Collins J said in Slimani, experts can vary in their independence and expertise to a very large degree. Some are well known as reliable, others perhaps equally well known as unreliable. In the centre ground comes the majority. It is the task of the Tribunal to decide what evidence they accept and what weight they can put upon the evidence they receive. We do not entirely agree with Miss Richard's analysis of the difference between an expert in this jurisdiction and an expert elsewhere. She argued that experts in this jurisdiction are the providers of raw data whereas those in the civil courts tend to be the interpreters of such data. In fact, in this jurisdiction, experts are not merely the providers of raw data but they can be the interpreters of it as well. Their interpretation, and any opinion based on that interpretation, can only be as good as the raw data itself. By that we mean not only the quality of the data, but the selection or filtering, of it.
>
> 39. We agree with the concept of the expert as a filter of evidence. A real problem arises in this jurisdiction from the use of the word "expert". In this context an "expert" is merely a witness giving factual, hearsay and opinion evidence. No witness is prohibited from doing that. The question is not therefore the admissibility of the evidence (as it would be in the criminal and civil courts) but the weight to be given to it. The task for us is therefore to decide, simply, how much weight is to be put on the conclusions and/or the filtered evidence that is put before us. The fact that it is demonstrably wrong may help to assess it. However, the fact that it is not demonstrably wrong does not engender reliance upon it, whether or not the person giving the evidence is, or claims to be an "expert". Additionally, in order to accept an expert as a competent and reliable filter mechanism it is necessary to trust the expert and to have confidence that he or she has filtered the evidence objectively and independently, not partially. The extent to which that trust

> can be established may depend on a number of factors including the reputation of the expert, and any established track record. It may also depend on the quality of the sources and whether there is a variety of sources. For example, a report on Sri Lanka that relied only on LTTE sources, without countervailing evidence from sources that did not support the LTTE, would be likely to carry little weight. The age of the source material and the number of sources is also important. An expert may not have any track record with the Tribunal, in which case particular care is needed in assessing the weight to be put on the evidence, and any opinion said to be derived from it."

265. Thus, an expert's opinion is itself a form of evidence going beyond simply the raw data. However, that data is nonetheless of importance when it comes to evaluating the weight to be attributed to the opinion upon which it has been based.

266. In the somewhat unusual circumstances of these appeals, we have taken account of the fact that all three experts have been jointly instructed. That does not mean that the parties were bound to accept all of their evidence, nor that we are bound to do so.

267. It is entirely possible that certain aspects of an expert's evidence may attract little weight, or indeed be rejected entirely, whilst others may be accorded significant importance: it will be relatively rare for such evidence to be considered on an "all or nothing" basis. As will become clear as the reader progresses through our decision, we have concluded that the evidence presents a mixed bag, as it were. We have preferred some aspects of the expert evidence to others, whether in respect of the same individual or as between the three, and we have found that some of the evidence specifically relied on by the respondent suffers from shortcomings.

268. What follows is only a very brief commentary on the evidence provided by the three experts. More detailed consideration of particular aspects of their evidence is best left to the appropriate point in our analysis and conclusions, as set out later in this decision.

Dr Smith

269. We recognise and acknowledge Dr Smith's experience and overall expertise in respect of the political and security situation in Sri Lanka over the course of time. He provided evidence in each of the previous three country guidance cases on Sri Lanka, GJ, TK, and LP. The respondent points out that certain aspects of his evidence in LP were deemed to be problematic (paragraphs 40-41), whilst in TK the Tribunal did not agree with some of the inferences drawn from the source material and that he had provided virtually no evidence in support of his opinion on the significance of illegal departure from Sri Lanka. In respect of GJ, one particular aspect of his evidence was regarded as

speculative and the Tribunal did not accept all of the risk categories that he had articulated.

270. On the other side of the equation, the appellants are correct to point out that Dr Smith's evidence in GJ was not the subject of any significant criticism, and that aspects of his contributions have underpinned important elements of the country guidance over time (for example the use of a stop list and a watch list: see LP at paragraphs 80 and 171, and GJ at paragraphs 122-133). It is also the case that Dr Smith has visited Sri Lanka as recently as November 2019 for the purposes of carrying out preparatory work for what was anticipated to be the provision of expert evidence. This was his third visit to that country since GJ was promulgated.

271. For reasons given when setting out our analysis and conclusions on relevant matters in due course, our overall assessment of Dr Smith's evidence is that whilst much of it is in general deserving of considerable weight, in particular in relation to, for example, GoSL's ability to gather information and the process by which this is analysed, there are certain aspects in respect of which we have reservations.

Dr Nadarajah

272. Like Dr Smith, Dr Nadarajah gave evidence in GJ and he was not the subject of any material criticism by the Tribunal. In general terms his evidence is detailed and of assistance in respect of many of the issues with which we are concerned in these appeals.

273. In particular, we have found much of his evidence relating to the substance of GoSL's attitudes towards separatist ideology and certain diaspora organisations to be, subject to a point discussed below, informative and reliable. His generally well-sourced opinions on the determination of the regime to prevent a resurgence of separatist activity within Sri Lanka have carried significant weight with us. We also deem his acknowledgment that a risk profile will depend on an "indicator-based" approach to be both candid and an accurate reflection of the reality of the current position.

274. We do note certain points which may be said to lie on the other side of the balance sheet. Dr Nadarajah has not been in Sri Lanka since June 2017 and will not therefore have had the more up-to-date direct evidence of the country as Dr Smith. It is right to say, though, that the absence is not particularly lengthy. Certain aspects of his evidence relating to the current technological capabilities of GoSL were in our judgment somewhat speculative, but we acknowledge that he has not purported to be an information technology expert. Indeed, this highlights a general omission in the evidence before us as to what must now be an important aspect of many protection claims relating to a variety of countries around the world which operate a relatively efficient

security apparatus. We would take this opportunity to urge parties to country guidance cases, where appropriate, to consider adducing expert evidence on the technological capabilities of the regime in question.

275. There is also an apparent tension between, on the one hand, Dr Nadarajah's assertion at certain points in his evidence that GoSL regards the entirety of the Tamil diaspora to be deserving of unqualified hostility, and on the other his repeated acceptance that risk on return "depends" on the overall profile of the individual. However, when his evidence is read holistically and together with all other relevant materials, the analysis and conclusions which we set out later in this decision do not materially undermine Dr Nadarajah's opinions as a whole. This is not of course to say that we have agreed with all aspects of his evidence.

276. As with the two other experts, Dr Nadarajah has been unable to provide any, or any reliable, evidence as to the experiences of individuals who have actually been returned to Sri Lanka from the United Kingdom.

Professor Gunaratna

277. Professor Gunaratna has also been involved in previous country guidance cases. In GJ, he was described as an "insider" in relation to the Sri Lankan government of the time and that his evidence reflected its "mindset" (para 273). We conclude that aspects of the evidence he has provided to us come from a similar perspective. The fact that there have been two changes of government since GJ does not materially reduce the relevance of what he says about current attitudes of GoSL. After all, the regime is of a similar make up to that in power in 2012/2013.

278. Having said that, for reasons we set out in detail at a later stage of this decision, we conclude that Professor Gunaratna's opinions have at times overstated the risks said to await returnees who have engaged in diaspora activities, although it is fair to note that he seemingly qualified his initial extremely broad category by accepting that risk will "depend" on the individual's overall profile.

279. A specific issue arose during the course of Professor Gunaratna's oral evidence which gave us immediate and serious cause for concern. It transpired that he had provided a draft of his report to a member of the Bar in the United Kingdom whose practice has, over the course of many years, involved representing Tamil asylum-applicants. The purpose of this, he informed us, was to see if the individual concerned had any comments to make on it before it was provided to the parties. Professor Gunaratna seemingly did not think it necessary to have notified the parties (by whom he had been jointly instructed) prior to taking this course of action. Counsel

confirmed to us that the parties had been made aware of what had transpired after the event.

280. With respect to Professor Gunaratna, whilst his request for any comments on the draft report was no doubt well-intentioned, it was also ill-advised. By the act itself, a risk was created that his report's content would be seen as tainted because of the input of another party with a professional connection to what might be described in general terms as one side of the argument, namely Tamil asylum-applicants. Greater caution should have been exercised before selecting the source of any review of the draft report. It would have been helpful if the parties had brought this matter to the Tribunal's attention during the case management process.

281. In the event we have concluded that this matter does not represent a significant tainting of Professor Gunaratna's evidence. He and the parties confirmed that no changes had in fact been made to the report as result of the "review" and we accept that this was the case. In addition, neither Ms Patel nor Mr Mackenzie sought to rely on the point in their submissions. Our conclusion might well have been different if any changes had been made to the report.

The FFM and Mr Stares' evidence

282. There are in our view a number of shortcomings in respect of the FFM which, to an extent, undermine its purported status as a "key" aspect of the evidential picture in these appeals.

283. Before turning to these, we make it clear that we in no way seek to impugn the good faith, professionalism, and honesty of Mr Stares and the members of the team who conducted the mission. We express our gratitude to Mr Stares for attending the hearing to give oral evidence at short notice.

284. The first point we make relates to the report's structure. The presence of an executive summary may be of some utility to the respondent's caseworkers operating under pressure of time, but the summary is of no evidential value to us. It is, in effect, a summary of the summaries which follow. As Mr Stares very fairly points out in his witness statement, decision-makers are still required to examine the interview notes themselves. That caveat applies all the more to impartial and independent tribunals when making their own findings.

285. There is less to be said against the thematic summaries than the executive summary and there is merit in the respondent's submission that there appears to be little or no actual analysis of the source material. The statements contained in each summary are cross-referenced to the underlying source. Having said that, there is no substitute for a proper consideration of the

source material, namely the interview notes. Again, this applies to the respondent's caseworkers and all the more so to tribunals. Whilst bearing in mind the fact that the Tribunal was considering a different report, we note the observations stated in paragraph 111 of EM:

> "Where Mr Henderson is on stronger ground, we find, is in relation to the executive summary at the beginning of the FFM report. The existence of this summary is hard to reconcile with the claim in the introduction that "No attempt has been made to provide any analysis of the material". Mr Walker, in his evidence, essentially agreed with Mr Henderson on this matter, informing us that he had argued against including an executive summary. For the respondent, Ms Grey informed the Tribunal that no reliance was placed on the executive summary or, indeed, the summaries of responses from the interviewees (other than the returnees). We have taken no account of those summaries in reaching our findings. Although it is not a matter for us, it may be that those responsible for the preparation of future FFM reports would in future do well to eschew such summaries, leaving decision makers and judicial fact-finders to draw their own conclusions from the full versions of the questions and answers of the interviewees."

286. Whilst appreciating that the structure of the FFM may provide practical assistance to caseworkers, it remains the fact that the report is also put before tribunals for consideration. It is not clear to us why the suggestion made by the Tribunal in EM has not been taken up.

287. Perhaps in anticipation of this first criticism, the respondent's skeleton argument expressly states that reliance was not being placed on the summary sections. We confirm that we have not taken these into account.

288. Mr Stares described one of the "main drivers" of the mission as the desire to obtain up-to-date information on, amongst other matters, the Sri Lankan government's attitude to diaspora activities and the treatment of members of groups such as the TGTE, in the context of what is said to be the "inexplicable rise" in individuals citing this organisation as the basis of their protection claims.

289. With this stated objective in mind, there is in our view some force in the appellants' criticism that the report's value as regards the central issues in these appeals is limited. Within the thematic summaries, that entitled "Diaspora and sur place activities " consists of only two short passages, with neither of the two sources seemingly well placed to provide information on this important matter. It is true that a number of sources were asked about the TGTE and that the relatively limited responses indicate a low level of general awareness of that organisation within Sri Lanka. However, on an overall analysis, we take the view that this evidence is, by itself, of limited value in our assessment of the core issues of the GoSL's attitude to relevant diaspora organisations (which, by definition operate outside of Sri Lanka) and, in turn, the consequences of this to returnees.

290. On our count, only seven of the sources identified in Annex D to the FFM were specifically asked about the TGTE. Of these, the TNA and UNHCR confirmed that they had no knowledge about this organisation whatsoever. The CID provided very little information, confirming that they were not experts on this organisation. The senior member of the Attorney General's Department was not aware that the TGTE was proscribed; a notable lack of knowledge that had to be corrected by a colleague. Those sources which could say something about the TGTE provided only brief responses relating to the possible adverse interest in returnees associated with it, or that its existence was not widely known within Sri Lanka.

291. We find it somewhat surprising that no lawyers and/or academics were interviewed. Although Mr Stares suggested that this was down to availability, we have not been provided with information as to whether any such sources were approached in the first place. A similar point arises in respect of the selection of only a single human rights activist. Such sources may (we put it no higher than that) have been able to provide contextual evidence on the attitudes of the government and/or security forces to diaspora groups perceived as pursuing a separatist agenda.

292. Whilst a source from the CID was interviewed, the TID does not appear to have been approached. Given that the latter has specific oversight of terrorism-related matters in Sri Lanka and the connections drawn by GoSL between separatism and national security, this omission is rather striking. It seems to us that the TID was a relatively obvious choice for selection as a source. In fairness, Mr Stares candidly accepted that with the benefit of hindsight, this agency might have been approached. This comment is certainly consistent with the CID interviewees' response that "they were not experts on the TGTE, it was an intelligence issue."

293. On the question of sources more generally, it is right to say that approximately a third were members of, or closely associated with, the government. It is appropriate to obtain the views of the state, although obtaining information from a variety of appropriate sources will assist in providing a more rounded evidential picture, which in turn may have implications for the weight likely to be attributed to it by fact-finding tribunals. In respect of the FFM, it may be said that the best possible balance was not achieved. However, in our judgment this is not of particular significance. Of greater import, and for the reasons set out above, is the lack of relevant evidence provided by a number of the selected sources, be they connected to the authorities or not.

294. Still on the theme of a lack of knowledge displayed by certain sources, it is in our view surprising, to say the least, that one of the two journalist sources interviewed appeared to believe that torture did not occur in Sri Lanka, contrary to the overwhelming weight of expert evidence and country information. In respect of the IOM's view that allegations of discrimination against Tamils made by members of that community were being put forward

to serve their "own ends", Mr Stares frankly accepted that this answer appeared to be "quite stark": we agree. It does not, on its face, sit happily with that organisation's stated impartiality.

295. Of lesser concern, but a concern nonetheless, is the fact that only a single source of Tamil ethnicity was interviewed. Whilst ethnicity is clearly not a decisive factor in selection, given that the focus of the mission was to obtain evidence relating to the Tamil diaspora and its activities, it might have been advisable to ensure a greater representation from the Tamil community in Sri Lanka.

296. In general terms the fact that a number of sources failed to respond to the request for approval of the interview notes does not cause us any particular concern. We accept Mr Stares' evidence that, in line with the respondent's internal guidance, interviewees are informed that a failure to respond to the request for approval of the interview notes will be deemed as an approval. What does raise a question mark is the confirmation in the FFM that one source did not want the interview notes to be used at all. We have not been told as to which source this was.

297. Noting what is said at paragraph 164 of AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC), the anonymity of the sources (to the extent that personal names are not used) does not, in all the circumstances, materially reduce the weight which might otherwise be attributed to the evidence. We take into account the fact that aspects of the expert evidence before us also rely on unnamed sources.

298. There is no real issue in respect of the timing of the mission. It could be said that waiting until after the presidential election on 16 November 2019 might have been appropriate, a point recognised by Mr Stares in his oral evidence. Yet it would have been very difficult, if not impossible, to predict what, if any, material changes might have come about over the following months as a result of President Gobabaya gaining power. The mission had to take place at some point.

299. Other than Dr Smith's evidence, the FFM is a product of the most recent information-gathering visit to Sri Lanka. This of itself provides a degree of illumination as to current knowledge and perceptions held by a variety of actors on the ground.

300. In summary, given that a central purpose for conducting the mission in the first place was the aim of obtaining useful information on attitudes towards diaspora organisations (including in particular the TGTE), and the treatment on return of members/supporters thereof, the utility of the FFM is not as apparent as it might otherwise have been. Nonetheless, we place weight on this evidence commensurate with our analysis and conclusions, above, and in the context of the core issues with which we are concerned in these appeals.

As with all other aspects of the evidence before us, we have placed the FFM in the context of the whole.

The CPIN

301. We do not propose to go into any great detail in respect of the CPIN. In general terms, we regard the "Assessment" section as constituting a statement of the respondent's guidance to her caseworkers on a number of thematically-arranged issues. The CPIN is simply evidence of the respondent's position as it was at the date of its publication in May 2020. The guidance to caseworkers may be relevant in any given case where the respondent seeks to put forward an argument that is inconsistent with it. As regards the "Country information" section, we evaluate the source materials set out therein on their own merits in the usual manner and as part of the overall evidence before us. Where the FFM and the DFAT are relied on as sources (as they are on a relatively frequent basis), we bear in mind what we have said about these, above and below. We have placed appropriate weight on the source materials cited in the CPIN.

DFAT

302. In addition to taking account of open source materials such as the US Department of State human rights reports, DFAT is based on "on-the-ground knowledge and discussions with a range of sources in Sri Lanka." However, none of the sources are identified, there is no explanation as to how the information from these sources was obtained, and there is no annex containing, for example, records of any interviews (unlike the FFM). Indeed, it is unclear whether any formal interviews took place. The report does not provide direct quotes from any source. In light of these matters, it is difficult to gauge the reliability of the sources which have informed the "judgement and assessment" applied to them by the authors of the report. On a broader point, the report is focused primarily on the situation within Sri Lanka and there is little on the question of *sur place* activities and the attitude of the authorities to these.

303. Notwithstanding these matters, the report does provide some useful background on issues such as monitoring within the country, the relevance of past LTTE links, and, to a more limited extent, the basis upon which the authorities may take an interest in particular returnees. We are also cognisant of the fact that two of the experts refer to the report in their own evidence and that the DFAT relies on evidence provided by Dr Smith in GJ.

304. DFAT was published on 4 November 2019, just before the presidential elections. As with the FFM, the benefit of hindsight might suggest that the

publication could have been delayed, but this point does not materially feature in our considerations.

305. With the above observations in mind, we have placed appropriate weight on DFAT when evaluating the country information as a whole.

Other country evidence

306. We have considered the large array of additional country information as part and parcel of the overall evidential picture. In so doing we have noted that certain materials have been relied on in their own right, whilst others have been cited by the experts in support of their opinions. We have assessed relevant reports in light of the written and oral submissions presented by the parties (including the written notes provided by the respondent at the hearing). In general terms, a relatively significant amount of this evidence relates to uncontroversial matters such as the prevalence of torture in detention and the use of monitoring by the Sri Lankan authorities. Where this has not been the case, we have attributed the weight we deem appropriate in all the circumstances.

Mr Yogalingam

307. In general terms Mr Yogalingam provided what we consider to be candid evidence of fact both in respect of the workings of the TGTE in the United Kingdom and his knowledge of KK's and RS' participation with the organisation over the course of time. What he said about the distinction between formal members of the organisation and supporters has been useful, as has his confirmation that anybody can be issued with a TGTE identity card upon payment of the relevant fee. Thus, possession of such a card is of very little, if any, probative value as to an individual's involvement with the TGTE. We find that the only formal members of the TGTE are the elected MPs.

308. We accept his evidence that the TGTE does not maintain any records of supporters who have been returned to Sri Lanka. The organisation (at least in respect of its operations in the United Kingdom) simply does not know how many, if any, supporters have in fact been returned. Our initial reaction to this evidence was one of surprise: collecting some form of information on the fate of its supporters would seem to be an exercise that the TGTE would wish to engage in. On reflection, our initial response is somewhat tempered by Mr Yogalingam's explanation that people would be afraid of contacting his organisation from within Sri Lanka, a consideration that found support from Dr Smith. Although individuals had contacted Dr Smith from Sri Lanka, he stands in a different position to that of a proscribed organisation. The same is true of Dr Nadarajah who has confirmed that he remains in communication

(using WhatsApp) with contacts in the country in order to keep abreast of developments. Notwithstanding this, it is relevant that the TGTE has not even sought to make contact with returnees or their families (whether in Sri Lanka or the diaspora) by using, for example, encrypted communication platforms such as WhatsApp or Signal in order to obtain information. In turn, the lack of anecdotal evidence undermines Mr Yogalingam's assertion that anyone attending TGTE events who is then returned to Sri Lanka will be at risk.

309. As to Mr Yogalingam's evidence on the particular activities undertaken by KK and RS, we find that there was no attempt to exaggerate the involvement during the course of oral evidence. It was to his credit that he clearly stated his inability to recall certain details and, viewed in the round, there was a broad consistency in his evidence as a whole.

Mr Uthayasenan

310. We were impressed by Mr Uthayasenan's evidence. Overall, we found it to be measured and reliable. The description of the methodical membership process, adopted in order to ensure that an individual was committed to the separatist and anti-GoSL agenda advanced by TS, was plausible and consistent with the detailed description of the organisation's aims set out in Mr Uthayasenan's witness statement. In light of TS's approach to full membership, it is likely that an individual supporter will become more heavily involved in activities as they progress down that path.

311. We find that TS has never been a proscribed group within Sri Lanka. We accept Mr Uthayasenan's evidence that TS and the TGTE do on occasion cooperate with the organisation of events, an example of this being a protest held in February 2018 during which the then Sri Lankan Defence Attaché Brigadier Fernando made a notorious throat-cutting gesture at the demonstrators.

312. Mr Uthayasenan's inability to say whether any TS supporters or members have been returned to Sri Lanka does not assist in our analysis of who might be at risk.

I: ANALYSIS AND CONCLUSIONS

313. Two interrelated preliminary observations can be made. First, by their nature, the issues with which we are concerned are such that the Sri Lankan authorities will not wish 'outsiders' to have any insight into their security practices and approaches. In a very real sense, we are being asked to peer into the secretive corners of a foreign State's national security priorities and apparatus. It would be remarkable if we had been presented with a clear

picture of GoSL's operational priorities and the criteria by which individuals in the diaspora are deemed to be a threat to the country's territorial integrity.

314. The second, and interrelated, point takes up a theme found in Mr Mackenzie's submissions, namely what he has described as the "positive role for uncertainty". Whilst we appreciate the point being made, it is important to emphasise that the concept is in reality simply a facet of the lower standard of proof applicable in protection claims. It does not modify that standard and judicial fact-finders must guard against legitimate extrapolation and reasonable inferences crossing over into impermissible speculation.

Detention and the risk of persecution and serious harm

315. Amongst all the numerous issues arising from the evidence and submissions thereon, it is important not to lose sight of the overarching question in these appeals: is there a reasonable likelihood that the individual concerned will be persecuted on return to Sri Lanka for a reason falling within Article 1A(2) of the Refugee Convention and/or be at real risk of ill-treatment contrary to Article 3 ECHR?

316. In the context of the scenario with which we are concerned, there is no doubt that any such risk of persecution would, if it exists at all, have a clear nexus with the Refugee Convention reason of political opinion, actual or imputed. In the generality of cases, Article 3 ECHR adds little, if anything, to the equation.

317. Thus, it is of paramount importance to establish whether an individual who is the subject of sufficient adverse interest to result in detention (authorised by law or otherwise) is at real risk of being exposed to treatment which constitutes persecution.

318. Paragraph 356(4) of GJ states in the clearest of terms that:

> "(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."

319. Consistently with her position in GJ, the respondent has expressly invited us to maintain this particular aspect of the existing country guidance, although there is a suggestion that the country evidence indicates some improvements in the treatment of detainees. Unsurprisingly, the appellants' stance is that the risk of persecutory treatment in detention remains high.

320. The expert evidence all points to the conclusion that detention will give rise to a real risk of ill-treatment. This is in line with numerous sources of country information, including Amnesty International, the DFAT, the 2019 United States State Department report, and the December 2016 report of the UN

Special Rapporteur. The use of torture and excessive force is variously described as "endemic" and "common", and that "a "culture of torture" persists" in the country. Descriptions of the types of treatment meted out to detainees are all-too familiar and follow a similar pattern to that considered by Tribunals in previous Sri Lankan country guidance cases.

321. In light of the position set out in GJ, together with the evidence before us, it is abundantly clear that there is a reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to persecution within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR.

322. It is the prior question concerning the circumstances in which an individual is at real risk of being taken into detention that represents the core issue for us to address.

323. In order to do so, it is necessary to undertake a contextual step-by-step approach to several matters, ranging from the general to the specific. We begin with the former.

The current political landscape in Sri Lanka

324. On 17 November 2019 Gotabaya Rajapaksa, the former Defence Secretary at the end of the civil war in May 2009, won the presidential election with just over 52% of the vote, having campaigned on an openly Sinhalese nationalist platform. Shortly thereafter he appointed his brother Mahinda, the former president between 2005 and 2015, as Prime Minister.

325. The new regime quickly took steps to implement its political agenda. In February 2020 it withdrew Sri Lanka from UN Resolution 30/1 which the previous government of President Sirisena had co-sponsored in order to promote reconciliation, accountability, and human rights in the country. There was an entrenchment of the presence of military personnel in the power structure of government. The possible repeal of the PTA envisaged by the previous government was firmly discounted. There is also ample evidence of journalists and others who have sought to investigate alleged wrongdoings by political and military leaders being targeted for harassment and intimidation. There is nothing to suggest that the phenomenon of what was described in GJ as the "Sinhalisation" of Tamil areas has been reversed and the FFM contains evidence that there continues to be a degree of "colonisation" by Buddhists. The evidence as a whole clearly shows that there is a very large military presence in the north and that the army still occupies a good deal of land previously owned by the Tamil population before the end of the civil war.

326. Both parties have described GoSL as "authoritarian" in nature. In light of the evidence before us, that is a fitting epithet. Whilst the term may not have been

expressly employed by the Tribunal in GJ, it would have also accurately described the government in power at that time.

327. The parliamentary elections took place on 5 August 2020. President Gotabaya's Sri Lanka People's Front ("Podujana Peramuna") won a landslide victory and, with the support of smaller parties, may be in a position to change the Sri Lankan Constitution. At this stage, it would in our view be premature to conclude that the overall human rights situation in the country will deteriorate to the extent that it should materially affect our findings. Having said that, the "direction of travel" quite clearly does not point towards any improvement in the foreseeable future.

328. It follows from the above that any modest reconciliatory efforts that might have occurred during the currency of President Siresena's time in office have, or are in the process of being, dissipated, and play no material part in our considerations.

Separatism in the Sri Lankan context

329. The often bloody history of separatism in the Sri Lankan context is well-documented and does not require recitation. Article 157A of the Sri Lankan Constitution, as amended, serves as the bedrock for successive governments' policies towards the notion of a separate Tamil homeland. Article 157A, brought in by the 6th Amendment to the Constitution on 8 August 1983, provides, in so far as is relevant:

> "157A. (1) No person shall, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka.
>
> (2) No political party or other association or organisation shall have as one of its aims or objectives the establishment of a separate State within the territory of Sri Lanka."

330. The determination of the then government to doggedly guard against the possibility of a renewed "threat" of separatism was a central plank of the Tribunal's conclusions in GJ.

331. Neither party has suggested that the resolve of the previous regime has in any way diminished over time. A question for us is whether President Gotabaya's government views the concept of separatism more widely, as advanced by the appellants, or in a more circumspect way, in line with the respondent's case.

332. It is clear from the evidence in GJ and before us (as previously summarised) that Sri Lankan governments have, over the course of time and through numerous public statements made through various media and to a range of audiences, regarded Tamil separatism as what Dr Nadarajah has described as

"an ongoing and existential threat to the state and prevailing Sinhala majoritarian social order". The unswerving desire to ensure the existence of the unitary State of Sri Lanka and combat what has been called the "separatist ideology" is in keeping with the agenda of a nationalist authoritarian regime comprised of many of the same protagonists who presided over the last stages of the civil war. With this in mind, there is merit to the appellants' submission that GoSL has genuine ideological and political incentives going beyond a simple populist desire to "talk up" the perceived threat of renewed separatist activity, in particular by the LTTE.

333. The respondent posits the argument that a distinction should be drawn between the rhetoric employed by GoSL and the reality of its actions (this argument has also been made in respect of its view of the Tamil diaspora; see below). In our view, there is a degree of force in this position too. Dr Smith acknowledged in oral evidence that speeches made by senior politicians are often for public consumption and involved "playing to the crowd". The expert evidence and country information provides consistent support for the conclusion that the LTTE remains a spent force within Sri Lanka, as was the case at the time of GJ. In one sense then, there is not now an organised, separatist movement operating within the country which, in the eyes of GoSL, requires immediate and concerted action.

334. It is also the case that there is, to use the respondent's phrase, some limited "political space" for pro-Tamil political discourse within Sri Lanka. The TNA took part in the parliamentary elections in August 2020, as did certain other minor parties representing Tamil interests, including the TNPF and the Tamil People's Council, both of which are described as "nationalist" in nature. A fourth, newly formed Tamil party, TMTK, gained a seat in the elections. We note that on 4 August 2017 the Sri Lanka Supreme Court rejected a claim that the advocation by ITAK for a federalist system was tantamount to separatism, contrary to Article 157A of the Constitution. Whilst there is scope for a legitimate argument that the Court's judgment should be seen as distinct from the views of GoSL itself, that case, together with the other evidence, indicates that there is currently at least some room, albeit constrained, for the espousal of political views which do not tally with those of the regime.

335. Evidence from the experts, the FFM and DFAT suggests that many in the Tamil community within Sri Lanka are now more interested in improving their economic circumstances and would not want a return to separatist violence. We have not been presented with evidence of individuals residing in Sri Lanka being detained purely on the basis of expressing separatist views, as opposed to suspected links with the LTTE or any other group. It may be inferred from this that there is no current groundswell of separatist views manifesting themselves within the country itself.

336. There are, however, contraindications within the evidence. Dr Smith, Dr Nadarajah, and Professor Gunaratna all provided evidence to the effect that

GoSL fears a resurgence of LTTE activity within Sri Lanka and a possible return to conflict. There is a logic to Dr Nadarajah's view that GoSL gives a broad interpretation to the term "separatism", and the same is true of Dr Smith's opinion that the regime views Tamil separatism and nationalism as "two sides of the same coin". An authoritarian government committed to suppressing the (actual or perceived) resurrection of separatism within its territory is, in our view, more likely to cast the net widely to ensure appropriate coverage in furtherance of its objective.

337. We note that of the three pro-Tamil political parties referred to above, the TNA has been criticised by some in the Tamil community for being too willing to compromise with GoSL, whilst at the same time having been heavily criticised by the Prime Minister in the run-up to the recent parliamentary elections for advocating federalism, which he in effect described as separatism by another route. On the evidence before us, neither of the other two pro-Tamil parties has ever explicitly professed the desire for Tamil Eelam. Furthermore, press articles in the period leading up to the elections report, in our view reliably, intimidation and harassment of the TNPF. Another party which appears to have been recently established is the Crusaders for Democracy, instigated by ex-LTTE cadres. As we understand it, the individuals concerned had been through the "rehabilitation" process and were regarded by the Sri Lankan authorities as being "reformed" and thus not posing any material threat as regards the propagation of separatist opinions.

338. We turn to a source of evidence to which we attach considerable weight. In an article published in a 2014 edition of PRISM, a journal of the Center for Complex Operations (a think tank connected to the US Department of Defense), President Gotabaya, who was then the Defence Secretary, wrote that:

> "… It must be further realised that there are groups even within the democratic mainstream in Sri Lanka that obtain funding from the LTTE's international network and pro-LTTE elements overseas, which more or less openly talk about achieving the very same objectives that the LTTE had. Though they appear to have a democratic face, their extremist separatist ideology has not yet disappeared. Their ultimate objective is achieving the division of Sri Lanka. As a result of their actions and statements, it is very much a possibility that certain radical elements will feel empowered to once again attempt to take up arms in the name of separation. This is a major national security threat that needs to be taken with the utmost seriousness."

339. This passage is significant for three reasons. First, it emanates from the horse's mouth, as it were: the author is now of course the President and there is no sound reason arising from the evidence to suggest that his views have materially changed since 2014 (the article in question was based upon a speech he had given in 2012; thus indicating a consistency of position over the years). Second, we find that the article was not written as a piece of electioneering propaganda intended for consumption by the generality of the Sri Lankan

voting public. Third, it sets up a link (actual or perceived) between ostensibly non-violent democratic groups and the threat (again, actual or perceived) of a revival of violent separatism; a threat that is, we conclude taken seriously now, as it was then.

340. The argument that much of the governmental and military pronouncements are simply rhetorical and should be viewed with real caution is further undermined, at least to an extent, by the fact, as we find it to be, of a number of unsuccessful LTTE-inspired plots to carry out attacks within Sri Lanka since GJ was decided. Of the eleven "attempts" detailed by Professor Gunaratna in an appendix to his main report, nine post-date GJ and occurred between 2014 and March 2020. He was able to provide further evidence as to apparent connections between the individuals concerned and LTTE-linked groups outside of Sri Lanka in respect of some of the incidents, whilst he could not be specific in respect of others. Added to this list, a variety of sources address the failed attempt by an ex-LTTE operative to undertake a suicide bombing in July 2020. The plot was said to have been instigated by an LTTE member residing in France.

341. These incidents certainly cannot be said to equate to general operational capabilities of the LTTE within Sri Lanka or to a meaningful resurgence of that organisation. However, they do add force to the appellants' argument that the rhetoric and the expression of determination to prevent any form of resurgent separatism does in fact have a basis in reality. In our view, the reality in this equation must be seen in the context of GoSL's authoritarian nature and Sri Lanka's violent history over the last four decades.

342. The foregoing is also in keeping with what the previous government stated in November 2015 when amending the list of proscribed groups and individuals deemed to be involved with terrorism (of which, more will be said, below). The LTTE's current listing entry includes the following:

> "Despite the military defeat of the LTTE in Sri Lanka its front organisations and structures continues to remain active overseas promoting LTTE ideology of creating a mono ethnic separate state of Tamil Eelam through terrorist means. Three clear resurgence attempts within the country with assistance from pro LTTE groups operating overseas (Year 2012-2014)."

343. The bombings that took place on Easter Sunday April 2019 were carried out by Islamic extremists, not Tamil separatists, but this terrorist attack was seen by many to be a significant intelligence failure by the authorities. It is not unreasonable, in our view, to infer that this incident will have only heightened the security-related sensitivities of the authorities in a general sense, which in turn is likely to feed into its standpoint on the threat (actual or perceived) of separatist activity within the country.

344. As for the POAC judgment in Arumugam and the evidence adduced before us pertaining thereto, we have taken the view that neither materially undermines

the position adopted by the respondent in these appeals, nor materially advances the appellants' case. The thrust of the respondent's submissions on "rhetoric and reality" went to the uncontroversial fact that the LTTE are not an active force within Sri Lanka and that GoSL's utterances should be seen in that context. She has not suggested that the organisation has ceased to exist in any form outside the country. We also take account of the relatively narrow basis on which POAC allowed the appeal against the decision to maintain proscription under the Terrorism Act 2000. In short, we see no real tension between the respondent's stance before us and as adopted in the POAC proceedings.

345. On the other hand, the POAC case does not detract from the appellants' argument that GoSL genuinely perceives the LTTE to represent an ongoing threat to the unity of the Sri Lankan state. It is unlikely that GoSL's view of the LTTE will have been altered by the proceedings in POAC. If anything, the case (including the respondent's position adopted therein) may have simply re-affirmed an existing belief that the LTTE (in whatever form it takes) continues its efforts to instigate attacks in Sri Lanka from abroad. In any event, the decision in Arumugam has not played a material part in our overall conclusion, as set out below.

346. Having regard to all relevant considerations, we conclude that much, if not all, of the rhetoric emanating from senior members of the political and military establishment since 2012 has represented an accurate reflection of GoSL's position and has not simply constituted hyperbolic or vacuous pronouncements. We are satisfied that there is deemed to be an imperative need to ensure that any nascent movement, organisational capabilities, political voice, and even sympathies, related to the "separatist ideology" within Sri Lanka are firmly suppressed.

347. The evidence does not, however, show that every expression of opinions which are pro-Tamil and/or anti-government will, *on that basis alone*, be deemed by GoSL to equate to the advocation of a "separatist ideology". Much will depend on the context. Certain political parties operating within Sri Lanka are described as "nationalist", but if any party or organisation sought to dress up a call for Tamil Eelam in the clothes of "nationalism", it is highly likely that GoSL will regard this as separatism by another name and act accordingly. Also of relevance is the source of the opinion (i.e. the profile of the particular individual or organisation expressing it) and what is actually being said. For example, it may be unlikely that a campaign for the accountability of political leaders for alleged human rights abuses mounted by an organisation perceived to be separatist in nature will be seen by GoSL as being in any way distinct from the overall separatist agenda. Conversely, a human rights activist with no separatist profile (actual or perceived) who investigates alleged corruption may well not be categorised as pursuing an agenda contrary to the territorial integrity of Sri Lanka.

348. Indeed, journalists and human rights activists, together with those who have given evidence to the LLRC, are the subject of specific risk categories under GJ which neither party has asked us to re-evaluate. Thus, individuals falling within them will not necessarily be regarded as having engaged in separatist activity (which is a separate risk category); although such a person could conceivably fall within more than one.

349. Drawing all of the above together, we conclude as follows. The core focus of GoSL is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam. GoSL draws no material distinction between, on the one hand, the avowedly violent means of the LTTE in furtherance of Tamil Eelam, and non-violent political advocacy for that result on the other. It is the underlying aim which is crucial to GoSL's perception. To this extent, GoSL's interpretation of separatism is not limited to the pursuance thereof by violent means alone; it encompasses the political sphere as well. Whilst there is currently limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of any avowedly separatist or perceived separatist beliefs.

GoSL's attitude to the Tamil diaspora in general

350. The next stage of our assessment relates to how GoSL views the Tamil diaspora in general, and sub-sets within that cohort, in light of what we have said about its attitudes towards separatism.

351. As with most other aspects of our decision, GJ provides the starting point. In paragraphs 303 and 335, the Tribunal stated that there were approximately 1 million Tamils living outside of Sri Lanka, with what were described as "diaspora hotspots" in London, Paris, Toronto, and Oslo (for the sake of completeness, we observe that the United Kingdom-based contingent of the diaspora consists of approximately 300,000 people).

352. As regards the regime's determination to prevent a resurgence of violent separatist activity within Sri Lanka, it was concluded that the focus had shifted from the domestic front to the external. This continues to be borne out by the evidence before us, although, given the attempted terrorist actions on home soil we have referred to previously, that focus is not exclusively outward-looking. The non-emergence of the LTTE or any other separatist movement within Sri Lanka in the period since GJ reinforces the conclusions reached in 2013 and is consistent with the current evidence that GoSL has an interest in maintaining the narrative of a risk of resurgence as justification for a continuation of authoritarian domestic security measures: in other words, that the apparently effective suppression of the separatist threat is said to be only as a result of the necessary actions of the government.

353. Does this mean that GoSL regards the *entire* Tamil diaspora as a separatist threat, or is the position more nuanced?

354. GoSL's hostility to the separatist movement is undoubtedly real and we accept that the activities which may be perceived as separatist in nature will in most cases emanate from within the diaspora: it is, as described by Dr Nadarajah, the "locus" of the perceived threat. It follows as a matter of logic that GoSL views the "entire" overseas Tamil population with a generally adverse mindset.

355. However, in our judgment this does not completely cloud its ability to differentiate between an entire class of persons and those within that class who are, to a greater or lesser degree, politically active in a manner known or perceived to be in furtherance of a separatist agenda. If every member of the diaspora was regarded with such enmity as to make them of adverse interest such as to warrant detention (and thereby exposing them to a real risk of persecution), we would, aside from any other considerations, have expected to see evidence that all returned failed Tamil asylum-applicants faced this outcome. No such evidence is before us and the appellants have not argued that all returnees are at risk. In addition, the evidence does not show that the Tamil diaspora forms a single cohesive body as regards political beliefs and, importantly, activism. Given the ability of the authorities to monitor diaspora activities, it must be the case that there continues to be a basic awareness of this fact, as previously acknowledged in GJ. Finally, we have already found that a limited amount of political freedom to express Tamil nationalist ideas exists within Sri Lanka itself. This is a further indication that GoSL is unlikely to view the expression of similarly constrained political beliefs as tantamount to the pursuance of an active separatist agenda.

356. Further and in any event, whilst certain aspects of Dr Nadarajah's evidence may be somewhat ambiguous, we agree with Mr Mackenzie's submission that he was not in fact purporting to make the claim that all members of the diaspora are at risk. Reading his evidence holistically we find that his intention was to attribute GoSL's main focus only to the political activities undertaken by certain groups and/or individuals within the diaspora. Our view is reinforced by the fact that he has not used the term "entire" in his evidence. Dr Nadarajah's evidence is also consistent with that of the other two experts, both of whom have referred, albeit using differing terminology, to the Sri Lankan authorities having expressed hostility towards politically active elements within the diaspora.

357. Thus, whilst there will logically be a focus on the entire diaspora, the operative concern is with a sub-set of that large group. In our judgment GoSL does not regard the entire cohort as either holding separatist views or, even if it did, that all members of this cohort would be perceived as being politically active in any meaningful way.

358. With the above parameter in mind and taking full account of what we have said about GoSL's attitude towards separatism in general, we turn to consider its perception of relevant political activities conducted in the United Kingdom. As the great majority of such activities are likely to be undertaken on behalf of organisations rather than simply as individuals, we will need to examine those which are the subject of evidence before us. Before doing so, we address the issue of the proscription of particular groups under Sri Lankan domestic law which was not the subject of consideration in GJ.

Proscription under the 2012 UN Regulations

359. The 2012 UN Regulations constituted the Sri Lankan government's implementation of United Nations Security Council Resolution 1373 (2001), setting out wide-ranging strategies with which the international community seeks to combat terrorism, particularly in relation to the financing thereof.

360. Under Regulation 4, the relevant minister, on the recommendation of a "Competent Authority" is mandated to proscribe :

    i. natural persons, legal persons, and groups or entities, in respect of which there are reasonable grounds to believe that they, "…commit or attempt to commit, participate in or facilitate the commission of, terrorist acts…"

    ii. legal persons, groups or entities which are owned or controlled directly or indirectly by such natural or legal persons, groups or entities

    iii. natural and legal persons, groups or entities acting on behalf of, or on the direction of any such natural or legal persons, groups, or entities.

361. In the Gazette published on 21 March 2014, sixteen diaspora organisations and 424 individuals were proscribed under the Regulations. That original list contained the following organisations (the countries in which they were based are, where stated in the Gazette, provided in parenthesis):

    i. LTTE;

    ii. Tamil Rehabilitation Organisation (Sri Lanka and other countries);

    iii. Tamil Coordinating Committee (France);

    iv. BTF (United Kingdom);

    v. World Tamil Movement (Canada);

vi. Canadian Tamil Congress (Canada);

vii. Australian Tamil Congress (Australia);

viii. GTF (United Kingdom);

ix. National Council of Canadian Tamils (Canada);

x. Tamil National Council (Norway);

xi. Tamil Youth Organisation (Australia, Canada, Switzerland, and France);

xii. World Tamil Coordinating Committee;

xiii. TGTE;

xiv. Tamil Eelam People's Assembly;

xv. World Tamil Relief Fund;

xvi. Headquarters Group.

362. In a revised list of proscribed organisations and individuals published in the Gazette on 20 November 2015 and re-confirmed on 9 November 2016, the following organisations were removed from the original 2014 list:

i. GTF;

ii. BTF;

iii. National Council of Canadian Tamils;

iv. Tamil Youth Organisation;

v. World Tamil Coordinating Committee;

vi. Canadian Tamil Congress;

vii. Australian Tamil Congress;

viii. Tamil National Council.

363. The Gazette published on 25 February 2021 confirmed that all of the de-proscribed organisations listed above, save for the Tamil National Council, were re-proscribed. Thus, the current list of organisations proscribed under the 2012 UN Regulations consists of:

i. LTTE;

ii. Tamil Rehabilitation Organisation;

iii. Tamil Coordinating Committee;

iv. BTF;

v. World Tamil Movement;

vi. Canadian Tamil Congress;

vii. Australian Tamil Congress;

viii. GTF;

ix. National Council of Canadian Tamils;

x. Tamil Youth Organisation;

xi. World Tamil Coordinating Committee;

xii. TGTE;

xiii. Tamil Eelam People's Assembly;

xiv. World Tamil Relief Fund;

xv. Headquarters Group.

364. The specified effect of proscription is that funds, other financial assets, and economic resources belonging to or owned or held by such natural or legal persons, groups, or entities shall be frozen for so long as they remain proscribed. The Regulations also prohibit any person from providing any form of financial assistance to proscribed persons, groups, or entities.

365. It is apparent that the legal effect of proscription relates to financial prohibitions. However, it would in our view be naïve to conclude that GoSL and its predecessors have in practice approached proscription on such a narrow basis. In light of the underlying premise of the Regulations and our conclusions on the regime's attitude towards separatism, there is force in Professor Gunaratna's evidence that the act of proscription warns the public (in our view, this will include the domestic population and the diaspora) not to have any involvement with listed persons and/or groups, and, in the words of Dr Smith, that it "draws a line in the sand" as to an express recognition by GoSL that a proscribed group will be, for that reason alone, of adverse interest. This much has been acknowledged, at least to an extent, by the respondent; she describes proscription as being "potentially significant" to, although not determinative of, risk on return. This position is consistent with the FFM, upon which the respondent places a good deal of reliance in these appeals. The report contains evidence from a human rights activist, the CID, a journalist, and the IOM, suggesting that the fact that a group (specifically, the TGTE) is proscribed might result in a "member" or activist being at risk.

366. However, for reasons which we will come to in due course, it does not follow that any individual connected in any way with a proscribed organisation will, without more, be at risk on return.

367. The parties disagree on the significance of an organisation having been removed from the list or never having been on it. The appellants contend that membership of a proscribed organisation must be relevant to an adverse profile. The respondent argues that the converse must also be a material consideration: in other words, an organisation that has been de-proscribed or never proscribed at all is accordingly likely to be of less interest to GoSL. The appellants' response to this is that there is no material distinction between the various organisations; proscribed or not, they will all be of adverse interest to GoSL. As with a number of issues with which we have had to grapple, the evidence upon which the parties' respective positions are based is not clear-cut. On our reading of their evidence, none of the three experts have either expressly stated or implicitly accepted the proposition that the de-proscribing of some organisations in 2015 or the absence of any proscription is indicative of a lack of material interest by the Sri Lankan authorities in a particular organisation. We see no particular tension between, on the one hand, the assertion that proscribed groups are regarded, to use the term of the source cited by Dr Nadarajah, as more "hard line", whilst on the other, that de-proscribed or non-proscribed groups perceived as less of a threat will nonetheless attract attention on the basis that, as Dr Smith has put it:

> "…no longer being considered a terrorist seems not to be the same as no longer being of existing adverse interest…it seems very possible that those who belong or are affiliated to diaspora groups that have been deproscribed remain of existing adverse interest."".

368. This standpoint is also reflected in the evidence of Professor Gunaratna, who states that:

> "While the effect of proscription is to forbid and make it an offence to have any contact or links with members of those proscribed organisations, the Sri Lankan Government does not limit its focus on those organisations proscribed.
>
> …
>
> Those in opposition of the Sri Lankan State are not defined by whether they are listed, delisted or unlisted, but by the activities the organisation is involved in."

369. In our view, what emerges from the body of expert evidence is a collective opinion that proscription does not represent a bright line between the existence of adverse interest and its absence.

370. This is supported further by the following considerations. In reaction to the de-proscription of eight organisations in 2015, the then opposition leader (now

Prime Minister) Mahinda Rajapaksa described the move as, "a definite threat to national security" and criticised the government of the day as having acted "irresponsibly". The re-proscription of seven of the eight organisations in February 2021 is indicative of GoSL's intent to follow through on the strident criticisms of the previous government's actions, as expressed by an individual whose views are likely to reflect the current thinking of this more authoritarian regime towards the types of groups deserving of adverse attention.

371. The attitude of GoSL as regards de-proscribed or non-proscribed groups must also be seen in the context of its hostility towards those who criticise it in general and those who espouse separatism in particular. Against this background, it would be surprising if the authorities eschewed an adverse interest in an organisation with a clear separatist agenda simply because it did not appear on the list complied under the 2012 UN Regulations.

372. The respondent's contention that de-proscription would indicate a reduction in adverse interest by GoSL is undermined by the re-proscription of a number of organisations in February 2021.

373. A final point is the fact that the LTTE itself was not proscribed under Sri Lankan law for much of the duration of the civil war (we have not been provided with the relevant legal provisions, but it does not appear that this is in dispute). This is another indication that the absence of proscription is not necessarily reflective of an absence of material interest.

374. In summary, we conclude as follows. Proscription of an organisation is a relatively significant factor in the assessment of the profile of an individual who is connected with that organisation, but it is not determinative of risk. Its presence is reasonably likely to entail a higher degree of adverse interest in a particular organisation and, by extension, in individuals known or perceived to be associated with it. In respect of those organisations which have been de-proscribed or never proscribed (the single organisation which remains de-proscribed, the Tamil National Council, is extremely unlikely to play a part in protection claims in the United Kingdom), it is reasonably likely that there will, depending on whether the organisation in question has, or is perceived to have, a separatist agenda, be an adverse interest on the part of GoSL, albeit not necessarily at the level applicable to proscribed groups. To this extent, we reject the unqualified assertion contained in a letter from the British High Commission in Colombo, dated 18 May 2017, that "… members of [the eight groups de-proscribed in 2015] whether active or lay, have no reason to fear persecution as a consequence of their affiliation to them from the government of Sri Lanka.".

The TGTE

375. GJ alluded to the existence of the TGTE, but there was no detailed consideration of its activities and how it was viewed by the Sri Lankan authorities at the time.

376. The TGTE describes itself as a government in exile and is an avowedly separatist organisation, although it is committed to non-violent means to achieve its goal of establishing Tamil Eelam on the island of Sri Lanka. Aside from its raison d'être, it is an undisputed fact that the TGTE's founder and current Prime Minister Mr Visvanathan Rudrakumaran, was a senior member of the LTTE and acted as its legal adviser during the peace process between that organisation and the Sri Lankan government in the early 2000s. In a real sense, the TGTE was born out of the LTTE.

377. For obvious reasons the TGTE does not operate within Sri Lanka itself and its Mission Statement confirms that only members of the diaspora are entitled to run for elected office. In light of this, we regard the evidence from certain sources in the FFM to the effect that the TGTE were not well-known within Sri Lanka to be relatively unsurprising and of limited value to our assessment of the question of how GoSL perceives the organisation and its activities.

378. The TGTE remains a proscribed organisation. Its entry in the list published in the Gazette on 9 November 2016 states the essential reason for the continuing status to be:

> "Terrorism related activities and Financing Terrorism."

379. Although it appears as though the Sri Lankan authorities have never provided evidence of this assertion for public scrutiny, the description is consistent (from the perspective of GoSL) with the TGTE's separatist agenda, its genesis from the LTTE, and the belief that any resurgence by the latter will be assisted by diaspora groups.

380. Professor Gunaratna, whose evidence we have found useful in providing an insight into the mindset of GoSL, is in no doubt that the TGTE is viewed as a "front" for the LTTE: indeed, he describes it as a "faction" of the LTTE. Dr Nadarajah's evidence is that the TGTE has been described in "official discourse and media coverage as an integral part of the LTTE". Dr Smith also uses the term "front", albeit when providing his opinion of how GoSL perceives not only the TGTE, but the other proscribed organisations. Thus, the body of expert evidence is as one on this particular point.

381. There are then the views of the former Defence Secretary (now President) Gotabaya, as expressed in the PRISM article from 2014 to which we have made reference previously:

> "[The TGTE] was formed with assistance of an advisory committee comprising prominent pro-LTTE activists, including foreigners who have been helping the LTTE for many years."

The article goes on to describe groups including the TGTE as "LTTE-linked".

382. Once again, we find these views instructive. The fact that the term "front" is not contained with any official categorisation criteria is of limited relevance. The important point is the extent to which this term, or indeed any other, illuminates the reality of GoSL's perception of and attitude towards the TGTE and other organisations.

383. We wish to make it clear that nothing in what we have said should be taken as an indication on our part that the TGTE does in fact have any involvement in, or support for, terrorism. There is no evidence before us to that effect and in any event, it is not a matter with which we are concerned. It has never been proscribed in the United Kingdom under the Terrorism Act 2000.

384. On the evidence as a whole, we find that the TGTE is involved in the following types of activities in the United Kingdom. It engages in what Dr Nadarajah described as "highly visible and effective" international lobbying and advocacy campaigns in pursuit of its agenda. One such campaign seeks to have Sri Lanka referred to the International Criminal Court for alleged war crimes committed at the end of the civil war. An online petition launched in 2015 in furtherance of this goal gathered over a million signatures worldwide. In the United Kingdom, we accept that the organisation undertakes political advocacy, fundraising, and community activities. We note that it was the TGTE which made an application to the Secretary of State to de-proscribe the LTTE in the United Kingdom (with reference to the POAC proceedings discussed earlier). The organisation maintains an Internet and social media presence through its website, Twitter, and Facebook. The TGTE has organised many demonstrations against the Sri Lankan government, the common themes of which have included calls for accountability for alleged war crimes resulting from the end of the civil war; protests against the "disappeared"; and the commemoration of "Black July" (referring to the 1983 communal riots in Sri Lanka). It organised a concerted campaign to have Brigadier Fernando prosecuted in this country for his "cut-throat" gesture at a demonstration in 2018. It is plain from the photographic evidence that the LTTE emblem has been displayed during these events alongside placards and flags showing the TGTE symbol of an outline of what is deemed to be Tamil Eelam. Many of these activities are publicised on social media platforms.

385. We find that the more community-based activities include an annual Sports Day meeting, together with particular commemorative events such as Maavirar Naal (Heroes Day) and the Pongal Festival. Again, these activities are publicised on social media.

386. It is self-evidently the case that the TGTE's activities are: (a) supportive of a separatist agenda; (b) highly critical of the Sri Lankan authorities and (c) a public platform for the professed support of the LTTE through the display of its insignia at events.

387. For the reasons set out above, we conclude that GoSL regards the TGTE with a significant degree of hostility. It is reasonably likely that GoSL perceives that organisation as a "front" for the LTTE, although this categorisation is in our judgement simply reflective of the level of adverse interest rather than a criterion for the existence of such interest in the first place.

Tamil Solidarity

388. We have found that TS pursues aims which are both separatist and highly critical of the human rights record of GoSL and its predecessors. It is, like the TGTE, a non-violent organisation.

389. On the evidence before us, TS does not appear to have the same relatively high profile as the TGTE. Nonetheless, we have been provided with credible evidence from Mr Uthayasenan (as summarised previously) that its activities are known to the Sri Lankan authorities and have been taken seriously enough for consequences to flow, including harassment within Sri Lanka in respect of attempted activities there. By way of example, an attempt by TS to open an office in Kilinochchi was met with visits by the CID and threats of detention if activities persisted. This led to an abandonment of the project. Mr Uthayasenan's evidence also satisfies us that TS occasionally cooperates with the TGTE in respect of the organisation of events. Photographs of a demonstration organised by TS and held in October 2019 clearly show attendees holding LTTE flags. The same is true of another demonstration held a month later.

390. It is inconceivable that GoSL will be unaware of the interaction, albeit on a limited basis, between TS and the TGTE and in respect of the display of the LTTE emblem at events organised by TS.

391. TS is not, and has never been, a proscribed organisation. However, as discussed previously, this fact does not preclude the existence of an adverse interest on the part of GoSL. Unlike the TGTE, we conclude that GoSL does not regard TS as a "front" for the LTTE, insofar as that term would indicate the belief that there was a direct link between the former and the latter. Aside from the fact that it has never been listed as a proscribed group, it has no direct historical ties to the LTTE and does not appear in any of the evidence emanating from politicians or military sources. Nonetheless, it is clear to us that there is likely to be hostility towards TS in light of its agenda, its associations with the TGTE, and the display of LTTE paraphernalia by attendees (whether TS members and/or supporters or not) at public events it has organised.

Other diaspora organisations

392. We have no direct evidence from any other diaspora organisations and are left with the opinions of the three experts together with the contents of their source materials. We have endeavoured to reach conclusions in respect of a number of organisations, being conscious of the limits of any inferences that can reasonably be drawn from the indirect evidence before us.

393. It is reasonably likely that GoSL will have a significant adverse interest in the remaining fourteen proscribed groups appearing on the current list maintained under the 2012 UN Regulations. As discussed previously, their inclusion is a reflection of the authorities' view over the course of time that the groups in question are involved in terrorist activities and/or the financing thereof. As with the TGTE, a number of these proscribed groups were specifically mentioned by President Gotabaya in his capacity as the then Defence Secretary in the PRISM article from 2014, including the Tamil Coordinating Committee and the Headquarters Group. The latter, based in France, has been described, along with the TGTE, as one of the "factions" of the LTTE, with perceived links to active participation in efforts to reorganise the LTTE and carry out attacks within Sri Lanka. It is, in our view, reasonably likely that GoSL regards these particular named groups as being "fronts" for the LTTE, although we re-emphasise that this categorisation is descriptive rather than representative of a threshold criterion.

394. We turn to two specific United Kingdom-based organisations to which reference has been made. The first of these is the GTF. Professor Gunaratna describes this group as one of the "factions" of the LTTE and that it is the "premier LTTE international front with headquarters in the UK". Dr Nadarajah cites the 2012 speech made by now President Gotabaya, in which he regarded the GTF as being an "LTTE front". As matters now stand, the GTF has been re-proscribed. Thus, the act of de-proscription in 2015 as an indicator of decreased adverse interest has been superseded. The re-proscription would also appear to have signalled a cessation of whatever cooperation between the GTF and the authorities begun in 2015, as described by Professor Gunaratna.

395. In light of the evidence as a whole, we see no sound reason for drawing a material distinction between the GTF and the other proscribed organisations previously named by President Gotabaya as being "fronts" for the LTTE. It is reasonably likely that GoSL now regards the GTF with a significant degree of hostility.

396. It is fair to say that the evidence on the BTF is mixed. It too is an organisation that was de-proscribed in 2015, having previously been cited by political and military figures as being linked to the LTTE. Dr Nadarajah's view was that the BTF continues to be perceived as an LTTE "front". Yet it too was re-proscribed in February 2021. In oral evidence Dr Nadarajah appeared to suggest that it did not pursue a separatist agenda, but instead seeks self-determination for Tamils in Sri Lanka; the implication being that there was little difference between the two, at least in the minds of GoSL. Professor Gunaratna's written

evidence was that the organisation is the "premier LTTE front in the UK", although in oral evidence he seemed to implicitly qualify the currency of this status by reference to the fact that the limited company was wound up in July 2020 as a result of a petition under the Insolvency Act 1986. He told us that the group advocates for a separate Tamil state and that it wanted to "revive the LTTE". Dr Smith's view was that the BTF supports self-determination with an implicit strategy of working with the Sri Lankan government to achieve this end. The evidential picture is therefore somewhat contradictory. We have not been assisted by the absence of any direct evidence from the BTF itself.

397. We have considered the organisation's website (accessed through the link in paragraph 7.1.2 of the CPIN). In the "Vision and Mission" section, the attainment of self-determination is stated, with the goal being "self-rule in their [the Tamil population's] Homeland" on the island of Sri Lanka through non-violent means. Reference is made to the need to establish the truth for victims of the civil war and the "Events" page refers to commemorative occurrences such as Black July and protests against what is described as the "genocide" of Tamils.

398. Ultimately, we conclude that the BTF remains a functioning organisation which is critical of GoSL and its predecessors and advocates for self-determination for the Tamil community with its own "Homeland". Whilst there is no express statement in respect of Tamil Eelam, the reference to a "Homeland" is apt to antagonise the authorities and is reasonably likely to lead it to perceive the organisation as being sympathetic to a separatist ideology. This is consistent with the act of re-proscription. We do not, however, find that GoSL actually regards the BTF as an LTTE "front", or an organisation attracting the very high levels of hostility suggested by Professor Gunaratna. It has not, for example, been specifically named in the rhetoric emanating from prominent political or military figures. It is nonetheless one which is reasonably likely to now be viewed with a significant degree of hostility.

399. Under the umbrella of the BTF, three groups aligned to the major political parties in the United Kingdom campaign for the interests of the Tamil community. The BTC, the TFL, and the TFLD are said by Dr Nadarajah to be perceived by GoSL as "key actors in the LTTE's post-war agenda and strategy". We are bound to say this overstates the reality. Dr Smith and Dr Nadarajah were themselves of the view that these organisations do not hold to a separatist agenda and the BTC was specifically described by the former as "not considered threatening" and having taken no stand on the question of Tamil Eelam. We have been provided with no evidence to suggest that these three groups in fact advocate Tamil Eelam, or that they have instigated campaigns or organised protests of the nature seen in respect of, for example, the TGTE or TS. Given the groups' alignment with mainstream political parties, this is perhaps unsurprising. Finally, we note that Dr Nadarajah's view as to the perception of GoSL is based on sources dating back to 2011,

including a chart from a military report describing the BTC and TFL as "front organisations" for the LTTE. In addition to its age, there is no source material to suggest that this very stark (and manifestly erroneous) perception on the part of GoSL pertains now. In all the circumstances, we are not prepared to draw the inference that it does.

400. Whilst taking full account of GoSL's dislike of criticism of any kind, we apply at least a degree of rational behaviour to the regime: it is simply not reasonably likely that groups such as the BTC,TFL, and TFLD will be placed in the same bracket of resolute adverse interest as those avowedly seeking Tamil Eelam and engaging in public anti-government demonstrations.

401. This is not to say that GoSL is unaware of the activities of these organisations. They are likely to be on the authorities' radar and monitoring is likely to occur. As with other organisations discussed previously, there are degrees of such interest and ultimately all will depend upon an overall assessment of the facts of any given case in so far as an individual's protection claim is concerned. In general terms though, links to the BTC, TFL, and TFLD will not attract the same significance as those with organisations towards which GoSL directs material hostility.

402. In respect of the ICPPG, we conclude that it falls into a different category than the organisations discussed above. It is a non-governmental entity and its primary objective is to "collect evidence against perpetrators of genocide and work towards justice, peace and reconciliation.". In our judgment, those who have worked for this organisation or those who have in fact provided evidence to UN OISL may, depending on the facts of the case, fall within one or other of the existing risk categories set out at paragraph 356(7)(b) and (c) of GJ. Given that the validity of these two categories is not an issue, it is unnecessary for us to say anything more about the ICPPG, particularly as we have not been presented with detailed evidence or submissions on what might have potentially constituted a new risk category (see MP and NT [2014] EWCA Civ 829, at paragraphs 36 and 37, and KK (Sri Lanka) [2019] EWCA Civ 59, at paragraph 41). We can, however, state the following conclusion. If an individual can show that they have provided a statement to the ICPPG and that this organisation has submitted it to UN OISL, this will constitute a matter in respect of which GoSL is likely to take an adverse view if known about. Whether it will obtain such knowledge will depend on the facts of the case.

Monitoring and information gathering in the United Kingdom

403. The key findings in GJ on the issue of monitoring and information gathering by the Sri Lankan authorities in the United Kingdom are to be found in paragraphs 324 and 336:

> "324. President Rajapaksa has stated, and the press reports and experts confirm, that the government has sophisticated intelligence concerning who is contacting the diaspora or seeking to revive the quest for a Tamil homeland. The government's intelligence includes monitoring of activities online, on mobile phones, and in the diaspora in the four hotspots: London, Paris, Oslo and Toronto. It has informers throughout the Northern and Eastern Provinces, and in the diaspora. It intercepts electronic and telephone communications and closes down websites. Photographs are taken of demonstrations and the GOSL sponsors an image recognition project at Colombo University.
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> …
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> 336. The former Tamil areas and the diaspora are heavily penetrated by the security forces. Photographs are taken of public demonstrations and the GOSL may be using face recognition technology: it is sponsoring a face recognition technology project at the University of Colombo. However, the question which concerns the GOSL is the identification of Tamil activists working for Tamil separatism and to destabilise the unitary Sri Lankan state. We do not consider that attendance at demonstrations in the diaspora alone is sufficient to create a real risk or a reasonable degree of likelihood that a person will attract adverse attention on return to Sri Lanka."

404. The parties' agreed position is that there is no evidence to indicate that this level of infiltration, surveillance, and monitoring has ceased.

405. In our judgment, this position is justified. All three experts have stated that GoSL continues to operate an extensive intelligence-gathering regime which attempts to cover "all forms of communication" and utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media. We find that at the initial stage of monitoring and information gathering, it is reasonably likely that the Sri Lankan authorities will wish to gather more rather than less information on organisations in which there is an adverse interest and individuals connected thereto. That is congruent with what we have said about GoSL's attitude towards the diaspora in general and in particular the sub-set of those organisations and/or individuals involved in perceived separatist activities. It is also supported by the evidence we have on the job description of the former Sri Lankan Defence Attaché in the United Kingdom, Brigadier Fernando, from May 2017, in respect of which there is no sound reason to believe that anything material has changed. In summary, this role involved:

    i. monitoring anti-government activities in the United Kingdom and reporting back to relevant Ministries and agencies in Sri Lanka;

    ii. monitoring "any LTTE activities" in United Kingdom and putting in place plans to counter these;

iii. notifying the High Commissioner of any anti-government protests and implementing strategies to counter them.

406. We accept that the dissemination of information through technological means has increased since GJ, a fact which all three experts stated has been met with increased monitoring efforts by the authorities. In the context of the evidence as a whole, we also accept that there is greater capacity in place so that relevant information gathering has, so far as possible, kept pace with developments in communication technology.

407. The evidence before us is insufficient to show that GoSL will have access to any databases held by organisations comprising specific details of their members and/or supporters. However, given the variety of methods that are available, this will not of itself prevent the authorities from being able to obtain relevant information on individuals.

408. We received evidence that the Sri Lankan authorities have sought technological assistance from China in order to break the end-to-end encryption used by WhatsApp, but none to indicate that this capability has in fact been achieved. The same applies to the suggestion that an Italian-based company had been approached for the purchase of "digital surveillance technologies". We are not prepared to accept that these capabilities currently exist.

409. Dr Nadarajah has addressed new technological territory, namely social network analysis (mapping) and its sub-set, social media analysis (mapping). As we understand it, information obtained by the former process can be fed into the latter in order to create a fuller picture of an individual's beliefs, contacts, and, importantly, the likelihood of future conduct. Whilst acknowledging that an information processing matrix such as that described is likely to be automated (in the sense that algorithms are applied to the raw data obtained), the evidence before us does not show that this is yet in place and being used by GoSL on a systematic basis. The main source material relied on by Dr Nadarajah is an academic article from 2010 and we would have expected a firmer and more current evidential basis upon which to conclude that such comprehensive, interlinked surveillance and analysis was now an established aspect of GoSL's security apparatus.

410. Having said that, we do accept that information obtained as a result of monitoring the Internet and social media will be relevant to the authorities' perception of an individual's profile, including any links established with other known or suspected activists within the diaspora.

411. The final matter is that of interviews conducted by the SLHC in London with proposed returnees who require a TTD. Paragraphs 307, 308, and 352 of GJ clearly set out the position at that time:

> "307. Sri Lankans returning without a Sri Lankan passport will require an Emergency Travel Document for which they need to apply at the SLHC in London. Full disclosure of all relevant identity information is given in the process of obtaining a TTD. An applicant completes a lengthy disclosure form and is then interviewed at the Sri Lankan High Commission in London; the information received is sent to the Ministry of External Affairs and the Department of Immigration and Emigration in Colombo. Files are created and records verified; if the authorities agree to issue a TTD, the MEA in Colombo emails the document to the Sri Lankan High Commission in London where the TTD is stamped, a photograph added, and issued to the applicant.
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> ...
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> 308. During the re-documentation process in the United Kingdom, or at the airport on return, a forced returnee can expect to be asked about his own and his family's LTTE corrections and sympathies.
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> ...
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> 352. The evidence before us indicates that any Tamil who seeks a travel document from the SLHC in London or another diaspora hotspot will have a file created in Colombo and will be interviewed in London before a decision is made to issue a TTD. By the time the DIE in Colombo emails a TTD to London to be issued to such an individual, the Sri Lankan authorities will know all they need to know about what activities an individual has undertaken outside Sri Lanka and, in particular, whether the returnee poses a real risk to the unitary Sri Lankan state or the GOSL on return."

412. The parties are agreed that this process continues and on the evidence before us, we conclude that this is so. As to the content of these interviews, Professor Gunaratna's oral evidence gave rise to potential uncertainty when he suggested that the extent to which an interviewee might be asked about their political opinions and any *sur place* activities would depend on the particular interviewing officer. To a limited extent, that might be the case, but to conclude that these interviews do not routinely cover such matters would be contrary to all we know of GoSL, its predecessors, and indeed to common sense. Like Dr Smith, we would be very surprised if questions surrounding *sur place* activities were not standard practice, and this is the case whether the interviewing officer already had before him/her evidence of such activities, or if nothing was at that stage known. An interview is a prime opportunity to ask a member of the diaspora about their views and activities prior to a return to Sri Lanka. It is unlikely in the extreme that the authorities would pass up this chance to ask specific questions. The only observation we would make in respect of what was said at paragraph 308 of GJ is that questions may be primarily focused not on the LTTE itself, but on diaspora organisations known or perceived to expose a separatist agenda.

413. In response to any questions put in interview, there is no suggestion that the interviewee can be expected to do anything other than tell the truth and we emphasise that this must be the premise upon which fact-finding tribunals proceed.

414. In summary, we conclude that prior to the return of an individual travelling on a TTD, GoSL is reasonably likely to have obtained information on the following matters:

    i. whether the individual is associated in any way with a particular diaspora organisation;

    ii. whether they have attended meetings and/or demonstrations and if so, at least approximately how frequently this may have occurred;

    iii. the nature of involvement in these events, such as, for example, whether they played a prominent part or have been holding flags or banners displaying the LTTE emblem;

    iv. any organisational and/or promotional roles (formal or otherwise) undertaken on behalf of a diaspora organisation;

    v. attendance at commemorative events such as Heroes Day;

    vi. meaningful fundraising on behalf of or the provision of such funding to an organisation;

    vii. authorship of, or appearance in, articles, whether published in print or online;

    viii. any presence on social media;

    ix. any political lobbying on behalf of an organisation;

    x. the signing of petitions perceived as being anti-government.

415. In respect of those Sri Lankan nationals who have failed in their protection claims but possess a valid passport, the position is somewhat different. The interview process at the SLHC relates only to applications for a TTD. We have not seen evidence indicating that those who do not require a TTD are nonetheless interviewed in the United Kingdom. We find that they are not. The effect of this is that a means by which potentially important information might be obtained from an individual is precluded: there will be no opportunity to put direct questions on a range of matters.

416. The absence of an interview at SLHC does not, however, discount the ability of GoSL to obtain information on the matters set out in paragraph 414 in respect of an individual with a valid passport using the other methods

employed as part of its intelligence-gathering regime, as described in paragraph 405.

417. When considering the case of an individual in possession of a valid passport, a judge must assess the range of matters listed above and the extent of the authorities' knowledge reasonably likely to exist in the context of a more restricted information-gathering apparatus. This may have a bearing on, for example, the question of whether it is reasonably likely that attendance at one or two demonstrations or minimal fundraising activities will have come to the attention of the authorities at all.

418. Whichever form of documentation is in place, it will be for the judge in any given case to determine what activities the individual has actually undertaken and make clear findings on what the authorities are reasonably likely to have become aware of prior to return.

Information processing and storage

419. What happens to the information obtained through the methods described in the previous section?

420. The starting point for the processing of information gathered in the United Kingdom is, we conclude, the Defence Attaché at the SLHC, an aspect of whose job it is to monitor diaspora activities and report back to Colombo. We accept Dr Smith's evidence that the Attaché is not simply a "postbox" and that he applies a basic filtration to the information before its next processing stage. As with certain other aspects of the evidence before us, it is unsurprising that we have not been provided with definitive criteria by which this filtration is undertaken. It is logical to infer that the factors relevant to GoSL's perception of what *sur place* activities are deemed to be separatist in nature will be in play. We would, however, apply a degree of caution here. As discussed below, once passed back to Colombo, the information is further considered by relevant agencies who will then address their collective mind to it. It is at this later stage, when the assessment of the agencies has been undertaken, that the more rounded and, for our purposes, material picture of the individual will have been inserted into what Dr Smith describes as the "institutional memory" of the authorities. With this in mind, it is reasonably likely that the Defence Attaché's filtration will not be rigorous, the reason being that agencies in Sri Lanka are likely to be better equipped to provide a more informed analysis. What this initial sift does in our view achieve though is to place a proposed returnee in one of two categories which may be fairly crudely described as "something relevant known" or "nothing relevant known". Those in the second category might include an individual who, for example, has only attended one or two demonstrations or meetings, without more. It may be, depending on specific findings of fact, that these activities have never become known to the authorities. Alternatively, it may be the case

that, whilst known of, such activities are deemed so minimal as to be unworthy of reporting back.

421. Drawing together the different threads of evidence on this issue (as summarised earlier in our decision), we conclude that once collected, the information is passed by the Defence Attaché to the collective defence and security apparatus of the Sri Lankan state. Specific recipients will include the army, the SIS, the TID, the CID, and the Ministries of Defence, Internal Affairs and External Affairs. The conduit for the dissemination of the information to these various bodies would appear to be the office of the Chief of National Intelligence.

422. Dr Smith's evidence is that a report is then presented to the President and the Minister of Defence. Whilst we accept that this is the case, it is highly unlikely that they would be made aware of the entire body of information passed on from the United Kingdom. We draw the reasonable inference that they would be provided with summaries and any specific security matters requiring their personal involvement.

423. The passing of information through the institutional hands of various agencies strongly suggests that further filtration takes place. This is the effect of Dr Smith's evidence, wherein he describes, in our view reliably, a two-stage process: first, the recipients of the information make an assessment as to whether it warrants being recorded on the operative storage system; second, a decision is made as to whether, if the first stage is satisfied, the individual concerned should be placed on a stop list or a watch list. We infer that these two stages do not require a collective decision-making process, and that a single agency can make the necessary judgment.

424. The upshot of this is that the information entered on the individual's record will be based in part on purely factual information relating to *sur place* activities (i.e. the what, when, and on whose behalf) and in part on GoSL's perception of what this amounts to in the context of its objectives.

425. We turn to the method of storing information. GJ does not address in any detail the issue of databases held by the authorities: its focus was on the existence of specific stop lists and watch lists at BIA. In these appeals, both parties agree that intelligence acquired on individuals in the United Kingdom prior to their return to Sri Lanka is stored on "an electronic database." Dr Smith's view is that there is a single, "generic" database, whilst Dr Nadarajah and Professor Gunaratna have referred to there being multiple-interlinked databases. In the absence of unanimity amongst the various evidential sources, we have stepped back and taken a holistic view of the position in light of all we know of the Sri Lankan authorities, including its history of record-keeping; the desire to keep a very careful watch on diaspora activities; the use of sophisticated information gathering methods; and modern technology capabilities.

426. It is reasonably likely that there is a single comprehensive electronic database on which is stored all information passed back from the United Kingdom and any other pre-existing information gathered within Sri Lanka relating to, for example, previous links (known or suspected) to the LTTE (personal or familial) and detentions. It is reasonably likely that this database is accessible by any of the agencies referred to above, and that such access is possible by officials at the SLHC, BIA, and anywhere else within Sri Lanka.

427. It is possible that other more narrowly defined databases are held by particular authorities within Sri Lanka, but these need not concern us.

428. In the absence of any evidence as to the cessation of the practice of maintaining stop lists and watch lists, we reaffirm their continued usage. Whilst we were initially inclined to view these as simply shorthand descriptions for "flags" recorded against the names of individuals contained in the general electronic database, the concept of separate electronic lists derived from that database is plausible.

429. In oral evidence, Dr Smith suggested that an individual may be on the stop list even if there was no extant arrest warrant. His response to the assertion that he had not said this in GJ was that he would have done so. Appendix J to the Tribunal's decision provided only a summary of Dr Smith's evidence, but it is relatively detailed. It is clearly stated that he associated the stop list with those subject to an arrest warrant. There is nothing in the summary about any other categories of persons who would appear on a stop list. In his main report for these proceedings Dr Smith confirmed the existence of the stop list and the watch list, but in respect of the former does not specifically state that it would only include those subject to an extant warrant or court order: the list operates to "ensure that those in which the authorities have an existing adverse interest are detained upon arrival." There is a lack of clarity as to who will be included on the stop list. It is unfortunate that this lack of clarity emanates from the expert who first raised the existence of the lists. None of the other experts support a contention that the stop list contains a wider category of individuals. In respect of country information, the DFAT report indicates that the stop list relates only to those against whom there is an extant arrest warrant, court order, or order to impound their Sri Lankan passport.

430. Despite Dr Smith's assertion to the contrary, we are satisfied that there was no evidence to this effect before the Tribunal in GJ and the preponderance of the evidence before us leads us to conclude that the stop list should continue to be narrowly defined: it consists of only those against whom there is an extant arrest warrant and/or a court order.

431. The watch list comprises the residual category of persons who are not on the stop list, but who are nonetheless deemed to be of adverse interest, to a greater or lesser degree, as a result of information gathered on them and the filtration process we have described previously. It is therefore not the case that

every individual who is placed on the wider electronic database will also be included on the watch list.

432. Finally, we address Dr Smith's contention that once created, an entry on the general database is held permanently and is not subjected to weeding or editing. For a state inclined to the gathering and storage of information on a category of its citizens, there is nothing implausible in the idea of keeping such data on a permanent basis. The technological capability for doing so plainly exists. The long-term preservation of data is, we find, highly likely to be perceived as useful. Indeed, deleting entire records would, simply as a matter of common sense, be counter-productive. For example, an individual may be politically active at one point, then apparently do nothing for some time, only to restart their involvement at a later stage. Deleting the original entry would deprive the authorities of a potentially useful source of information. It follows that an entry can be added to where appropriate.

The assessment of an individual's profile

433. We turn to what is perhaps the most important question before us, at least in respect of the scope of the country guidance to be given: what is the threshold against which GoSL is reasonably likely to determine whether or not to detain a returnee by virtue of their actual or perceived *sur place* activities?

434. Paragraph 356(7)(a) of GJ describes the first category of returnees at risk of detention and persecution:

> "(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."

435. As far as we can discern, the phrase "significant role" did not emanate from a specific evidential source, but was rather the view arrived at following consideration of the body of expert opinion. In this regard we refer to the Tribunal's conclusions set out prior to its use of that phrase. Paragraphs 268, 272, 326, and 351 state, in so far as relevant:

> "268. We consider that Dr Smith's factor (c) [attendance at anti-government demonstrations in the United Kingdom] has relevance, in circumstances where the GOSL has reason to consider that a person has significant involvement in diaspora activities which may unsettle the situation in Sri Lanka and lead either to the resurgence of the LTTE or a similar militia, or to the revival of the internal conflict.
>
> …

> 272…We do not consider, therefore, that this risk [the lack of a national identity card] is distinct from the new risk of being perceived as a person seeking to destabilise the GOSL by actively working for resurgence of the Tamil conflict.
>
> …
>
> 326. Many of the witnesses stated that despite official pronouncements that all returning asylum seekers were traitors, the GOSL was aware that many of them were economic migrants. Such returnees would be interviewed at the airport and unless it was established that they had significant diaspora activities, were likely to be allowed to continue to their home areas.
>
> …
>
> 336. … However, the question which concerns the GOSL is the identification of Tamil activists working for Tamil separatism and to destabilise the unitary Sri Lankan state. We do not consider that attendance at demonstrations in the diaspora alone is sufficient to create a real risk or a reasonable degree of likelihood that a person will attract adverse attention on return to Sri Lanka.
>
> …
>
> 351. Our overall conclusion regarding diaspora activities is that the GOSL has sophisticated intelligence enabling it to distinguish those who are actively involved in seeking to revive and re-fund the separatist movement within the diaspora, with a view to destabilising the unitary Sri Lankan state. Attendance at one, or even several demonstrations in the diaspora is not of itself evidence that a person is a committed Tamil activist seeking to promote Tamil separatism within Sri Lanka. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual."

436. Paragraph 356(3) of the country guidance itself concludes that it was the then government's objective "to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state…"

437. The respondent urges us to re-affirm the utility of, but not to depart from, or apply any gloss to, the term "significant role", contending that:

> "[t]he key question is always whether the activity is or might be perceived as indicative of a significant role in Tamil separatism. Beyond that, there is little utility in the [Upper Tribunal] seeking to enumerate types of activities."

438. The appellants have submitted that if the "significant role" threshold is to be retained, it should be clarified or amended so as to include, in the perception of GoSL, "anyone participating in activities…at anything more than the most trivial level" (a threshold we have previously noted when summarising the submissions). It is said that the appropriate threshold will in practice be

readily met: "any" individual involved in "any" diaspora activities of a more than a trivial nature on behalf of "any" separatist diaspora organisations will be at risk.

439. Having regard to what was said in GJ and the evidence before us, we conclude that the question of whether an individual has, or is perceived to have, undertaken a "significant role" in Tamil separatism remains the appropriate touchstone for the assessment of risk in cases concerning *sur place* activities. In our judgment it continues to accurately reflect, on the one hand, a degree of discernment on the part of GoSL as to whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam, whilst on the other allowing for fact-sensitive assessments in order to ensure effective protection under the Refugee Convention.

440. In so concluding, we reject the respondent's contention that nothing more need be said about the content of the phrase "significant role." To our mind, acceding to the respondent's request would create the danger of leaving begging the question likely to be in the minds of decision-makers: when will the activities being evaluated amount to a "significant role"? To answer this by opining that the activities will disclose a "significant role" if they are considered "significant" creates an obvious circularity, runs the risk of failing to do justice to the evidence before us, and avoids the responsibility of providing practical guidance.

441. What we say in due course about "significant role" is clarificatory in nature: we are not departing from the core of the guidance provided by GJ, but instead simply illuminating the phrase in the context of the current evidence on Sri Lanka.

442. If, contrary to our primary view, the approach amounts to an amendment to the existing guidance, it is nonetheless justified, bearing in mind the evidential requirements and the need to exercise caution elucidated in EM.

443. We take full account of the fact that, whilst a number of years have passed since GJ was promulgated, many of those in positions of political significance then hold office now. Furthermore, GJ was decided less than four years after the end of the civil war. These factors would tend to indicate that the situation now is unlikely to be worse than in 2013.

444. There are, however, countervailing factors, derived from the evidence of the three experts and other sources post-dating GJ.

445. First, we have found that there have been a number of plots to carry out what have at least been perceived by the authorities to be LTTE-inspired attacks in Sri Lanka, all of which have either been thwarted by the security forces or failed for other reasons. The last of these was in July 2020. The bomb attacks on Easter Sunday in 2019 were of course perpetrated by Islamic terrorists and

had nothing to do with Tamil separatism. However, their occurrence and the apparent failures of intelligence gathering have clearly fed into a narrative of national concerns. As a whole, these matters are indicative of a current, heightened state of security alertness.

446. Second, the deep-rooted hostility towards Tamil separatism and its perceived links to the LTTE and/or a resurgence of violence has been expressed on numerous occasions over the past six or seven years through pronouncements made by leading politicians (including the current President) and senior military and security services personnel. We have found that this has not simply been a trail of empty rhetoric, but represents, at least to a material extent, a genuine agenda on the part of GoSL. Combined with the recent consolidation of power by President Gotabaya, the criticism of the previous government's more conciliatory approach and the disengagement in February 2020 from international scrutiny of issues connected (at least in the eyes of GoSL) to the fight against an existential threat, this agenda is, in our judgment, entrenched.

447. Third, the advent of the 2012 UN Regulations and the proscription in 2014 of a number of organisations and the re-proscription in February 2021, has formalised and reinforced the authorities' adverse view of particular aspects of diaspora activities.

448. Fourth, GJ did not provide a detailed analysis of relevant organisations in the context of proscription because none had then been proscribed. Our assessment of this issue and the accompanying evidence is a material addition to the risk analysis which must now be conducted.

449. Fifth, whilst we may not ultimately agree with everything they have said as to where the risk line should be drawn, none of the experts have endorsed the "significant role" criterion: indeed, all three have either expressly disagreed with or at least questioned the validity of the proposition that this threshold is applied by the Sri Lankan authorities, although the consensus is that risk "depends" on a variety of factors.

450. The countervailing considerations set out above show that there is a sufficiently well-established and durable evidential basis on which to look again at the phrase "significant role" and amend what is meant by it.

451. We now proceed with our analysis of the "significant role" threshold, whether that is by way of clarification of what was said in GJ, or substantive amendment thereto.

452. The English Oxford Dictionary (3rd Edition), contains the following two definitions for the word "significant":

> "Sufficiently great or important to be worthy of attention; noteworthy; consequential, influential.

In weakened sense: noticeable, substantial, considerable, large."

453. The entry for "role" provides the following:

"…status assigned to or assumed by a person."

454. It is apparent from these definitions that the words are amenable to a range of interpretations. In the context of GJ and our deliberations, it is in effect used to describe the outcome of an evaluative assessment based on factual matters. This is very much within the province of the security apparatus of the Sri Lankan state and, as has been discussed previously, it is near-impossible to shine a direct light on this critical stage of the process. The only illumination will be by way of extrapolative and inferential means, consistent with the lower standard of proof.

455. It is clear to us that "significant role" should not, and was never intended to, require an individual to demonstrate that they have held a formal role within an organisation. By "formal" we mean a specified position or status held through an election or as a result of appointment by a relevant committee/body/individual or any other applicable mechanism. No such criterion emerges from GJ itself, nor is it apparent from any of the evidential sources before us. On the totality of that evidence, it would be contrary both to what we know about GoSL's approach to separatism within the diaspora and the need for effective protection under the Refugee Convention and Article 3 ECHR to apply what we consider to be an insufficiently relevant factor such as this. An organisation which pursues a separatist agenda may not have a structure which involves formal roles. In any event, it is highly unlikely that GoSL will view the absence of such a role as being of any real significance if the substance of an individual's activities otherwise discloses sufficient interest. Having said that, if a formal role has been held by an individual, this will be a relevant factor in respect of their overall profile.

456. By the same token, the fact that individual may not be a "member" of a particular organisation does not preclude them from having a profile sufficient to disclose a real risk on return. As we have seen from the examples of the TGTE and TS, certain organisations with a separatist agenda may have a very limited membership structure. It cannot sensibly be said that anyone involved with such an organisation, however active they may be, will be filtered out from GoSL's analysis merely because they are classed as a supporter.

457. Nor should the term "significant role" denote the need for an individual to show that their role (whether formal or not) has been "high profile" or "prominent" to the extent that these descriptions might suggest a position of leadership or, for example, particularly substantial media exposure or organisational duties. On our analysis of the issues thus far, to conclude otherwise would set the bar too high and be inconsistent with the application of the lower standard of proof in respect of the assessment of risk. We note

that both these categorisations (as set out in the assessment section of the CPIN) are based on evidence contained within the FFM, a report in respect of which we have expressed certain reservations, with a consequential impact on the attribution of weight. Even on the basis of that evidence alone, the restrictive interpretation of what might be regarded as sufficiently "significant" is only said to be "more likely" to lead to a risk: that provides a weak evidential basis on which to conclude that a profile below that of "prominent" or "high" will not be reasonably likely to lead to risk.

458. We agree with the appellants' observation that the level of risk will generally increase with the level of actual or perceived activities, and that an individual with what is established by the evidence to be a "high profile" or "prominent" position may well be exposed to a level of risk significantly above that required to be shown in order to succeed in a protection claim.

459. What then of the appellants' case, relying as it does on a risk threshold sitting just above what is described as "the most trivial" level of diaspora activity?

460. For the reasons set out below, we conclude that in so far as the evidence upon which this argument is predicated asserts that "anyone" linked in "any" way to "any" separatist diaspora organisation and who has undertaken "any" diaspora activities known to the authorities "regardless" of their level of involvement will be at risk, the appellants' position does indeed overstate the reality as regards GoSL's view of who is of sufficient adverse interest to warrant detention.

461. That evidence largely emanates from Professor Gunaratna, although he appears to qualify the apparently catch-all assertion stated at various points. For example, when asked whether the authorities would always take action against a returnee that had engaged in relevant activity at however low a level, his response was that it "depends" on the profile of the individual. Whilst not necessarily inconsistent with the very wide scope of those at risk contended for, the caveat does indicate a somewhat more nuanced approach on the part of GoSL to those they consider to be of sufficiently adverse interest.

462. The qualificatory indication in Professor Gunaratna's evidence is more strongly represented in that of Dr Nadarajah. In several responses to written questions and in his oral evidence, he confirmed that whether an individual would be regarded as a "threat" to Sri Lanka's territorial integrity would "depend on his or her own overall profile as perceived by the authorities, and based on what they know or suspect about him/her." On the basis that a person regarded as a "threat" is a crucial (if not a decisive) factor in assessing risk, it is implicit in Dr Nadarajah's evidence that the simple fact of a link of any kind to a relevant organisation and/or any activity whatsoever in support thereof does not accurately reflect GoSL's approach. If it were said that the term "depends" relates only to the assessment of threat, a subsequent

response by Dr Nadarajah is instructive: although involvement with a relevant organisation would create an interest in an individual, consequent action against them would "depend" upon the overall profile. Thus, the qualification is provided in the context of what might actually occur, rather than just in respect of the perception of the individual.

463. This picture of a more nuanced reality to the assessment of risk was articulated by Dr Nadarajah as an "indicator-based approach", a phrase that in our judgment is both accurate and helpful. We shall return to its utility, below.

464. The totality of Dr Smith's evidence is more supportive of Dr Nadarajah's view than Professor Gunaratna's. We note his comments that an individual who is on the authorities' "radar" will be detained, as would "anybody whom the authorities believe might be returning to assist the revival of the LTTE…". However, on our reading, these points do not go to the issue of when GoSL will have already decided that an individual is of sufficient interest to warrant detention.

465. Finally, we address the evidence relating to individuals actually returned to Sri Lanka. We are grateful to the respondent for obtaining the statistics on returnees to the country over the course of six years and out of respect for her efforts we set out the figures here:

Year	Total asylum -related returns	Enforced	Voluntary
2013	257	115	142
2014	274	157	117
2015	288	131	157
2016	170	56	114
2017	248	69	179
2018	151	26	125
2019	74	18	56

466. It is immediately apparent that these figures are not of any great probative value to our task for the principal reason that we cannot discern the nature of the individuals' claims and the reasons for their lack of success. Specifically, it is impossible to tell whether any of the returnees had been found to have engaged in *sur place* activities in United Kingdom.

467. No evidentially material assistance has been provided by either the experts or witnesses of fact. The problems with Dr Smith's collation of and reliance on the six case-studies contained in his report emerged as a result of the respondent's research into the background of a number of the individuals concerned and during the course of his oral evidence. It transpired that Dr Smith had been put in contact with the interviewees by a United Kingdom-based solicitor previously known to him. Rather unfortunately, Dr Smith did not apparently ask for, and was not in any event provided with, any background documentation on any of the subjects. As a consequence, his impression of the interviewees' profiles had not been formed from a position of full knowledge. Through questioning and an analysis of decisions of the First-tier Tribunal in three of the cases, it became clear that these profiles included actual or perceived links to the LTTE and/or significant connections with the TGTE. In respect of the latter, one individual had been found to have had an important organising role and a substantial media and online profile. Another had appeared on relevant television channels. A third had assumed prominence through involvement at TGTE cultural events. All of this leads us to conclude that the evidence simply does not support the proposition put forward by Dr Smith that "any" form of association with the TGTE will result in a risk on return. In short, the methodology adopted, whilst done so in good faith, rendered this particular aspect of his evidence less than reliable.

468. Dr Nadarajah's lack of information on what may have in fact happened to returnees was, he told us, based on the absence of data. Professor Gunaratna accepted that he was unaware of any examples of returnees who might have been linked to the TGTE, which is consistent with the general absence of evidence on this important issue.

469. We have already expressed our views on the failure of the TGTE and TS to hold, or even seek, evidence on returnees associated with their respective organisations. This state of affairs has not made our already difficult task any easier.

470. There is a dearth of concrete examples of what has happened to returnees. We do accept that in principle the absence of evidence does not necessarily indicate evidence of absence. However, its effect here is to highlight a lack of positive support for the appellants' primary contention that those who have engaged in anything more than "the most trivial" level of activities are at risk.

471. Stepping back and taking account of the evidence as a whole, and notwithstanding the finding that GoSL is an authoritarian regime with a poor human rights record and a hostile attitude towards Tamil separatism, it does not follow that it should be regarded as a government which exercises no, or no meaningful, filter in respect of who is regarded to be of sufficient adverse interest to justify detention. Clearly, this was not the view of the Tribunal in GJ and in our view the adoption of such a low risk threshold would be to stretch the meaning of the phrase "significant role" almost to breaking point.

472. The position we have therefore arrived at is a rejection of both the respondent's argument that we should simply say nothing more about what constitutes a "significant role" and the appellants' assertion that anyone engaging in "more than the most trivial level" of diaspora activities will be at risk.

473. Turning to the provision of practical guidance as to what is reasonably likely to form the substance of the phrase "significant role", we see a consideration of overall context and examples of specific factors as representing the best means of elucidating the "indicator-based approach" (or, as described in the CPIN, a "multi-factorial assessment").

474. The relevant contextual factors are as follows:

    i. the implacable hostility of GoSL to the concept of separatism in general;

    ii. the post-GJ pronouncements by leading establishment figures as to the view taken of the section of the Tamil diaspora with which we are concerned, together with our findings that these have not simply been rhetorical in nature;

    iii. our analysis of some of these diaspora organisations and the clear fact that the United Kingdom remains, eleven years after the end of the civil war, a "hotspot" for separatist and anti-government activities;

    iv. the advent of proscription since GJ was decided;

    v. the unsuccessful (perceived) LTTE-inspired attempts at committing violent acts within Sri Lanka in recent years, the last of these being in July 2020;

475. With these matters in mind, and having regard to the totality of our conclusions so far, we are satisfied that GoSL's objective is to identify those who are an actual or perceived threat to the integrity of the Sri Lankan state by reason of their committed activism in pursuit of the establishment of a separate Tamil state on the island of Sri Lanka. That is the contextual prism through which the term "significant role" should be interpreted. This is consistent with what was said in GJ and accords with the evidence before us.

476. We turn to factorial matters. What follows is not an exhaustive list. They are examples of elements which will inform a cumulative assessment, predicated in all cases on careful fact-finding.

477. The first relevant factor is the nature of any particular organisation on behalf of which an individual has been active. Reference should be had to our analysis and conclusions on the named United Kingdom-based organisations.

In respect of any other organisation which we have not specifically considered, it will be for the individual concerned to adduce evidence of its agenda and activities. The assessment of how GoSL might perceive the organisation will be a matter for the judge to undertake in light of the relevant conclusions set out in our decision.

478. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it, although it is not determinative of risk.

479. The adjective "active" is relevant because an individual who supports an organisation in a wholly passive manner is in general not reasonably likely to come to the attention of the authorities in the first place. If they did, it is difficult to conceive of a situation in which such support, without more, would give rise to a material risk profile. An example of passive support might be the individual who follows the activities of the TGTE through its online and social media presence, but without contributing anything themselves by way of attendance at events, meaningful fundraising, online posts, and suchlike.

480. The holding of a particular role within an organisation may well, depending on all the circumstances, increase the profile of an individual, although its absence is not an indicator of a decreased risk. By "role" we include any formal positions acquired by election or appointment; *ad hoc* organisational or promotional duties such as being named as a contact point for a specific event; or a more regular set of responsibilities, albeit outwith any formal organisational structure.

481. In the normal run of cases, a protection claim based on diaspora activities will feature a particular organisation. We do not rule out the possibility that an individual may, albeit unusually, have been active solely on their own account. Such independent activity will still need to be properly assessed in light of the remaining factors discussed below, together with any other relevant circumstances.

482. A second factor is the <u>type</u> of activities undertaken by an individual. Whilst <u>GJ</u> made specific reference to attendance at demonstrations only, we have been provided with reliable evidence in respect of a greater range of diaspora activities we regard as being relevant to an individual's overall risk profile and in respect of which we have already found that the Sri Lankan authorities are capable of obtaining information. These activities include, but are not limited to:

    i. attendance at public demonstrations;

    ii. attendance at meetings held in venues that may or may not be open to members of the public;

iii. actual membership of or particular roles within relevant organisations;

iv. distribution of promotional literature;

v. meaningful fundraising on behalf of and/or providing meaningful funding to relevant organisations;

vi. attendance at commemorative events such as Heroes Day;

vii. authorship of, or appearance in, articles, whether published in print or online;

viii. social media activity, whether manifested by the posting of original comments or promoting the views of others;

ix. political lobbying on behalf of an organisation;

x. the signing of petitions perceived as being critical of the government.

483. In respect of attendance at demonstrations, we see no inconsistency between our view that it constitutes a relevant factor and the Tribunal's conclusion at paragraph 351 of GJ that a presence at one or several was not "of itself" evidence of a genuine commitment to Tamil separatism. The point being made there was not about relevancy *per se*, but whether attendance was sufficient to show a commitment to that ideology. All would then, and still does, depend on the facts of the case.

484. With reference to fundraising and/or the provision of funding, we include the adjective "meaningful" because certain payments to organisations are either not reasonably likely to come to the attention of the authorities in the first place, or, if they did, would not be reasonably likely to incite the interest of the Sri Lankan authorities. For example, we know that anyone can pay the requisite fee to obtain an identity card from the TGTE: this is not indicative of any level of activity as such, and it is highly likely that GoSL will be aware of this.

485. In addition, we have purposely not included the provision by an individual of testimony to international investigations such as that carried on under the auspices of UN OISL. Such actions are covered by the risk categories set out in paragraph 356(7)(c) of GJ, a category that we have not been asked to re-evaluate and which remains valid.

486. The next factor is the extent of any activities. The appellants have realistically acknowledged that a brief attendance at a single demonstration, even if known about, would not be capable of establishing a profile sufficient to disclose a risk on return. In so far as it goes, that is clearly right. For reasons

set out previously, it does not follow that even if this *de minimis* threshold is crossed any further activity whatsoever will disclose a risk. By way of example, it might be open to serious question as to whether GoSL would be reasonably likely to perceive an individual who had attended two, three or more demonstrations, standing passively at the back of a crowd and without having engaged in any other diaspora activity, as a threat to the integrity of the state, even assuming that the attendance was known about in the first place.

487. Having said that, there may be situations in which only a few attendances are capable of attracting greater significance. We can contemplate cases where an individual has attended on a few occasions but has spoken publicly at each of them or has otherwise taken on a prominent organisational role; or where a recent arrival in the United Kingdom has attended every demonstration organised by a particular organisation since and has, for example, held flags bearing the LTTE emblem, albeit that only a few such events have taken place.

488. The number of demonstrations attended can bear relevance in another way. Whilst the overall assessment of an individual's profile is not simply a quantitative exercise, a significant number of attendances may, depending on all the circumstances, go to inform a qualitative evaluation. It is, after all, the perception of GoSL which is important: if the authorities are aware that an individual has taken part in numerous demonstrations over the course of time, it may indicate a genuine commitment to the Tamil separatist cause. In our judgment, having regard to everything we know of relevant developments over the last six years or so and GoSL's attitude, it would be inappropriate to rule out the potential significance of an individual's attendance history.

489. Our position on the question of an individual's history of attendance at demonstrations leads us back to what the Tribunal said in GJ. What we have said in relation paragraph 351 of GJ, above, holds good at this point too: even multiple attendances will not "of itself" prove a genuine commitment to Tamil separatism, although a track record will be relevant to that issue.

490. In respect of paragraph 336 of GJ, the Tribunal's conclusion that attendance at demonstrations in the diaspora was not "alone" sufficient to create a reasonable likelihood of adverse attention on return to Sri Lanka remains sound, but only in so far as it goes. It must be seen in light of what was not considered and our analysis of the evidence presented some seven years later. The Tribunal did not, for example, specifically consider what role, if any, an individual might have played in the demonstrations attended. Nor did it address the question of the nature of the organisations behind the demonstrations. We have already assessed the significance of associations with avowedly separatist organisations in the United Kingdom, two of which, the TGTE and the BTF, are proscribed. These two considerations themselves may, depending on the facts of a case, significantly increase the importance of

attendance at demonstrations and may, again on a fact-specific basis, give rise to the perception by GoSL that an individual constitutes a potential threat to the state.

491. The foregoing does not materially depart from what is said in GJ. Further, it is of some note that the assessment section of the CPIN itself recognises the multi-faceted relevance of attendance at demonstrations to the overall evaluation of risk:

> "2.4.33 Decision makers should consider a range of factors when assessing someone's sur place activities, these include (but are not limited to);
>
> • The diaspora groups they are involved with; whether this groups is on the proscribed list of organisations (see Proscribed/de-proscribed groups);
>
> • the nature of the demonstrations attended/nature of diaspora activities involved in;
>
> • a person's role in any demonstration- are they a leader/organiser;
>
> • how many demonstrations have they attended;
>
> • have the demonstrations attracted media attention;
>
> …"

492. Our consideration of attendance at demonstrations should not deflect from the reality that many, if not most, protection claims based on involvement with diaspora organisations will involve a variety of activities. This is illustrative of the need to undertake a holistic assessment of all relevant factors, as they ultimately feed into the overall profile collated by the authorities.

493. The duration of the activities undertaken by the individual is relevant. Subject to what we have said above about the particular prominence of any specific activities and the period that an individual has been in the United Kingdom, the longer that relevant participation has been pursued, the greater the possibility that GoSL may consider the individual to be committed to Tamil separatism.

494. In terms of the evaluative assessment of an individual's profile as it is reasonably likely to be perceived by GoSL, we agree with the appellants' submission that motivation is not relevant. The reason for this lies within the previous sentence: the critical question is what the authorities will make of the activities in respect of which they have obtained information. They will have little or no inclination to enquire into an individual's good faith or lack thereof. We acknowledge that there must exist the possibility of opportunistic "hangers on" making out a claim for international protection. Unattractive as this may seem, it cannot act as a valid basis for rejecting a risk.

495. The genuineness of an individual's political beliefs and activities conducted as a consequence of these will be relevant to the application of the HJ (Iran) principle, and we will address this in due course.

496. The penultimate factor relates to matters not arising within the United Kingdom, but instead to an individual's history in Sri Lanka. In GJ, the Tribunal concluded that the Sri Lankan government's concern was not with past membership of or sympathy for the LTTE and that previous connections with that organisation were not perceived by the authorities as indicating an individual's threat to the state. Paragraph 356(8) confirmed that a history would be relevant "only to the extent that is perceived by the Sri Lankan authorities as indicating a present risk to the Sri Lankan state or the Sri Lankan Government."

497. As will be apparent from our decision thus far, the evidence before us is replete with references to the LTTE and the belief on the part of GoSL (irrespective of whether this perception is accurate) that the organisation remains a source of danger to the Sri Lankan state. Sources in the FFM stated that past LTTE links could result in individual being monitored or questioned on return. The DFAT refers to "low-profile" former LTTE members being harassed and monitored. Also of note is the fact that when Dr Smith's case-studies were interrogated, it transpired that a number of individuals had previous connections to the LTTE and the appellants' ability to rely on these examples as evidence of a risk to TGTE activists was said to be undermined by these histories; the implication being that, even in the post-civil war environment, actual or perceived links to the LTTE may still be deemed relevant. A final reason for the inclusion of this factor in the non-exhaustive list is our finding that GoSL regards the TGTE as a "front" for the LTTE: as a matter of the logic reasonably likely to be applied by the regime, actual or perceived LTTE links in the past would not be left out of account when assessing an individual's overall profile.

498. The cumulative effect of this drives us to the conclusion that a history of links to the LTTE continues to represent a relevant factor in the overall assessment of an individual's profile in so far as it is reasonably likely to inform the perception of GoSL as to the propensity of the individual concerned to engage in separatist activity with a view to threatening the integrity of the Sri Lankan state. The extent of its relevance will depend on the particular facts of the case. It will not, save in very exceptional circumstances, be determinative.

499. The final factor in our non-exhaustive list is that of an individual's familial connections. In light of what we have said about the preceding factor and taking account of the evidence in the FFM and DFAT suggesting that family members of former LTTE operatives may be monitored within Sri Lanka, it would in our view be artificial to exclude the potential relevance of relatives' links to either the LTTE or separatist diaspora organisations. Whilst this factor is in general likely to carry less weight than others, its assessment remains

highly fact-sensitive, with the degree of relationship and nature of the links in question clearly being relevant to the enquiry.

500. At this point it is appropriate to make reference to the cautionary observation made by Underhill LJ at paragraph 50 of MP and NT, the relevant part of which reads as follows:

> "…It is also clear that the Tribunal believed that "diaspora activism", actual or perceived, is the principal basis on which the Government of Sri Lanka is likely to treat returning Tamils as posing a current or future threat; and I agree that that too was a conclusion which it was entitled to reach. But I do not read para. 356 (7) (a) of its determination as prescribing that diaspora activism is the only basis on which a returning Tamil might be regarded as posing such a threat and thus of being at risk on return. Even apart from cases falling under heads (b)-(d) in para. 356 (7), there may, though untypically, be other cases (of which NT may be an example) where the evidence shows particular grounds for concluding that the Government might regard the applicant as posing a current threat to the integrity of Sri Lanka as a single state even in the absence of evidence that he or she has been involved in diaspora activism."

501. The guidance we have provided is just that: the assessment to be undertaken in any given case is always fact-specific and there may be exceptional scenarios which fall wholly or partially outside the parameters of our analysis.

502. We have now arrived at the stage at which GoSL will have gathered any relevant information it can on an individual, sent it back to the security apparatus in Sri Lankan to be assessed, and created or added to a profile on the general electronic database. What is contained on that database will determine the consequences for a returnee on arrival at BIA or once they reach their home area or another place of resettlement.

The position of returnees at the airport

503. Our analysis of diaspora activities, GoSL's information-gathering capabilities, its assessment and recording of an individual's profile on the electronic database, and the judgment as to who would be perceived to constitute a threat, come together to produce four separate categories of returnees: (a) those of whom nothing material is known at all and who therefore do not appear on the general electronic database; (b) those who have an entry on that database, but do not appear on either the stop list or the watch list; (c) those who appear on the stop list; and (d) those who appear on the watch list.

504. It remains clear that the Sri Lankan authorities will be given advance notice of the arrival of individuals subject to return on a TTD. Although there is a degree of divergence amongst the various sources of evidence as to which agencies are present at BIA, we are satisfied that in addition to the

immigration authorities, the TID and CID have either a permanent or near-permanent presence, and it is reasonably likely that the SIS will be represented, at least to a degree, given its role in populating the database and in pursuing the national security agenda. At the very least, relevant personnel will be available for the arrival of flights carrying returnees travelling on a TTD.

505. It is plainly the case that all relevant officials will have access to the general electronic database, together with the stop list and watch list. Any other conclusion would run entirely contrary to the whole purpose of the information storage exercise. Adopting GJ as our starting point and in light of all we have said about the information gathering and processing thus far, we are satisfied that the authorities will, in the words of the Tribunal, "know everything they need to know about that individual."

506. The issue of facial recognition technology at BIA has been canvassed before us. Dr Nadarajah was of the view that it may well be in operation in Sri Lanka (we infer that this included the airport). His opinion was based on the involvement of Chinese companies such as Huawei in Sri Lanka's technology infrastructure and a 2018 Freedom House report. This evidence does not in our judgment show that facial recognition technology is in fact being used in the country, at least not at any meaningful scale. Dr Nadarajah himself acknowledged that cameras have not been installed in BIA. This is consistent with Dr Smith's recent experience when he visited the country in November 2019. In addition, the 2018 report states only an intention by the authorities to start using a facial recognition system. There is no subsequent evidence to indicate that such a system has in fact been put in place. We do accept Dr Smith's evidence that there is a manual system at the airport whereby photographs can be matched to individuals. His view that there is a lack of clarity as to the operation of this process is one with which we agree.

507. It is uncontroversial that those being returned on a TTD will be questioned on arrival at BIA. We find that that is the case. In respect of those who do not appear on either the stop list or the watch list, the respondent submits that any questioning on return will be limited to establishing identity and whether there are in fact any outstanding arrest warrants or criminal proceedings. We agree. Additional questioning at the airport over and above the confirmation of identity is only reasonably likely to occur where the individual is already on either the stop list or the watch list. This is because all relevant information on *sur place* activities and matters arising within Sri Lanka itself (for example, legal proceedings, past detentions, or other issues passed on by the authorities in the home area) will have already been entered onto the general electronic database and will have been assessed by relevant agencies in order to determine whether the individual should be placed on either of the lists. If they are on neither, it follows that they are not of sufficient interest to warrant further questioning about any possible diaspora activities.

508. The position of returnees in possession of a valid passport is different, but only to a limited extent. The evidence indicates that such individuals will not be part of the readmission process and that the authorities at BIA will not automatically be provided with their names in advance of arrival, in contrast to those returning on a TTD. We conclude that such returnees will not automatically be subject to questioning on arrival as regards the establishment of identity: their passport will confirm this. However, it is the case that passports are swiped at immigration control. It would be fanciful to suppose that the terminals used for this are not linked to the general electronic database and the stop list and watch list derived therefrom. If the individual appears on one or other of the two lists it is reasonably likely that they will be questioned further.

509. Our conclusion in respect of returnees in category (a) who do not appear on the general electronic database at all is that at most they will be subjected to brief questioning in order to confirm their identity and will then be admitted to the country without any further intervention or ongoing monitoring. Our conclusion is the same in respect of returnees falling within category (b), namely who do appear on the general electronic database, but whose entry is not flagged such as to designate inclusion in either the stop list or the watch list.

510. Those appearing on one of these two lists face a different scenario. We reaffirm the conclusion at paragraph 356(6) of GJ that a returnee in category (c) who is included on the stop list will be detained immediately and taken to facilities away from the airport. It is at this stage that the risk of persecution and serious harm materialises.

511. As to those returnees in category (d) who are named on the watch list, we reaffirm what is said at paragraphs 356(6) and 356(9) of GJ, namely that they are not detained at the airport, but will be permitted to pass through and journey onward to their home area. In our judgment, these returnees must then be divided into two sub-categories: (i) those who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention; and (ii) those who are of interest, but not at a level sufficient to justify detention at that point in time.

512. Although ostensibly only included on the watch list, those who fall within the first sub-category, which corresponds with the risk category under paragraph 356(7)(a) of GJ, are not simply being "watched" after arrival to determine what they may or may not do: they are at risk of being detained, persecuted, and subjected to serious harm. Our view is reinforced by what the Tribunal itself said at paragraph 310 of GJ:

> "[I]f the authorities have an adverse interest in an individual, he will be picked up at home, not at the airport, unless there is a "stop" notice on the airport computer system."

(Emphasis added)

513. On one view of the respondent's submissions, she appeared to suggest that the risk of detention for individuals within the first sub-category would only materialise if further relevant activities were undertaken within Sri Lanka. If this was indeed her position, it cannot be correct. Such an approach would, in effect, require a returnee to show a risk of persecution twice over: first, in relation to their existing profile; and second, by corroborating that profile by undertaking the same, or similar, activities after return. It cannot have been the intention of the Tribunal to endorse such an approach.

514. For the avoidance of any doubt, we add, that such an individual is reasonably likely to be monitored following departure from the airport and would be picked up wherever they may seek to go, even if this is a location other than their original home.

515. In light of the above, inclusion in the risk category set out in paragraph 356(7)(a) of GJ is dispositive of a protection claim or an appeal against a refusal thereof, subject to any issues of exclusion (a topic which has not featured in these proceedings).

Beyond the airport: monitoring, "rehabilitation", and recruitment as an informant

516. For all others on the watch list (in other words those in the second sub-category of returnees identified in paragraph 511, above), we conclude that in light of the evidence before us as a whole, the guidance set out at paragraph 356(9) of GJ remains valid and that it is reasonably likely that they will be monitored by the authorities in their home area or wherever else they may be able to resettle. There is, in general, no risk of such individuals being detained, without more.

517. We have received little evidence as to the precise nature of any monitoring undertaken. We accept Dr Smith's evidence that the authorities use what he describes as local "catchers" (informants) who are employed by the security forces (sometimes with the use of financial incentives and quite possibly accompanied by an implied threat of the consequences of refusing to cooperate) to provide what has been described as "real time" information on the activities of individuals; primarily, one assumes, their associations or activities. DFAT and the FFM corroborate sources cited by Dr Nadarajah indicating that undercover members of the security forces carry out surveillance. We find that this is the case. DFAT describes the interaction between the authorities and the subjects of surveillance as more "subtle" than in the past and that aside from being watched, individuals may be visited at home or receive telephone calls. Again, we accept this to be the case. A 2018 report by the Sri Lanka Campaign for Peace and Justice speaks of there being

"very intense levels of contact" between the subjects of surveillance and the authorities, although no details of what the "contact" entails are given and it adds nothing to what we have already found. The evidence does not show that an individual subject to monitoring would have their freedom of movement formally restricted, or that they would be placed under reporting conditions.

518. To the nature of surveillance reasonably likely to occur we would add the ability of the authorities to monitor electronic communications, the Internet and social media activity (in so far as it can view Facebook posts and other unencrypted platforms), as borne out by the expert evidence and the overall tenor of the evidence indicating GoSL's authoritarian nature and its sensitivity to perceived separatist activity.

519. It is common ground between the parties that monitoring will not in general constitute persecutory treatment, a position which is in line with what is said at paragraphs 317 to 319 and 431 of GJ. On the evidence before us, we agree, but would add two observations.

520. First, we accept the appellant's argument that it may, in an exceptional case, be possible for an individual to show that by virtue of, for example, very significant mental health problems (such as paranoid schizophrenia), the process of monitoring will have such a detrimental impact as to permit them to succeed under the Refugee Convention (the monitoring will be as a result of actual or imputed political opinion and the threshold for persecution is to be assessed in light of the individual's characteristics) and Article 3 ECHR.

521. Second, in considering the question of post-return monitoring, the Tribunal in GJ did not address the implications of the HJ (Iran) principle in terms not only of what an individual may do, but what they may desist from doing due to the consequences of undertaking certain activities. This important, and in some cases decisive, issue is dealt with in greater detail, below.

522. We turn to the issue of the "rehabilitation" programme in Sri Lanka, which whilst not featuring significantly in the evidence or submissions before us, nonetheless requires consideration. In GJ, the Tribunal dealt with the matter in paragraphs 316 to 319, with the relevant passages stating as follows:

> "316. The "rehabilitation" programme was designed by the Sri Lankan government to re-educate former LTTE cadres, who may never have known peace, and enable them to return to the community as ordinary citizens. The best evidence on this should have been that of Professor Gunaratna, who helped design the programme, but in fact, very little information was provided by him or anyone else about the operation of the programme."
>
> 317. Those who have been rehabilitated are monitored and are required to report regularly and live in their home areas; the GOSL has confidence that those who have been through rehabilitation are unlikely to return to combat but monitors them closely.

> 318. Professor Gunaratna's opinion, which we accept, is that there has been a qualitative change in the purpose of the rehabilitation programme between 2009 and now. The government's concern now relates to those who may be associated with attempts to destabilise the unitary Sri Lanka by reviving the LTTE within the diaspora. His evidence explained how the Sri Lankan authorities would approach selection of individuals for rehabilitation now: he told us that those within Sri Lanka who undertake high profile separatist activity (such as the Jaffna students trying to celebrate Maaveerar Naal in November 2011) or who are known or perceived (while still in Sri Lanka) to be seeking contact with the leaders or activists of the resurgence movement in the diaspora hotspots, risk detention or "rehabilitation".”

523. The evidence of “rehabilitation” before us emanates largely from Professor Gunaratna. The relevant section of his report refers solely to LTTE leaders, members, or supporters having been “rehabilitated”. His evidence also links rehabilitation with prosecution; it being said that relevant individuals “will” be taken to court and either placed into the programme for two years or “punished”. Dr Nadarajah’s view was that a single “rehabilitation” centre still operated. In oral evidence, he stated that he did not think the programme had now been wound up. In contrast, Dr Smith has said that the programme has “run its course”. When this was put to Professor Gunaratna, he told us that a single “rehabilitation” centre existed, with ten occupants who had been connected with the LTTE.

524. The evidence on this issue does not satisfy us that there is a reasonable likelihood of a returnee appearing on the watch list and subject to monitoring then being prosecuted and either sentenced to a period of custody or sent for “rehabilitation”. Nor does it show that “rehabilitation” will be used as an alternative to formal proceedings. Neither Professor Gunaratna’s evidence nor that of Dr Nadarajah relates specifically to diaspora activists as such (who may, or may well not, have any previous links to the LTTE). It is also, to an extent, undermined by what Dr Smith says and there is no empirical or anecdotal evidence of prosecutions, an omission which is in our view significant given the formality of any such proceedings and the reasonable assumption that records would exist.

525. As a result of this conclusion, the question of whether being subject to prosecution or “rehabilitation” is persecutory does not arise.

526. The final issue which falls to be addressed is that of the recruitment of returnees as informants. This is a topic which was not canvassed in GJ and has not, as far as we are aware, been the subject of any judicial consideration.

527. There are significant difficulties with this particular aspect of the appellants’ case.

528. The only evidence which purports to establish a link between returnees subject to monitoring and recruitment as informants emanates from Professor

Gunaratna. Even then, there is only a brief allusion to the topic; in the context of discussing intelligence gathering, it is said that, "depending on their disposition, [the returnee] would be prosecuted if uncooperative or recruited if cooperative." In responses to further questions put to him, Professor Gunaratna spoke of a "preference" to recruit Tamils as informants and community sources and then stated that in cases known to him, TGTE members "were recruited".

529. There is a distinct absence of source materials cited by Professor Gunaratna for an opinion stated in relatively robust terms. Further, he is unable to provide specific examples of any TGTE "members" who have been returned to Sri Lanka and then recruited as informants. There is also no clear explanation as to what role any recruited returnee would be expected to undertake. For example, it has not been said whether the recruit would be expected to provide information on other individuals resident in Sri Lanka, or maintain contact with previous associates in the United Kingdom.

530. It is clear from the evidence as a whole that the Sri Lankan authorities use informants both in the diaspora and Sri Lanka itself. However, the evidence relating to the former category is not relevant to the issue with which we are currently concerned. In respect of the latter, aside from Professor Gunaratna, other sources including Dr Smith and Dr Nadarajah, said nothing about the recruitment of returnees as informants, as opposed to members of the Tamil community already residing in Sri Lanka. In fact, Dr Smith's evidence was that recruits consist of former LTTE operatives, "low caste" Hindus, those disabled as result of the civil war, and those in need of financial resources due to very high levels of unemployment in the north. He makes no connection between returnees and recruitment. In addition, even in respect of the case-studies set out in his report which have been the subject of criticism by us, there is no reference to any of the individuals concerned being confronted with recruitment.

531. We acknowledge that a demand to become an informer was a relevant risk factor in LP (LTTE area – Tamils – Colombo - risk?) Sri Lanka CG [2007] UKAIT 00076, but this was a country guidance decision promulgated during the currency of the civil war and the risk factor applied to those who had been resident in Sri Lanka, had been considered by the authorities as a potential source of information in respect of the then ongoing operations of the LTTE, and had previously refused to cooperate before leaving the country. It was not, and is not, relevant in the context of a returnee being the subject of recruitment for the first time.

532. Our overall conclusion is that the evidence does not show that there is in general a reasonable likelihood of a returnee who appears on the watch list and is then subject to monitoring being recruited as an informant or being prosecuted for a refusal to undertake such a role.

533. It follows from this that the issue addressed in PK and OS (basic rules of human conduct) Ukraine CG [2020] UKUT 00314 (IAC) does not arise in these appeals.

534. For the sake of completeness, we reaffirm the undisputed conclusion reached in GJ that internal relocation is not a viable option for those individuals who are at risk in their home area or indeed any other place that they may be able to resettle in immediately following return to the country.

J: THE COUNTRY GUIDANCE

535. The basic starting point for both parties in these proceedings has been that the country guidance set out in GJ remains valid, subject to one or two suggested "tweaks" or nuanced amendments. Following our endeavours to undertake a comprehensive analysis of the arguments and the evidence upon which they have rested, it will be apparent that we have arrived at something of a hybrid of conclusions. In fairly large measure, we agree that in broad terms GJ still accurately reflects the situation facing returnees to Sri Lanka. However, in material respects, we have also deemed it appropriate to clarify and supplement the existing guidance, with particular reference to *sur place* activities.

536. Rather than requiring the reader to cross-reference GJ with our conclusions, it is best simply to restate the country guidance in its entirety as follows:

(1) GoSL is an authoritarian regime whose core focus is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam.

(2) GoSL draws no material distinction between, on the one hand, the avowedly violent means of the LTTE in furtherance of Tamil Eelam, and non-violent political advocacy for that result on the other. It is the underlying aim which is crucial to GoSL's perception. To this extent, GoSL's interpretation of separatism is not limited to the pursuance thereof by violent means alone; it encompasses the political sphere as well.

(3) Whilst there is limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of avowedly separatist or perceived separatist beliefs.

(4) GoSL views the Tamil diaspora with a generally adverse mindset, but does not regard the entire cohort as either holding separatist views or being politically active in any meaningful way.

(5) *Sur place* activities on behalf of an organisation proscribed under the 2012 UN Regulations is a relatively significant risk factor in the assessment of an individual's profile, although its existence or absence is not determinative of risk. Proscription will entail a higher degree of adverse interest in an organisation and, by extension, in individuals known or perceived to be associated with it. In respect of organisations which have never been proscribed and the organisation that remains de-proscribed, it is reasonably likely that there will, depending on whether the organisation in question has, or is perceived to have, a separatist agenda, be an adverse interest on the part of GoSL, albeit not at the level applicable to proscribed groups.

(6) TGTE is an avowedly separatist organisation which is currently proscribed. It is viewed by GoSL with a significant degree of hostility and is perceived as a "front" for the LTTE. GTF and BTF are also currently proscribed and whilst only the former is perceived as a "front" for the LTTE, GoSL now views both with a significant degree of hostility.

(7) Other non-proscribed diaspora organisations which pursue a separatist agenda, such as TS, are viewed with hostility, although they are not regarded as "fronts" for the LTTE.

(8) GoSL continues to operate an extensive intelligence-gathering regime in the United Kingdom which utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media. At the initial stage of monitoring and information gathering, it is reasonably likely that the Sri Lankan authorities will wish to gather more rather than less information on organisations in which there is an adverse interest and individuals connected thereto. Information gathering has, so far as possible, kept pace with developments in communication technology.

(9) Interviews at the SLHC continue to take place for those requiring a TTD.

(10) Prior to the return of an individual traveling on a TTD, GoSL is reasonably likely to have obtained information on the following matters:

i. whether the individual is associated in any way with a particular diaspora organisation;

ii. whether they have attended meetings and/or demonstrations and if so, at least approximately how frequently this has occurred;

iii. the nature of involvement in these events, such as, for example, whether they played a prominent part or have been holding flags or banners displaying the LTTE emblem;

iv. any organisational and/or promotional roles (formal or otherwise) undertaken on behalf of a diaspora organisation;

v. attendance at commemorative events such as Heroes Day;

vi. meaningful fundraising on behalf of or the provision of such funding to an organisation;

vii. authorship of, or appearance in, articles, whether published in print or online;

viii. any presence on social media;

ix. any political lobbying on behalf of an organisation;

x. the signing of petitions perceived as being anti-government.

(11) Those in possession of a valid passport are not interviewed at the SLHC. The absence of an interview at SLHC does not, however, discount the ability of GoSL to obtain information on the matters set out in (10), above, in respect of an individual with a valid passport using other methods employed as part of its intelligence-gathering regime, as described in (8). When considering the case of an individual in possession of a valid passport, a judge must assess the range of matters listed in (10), above, and the extent of the authorities' knowledge reasonably likely to exist in the context of a more restricted information-gathering apparatus. This may have a bearing on, for example, the question of whether it is reasonably likely that attendance at one or two demonstrations or minimal fundraising activities will have come to the attention of the authorities at all.

(12) Whichever form of documentation is in place, it will be for the judge in any given case to determine what activities the individual has actually undertaken and make clear findings on what the authorities are reasonably likely to have become aware of prior to return.

(13) GoSL operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself. This database is accessible at the SLHC, BIA and anywhere else within Sri Lanka. Its contents will in general determine the immediate or short-term consequences for a returnee.

(14) A stop list and watch list are still in use. These are derived from the general electronic database.

(15) Those being returned on a TTD will be questioned on arrival at BIA. Additional questioning over and above the confirmation of identity is only reasonably likely to occur where the individual is already on either the stop list or the watch list.

(16) Those in possession of a valid passport will only be questioned on arrival if they appear on either the stop list or the watch list.

(17) Returnees who have no entry on the general database, or whose entry is not such as to have placed them on either the stop list or the watch list, will in general be able to pass through the airport unhindered and return to the home area without being subject to any further action by the authorities (subject to an application of the HJ (Iran) principle).

(18) Only those against whom there is an extant arrest warrant and/or a court order will appear on the stop list. Returnees falling within this category will be detained at the airport.

(19) Returnees who appear on the watch list will fall into one of two sub-categories: (i) those who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention once the individual has travelled back to their home area or some other place of resettlement; and (ii) those who are of interest, not at a level sufficient to justify detention at that point in time, but will be monitored by the authorities in their home area or wherever else they may be able to resettle.

(20) In respect of those falling within sub-category (i), the question of whether an individual has, or is perceived to have, undertaken a "significant role" in Tamil separatism remains the appropriate touchstone. In making this evaluative judgment, GoSL will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam.

(21) The term "significant role" does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been "high profile" or "prominent". The assessment of their profile will always be fact-specific, but will be informed by an indicator-based approach, taking into account the following non-exhaustive factors, none of which will in general be determinative:

i. the nature of any diaspora organisation on behalf of which an individual has been active. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it;

ii. the type of activities undertaken;

iii. the extent of any activities;

iv. the duration of any activities;

v. any relevant history in Sri Lanka;

vi. any relevant familial connections.

(22) The monitoring undertaken by the authorities in respect of returnees in sub-category (ii) in (19), above, will not, in general, amount to persecution or ill-treatment contrary to Article 3 ECHR.

(23) It is not reasonably likely that a returnee subject to monitoring will be sent for "rehabilitation".

(24) In general, it is not reasonably likely that a returnee subject to monitoring will be recruited as an informant or prosecuted for a refusal to undertake such a role.

(25) 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 are associated with publications critical of the government, face a reasonable likelihood of being detained after return, whether or not they continue with their activities.

(26) Individuals who have given evidence to the LLRC implicating the Sri Lankan security forces, armed forces, or the Sri Lankan authorities in alleged war crimes, also face a reasonable likelihood of being detained after their return. It is for the individual concerned to establish that GoSL will be aware of the provision of such evidence.

(27) There is a reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to persecutory treatment within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR.

(28) Internal relocation is not an option within Sri Lanka for a person at risk from the authorities.

(29) In appropriate cases, consideration must be given to whether the exclusion clauses under Article 1F of the Refugee Convention are applicable.

K: THE HJ (IRAN) PRINCIPLE

537. Beyond the application of the country guidance set out above, it is of critical importance for tribunals to have regard to wider principles of refugee law. The ultimate decision in any case is, after all, not whether an individual falls within the parameters of the guidance, but whether they have a well-founded fear of persecution for a Convention reason.

538. It is therefore essential, where appropriate, that a tribunal does not end its considerations with an application of the country guidance to the facts, but proceeds to engage with the HJ (Iran) principle, albeit that such an analysis will involve interaction with that guidance.

539. The HJ (Iran) principle establishes that it is no answer to a claim for asylum that an individual would conceal their sexual identity in order to avoid persecution that would follow if they did not do so. At paragraph 82 of HJ (Iran), Lord Roger, JSC, set out the correct approach to be adopted by decision-makers in the context of an individual claiming to be at risk in their country of origin by virtue of wishing to live openly as a gay man:

> "82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.
>
> If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
>
> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
>
> If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind

do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

540. That the HJ (Iran) principle applies to cases concerning political opinions was confirmed by Lord Dyson, JSC, at paragraphs 26 and 27 of RT (Zimbabwe):

> "26. The HJ (Iran) principle applies to any person who has political beliefs and is obliged to conceal them in order to avoid the persecution that he would suffer if he were to reveal them. Mr Swift accepted that such a person would have a "strong" case for Convention protection, but he stopped short of an unqualified acceptance of the point. In my view, there is no basis for such reticence. The joint judgment of Gummow and Hayne JJ in Appellant S395/2002 contains a passage under the heading "'Discretion' and 'being discreet'" which includes the following at para 80:
>
> > "If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be 'discreet' about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences."
>
> 27. I made much the same point in HJ (Iran) at para 110:
>
> > "If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to

> surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man in order to avoid persecution on return to his home country."

541. GJ did not address the HJ (Iran) principle in the context of political opinions held, or perceived to be held, by returnees to Sri Lanka. The primary focus of the Tribunal was the risk to returnees on the basis of what the authorities already knew about them. The HJ (Iran) principle is centred on what the individual would do, or at least would wish to do, *after* return. This prospective assessment cannot, however, be entirely divorced from matters falling under the ambit of the country guidance.

542. The genuineness of the belief in the establishment of Tamil Eelam is the very first question that must be answered when applying the step-by step approach set out in paragraph 82 of HJ (Iran). It is essential that careful findings of fact are made on the evidence.

543. In accepting that certain individuals may be refugees under the HJ (Iran) principle, the respondent suggests that the following criteria must be satisfied:

> "They have a genuine belief in Tamil separatism which has manifested in a significant role within Tamil separatism in the diaspora."

544. To the extent that this seeks to introduce some form of a qualitative threshold, the respondent's position cannot be right. The first question is simply whether the separatist beliefs are genuinely held. There is no need at this stage for those beliefs to have been manifested in any particular way whilst the individual was outside of Sri Lanka. The level of involvement in diaspora activities may, however, be relevant to questions arising further down the line of enquiry.

545. We take account of Lord Rodger's reminder that an individual may be perceived by a potential persecutor to be something that he/she is not (in that case, gay). Whilst that is undoubtedly true, it is difficult to envisage a situation in which a non-genuine professor of separatist beliefs could succeed with reference to the Refugee Convention. It seems to us very unlikely that a tribunal would find that such an individual would wish to openly manifest beliefs on return that they did not in fact hold, particularly in light of the evidence on what is likely to flow from such actions. Even if this initial credibility barrier were overcome, it would inexorably follow that the individual's reluctance to openly express non-genuine separatist views would have no impact whatsoever on any protected right - in this case the right to hold and express political beliefs – because no such belief would exist.

546. We emphasise that we are here concerned with those professing to hold separatist beliefs, as that concept has been discussed earlier on in our decision.

We cannot, and do not, preclude the possibility that other beliefs held in respect of political, religious, or social matters might be relevant to the establishment of a protection claim based on the HJ (Iran) principle.

547. The next step of the enquiry involves the individual proving that the open expression of their separatist beliefs would be reasonably likely to result in persecutory treatment. We have previously concluded that there is only limited political space for the assertion of certain Tamil nationalist views within Sri Lanka. However, a tribunal considering the question of how GoSL will react to the expression of beliefs must do so on a correct premise: a genuine belief in varying degrees of autonomy for the Tamil majority areas within Sri Lanka is self-evidently distinct from a commitment to the establishment of Tamil Eelam. As discussed earlier, GoSL views separatism with real hostility. The view of a witness in GJ that any political activity within Sri Lanka was at that time "incredibly dangerous" remains valid now in the context of a "separatist ideology" and the expression thereof. Dr Nadarajah's evidence to us, upon which we attach significant weight, is that individuals would be at risk if they sought to undertake activities in Sri Lanka that they had pursued in the United Kingdom and that there was "zero" possibility of any organisation with an avowedly separatist agenda being able to operate in that country.

548. To these contextual factors must be added the uncontentious fact that the authorities monitor the activities of those returnees who appear on the watch list and the Tamil population in a more general sense, particularly in the north and east of the country. In our judgment, the authorities would be reasonably likely to become aware of pro-separatist activities or the open expression of such beliefs undertaken by a returnee, in whatever form they may be manifested.

549. The respondent has asserted that in order to succeed under the HJ Iran principle, the returnee must show that:

> "If returned, they would manifest their belief similarly [i.e. at a level disclosing a "significant role" within the diaspora] and GoSL would be reasonably likely to detect at the same."

550. As with the accompanying assertion discussed in paragraphs 545 and 546, above, this position is misconceived. There is no requirement for equivalence as between activities undertaken in the United Kingdom and those the individual may wish to pursue in Sri Lanka. We say this for three reasons. First, it is a simple fact that no organisations with a separatist agenda operate within the country. Thus, an individual who was, for example, highly active with the TGTE could not manifest his/her genuinely held beliefs "similarly" when in Sri Lanka because the organisation does not operate there. That does not prevent them from acting on an individual basis. Second, whilst diaspora activities are clearly a source of hostility on the part of GoSL, the manifestation

of separatist beliefs within Sri Lanka itself is highly likely to attract adverse attention and may, depending on the facts of the case, require less from an individual to prove that they would be detained. Third, the respondent's position appears to require an individual who would already be at risk on return under paragraph 356(7)(a) of GJ to then undertake yet further activities so as to replicate that same risk.

551. Continuing with the enquiry, facts must then be found as to what the individual would wish to do on return in relation to the expression of his/her genuinely held separatist beliefs. If it is accepted that they would intend to manifest these beliefs in an open fashion (whether by physical protest, campaigning and/or statements in the media and/or on social media), a finding would have to be made as to whether these activities would be reasonably likely to be detected by the authorities, bearing in mind the climate of hostility towards Tamil separatism, the use of informants, and the ability to monitor individuals and most, if not all, forms of media.

552. If the individual would engage in the expression of separatist views and these were to become known, it is reasonably likely that they would be detained, with the consequential risk of persecution within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR.

553. If it is found that the individual would not seek to express their separatist beliefs on return, the next question is *why* that is the case. If a material reason for this self-imposed censorship is to avoid the risk of persecution and serious harm, they are entitled to international protection. It is no answer, as appeared to be the respondent's suggestion before us, that an individual could pursue an alternative means of expressing their political beliefs through support of a nationalist organisation such as the TNA. As highlighted earlier, there is a material distinction between a nationalist agenda and one with separatism at its core. In our judgment, it is wrong in principle to expect an individual who holds a particular set of political beliefs to "make do", as it were, with another, solely in order to avoid persecution or serious harm. This would amount to a material modification of the protected right. To conclude otherwise would run the risk of diluting the protection afforded by the Refugee Convention.

554. In the first instance, there must be an engagement with the step-by-step approach in relation to a returnee who is on the watch list, but not in the category of those who will be detained in the home area by virtue of their pre-existing adverse profile. In undertaking this exercise, a tribunal will need to bear in mind the fact that the authorities will be monitoring the individual concerned, as the country guidance makes clear.

555. However, even an individual who does not appear on the watch list or indeed on the general electronic database at all is nonetheless entitled to have their protection claim examined in light of the HJ (Iran) principle if the findings of fact support a conclusion that they would or would wish to openly express

genuinely held separatist beliefs on return but would conceal such beliefs in order to avoid the risk of detention and persecutory treatment.

L: THE TWO INDIVIDUAL APPEALS

556. We now turn to consider the appellants' individual cases. In so doing we have taken all the evidence adduced into account, whether or not specific reference is made to any particular aspect of it.

KK's case in outline

557. As originally put forward, KK's protection claim was based on a fear of the Sri Lankan authorities due to detention and ill-treatment whilst in that country, together with the consequences of *sur place* activities in the United Kingdom. It was said that the detention occurred because of suspected support for the LTTE between 2006 and 2007. The *sur place* activities were on behalf of the TGTE and included attendance at demonstrations and other community events.

KK: the decision of the First-tier Tribunal

558. In dismissing KK's appeal, the First-tier Tribunal found that he had not provided a truthful account of claimed events in Sri Lanka. In addition to a significant delay in making the protection claim in the United Kingdom, the judge found there to be material inconsistencies in the evidence. The judge accepted that KK had undertaken some *sur place* activities, but concluded that he had never "played any significant role in the TGTE" and would not be of interest to the Sri Lankan authorities on return. A claim based on the risk of suicide and Article 3 ECHR was rejected.

KK: the error of law decision

559. Upper Tribunal Judge Rimington concluded that the First-tier Tribunal had erred in law by failing to adequately consider whether KK's accepted *sur place* activities would be perceived by the Sri Lankan authorities as sufficiently adverse to place him at risk on return. In setting aside the First-tier Tribunal's decision, Judge Rimington expressly upheld the findings of fact on claimed events in Sri Lanka and the nature of the activities undertaken in the United Kingdom. The issue to be determined when re-making the decision was whether, in light of the *sur place* activities to date, KK would attract sufficiently adverse interest to disclose a risk on return.

KK: the parties' submissions

560. The case-specific skeleton argument provided on KK's behalf emphasised the preserved findings of the First-tier Tribunal in respect of his *sur place* activities and the respondent's acceptance of the fact of additional activities undertaken since August 2019. KK's involvement with all activities has been sustained and committed. The range and nature of these activities are significant. The evidence of his brother being arrested in Sri Lanka and questioned about KK's activities in the United Kingdom should be accepted. Even if this particular factual element is rejected, KK's profile is such that he would be at risk on return. Alternatively, KK's genuinely held separatist beliefs and his desire to express them if returned to Sri Lanka, but an unwillingness to do so because of the risk of detention and persecution, permits him to succeed under the HJ (Iran) principle.

561. The oral submissions built upon those set out in writing. The evidence from Mr Yogalingam added further support to the case. It was clear that GoSL will be aware of KK's activities in this country prior to his return.

562. The respondent's case-specific skeleton argument for KK accepts that there is "relatively little dispute between the parties as to the broad kinds of activity that KK has engaged in." Whilst accepting that KK has been involved in a variety of activities on behalf of the TGTE, and that GoSL will be aware of these, the respondent asserts that there is no risk on return, whether in respect of an application of the country guidance, or with reference to the HJ (Iran) principle.

563. Reliance is placed on the preserved finding of the First-tier Tribunal that KK has never held a formal role within the TGTE. Other preserved adverse findings are said to be "highly relevant and material" to the assessment of KK's overall credibility at this stage. Claimed activities for which there is no additional supporting evidence should not be accepted. Having accepted that GoSL will be aware of certain activities, KK's profile would still not show that the authorities would perceive him as having played a "significant role" within the Tamil separatist movement. At most, he would be subject to monitoring, but this would not lead to persecution or serious harm.

564. The oral submissions focused primarily on the lack of what may be described as higher profile activities by KK in the United Kingdom. His attendances at demonstrations involved nothing more meaningful than that. He had never been named as a coordinator in any TGTE brochures. In respect of the claimed harassment of KK's brother in Sri Lanka, it was noted that this had been rejected by the First-tier Tribunal and there was an absence of evidence from the brother himself.

565. In respect of the HJ (Iran) principle, there were serious doubts as to whether KK's activities had been undertaken out of a genuine belief in separatism. The evidence as to what he might wish to do on return to Sri Lanka was vague. This, in combination with his mental health problems, the absence of the TGTE in that country, and the ability of his family and the Tamil community at large to provide support, went to show that KK would not in fact wish to express any relevant political beliefs on return. Therefore, the HJ (Iran) principle did not apply.

KK: findings of fact

566. As with all the evidence before us, we have considered that relating specifically to KK holistically and set against the lower standard of proof. Overall, notwithstanding his vulnerability, we are satisfied that he was able to participate in the hearing fully.

567. We begin by reaffirming the preserved finding of fact relating to claimed past events: KK had never worked for the LTTE, nor had he been detained and ill-treated by the Sri Lankan authorities in 2008. It follows that he was never released from detention on payment of a bribe, nor was he ever subject to reporting conditions.

568. In his latest witness statement, KK purports to rely on previous statements and his asylum interview record. In addition, he asserts that after his arrival in this country, he wanted to "vent my anger against the Sri Lankan government due to the ill-treatment I suffered at the hands of the Sri Lankan security forces…". Clearly, in light of the preserved finding of fact as to past events, KK's continued reliance on elements of his claim that have been rejected does not assist his overall credibility at this stage.

569. We have borne in mind the preserved adverse findings when assessing KK's evidence as a whole. On the one hand, having told untruths in the past may act as an indicator as to a propensity to do so subsequently. On the other hand, we remind ourselves that a person can be untruthful in certain respects, whilst providing reliable evidence in relation to other matters.

570. In oral evidence, KK accepted that he had not mentioned his parents' claimed support for the LTTE, or that three cousins had died fighting on behalf of that organisation. This point was not the subject of specific submissions, but we address it in any event. We are prepared to accept KK's evidence. Notwithstanding other untruthful elements of the claim, it is plausible that his mother would have supported the LTTE as a member of the Tamil population living in Jaffna during the currency of the long-running conflict. There is no suggestion that she was ever active and we find that to be the case. In respect of the cousins, we accept that they existed and died in the manner claimed. Having reviewed the evidence, we note that KK had not previously been

asked about the involvement of any members of his extended family in the conflict. It is likely that he did not regard them as having any bearing on his own claim. As discussed later, that is our view as well.

571. We now turn to KK's activities in the United Kingdom. Again, aspects of the evidence relating to these are the subject of preserved findings:

    i. KK first became involved with the TGTE in September 2014 and had been issued with a Tamil Eelam identity card in May 2017;

    ii. between 2014 and the hearing before the First-tier Tribunal in May 2019, KK had been involved in the distribution of leaflets; attending meetings and demonstrations; and in a petition campaign;

    iii. KK had not held a formal role within the TGTE;

    iv. KK's brother and uncle had not been approached by the authorities in Sri Lanka concerning his activities in the United Kingdom.

572. We confirm the status of those findings.

573. Beyond the preserved findings from the First-tier Tribunal's decision, the respondent has also accepted, to the extent that his own evidence is supported by other sources, that KK continues to be involved with the TGTE and that he has undertaken a variety of *sur place* activities, including attendance at meetings and public demonstrations; fundraising; the distribution of leaflets; and involvement in the "one million signatures" petition campaign.

574. In so far as the respondent's position on the additional *sur place* activities is concerned, we conclude that she is right to have accepted the essential fact of much of what KK has claimed to have undertaken. In addition to what KK himself has set out in considerable detail in his latest witness statement, there is a good deal of corroborative evidence in the form of photographs of his attendance at demonstrations and other events. We are satisfied that the images in fact show KK at the various events listed in the index to the main bundle and covering the period beyond the hearing before the First-tier Tribunal. We also find that a number of the relevant events have been the subject of Internet-based media coverage, as evidenced in the sources listed in the index.

575. In respect of other activities which KK claims to have undertaken, but which are not specifically corroborated by photographs, social media posts, or other literature, we find it to be reasonably likely that he did in fact participate because the uncontentious activities form the large majority of those claimed. The additional events are consistent with KK's pattern of involvement.

576. KK can also derive material support from the evidence of Mr Yogalingam. We have previously stated our overall view that his evidence has been candid and without exaggeration, both in respect of wider issues relating to the TGTE and his knowledge of the activities undertaken by KK and RS. Specific examples are provided in Mr Yogalingam's witness statement on events in which it is said that KK participated. We find that this evidence is essentially reliable as regards those events which are within Mr Yogalingam's own knowledge and those in respect of which he contacted his TGTE colleague, Mr Seevaratnam, in order to confirm KK's involvement.

577. Although KK has alluded to some participation with TS, Tamil Coordinating Committee, and the World Tamil Historical Society, there has been no detail or corroborative evidence provided whatsoever. Any activities of this nature which may have been undertaken are not of any material relevance in this case.

578. The nature of KK's involvement in activities on behalf of the TGTE (as opposed to the simple fact of participation) is in dispute. From what we now know about the TGTE's structure, it is clear that KK is not a "member" as he is not one of the elected MPs. It has not been suggested that he holds any permanent and/or formal role within that organisation. KK's case is that he has undertaken what might be described as *ad hoc* organisational and promotional duties over the course of time.

579. The evidence on this important issue presents something of a mixed picture. The preserved adverse findings count against what KK has to say about the nature of his involvement with the TGTE, at least to an extent. There is also an absence of much evidence documenting any claimed organisational and/or promotional activities. In particular, there are very few, if any, photographs of KK in what might be described as an organisational role in demonstrations or other events (for example, acting as a steward or addressing protesters with a loudspeaker). His oral evidence highlighted these shortcomings. He was bound to accept that his name had not appeared on brochures or posters as a coordinator or member of any security detail for particular TGTE events.

580. However, KK can look once again to Mr Yogalingam for evidential support. The letter of 16 May 2019 is fairly sparse as regards the particulars of KK's involvement. It does however state in terms that he has been given "responsible roles" including assisting with the organisation of events. Examples provided in the letter include the TGTE National Sports meets in 2017 and 2018; the Black July protest; the TGTE election campaign; and the protest against Brigadier Fernando in February 2018. Without more, we might regard the contents of this letter as being insufficiently detailed in order to overcome the credibility concerns pertaining to KK's own evidence. The letter must be read in conjunction with Mr Yogalingam's witness statement. In this he provides a good deal more information, not simply about the number and range of activities undertaken, but, importantly, on the nature of KK's

involvement in some of these. Examples are given of specific events in which it is said that KK had an organisational role, a number of which are also contained in the 2019 letter, but also include additional community events, protests, and a hunger strike. All-told, ten named events are set out within the period 2017 to 2020. Mr Yogalingam places these in the context of KK having worked with him "closely".

581. Taking a holistic view of the evidence, there are no sound reasons for rejecting the truthfulness or reliability of what Mr Yogalingam has to say about the nature of KK's involvement with the TGTE. We find that his evidence, viewed in the round and when combined with that of KK (in respect of which we have applied appropriate scepticism), shows that the latter has undertaken organisational and promotional responsibilities in respect of TGTE events since 2017. Prior to that we find that his involvement did not include such responsibilities.

582. As implicitly acknowledged by the respondent, the medical evidence from Professor Katona is effectively of neutral value on this issue: it does not suggest that KK would be more likely to undertake such responsibilities; nor does it indicate that such activities are inconsistent with his mental health condition.

583. We reject KK's evidence that his brother has been harassed by the Sri Lankan authorities over the course of many years and to date. The claim that this same brother had been confronted by the Sri Lankan authorities in November 2017 because of KK's *sur place* activities was specifically rejected by the First-tier Tribunal. We note that the brother's latest witness statement purports to rely on previous statements which had been considered by the First-tier Tribunal and found wanting. This aspect of KK's case is, in our judgment, an embellishment. Whilst taking this into account when assessing KK's overall credibility, it does not, on the lower standard, drive us to the conclusion that other core aspects relating to his activities in the United Kingdom are rendered unreliable.

584. The fact of KK's activities for the TGTE, both in terms of their nature and extent, is conceptually distinct from the question of whether they have been motivated by a genuine belief in Tamil separatism. We cannot of course peer into an individual's mind. The best we can do is to examine what KK himself has said and done, together with the surrounding evidence.

585. The assertion in KK's witness statement that his political beliefs are underpinned by his own experiences at the hands of the Sri Lankan authorities does not bear scrutiny given the preserved adverse findings. Nor does it automatically follow that being of Tamil ethnicity denotes support for separatism. KK's willingness to provide an untrue account in the past counts against the general credibility of the claimed genuineness of his activities in

United Kingdom: it could be said that he has a vested interest in creating a profile for himself simply to avoid removal from this country.

586. Competing against these concerns are the following matters. We are prepared to accept that KK attended some demonstrations in 2009, soon after his arrival in the United Kingdom. However, his *sur place* activities only commenced in any meaningful way when he became involved with the TGTE in September 2014, some eighteen months after he made his asylum claim. Whilst he has been criticised for the delay in claiming asylum, the period of his prior involvement in *sur place* activities cannot in our view simply be dismissed as opportunism in order to bolster a protection claim. We have found that he has engaged in a variety of activities on behalf of the TGTE over the course of time and has taken on additional responsibilities since at least 2017. The duration and nature of these activities points towards a genuine commitment to the belief in Tamil Eelam. There is also the evidence of Mr Yogalingam, who has attested not only to the variety and nature of KK's contribution, but also what he has described as KK's "sincere commitment" to the TGTE's objectives. We place weight on this assessment by the witness of fact who has represented the organisation's position in these appeals.

587. Overall, and not by a particularly wide margin, we find that KK does hold a genuine belief in and commitment to the establishment of Tamil Eelam. His rejection of the suggestion that he might be able to find a political home, as it were, with the TNA is, we find, plausible and in keeping with his political standpoint, being one which does not match that of any political party or organisation operating within Sri Lanka.

588. We find that KK would wish to express his genuinely held separatist views on return to Sri Lanka. His oral evidence was that, "if I go [to Sri Lanka] I will do something." That statement of intent is consistent with what he has done whilst in the United Kingdom over the course of several years. On our view of the evidence as a whole, KK has not merely been a passive activist; he has a track record of expressing his views on separatism publicly and of participating in events which themselves manifest the ideology of a separate Tamil state.

589. When it was put to KK that he would not participate in TGTE events in Sri Lanka (leaving aside the somewhat misconceived nature of the question, given that that organisation does not operate within the country), KK replied that there would be "no protection for me". We infer from that answer that he would desist from undertaking any activities in Sri Lanka which would involve the expression of his separatist beliefs because he believes he would thereby expose himself to a risk of harm.

590. It is accepted that KK does not have a valid Sri Lankan passport. We find that his return could only be facilitated through the issuance of a TTD.

591. KK's mental health does not play a material role in our assessment of risk on return. However, it is right that we state our findings as to his current circumstances, in light of the unchallenged medical report from Professor Katona. We place significant weight on this evidence and find that KK is currently suffering from Complex PTSD and a Major Depressive Episode. There is no evidence before us to indicate that KK has yet accessed any specialist treatment for either condition, although it appears as though he continues to take prescribed antidepressant medication.

KK: conclusions

592. We now apply our findings of fact to the assessment of risk on return. This exercise has been undertaken in light of our analysis of the country situation, as crystallised in the country guidance, together with the HJ (Iran) principle.

593. The factual profile pertaining to KK is as follows:

i. he has no previous history of involvement with the LTTE itself;

ii. there is no material familial history of LTTE involvement;

iii. he has been actively involved with the TGTE for six years;

iv. his involvement has included attendance at demonstrations, meetings, and community events, together with fundraising and the distribution of literature;

v. A number of his attendances at events have been shown in online media reports;

vi. the nature of his involvement in the relevant activities has included organisational and promotional roles;

vii. he has worked "closely" with an TGTE MP, Mr Yogalingam;

viii. his belief in Tamil separatism and his activities on behalf of the TGTE are motivated by a genuine conviction.

594. It is reasonably likely that GoSL will already be aware of this factual profile, or will come to know of it prior to KK's return to Sri Lanka. This is the case by virtue of the various information-gathering techniques used by the authorities in this country, as we have assessed them to be, together with the near-certainty that KK will be interviewed at the SLHC as part of the TTD process. At any such interview KK will be expected to tell the truth and this is reasonably likely to reveal any additional relevant information on his activities which would not already be known through other sources.

595. It is plainly the case that the information relating to KK's activities in this country will be passed back to Sri Lanka, whereupon it will be entered into the general electronic database.

596. There is no question of a court order or extant arrest warrant having been issued against KK. Therefore, he will not appear on the stop list.

597. What then will the authorities make of KK's particular circumstances, as we have found them to be? He is an individual who has been actively involved with a proscribed organisation perceived as a "front" for the LTTE. The activities undertaken have covered a relatively wide range. His involvement with the TGTE has been protracted and not limited to the lowest level.

598. We conclude it to be reasonably likely that GoSL will identify KK as an individual who poses a perceived threat to the integrity of the Sri Lankan state by virtue of his committed activism in pursuit of Tamil Eelam. He will, in the eyes of the authorities, be seen to have played a significant role in the Tamil separatist movement. This analysis will place KK on the watch list.

599. The authorities will be aware of KK's return to Sri Lanka on a TTD. As they will already know all they need to, KK will be permitted to exit BIA, but will be placed under surveillance in order to ensure that his arrival in his home area (or indeed anywhere else) is known. In light of our conclusions on the assessment of risk, there is a real risk that KK will be detained on the basis of his existing profile.

600. The risk of persecution and serious harm materialises at this juncture. It follows that KK is a refugee and a person whose removal would expose him to ill- treatment under Article 3 ECHR. He succeeds in his appeal.

601. If it were necessary to decide KK's appeal on the application of the HJ (Iran) principle, we conclude as follows. His belief in, and activities in pursuance of, Tamil separatism are genuine. We have found that he would, if returned to Sri Lanka, wish to express his separatist beliefs openly. It is clear to us that if he were to do so, he would expose himself to the very real possibility of being detained by the authorities and, in turn, the risk of persecution and serious harm. KK's accepted evidence is that he would conceal his beliefs and exercise self-censorship in order to avoid that risk. We have previously concluded that it is no answer to his protection claim to require KK to make do with professing support for a different political creed (whether through the TNA or any other pro-Tamil organisation in Sri Lanka): that would constitute a material modification of his beliefs and the expression thereof.

602. On this alternative basis, KK is a refugee.

RS' case in outline

603. The original asylum claim put forward in 2007 was predicated on the claimed fear of the Sri Lankan authorities as a result of RS having been detained and ill-treated due to perceived links to the LTTE. This history was rejected by the First-tier Tribunal in 2008, which concluded that she was not a credible witness. That core finding has never been disturbed.

604. Following that unsuccessful appeal, RS made a series of further submissions to the respondent in 2011, 2014, and 2018. The focus of these was the claimed political activities undertaken in the United Kingdom, latterly on behalf of the TGTE. It was said that these activities were being conducted together with ST. Further, RS relied on her poor mental health. Although the respondent rejected her further submissions, they were treated as a fresh claim enabling RS to appeal the respondent's decision to the First-tier Tribunal.

RS: the decision of the First-tier Tribunal

605. Having considered the evidence before her in the context of the well-known principles set out in D (a Tamil) *[2002] UKIAT 00702, the judge reached the following material conclusions:

    i. the adverse credibility findings made by the First-tier Tribunal in 2008 were re-affirmed;

    ii. RS had not been suffering from mental health problems at the time of her 2007 asylum interview, the 2008 First-tier Tribunal hearing, and for a number of years thereafter;

    iii. RS' current mental health problems were not the result of ill-treatment by the Sri Lankan authorities;

    iv. any *sur place* activities undertaken by RS were not significant and did not place her at risk on return;

    v. neither the medical claim based on Article 3 ECHR nor the Article 8 ECHR claim based upon the relationship with ST could succeed.

606. The appeal was dismissed on all grounds.

RS: error of law decision

607. In setting aside the First-tier Tribunal's decision, Upper Tribunal Judge Rimington expressed the basis of her decision in clear terms: the error related solely to the failure to adequately assess whether RS' involvement with the TGTE would have placed her at risk on return. The First-tier Tribunal's

confirmation of the adverse findings made in 2008 and the circumstances surrounding RS' mental health problems were preserved.

RS: the parties' submissions

608. RS's case-specific skeleton argument emphasised her very poor mental health and the respondent's acceptance of certain activities undertaken in the United Kingdom on behalf of the TGTE and TS. The evidence as a whole shows RS to be a genuine and committed activist who supports the creation of Tamil Eelam. Her numerous activities are supported by the two organisations together with photographic and other materials covering the period from 2014 to 2020. In addition to her own activities, it is submitted that those of her partner, ST, have been prolonged and significant: these include speaking at protests; appearing on a TGTE brochure; and a material social media presence. As with KK, it is submitted that RS' profile, alone or in combination with that of ST, is sufficient to place her at risk on return, whether in respect of the original guidance set out in GJ or under a clarified and/or amended version thereof. Again, the alternative argument based on the HJ (Iran) principle is relied on as a route to success.

609. The oral submissions made reference to the number of relevant activities undertaken by RS and ST, together with corroborative evidence, all of which went to show a risk on return. There was no real issue as to ST's Facebook settings: these could be changed from public to private and back again at different times. Mr Mackenzie noted that there was a familial connection with the LTTE (in respect of RS' father) and that this was an additional risk factor. Finally, it was submitted that her mental health was sufficiently poor so as to give rise to a real risk of serious harm if she were placed under surveillance on return to Sri Lanka Being forced to engage in contact with the authorities could, it was said, trigger a mental health crisis.

610. The respondent's skeleton argument emphasised the adverse findings made by the First-tier Tribunal in 2008 and 2019. RS' willingness to tell untruths in the past was relevant to an assessment of her credibility now. As with KK, it is accepted that RS has participated in diaspora activities in respect of which there is corroborating photographic or other documentary evidence. However, and notwithstanding her status as a vulnerable individual, numerous aspects of her evidence now should be rejected, specifically in relation to the nature and extent of her *sur place* activities, whether she holds a genuine belief in Tamil separatism, and whether any members of her family in Sri Lanka have been approached by the authorities. The same credibility concerns should apply to ST's evidence.

611. Even if RS' *sur place* activities are known to GoSL, her profile would not be such as to give rise to risk on return. Her activities only occurred relatively recently and have all been of a low level. The respondent accepts that there

might be a risk of RS being subjected to monitoring after her return, but it is said that this would not constitute persecution or lead to serious harm. In respect of the HJ (Iran) principle, there are question marks surrounding the genuineness of the motivation behind her activities.

612. The oral submissions emphasised the lack of any detailed evidence on claimed activities prior to 2017. It was not accepted that RS had ever provided a statement to the ICPPG. Whilst attendance at some demonstrations was accepted, it was not at the level suggested by RS and ST in their evidence. The photographic and other documentary evidence did not indicate that RS had ever played a prominent role in any activities on behalf of the TGTE. Indeed, her poor mental health was consistent with not having done so. It was submitted that Mr Yogalingam had put a "gloss" on RS' low level activities. At its highest, her involvement had clearly not amounted to a leadership or significant organisational role. It was not accepted that her mother had been visited by the authorities. It was of note that there was no evidence from the mother.

613. We were asked to find that ST had sought to change his Facebook page from private view only to open during the course of the hearing. This reflected poorly on his credibility.

614. On the HJ (Iran) principle, the respondent maintained her view that RS did not hold a genuine belief in separatism. There were serious question marks as to whether RS would wish to advocate for separatism in Sri Lanka at all. Even if she wanted to express some form of political beliefs, other non-separatist views might be appropriate. It was not accepted that RS would be required to become an informant for the authorities, particularly in light of her low-profile and mental health conditions.

RS: findings of fact

615. As with KK, RS arrives at this stage of the appellate proceedings already burdened by preserved adverse findings. Nothing we have seen or heard discloses a good reason to disturb those findings and we confirm that they stand. Thus, RS has previously been found to have provided an untruthful account as to claimed past experiences in Sri Lanka. She was not detained and ill-treated by the authorities on suspicion of involvement with the LTTE, or for any other reason.

616. It has never been in dispute that RS was born and brought up in Batticaloa in the Eastern Province of Sri Lanka, a region which was the setting for fierce conflict during the currency of the civil war. The witness statement provided for the First-tier Tribunal in 2019 refers to her experiences growing up in that area, including witnessing the consequences of the war for the civilian population. A similar account was provided to Dr Brady in her 2020 report.

Notwithstanding her adverse credibility profile, we find it to be reasonably likely that she was exposed to distressing experiences, as indeed were many thousands of civilians caught up in the conflict.

617. The 2008 First-tier Tribunal accepted that RS' younger brother had been taken by the LTTE in line with their one member of a household "policy". It also accepted that her sister had committed suicide (albeit not whilst in the custody of the Sri Lankan army). These findings were not the subject of any comment by the First-tier Tribunal in its 2019 decision, nor were they specifically preserved in the Upper Tribunal's error of law decision. In all the circumstances, we find both of these events to be true. The evidence in respect of each was considered in the 2008 appeal and there is nothing by way of subsequent judicial assessment or evidence which undermines the original findings.

618. Nothing in the evidence relating to ST indicates that he has any material LTTE history and we find that there is none.

619. We turn to RS' activities in the United Kingdom. As is the case with KK, the respondent accepts that RS has participated in a number of activities including attendance at protests, commemorative events, meetings, together with some assistance with the promotion of such. It is also accepted that these activities have in the main been on behalf of the TGTE and TS.

620. Before addressing the evidence on the nature and extent of RS' activities, it is important to establish her mental health circumstances. There is no dispute as to the medical evidence provided by, in particular, Dr Brady. In light of this, we accept her diagnoses and find that RS is currently suffering from the following conditions:

    i. severe PTSD;

    ii. severe depression;

    iii. schizoaffective disorder, currently in partial remission.

621. There is also no dispute as to her significant mental health history, at least from 2016 onwards. Given the medical evidence as a whole, we find that RS has been detained under the Mental Health Act 1983 on three separate occasions: August to October 2016; June 2017; and January 2019. We find that in 2017 she attempted suicide. She had been deemed to be highly dependent upon ST for her care needs and overall emotional support. Dr Brady was of the view that she presented a "low to moderate" risk of suicide, with that risk being largely mitigated by the support of ST. We accept this evidence. We also accept that her removal from the United Kingdom would be reasonably likely to increase the risk of a deterioration in her overall mental health, with the consequent risk of psychotic symptoms and a higher chance of suicide or self-harm.

622. It is clear to us that there is a particularly strong relationship of dependency between RS and ST.

623. We have taken RS' mental health into account when evaluating her evidence.

624. With the above in mind, we find it credible that RS has only been able to participate in activities when accompanied by ST. It is also the case that RS' mental health conditions will have effectively precluded her from taking on what may be described as higher-level organisational roles on behalf of the TGTE and/or TS.

625. We find that RS has been regularly active on behalf of the TGTE since 2017. Her own evidence on this point is supported by that of Mr Yogalingam, whom we have found to be a generally reliable witness.

626. Having interrogated the helpful table of activities set out in RS' case-specific skeleton argument, we are satisfied that she and ST have attended at least seventeen public protests in the period early 2019 to February 2020. We find that they have also attended commemorative events between 2014 and 2019 and were active in the TGTE election campaign in April 2019. It is also the case that they have attended various TGTE Sports Day event meetings.

627. We do not accept ST's evidence that he and RS have attended at least fifty demonstrations in this country. That figure is not supported by any documentary evidence or indeed by any details provided by ST himself. We regard his assertion that RS may have forgotten about a number of demonstrations attended because of her ill-health as less than credible, particularly as RS has not provided a similar explanation.

628. The photographic evidence to which we have been referred clearly shows that the LTTE flag has been prominently displayed at a number of the protests attended by RS and ST. There is also reliable evidence to show that RS's attendance at least one protest was included in footage broadcast on TGTE TV. It is clear that other events she and ST attended were the subject of publicity whether in print or online.

629. With the corroborative support of Mr Yogalingam's evidence, we accept that RS has been a regular attendee at the sub-committee of the TGTE in her local area. Whilst this is not a formal membership role (bearing in mind the very limited scope of that term in the context of the TGTE), we do accept that she has worked as a volunteer in order to assist, to the relatively limited extent that she is able, with the organisation and promotion of events. It is of some note that Mr Yogalingam regards her involvement as being important for the organisation, given what he has described as the low levels of participation by women in general.

630. We find that RS and ST have been issued with TGTE cards. However, for the reasons set out earlier in our decision, this has no material bearing on their overall profile.

631. Turning to activities conducted on behalf of TS, we find that RS and ST have been involved with this organisation since 2019 and have attended protests and other events. There is photographic evidence appearing on the TS Facebook page of their attendance at a demonstration in 2019. We have previously stated our favourable impression of Mr Uthayasenan's evidence and we regard what he has to say about RS and ST as providing good support for this aspect of RS's case. In particular, his confirmation that RS is well known to a number of TS coordinators is indicative of a level of committed involvement. Overall, we find that the description of RS as a "regular supporter and activist" is an accurate one, and we place weight on Mr Uthayasenan's belief that she and ST will become full members of TS in due course.

632. For the reasons set out previously and relating to RS' mental health, her activities are largely reflective of those undertaken by ST. There are certain aspects of his activities which require additional consideration. Photographic evidence confirms that he has, on at least one occasion, attended a protest and led proceedings with a loudspeaker. The relevant photograph accompanies an online article providing details of the event. ST's full name also appears on the brochure for a TGTE event in 2019. In respect of TS, the photographic evidence shows ST in attendance at events organised by this organisation and that which the LTTE flag is on prominent display. He is also seen pictured with Mr Yogalingam at several demonstrations. Overall, we find that the evidence proves ST to have, on occasion, taken on a role more specific than simple attendance at events.

633. RS and ST have asserted that in 2014 they provided statements to the ICPPG who in turn submitted these to UN OISL. This aspect of the case caused us some concerns. The alleged statements have not been provided to us and it is right to say that ST's oral evidence on this issue was vague. These difficulties must be set against the documentary evidence. There are photographs showing RS and ST at a location said to be the offices of the ICPPG. A banner situated behind the couple in one of the photographs does indeed name that organisation and is to that extent supportive of the location. What is of more evidential significance are the two letters from the organisation. The first, dated November 2014, confirms that RS had provided "written evidence" which was "to be submitted" to UN OISL. This would only take RS' assertion so far as it does not confirm the actual submission of any statement to that body. The second of the two letters, dated July 2020, states that due to the Covid-19 pandemic, the ICPPG offices were closed and the statements of RS and ST could not be obtained. The letter goes on to confirm, however, that the statements had in fact been submitted to UN OISL. Although the picture is not particularly satisfactory, we are not inclined to treat the letter's contents as

simply unreliable and we find that a statement was in fact provided by RS in 2014. Having said that, there is nothing to indicate that her name, or any other personal information which would lead to her identification, will have been disclosed either by the ICPPG or UN OISL.

634. In respect of the issue surrounding the settings on ST's Facebook account, we are presented with an evidential scenario for which there is no clear answer. We find that ST did change his Facebook setting from private to public after completing his oral evidence and that posts covering the period September 2019 to June 2020 were made viewable by the public. We are unclear as to why this was done, but it would appear to have been opportunistic and thus adverse to his credibility. However, when seen in context of the evidence as a whole, this specific matter does not materially affect our overall findings as to ST's political beliefs and activities. We also find that he has in any event posted publicly-accessible anti-government content both before and after the period in question.

635. It is apparent from our findings thus far that the level of activity undertaken by RS and ST increased significantly during 2019. It is of course possible that this was in some way engineered in order solely to bolster the prospects of her appeal to the First-tier Tribunal and then in this Tribunal. On the lower standard of proof and not without a degree of hesitation, we are prepared to accept that they both have in fact acted out of a commitment to a genuinely held belief in the establishment of Tamil Eelam through non-violent means. There are difficulties with certain aspects of their evidence and we are fully cognisant of the fact that RS has previously been found to have fabricated aspects of her protection claim. The following matters, when combined, go to outweigh these not insignificant concerns.

636. First, the couple have been involved in diaspora activities for some time now, at least in respect of the TGTE. They have engaged in a variety of activities.

637. Second, the nature and commitment of their involvement has been supported by the TGTE and TS.

638. Third, the aspects of RS' background in Sri Lanka which we have accepted lend some weight to a subsequent development of a genuine belief in the need for a Tamil homeland. We do not see the fact of her brother's "recruitment" by the LTTE as something which would make the holding of such a belief materially less likely. After all, the violent methods of that organisation have never represented the sole basis upon which any support for separatism is based.

639. Based on the unchallenged letter from BTF we are prepared to accept that RS became a paid member of that organisation in 2014. However, we find that the membership lapsed in October 2015 and that neither RS nor ST have had any involvement since.

640. Both RS and ST have claimed that their respective families in Sri Lanka have been approached by the authorities on the basis that the *sur place* activities are known about. Whilst acknowledging that the harassment or relatives by the authorities is not in general terms implausible, we find that these assertions are embellishments. RS' evidence on this issue is brief in the extreme; all that is said in her witness statement is that her mother informed her at some unknown point in time that "the CID had asked about me twice last year." There is no evidence from her mother. ST has stated that his family has been visited by the CID on two or three occasions, the last being in approximately April 2020 and that they had been shown photographs of him at a demonstration in London. When asked in cross-examination why he maintained regular contact with his mother despite the alleged adverse interest by the authorities, his apparent explanation was that she was unaware of what he had been doing in the United Kingdom and that she had difficulties with her hearing. We do not find that to be a credible response.

641. The final factual matter to be addressed is what, if anything, RS would wish to do if returned to Sri Lanka in terms of the expression of any genuinely held political beliefs. As matters stand, we cannot say whether she would be returned together with ST: the prospect of a separation would seem to be somewhat unlikely, but he is not an appellant in these proceedings.

642. We find that, whether or not she was returned with ST, RS would hold a desire to express her separatist views in one form or another. We have little hesitation in finding that she would not in fact do so. If she were in Sri Lanka without ST a reason for concealing her beliefs would be the absence of his support, upon which she greatly depends. However, we find that that would not constitute the sole basis for her self-censorship. A material reason would also be the risk, of which she is quite clearly aware, of being detained by the authorities. Indeed, in light of her very poor mental health, the very prospect of adverse attention would be likely to cause her further problems on that front. If she were in Sri Lanka with ST, the fear of the consequences of expressing her beliefs would constitute the only reason for remaining silent.

RS: conclusions

643. The factual matrix is now to be applied to our conclusions on the country guidance issue and the HJ (Iran) principle.

644. The relevant factual profile pertaining to RS is as follows:

    i. her brother was taken by the LTTE to fight during the civil war;

    ii. she was never herself involved with that organisation;

iii. she has never been detained or ill-treated by the Sri Lankan authorities;

iv. since 2017 she has been involved with the TGTE, engaging in a variety of activities extending beyond attendance at demonstrations;

v. more recently she has actively supported TS, with the prospect of becoming a full member of that organisation;

vi. she has submitted a statement to the ICPPG, which has in turn been submitted to UN OISL. Her identity will not have been disclosed by either organisation;

vii. her *sur place* activities have been undertaken out of a genuine commitment to Tamil separatism;

viii. she is the long-term partner of an individual who is also actively involved with both the TGTE and TS. His activities have also been undertaken on a genuine basis and have, to an extent, been at a higher level of prominence than her own;

ix. the Sri Lankan authorities have not as yet approached family members within that country on account of activities undertaken by RS in the United Kingdom;

x. RS suffers from significant mental health problems;

xi. she would wish to express her genuinely held political beliefs on return to Sri Lanka, but would not do so in part because of the fear of the consequences.

645. In light of its intelligence-gathering capabilities as we have assessed them to be, it is clear enough that GoSL will be aware of RS' activities in the United Kingdom on behalf of the TGTE and TS, whether or not this knowledge encompasses the entirety of what she has done. RS will be subject to the TTD application process and will be interviewed at the SLHC. At this point she is likely to be asked additional questions about her activities in this country, to which she must respond truthfully. Quite clearly, we cannot say for sure precisely what questions will be posed; but we cannot exclude the reasonable likelihood that she would be asked about any connection with the ICPPG and/or UN OISL, given GoSL's heightened sensitivity to this particular issue.

646. It is then reasonably likely that material information will be passed back to Sri Lanka and entered onto the general electronic database.

647. Following further analysis from within the country, it will be apparent that RS has no extant arrest warrants or court orders against her name. It follows that

she will not appear on the stop list and will not therefore be detained at the airport.

648. Her assessed profile will, we conclude, place her in the category of persons included in the watch list who are of sufficient adverse interest to warrant attention on their arrival in their home area or another place of resettlement. This conclusion is based on the following analysis, which of course is itself predicated on the perception of GoSL.

649. It will be seen that RS has a familial link to the LTTE in the past, albeit not one that is reasonably likely to arouse significant hostility. She has a track record in the United Kingdom of active involvement with a proscribed group - the TGTE- regarded as a "front" for the LTTE and TS, another avowedly separatist organisation. It will be noted that RS has not only attended a fairly significant number of demonstrations, but that several of these have received publicity, either in print or online. Her other activities, including involvement with a local sub-committee of the TGTE, is reasonably likely to be regarded as indicating a genuine commitment to that organisation and the separatist ideology in general. The adverse interest in her will be exacerbated by the knowledge that she has provided evidence to UN OISL.

650. RS' own circumstances will be seen by GoSL in the context of her relationship with ST, whom, we conclude, is also reasonably likely to be viewed with significant hostility by virtue of his activities in this country. We are not basing this on the premise that ST will necessarily be the subject of any TTD application process at the same time as RS. Rather, we are concluding that information on him will either already be known when RS begins that process, or that she will be obliged to truthfully disclose it during an interview at the SLHC. The effect of her relationship is, in our judgment, likely to increase the level of animosity towards RS herself. Put shortly, GoSL is reasonably likely to see RS as one part of a committed separatist couple.

651. We do not regard RS' sex or mental health problems as representing any sound basis on which to conclude that her profile would be reduced. Nothing in the expert or country evidence before us indicates that women are deemed to be less of a threat than men, whether in respect of violent or non-violent separatist activism. As to the mental health conditions, GoSL will see RS' record for what it is: as a matter of fact she has participated in numerous activities over a not insignificant period of time, notwithstanding her difficulties. To regard her ill-health as a significant "mitigating" factor in the eyes of GoSL would, quite frankly, run contrary to all that we know about the regime's authoritarian nature and poor human rights record.

652. In summary, we conclude that it is reasonably likely that RS will be perceived by GoSL as a committed activist who has, in all the circumstances, been playing a significant role in the Tamil separatist movement and as such will be regarded as a threat to the integrity of the Sri Lankan state.

653. It follows from this that RS is reasonably likely to be detained and exposed to the risk of persecution within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR. She therefore succeeds in her appeal.

654. As with KK, we go on to consider the alternative scenario; namely that RS would appear on the watch list, but would not be at risk of being detained without more. In such circumstances, she would be subject to monitoring.

655. We have found as a fact that RS genuinely holds separatist beliefs and that she would wish to express these on return to Sri Lanka. If she in fact did so, even to a lesser extent than she has been able to do thus far whilst in the United Kingdom, it is reasonably likely that any such activities would be detected and that she would consequently be detained and persecuted. RS is aware of this risk and we have found that at least a material reason for her concealing her separatist beliefs would be to avoid being ill-treated.

656. Expecting her to modify her beliefs by seeking to profess support for a party such as the TNA is no answer to her case. Nor is the availability of familial support on return. Whilst this would clearly be of assistance to RS, given her very poor mental health, emotional and practical support from others is not a substitute for genuinely held political beliefs on a specific issue and the desire to manifest these beliefs.

657. Thus, on this alternative scenario RS is a refugee.

Notice of Decision

658. **The making of the decisions of the First-tier Tribunal in the appeals of KK and RS involved the making of errors on points of law.**

659. **The decisions of the First-tier Tribunal have been set aside.**

660. **The decision in the appeal of KK is re-made and that appeal is allowed.**

The decision in the appeal of RS is re-made and that appeal is allowed.

Signed: *H Norton-Taylor* Date: 26 May 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

No fees have been paid in these appeals and there can be no fee awards.

Signed: *H Norton-Taylor* Date: 26 May 2021

Upper Tribunal Judge Norton-Taylor

APPENDICES

Appendix A: the country information

OBJECTIVE DOCUMENTARY EVIDENCE BEFORE THE UPPER TRIBUNAL

Item	Document	Date
1.	Sri Lankan Government: Prevention of Terrorism (Temporary Provisions) Act	24 July 1979
2.	UNSC Resolution 1373 (2001) S/RES/1373	28 September 2001
3.	Human Rights Watch: Funding the "Final War" - LTTE Intimidation and Extortion in the Tamil Diaspora	14 March 2006
4.	The Independent, 'Tamil Tigers: defeated at home, defiant abroad'	23 May 2009
5.	Report of Home Office Information Gathering Visit to Colombo Sri Lanka, 23 – 29 August 2009	August 2009
6.	Roger Mac Ginty, 'Social network analysis and counterinsurgency: a counterproductive strategy?' , Critical Studies on Terrorism 3(2) pp.209-226	2010
7.	International Crisis Group: The Sri Lankan Tamil Diaspora after the LTTE	23 February 2010
8.	Transnational Government of Tamil Eelam (TGTE): The Advisory Committee, 'Formation of a Provisional Transnational Government of Tamil Eelam: Final report based on the study by the Advisory Committee'	15 March 2010
9.	TamilNet, 'Cancellation tactics make potential candidates withdraw from TGTE elections'	11 May 2010
10.	Letter from the British High Commission (as quoted in UKBA 2012 Country of Information Report)	5 January 2012
11.	Ministry of Foreign Relations Website, 'Sri Lanka is still under threat – warns Secretary Defence' (contains text of "Future Challenges of National Security in Sri Lanka)	12 January 2012
12.	Amnesty International: 'Locked Away: Sri Lanka's security detainees'	March 2012
13.	Sunday Observer, 'LTTE front funds Amnesty International'	4 March 2012
14.	Sri Lankan Government: Gazette, United Nations Regulation No.1 of 2012	15 May 2012

15.	Sri Lankan Government: Gazette, United Nations Regulations No.2 of 2012	31 May 2012
16.	UN: UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka	21 December 2012
17.	Amnesty International: Sri Lanka's Assault on Dissent	2013
18.	Human Rights Watch: We Will Teach You a Lesson – Sexual Violence against Tamils by Sri Lanka Security Forces	26 February 2013
19.	Freedom from Torture: Written evidence to the House of Commons Select Committee on Foreign Affairs	21 June 2013
20.	Gotabaya Rajapaksa, 'Sri Lanka's National Security', Prism (vol 4, 2014)	2014
21.	International Truth and Justice Project (ITJP): A Still Unfinished War	March 2014
22.	International Crisis Group: 'Sri Lanka: Free Prominent Rights Defenders'	17 March 2014
23.	Sri Lankan Government: Gazette, Government Notification	21 March 2014
24.	The Economist, 'Never a Good Time: Sri Lanka and Human Rights'	21 March 2014
25.	Tamil Guardian, 'Diaspora organisations proscriptions should not be used to stifle free speech and legitimate criticism UK tells Sri Lanka'	1 April 2014
26.	The Hindu, 'Sri Lanka bans 15 Tamil diaspora organisations'	2 April 2014
27.	BBC, 'Suspected Tamil rebels shot dead in Sri Lanka'	11 April 2014
28.	New.LK, 'Terrorist-Political-Human Rights Nexus in Canada'	16 April 2014
29.	Daily Mirror, 'Third abortive Diaspora-backed attempt to revive the LTTE'	25 April 2014
30.	Tamil Guardian, 'Sri Lanka's diaspora ban has 'no legal effect in Canada' says Foreign Affairs Minister'	29 April 2014
31.	The Sunday Leader, 'TGTE Losing Lustre Among Tamils'	11 May 2014
32.	The Sunday Leader, 'The LTTE revives its US network'	13 July 2014
33.	The Sunday Leader, 'LTTE reaches out to Scottish separatists'	27 July 2014

34.	Home Office Country Information and Guidance Note, 'Sri Lanka: Tamil Separatism'	28 August 2014
35.	UN: Oral update of the High Commissioner for Human Rights on promoting reconciliation, accountability and human rights in Sri Lanka	22 September 2014
36.	Huffington Post, 'Why Sri Lanka's Detention of Mrs Balenderan Jayakumari Is so Sinister'	1 October 2014
37.	Sri Lankan Government: Gazette, Amendments to the United Nations Regulations	11 December 2014
38.	Stanford University Centre for International Security and Cooperation, 'Liberation Tigers of Tamil Eelam'	2015
39.	UN: Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka (OISL)	16 February 2015
40.	Al Jazeera, 'Spy cables reveal Sri Lanka hyped up Tiger postwar threat'	4 March 2015
41.	GroundViews, 'PTA detainees – Ignored under "Yahapalanaya"?'	9 May 2015
42.	Sri Lankan Government: The Constitution of the Democratic Socialist Republic of Sri Lanka (revised – as amended up to 15 May 2015)	15 May 2015
43.	International Truth and Justice Project (ITJP): A Still Unfinished War (with annexes)	1 July 2015
44.	Freedom from Torture: Tainted peace	August 2015
45.	International Crisis Group: 'Sri Lanka between elections'	12 August 2015
46.	Sunday Times (Sri Lanka), 'TNA hits out at LTTE, calls on Govt. to accept OISL report'	20 September 2015
47.	UN: Comprehensive report of the Office of the UN High Commissioner for Human Rights on Sri Lanka	28 September 2015
48.	UN Resolution 30/1	1 October 2015
49.	Human Rights Watch: We Live in Constant Fear – Lack of Accountability for Police Abuse in Sri Lanka	23 October 2015
50.	Sri Lankan Government: The Gazette of the Democratic Socialist Republic of Sri Lanka	20 November 2015
51.	Daily FT, 'Sri Lanka slashes list of 'terrorists' in reconciliation bid'	23 November 2015

52.	Jeevanthie Senanayake, 'Understanding Separatist Networking in Sri Lanka: Ideology as a concept in network analysis.' Defence & Security Journal 1: 15-29. (Journal of the Defence Services Command and Staff College, Sri Lanka.)	2016
53.	Vajira Senadheera, 'Back to Civilian Life: Dynamics of Economic Reintegration Process of Ex- LTTE Combatants in Post-War Sri Lanka', Defence and Security Journal, Volume 1, Issue 1, 2016 pp 60-74.	2016
54.	International Truth and Justice Project (ITJP): Silenced: Survivors of Torture and Sexual Violence	January 2016
55.	Human Rights Watch: Sri Lanka: Events of 2015	27 January 2016
56.	Immigration and Refugee Board of Canada, 'Sri Lanka: Activity of the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, including arrests, whether LTTE members have been responsible for extortion, disappearances or bombings since the government defeated the LTTE, and whether the LTTE has the capacity to regroup within Sri Lanka (2010-Feb. 2016)'	15 March 2016
57.	Benar News, 'Sri Lanka Faces Twin Threat Commentary'	4 April 2016
58.	International Crisis Group: Sri Lanka: Jumpstarting the Reform Process	18 May 2016
59.	Perera, 'The influence of Tamil diaspora on stability in Sri Lanka'	June 2016
60.	The Guardian, 'Briton 'tortured' in Sri Lanka returns to UK'	11 June 2016
61.	The Independent, 'British groom detained in Sri Lanka has been arrested and tortured says family'	11 June 2016
62.	Sri Lanka Campaign: Torture is still happening in Sri Lanka	16 June 2016
63.	UN: Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Sri Lanka	8 July 2016
64.	PTI, 'Sri Lanka police cracks down on violent gang with 'LTTE link''	31 October 2016
65.	Sri Lankan Government: Gazette, Government Notification	9 November 2016
66.	Adalayaam: Situation Brief No. 1: Student Killings, Aava Gang and the Securitisation of Jaffna	18 November 2016
67.	UN: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka	22 December 2016

68.	John A. Gentry. 'The intelligence of fear.' Intelligence and National Security 32(1): 9-25	2017
69.	Niels Terpstra and Georg Frerks, 'Rebel governance and legitimacy: understanding the impact of rebel legitimation on civilian compliance with the LTTE rule.' Civil Wars 19(3): 279-307	2017
70.	UN: Concluding observations on the fifth periodic report of Sri Lanka , adopted on 30 November 2016	27 January 2017
71.	UN: Report of the Special Rapporteur on minority issues on her mission to Sri Lanka	31 January 2017
72.	Alpes Blonder Preiss and Monras, 'Post-deportation risks for failed asylum seekers', Forced Migration Review	February 2017
73.	Sri Lanka Campaign for Peace & Justice: 'Broken Promise'	February 2017
74.	Sunday Times, 'Police Counter Terrorism Unit warns of LTTE resurgency'	12 February 2017
75.	Pearl: Impunity Reigns in Sri Lanka	March 2017
76.	Adalayaam: Joint Civil Society Submission to the UN Periodic Review of Sri Lanka (28th Session)	30 March 2017
77.	UN: Concluding observations on the eighth periodic report of Sri Lanka	9 March 2017
78.	CPIN Annex A – British High Commission Letter	18 March 2017
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270.	Evidence disclosed by Respondent in *Kanthappu & others v Secretary of State for the Home Department*	undated
271.	Terrorism Research and Analysis Consortium, 'Transnational Government of Tamil Eelam'	undated

Appendix B: error of law decision in KK

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09978/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10th December 2019

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR K K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss A Benfield, instructed by Kanaga Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

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

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

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge Cary promulgated on 12th August 2019.

2. The appellant is a Sri Lankan national of Tamil ethnicity born on 15th October 1984 and he arrived in the UK in January 2009 with leave to enter as a student valid until 30th November 2010. He had leave extended as a Post-Study Work Migrant until 11th January 2013 and then made an application for leave to remain as a Tier 1 Highly Skilled Entrepreneur which was refused on 17th May 2013. His appeal against that decision was dismissed on 11th December 2013 and he became appeal rights exhausted on 16th April 2014.

3. He made two further unsuccessful applications, under Tier 1 and on Article 8 ECHR grounds and claimed asylum again on 5th March 2016. The appellant appealed the refusal decision and the appeal was heard by First-tier Tribunal Judge Mozolowski who dismissed the appeal but that decision was set aside and the matter was remitted to the First-tier Tribunal and heard by First-tier Tribunal Judge Cary.

4. During his asylum interview on September 1st 2016 the appellant claimed he had collected money for the LTTE in Colombo in Sri Lanka from about February 2006 until November 2007. He said he was subsequently arrested on 8th October 2008 for helping the LTTE by collecting money for them and was taken to an army camp and detained for fifteen days and tortured. He was eventually released on reporting conditions after signing a document stating he was an LTTE member. He decided to leave Sri Lanka with the assistance of an agent.

5. The appellant also claimed to have been involved with the Transitional Government of Tamil Eelam, TGTE in the United Kingdom but the respondent did not consider his involvement was such that it would put him at risk on return as there was no evidence that he played a significant role in Tamil diaspora activities in the UK.

6. The grounds of appeal against the determination of Judge Cary were as follows

    a. a failure to exercise anxious scrutiny and take account of relevant factors when assessing the credibility of the appellant's claim

        i. the judge purported to direct himself to the joint presidential guidance but the determination disclosed that the judge made adverse credibility findings divorced from any consideration of the medical report. Dr Dhumad's first report of October 2016 diagnosed the appellant as suffering with severe depression and PTSD. There was a failure to give adequate reasons for rejecting the reports as clinically supportive of the appellant's claim and as independent evidence of torture, failing to engage with the report. The first report of Dr Dhumad included opinions which cited that the psychological symptoms were consistent with the response to traumatic experience such as torture (12.2), (18.1), (18.4). The judge did not engage with the clinical assessment of Dr Dhumad and placed little or no weight on the medical reports and the reasons for placing no weight on the medical reports appeared to be based on the fact that Dr Dhumad

made no reference to having read **GJ**. Dr Dhumad is a country expert. The references to the appellant's condition deteriorating owing to fears of deportation could not properly draw away from the detailed conclusion Dr Dhumad came as to the consistency of the appellant's account with trauma. The judge failed to consider the medical evidence with due care in line with **SS Sri Lanka and the Secretary of State for the Home Department [2012] EWCA Civ 155**;

ii. there was a failure to take account of relevant evidence;

iii. the judge expressed doubt about the appellant's credibility owing to concerns how he left Sri Lanka given what was said about those being on a stopwatch being at risk and that the appellant had not claimed to be on a stop list. There is no evidence that those on a watch list would be stopped at the airport. There is no evidence in **GJ and others (post civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)** that persons on a watch list would be stopped and **GJ** expressly addressed that agents were able to assist persons from leaving the country;

iv. the judge expressed as significant that the appellant had not explained why the Authorities were able to find out about his activities which had stopped a year earlier but it was not rational for the appellant to give a definitive response;

v. the appellant had not produced written evidence to support his claim to have been released on reporting conditions, but this was not a matter that the judge could hold against A. There was no reference in the country guidance to the requirement of reporting conditions to be in writing given the extrajudicial nature of detention in Sri Lanka;

vi. the judge placed lesser weight on the brother's evidence merely by stating "in his letter of October 16th 2016 S makes no mention of being threatened when the CID came to their house on February 2nd 2019";

vii. at 63 the judge stated that he

> *"Did not understand why the Authorities would continue to visit the appellant's home relatively frequently for such a prolonged period after the cessation of hostilities particularly as they had been told about the appellant's departure for the United Kingdom in 2009".*

But country information had supported that repeated visits to family members do occur in Sri Lanka even when a person is known to be out of the country;

viii. finally when assessing credibility the judge failed to give reasoned findings on the evidence of the witness Mr Ka recorded at 29 to 32 did not carry weight. That witness reported he had been questioned about the appellant and had been told that the appellant was working with the TGTE;

b. there was a failure to take account of relevant factors when assessing the appellant's sur place claim

i. the judge fell into error by considering the appellant had not told Dr Dhumad about his activities with the TGTE but that was incorrect and amounted to a failure to consider the evidence with anxious scrutiny and was material to the totality of the assessment of the sur place claim. It was accepted that the first report of October 2016 did not address his activities but in his third report the point is directly addressed at 5.4 where the doctor refers to the appellant "attending Tamil events";

ii. failure to consider the evidence with anxious scrutiny. The judge addressed the evidence in support of the activities of the TGTE at 74 to 75 but the judge only gave superficial and cursory consideration to what was a much more extensive body of evidence such as the TGTE card issued in May 2017, photographs, articles on which the appellant is named or photographed 2019, articles in which the appellant is named or photographed 2017 to 2018, photographs of the appellant at a demonstration and meetings, letters from the TGTE, photographs of the appellant's involvement in TGTE activities.

The judge failed to take account of the totality of the evidence and erred in considering that the "bulk" of the photographic evidence was from 2016. The judge failed to consider this evidence with anxious scrutiny and this affected the assessment of the determination such that the judge ruled out as not reasonably likely the appellant's brother and Mr Ka were questioned about his activities in 2017. There was an absence of consideration of the evidence from 2016 and for the judge to consider that the appellant's involvement with the TGTE was not significant could not stand in the absence of detailed consideration;

iii. there was a failure to properly apply the country guidance and relevant country information. The judge failed to provide any clear reasons why it was considered the appellant's activities with the TGTE would not be considered to be significant in the eyes of the Sri Lankan Authority and gave a simplistic analysis at 76 which did not extend beyond an acknowledgement the TGTE was a proscribed organisation.

iv. The grounds added that the determination failed to engage with the public statement about the extensive monitoring of the Tamil diaspora and the appellant having been repeatedly pictured in the public domain associated with TGTE activity.

v. The country guidance in **GJ** states the primary objective was to identify those who were active in the Tamil diaspora and set out detailed findings about the nature and extent of monitoring in the UK. The Tribunal in **GJ** accepted the Government were seeking to identify individuals who are seeking to destabilise the unitary state by using face recognition technology, photographs taken at demonstrations, filming and sophisticated extensive intelligence, see paragraph 336 and 354 and 324.

vi. The Home Office Country Information and Guidance Sri Lanka Tamil Separatism Version 1 valid from 28th August 2014 expressly addressed the proscription of diaspora organisations, see Section 2.3.6.

7. Upper Tribunal Judge Smith granted permission to appeal finding it was arguable the judge's credibility findings were not open to him to make and he conflated the evidence of the stop/watch list held by the intelligence services and the judge expected the appellant to provide answers to questions he could not reasonably have been expected to know.

The Rule 24 Notice

8. The Rule 24 notice submitted that the decision was a comprehensive that considered all of the evidence both medical, witness evidence, serious delay and objective evidence, country guidance. It was submitted the judge had given comprehensive reasons for rejecting the appellant's claim to be at risk on return and it was not for a judge to assess every piece or making findings on every piece of evidence but sufficient that the reader knows why the appeal had been allowed or dismissed. The Tribunal directed itself appropriately.

9. At the hearing before the Upper Tribunal Mr Haywood took the Tribunal through the evidence, particularly that in relation to the appellant's claimed membership and activities with the TGTE. There were three main areas of challenge to the determination, (albeit only two grounds in the challenge) the treatment of the evidence given by Dr Dhumad, the credibility assessment and the third in relation to the TGTE involvement with which Mr Haywood started and clearly thought was the most important of the grounds.

10. In particular he submitted that the evidence showed that the appellant had been involved with the TGTE since 2014 and there were numerous photographs of him at demonstrations and an article on electronic media. When considering paragraph 336 of **GJ and Others post-civil war returnees Sri Lanka CG [2013] UKUT 00319** which stated "we do not consider that attendance at demonstrations in the diaspora alone is sufficient to create a real risk or reasonable degree of likelihood that a person will attract adverse attention on return to Sri Lanka" but here the evidence went much further. The appellant had produced cogent evidence of his involvement with TGTE.

11. There was evidence from S his brother that he had paid an agent to make arrangements at the airport.

12. There were various letters to show that the appellant had been active in the TGTE, not least there was an official stating at D1 in the bundle that the appellant was known in the TGTE, his membership card and a range of photographs of the appellant shown close to public placards and articles posted on the world wide web, such as a media article at page 48 of the bundle. The judge had not addressed the membership of the TGTE fully in paragraph 74 onwards and the key passages at 75 to 78 did not address all of the evidence. The judge noted that the individuals who are perceived to be a threat may be at risk and that the TGTE was proscribed but he

did not make any clear or detailed findings on the appellant's level of involvement when considering this appellant's level of involvement was a matter of public record. The salient passage at 78 that the appellant was not an officer did not reflect that he was not required to show he was an officer of the TGTE. He was not expected to lie on return to Sri Lanka and the fact was he was a member of the TGTE as evidenced by his card.

13. Overall all of the evidence should have been analysed more closely.

14. In relation to the findings on credibility both of the brothers referred to paying a bribe and paying an agent to secure the removal of the appellant from Sri Lanka. The question of the watch list did not take matters further because not only were a stop and watch list different concepts but **GJ** talked in terms of return, not of departure and further the appellant did give information about going through the airport. There were findings made on information that the appellant could only have speculated on and it was not proper to take the point against him, factual confusion at paragraph 63 and a need for clarity about the findings in relation to the individual witnesses.

15. In relation to the evidence of Dr Dhumad his evidence was relevant and the structure of the determination was such that it divorced the treatment of credibility from the medical evidence. Dr Dhumad had applied the methodology of the Istanbul Protocol but the judge had compartmentalised his evidence in the decision.

16. Mr Melvin responded that looking at the evidence in the round the appellant had no significant role and a full analysis regarding involvement in the TGTE was made from paragraph 74 to 78. The judge had looked at the evidence holistically. There was no need to make a finding on every document and given his mental health it was surprising if he played a significant role in the organisation and the judge noted that. The appellant was not a speaker and has not made a TV documentary or radio appearance mocking the Government but had merely attended several demonstrations. There was no indication as to the circulation of the Tamil website. This was a last ditch attempt for the appellant to claim asylum in the UK. The appellant had left Sri Lanka on a student visa and had the ability to leave on his own passport. There were numerous credibility findings, no evidence of the mother or brother being threatened and a lack of consistency in the evidence. The credibility findings were open to the judge and there was an attempt to argue small parts of the evidence. The judge gave a careful assessment of the evidence in this appeal and **UT Sri Lanka [2019] EWCA Civ 1095** cautions against revisiting findings of the First-tier Tribunal merely because the Upper Tribunal does not agree with it. For example at paragraph 19 it holds

> *"Although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FtT simply because it does not agree with it or because it thinks it can produce a better one".*

Analysis

17. **UT Sri Lanka** cited **AH Sudan** [2007] UKHL 49 in which Baroness Hale identified that the immigration Tribunal was a specialist Tribunal and appeal courts should not rush to find misdirections merely because on the facts the decision might have been decided differently.

18. It is clear that the judge did direct himself to the joint presidential guidance on vulnerable witnesses at paragraph 47 and at 66 to 68 recognised the need to consider the medical evidence as an integral part of the assessment of credibility. At paragraph 10 the judge noted that the appellant would not be giving evidence because of his mental health issues as identified in the various reports of Dr Saleh Dhumad. The determination shows the judge was fully conscious of the mental health of the appellant. The absence of the appellant from the proceedings could not have gone unnoticed by the judge. Indeed, again at paragraph 36 the judge recorded that the appellant was said to be suffering from PTSD and at paragraph 44 specifically stated

> *"I have specifically considered what is said about the appellant's mental health to assess the likely impact of that on his credibility'*

19. The judge proceeded to note that Dr Dhumad in his first report stated that the appellant's

> *'presentation … is consistent with a diagnosis of severe depressive episode without psychotic symptoms' and also that he suffered from 'post-traumatic stress disorder'".*

20. The judge gave further detail of the subsequent reports of Dr Dhumad, including that of 28th May 2019 noting that the appellant was unfit to attend court. It was thereafter at paragraph 46 that the judge proceeded to give his findings in relation to credibility having already identified key elements of the reports. As set out in **HH (medical evidence; effect of Mibanga) Ethiopia** [2005] UKAIT 00164 medical evidence, a Tribunal considers that there is a danger of **Mibanga** being misunderstood. The judgment is not intended to place judicial fact-finders in a form of "forensic straightjacket". There is no order as to which judicial fact-finders are to approach the evidential materials before them and "one has to start somewhere". There is nothing illogical in this approach. It was open to the judge to criticise the appellant's failure to claim international protection until March 2016 where he appeared to have exhausted all other avenues for remaining in the UK. His observations therein are pertinent. The judge at paragraph 55 stated

> *"There appears to be no mental health reasons justifying the appellant's tardiness in seeking international protection. He was presumably well enough to make a series of applications no doubt with the benefit of legal assistance up to and including February 2016 and in those circumstances it makes no sense for the appellant to delay asking the Authorities in this country for protection".*

As the judge cited when the appellant arrived in the United Kingdom he looked well and was alright prior to 2016 and that was confirmed by Dr Dhumad.

21. It should be noted that the appellant did not give oral evidence and the criticism of the judge's application of the "consideration of vulnerability" at paragraph 58 were such that the appellant had given "very little detail as to exactly what happened at the airport and how the agent was able to secure his safe passage" citing the asylum interview. Indeed to a range of questions in the asylum interview when asked the appellant merely stated "I don't know". That was limited information and it was this which undermined the appellant's case regarding departure. That interview was undertaken in 2016 when the appellant was supposed to be well enough to have made applications and had legal assistance.

22. Although there was criticism of the judge's approach at paragraph 61 in relation to the appellant not being able to explain how the Authorities were able to find him a year earlier, the main thrust of paragraph 61 is that although the appellant claimed he was beaten with plastic pipes and had backpain there was no assessment by a medical professional and no medical evidence to support the appellant's claim to have been ill-treated either in Sri Lanka or the United Kingdom. Again that observation was open to the judge.

23. The consideration of the medical evidence is woven throughout the determination. As the judge states it was his responsibility to assess the appellant's credibility in the light of all of the evidence, including the medical report, **HH Ethiopia and the Secretary of State for the Home Department [2007] EWCA Civ 306**. As the judge identified "there could be other obvious potential causes for the signs of anxiety, stress and depression" and that these included the fact that an applicant may be facing return to the country which he has left. The judge noted that there were a family history of mental health issues and specifically the judge noted that Dr Dhumad concluded "the appellant's condition had deteriorated due to a fear of deportation".

24. Mr Haywood criticised the judge's observation that the more a diagnosis was dependent on assuming that the account given by the appellant was to be believed the less likely it is that significant weight should be attached to it. The judge did however consider the evidence in the round. At paragraph 70 the judge considered that it was not just that the appellant's evidence was vague but the witness evidence did not assist, for example because Mr K had never fully explained why he would be involved in collecting money in Colombo and in particular why the appellant was his only operative. There is no traction to the assertion that the judge failed to engage with the clinical assessment of Dr Dhumad albeit that the doctor may have complied with the Istanbul Protocol. As the judge states the question of credibility falls to the judge.

25. Turning to the second ground in relation to the assessment of credibility and particularly how the appellant left Sri Lanka, I refer to the findings in relation to departure above. It was further asserted that the appellant had not claimed that he

had been on a stop list in 2008 and there was no evidence in **GJ** that a person on a watch list would be stopped at the airport. From paragraph 56 onwards the judge carefully assessed the appellant's departure from Sri Lanka, taking into account the evidence of S his brother who made no mention of organising the appellant's departure from Sri Lanka in either of his letters (at 56). The judge notes that he refers to paying a bribe to secure the appellant's release from detention but he makes no mention of any involvement in helping the appellant leave Sri Lanka. The judge also noted at paragraph 56

> *"In his asylum interview the appellant claimed that his brother had organised and printed his application for a visa and that he had applied for a student visa with the help of his brother. He specifically said that when he was applying for his visa he did not need the agent's help"*.

Further

> *"according to the respondent the appellant did not apply for a student visa until January 13th 2009 several weeks after his claimed release from detention. He has not given any reason for the delay"*.

26. The evidence given in **GJ** was that "there are two main lists at the airport to alert the Authorities of someone of adverse interest; the watch list and the stop list". Those on the watch list will likely be placed under surveillance especially on return to their homes. The fact is that the appellant claimed to have left Sri Lanka after having obtained a visa, for which he did not need the agent's help and the judge found that even if he was using an agent, the appellant had given very little detail as to exactly what happened at the airport and how he was able to secure his safe passage. The judge also went on to state that S had arranged everything, ASQ 92 but that he had paid the agent the bribe and had given him the money to do so, ASQ 98. This contradicted the evidence of one of the other witnesses Mr [K} who simply said it was S who had paid the bribe. Thus the evidence was inconsistent.

27. Crucially the judge also stated that

> *"At 59 Mr [K] also told me his brother was definitely proposing to return to Sri Lanka when he initially arrived in the United Kingdom. That makes no sense if the appellant had been arrested and tortured as claimed and subsequently failed to report to the Authorities in accordance with his release conditions"*.

28. Against that background even if the judge had confused a watch and stop list it was not material bearing in mind the remainder of the fundamental findings which undermined the appellant's credibility as to his experience in Sri Lanka. The judge applied **GJ** and in the circumstances of this particular case, and the critical lacuna in the appellants' evidence, the country background evidence would not assist further.

29. I find that much of the criticism for example at paragraph 51 of the judge's expectation of the appellant being able to explain the Authorities' ability to locate him was in fact comment and not material to the main critical findings on a credibility.

30. At paragraph 62 the judge is merely describing the fact that the appellant had not produced written evidence in support of his claim to have been released on reporting conditions albeit he said that he had reported six times and that he had not explained why he went into hiding and further the appellant made no mention of the payment of any bribe for release during his asylum interview.

31. In relation to the witnesses, the appellant's own evidence and that of S contradicted each other as set out at paragraph 63

> *"however in his letter of October 16th 2016 S makes no mention of being threatened when the CID came to their house in February 2nd 2019. He simply refers to threats made against their mother".*

32. The judge merely made the passing comment at paragraph 63 that he did not understand why the Authorities would continue to visit that appellant's home relatively frequently for such a prolonged period after the cessation of the hostilities. It was the frequency and the length of period which the judge commented on albeit that it was accepted in **GJ** that Authorities do continue to hassle family members.

33. Further the judge stated

> *"There is no evidence that an arrest warrant has been issued against the appellant. Although Mr K told that he had seen the newspaper articles confirming that his brother was still wanted by the CID my attention was not drawn to those articles (assuming they exist) at the hearing".*

34. Overall the judge made a series of valid findings in relation to the appellant's credibility, not least the contradiction between Mr Ka's oral evidence and his statement as to his discovery of what happened to the appellant through the LTTE Intelligence Department. In evidence he did not know what happened to the appellant after he found out he had been arrested but in his letter he claimed that the Authorities had all the information, paragraph 64. Mere disagreement about the weight to be accorded to the evidence, which is a matter for the judge, should not be characterised as an error of law, **Herrera v SSHD** [2018] EWCA Civ 412. Overall the credibility findings were detailed and sufficiently adequately reasoned in relation to the experience in Sri Lanka, bearing in mind **GJ** and the country background material, and those findings will stand.

35. In relation to the TGTE activities I note that **UB Sri Lanka [2017] EWCA Civ 85** was within the papers submitted to the First-tier Tribunal and paragraphs 12 and 13 of **UB Sri Lanka** held as follows:

> *"12. Annexed to the guidance is the text of two letters from the British High Commission in Sri Lanka. This material is authoritative and clearly intended to be read with the guidance. The first letter is dated 16 April 2014:*
>
> *"Proscribed Terrorist Groups*
>
> *On 1 April 2014, the government of Sri Lanka announced the designation of 16 Tamil Diaspora organisations and 424 individuals under the UN*

Security Council resolution 1373 on counter-terrorism. The order was issued by the Secretary of Defence. The government asserts that this action has been taken to stop attempts to revive the LTTE. The BHC [i.e. British High Commission] has asked the government of Sri Lanka to provide evidence to support this decision.

Among the organisations proscribed are the Transnational Government of Tamil Eelam (TGTE) and the UK-based Global Tamil Forum (GTF) and British Tamil Forum (BTF). When making the announcement on 1 April, Brigadier Ruwan Wanigasooriya said that individuals belonging to these organisations would face arrest under anti-terrorism laws … [T]o date, there have been no known arrests based on membership of one of the newly proscribed groups."

13. *The later letter is dated 25 July 2014 and the relevant text reads:*

"The spokesperson from the DIE stated that returnees may be questioned on arrival by immigration, CID, SIS and TID. They may be questioned about what they have been doing whilst out of Sri Lanka, including whether they have been involved with one of the Tamil Diaspora groups. He said that it was normal practice for returnees to be asked about their activities in the country they were returning from.

The spokesperson from the SIS said that people being "deported" will always be questioned about their overseas activities, including whether they have been involved with one of the proscribed organisations. He said that members of the organisations are not banned from returning to Sri Lanka, they are allowed to return, but will be questioned on arrival and may be detained.".

UB (Sri Lanka) proceeded at paragraph 24

"24. *In truth, consideration of the risk to the Appellant turns not merely on him showing that he was actually a member of the TGTE, but relies on his membership being detected on arrival in Sri Lanka. There is no suggestion that this Appellant is on any list of individuals of interest to the authorities in Sri Lanka. The objective findings by the FTT are clear that any activity by the Appellant in this country, even if observed or recorded, was low level and not likely to carry risks. That activity itself would not demonstrate membership of the TGTE. In addition, I bear in mind the very clear findings that the Appellant lied and exaggerated in alleging mistreatment during his last visit to Sri Lanka, and thus his credibility is low".*

36. In this instance albeit the credibility in relation to his activities in Sri Lanka was disbelieved the judge nevertheless accepted the TGTE membership card was genuine.

37. The judge rejected the activities of the appellant in relation to the TGTE noting the letter from Mr Si on TGTE notepaper at 74 but observed that it was a remarkably brief letter and described the appellant as a "activist involved in promoting" the TGTE's projects "on genocide of Tamils". No details were given. The judge

struggled "to understand how the appellant is able to play such a seemingly significant role in the TGTE in view of his psychiatric problems as described by Dr Dhumad".

38. At paragraph 75 the judge states this

> *"75. Although I have some photographs of the Appellant attending what appeared to be various demonstrations the bulk of those photographs are from 2019. I was told that he is referred to by name in two articles. The first dated April 5 2019 simply names "K…". The second dated May 11 2019 refers to "Ko… Ka…" amongst others as a "Tamil Eelam sentimentalist" involved in attending an event in Downing Street".*

And at 77 and 78 the judge stated the following

> *"77. In reaching my assessment I have taken into account what is said by the witnesses about the enquiries/threats alleged to have been made by the authorities in Sri Lanka in relation to the Appellant's alleged TGTE activities. Mr Ka claims that Su and himself were approached in November 2017 by Military Intelligence who claimed that they were aware that the appellant was acting "in concert" with the TGTE in the UK. In view of the evidence of the Appellant's involvement with the TGTE I do not consider it reasonably likely that this ever happened despite what is said by Su in his letters of March 7 and December 2 2017, In the first letter Su refers to an earlier visit in February 2017 and claims that he referred what occurred to a Mr Arnold of the Northern Provincial Council. Although I have a letter from him dated March 14 2017 he does not mention any ongoing interest by the authorities due to the Appellants alleged association with the TGTE. His earlier letter of October 12 2016 simply refers to the Appellants earlier arrest "for supporting the LTTE" without specifying exactly what the Appellant did in support.*
>
> *78. The Respondent does not accept that the Appellant has had a significant role in relation to post-conflict Tamil separatism within the Diaspora and/or the renewal of hostilities within Sri Lanka. I agree with that assessment. I do not consider it reasonably likely that the Appellant has ever played any significant role in the TGTE sufficient to be of any conceivable interest to the Sri Lankan authorities. He has never been an officer or committee member. Although he may have turned up at a few demonstrations that does not mean that he will perceived to have a "significant role" in the organisation. Indeed it is difficult to see how he could in the light of his claimed health issues. It therefore follows that the Appellant can have no claim to international protection either on asylum grounds or under Articles 2 and 3 of the European Convention as he does not fall within any of the risk categories identified in **GJ**. He has no claim to humanitarian protection. I reject the credibility of the Appellant and his witnesses (at least some of whom are family members) for the reasons given".*

39. The judge appears to accept that the appellant has a role in the TGTE but does not accept that he has a *significant* role and indeed it was difficult to see how he could do so in the light of the claimed health issues.

40. I am not persuaded the judge failed to take account of the totality of the evidence but the key question is whether the appellant's activities, as accepted, would be considered to be significant in the eyes of the Sri Lankan Authorities, particularly as pointed out in the grounds, that if the appellant was questioned about his activities in the UK and disclosed his involvement with the TGTE over a five year period he would likely be detained. The real question is whether on the findings of the judge whether the perception of the appellant's role would be significant in the eyes of the Sri Lankan Government.

41. I do not set aside the judge's actual factual findings in relation to his TGTE activities but his conclusion as to risk from TGTE activities is set aside. This is because from paragraph [74] onwards the assessment omitted reference to all relevant information such as the media articles and at [78] there was required, an assessment in relation to the need to play a 'significant' role in order to be at risk on return. On this ground alone, that is in relation to his TGTE activities, I consider there to be an error of law. **I set aside paragraph [78] and thus the conclusion in relation to protection grounds.** The matter shall be resumed before me in the Upper Tribunal on the issue of the TGTE activities of the appellant in the United Kingdom and its implications.

42. The Judge erred materially for the reasons identified. I set aside the decision at paragraph [78] and only specifically paragraph [78] pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be retained in the Upper Tribunal and will be relisted before me.

Direction:

Any further evidence is to be filed and served in accordance with paragraph 15(2)A of The Tribunal Procedure (Upper Tribunal) Rules 2008 at least 14 days prior to the resumed hearing.

Signed *Helen Rimington* Date 23rd December 2019

Upper Tribunal Judge Rimington

Appendix C: error of law decision in RS

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13288/2018

THE IMMIGRATION ACTS

Heard at Field House
On 2nd January 2020

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MS R S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Bandegani of Counsel, J W I Joint Council for the Welfare of Immigrants
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

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

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

1. The appellant appeals against the decision of First-tier Tribunal Judge O'Garro promulgated on 18th September 2019 which dismissed the appellant's appeal on asylum, humanitarian protection and human rights grounds. The appellant is a citizen of Sri Lanka born on 14th May 1977 and she appealed against the refusal decision of the respondent dated 7th November 2018. As the judge recorded, the appellant had a previous claim for asylum which was refused on 25th January 2008 and her appeal against that decision was dismissed on 27th May 2008. She became appeal rights exhausted on 25th June 2008.

2. In this challenge there were four grounds of appeal. Permission to appeal was granted by Upper Tribunal Judge Norton Taylor on all grounds

3. Ground (i); failure to apply the vulnerable witness guidelines. The judge described the appellant by reference to the medical evidence as "psychotic, depressed, hopeless and very anxious, her concentration is poor … she would not be able to follow the proceedings meaningfully" [12]. The evidence stated she was "suffering from PTSD" although in the light of her psychotic symptoms no clear diagnosis could be made. It was recorded, in the evidence that she had been detained on three occasions under the Mental Health Act. However, the judge stated she had borne in mind the vulnerability guidance at [13] but she did not apply it.

4. Mr Bandegani did not rely on the grounds of appeal whereby it was asserted that the judge did not say whether she had concluded the appellant was indeed a vulnerable witness. That was abandoned at the hearing before me but he submitted that the judge did not determine the effect of vulnerability on the quality of the evidence and the weight to be placed on such vulnerability in assessing the evidence. The judge did not address whether she considered the appellant's disability caused or resulted in impaired memory or whether "the order and manner in which evidence was given was affected by mental, psychological or emotional trauma or disability or whether the appellant's comprehension of questioning may have been impaired". That her previous legal representatives in her previous asylum claim failed to secure evidence as to her capacity to instruct or give evidence at any time could not make a hold against the appellant in principle.

5. Ground (ii); failure to adequately deal with the TGTE issue. There was the failure to take into account all the photographic evidence and content in relation to the activities that the appellant had undertaken on behalf of the TGTE. The appellant was clearly marked in the photographs and she had attended public pro-Tamil demonstrations flying a large flag with the Tamil Tiger emblem at the centre. She was also standing in the group of men next to men wearing vests with the TGTE logo on it and was standing next to a minister of the TGTE in London.

6. In concluding that there was no written confirmation of the appellant's or her partner's membership directly from the TGTE at paragraph 40 the judge failed to take into account that the TGTE rarely, if ever, provided such letters. She did not need to hold senior office or have a high profile to be of interest to the Sri Lankan authorities on return. The judge failed to consider that the TGTE was a proscribed

organisation in Sri Lanka and the ban made it a criminal offence for Sri Lankans to maintain contact with such organisations or its members. This was acknowledged in the Country Information Guidance Sri Lanka Tamil separatism. The judge failed to consider that the country guidance of **GJ** did not assess or consider the risks facing a person associated with TGTE, a terrorist organisation.

7. Ground (iii): erroneously took into account personal knowledge experience. At paragraph 32 the judge reached the surprising finding that "in my experience a person who had been raped or sexually abused in conditions such as detention, will take a long time to trust and engage with someone of the opposite sex. There was no indication that the judge had experience in this regard and failed to explain why on her experience and on what evidence, three years was not a long time. The judge's finding in this respect was unfair and irrational as it was based on no evidence.

8. At ground (iv), the judge in approaching the medical evidence erred by placing the cart before the horse and determining credibility in advance in considering the content of the expert medical report. Because the judge decided that the appellant lacked credibility, the doctor's opinion in turn could not be given much weight. The judge also erred by concluding that the doctor only reached his clinical assessment based on what he had been told by the appellant whereas it was undertaken by applying clinical methodology, his experience, training and expertise.

9. At the hearing before me Mr Bandegani pointed to the 2008 determination which did refer to the appellant's distress and referred to her claim that she had been mistreated. It should have been considered whether there was a plausible or good reason, there being no reference in the medical reports to her vulnerability and it was to be found in the report of Dr Dhumad dated 3rd August 2019 which stated that the appellant could not talk about her previous sexual assault. According to the Secretary of State's policy on credibility Asylum Policy Instruction assessing credibility and refugee status version 9 publication date 6th January 2015 there was no dispute that a decision maker must, when looking at a vulnerable witness, consider why matters were not referred to before and at paragraph 7.8 acknowledge that there may be a delay in disclosure. This applied equally to the Secretary of State and to the judge.

10. The appellant was diagnosed with PTSD which stemmed from a life-threatening traumatic experience. The judge at paragraphs 21 to 27 accepted she had a mental health condition and the judge took no issue with the clinical opinion of Dr Dhumad. The judge at 27 stated "I am also aware that facts personal to the appellant that were not brought to the attention of the first Immigration Judge, that were relevant to the issues before me should be treated with a greater circumspection".

11. The judge looked at the GP records and there was no reference to her being mentally unwell but that would not be apparent from the information because the appellant had not previously disclosed and the reason was explained in the medical report. Mr Bandegani submitted that had the judge properly applied the vulnerability guidance the judge would have been aware that what she had to do was consider the extent of

the vulnerability and the impact of that and there was no application of that important part of the guidance. The ultimate conclusion of Dr Dhumad was to be found at 10.3. which stated "She saw her GP in the UK but was not able to talk about the torture or the sexual assault, she felt ashamed and could not talk about it."

12. In relation to Ground (iv), Mr Bandegani submitted that the judge placed the cart before the horse and this was accepted by the Secretary of State and put alongside the failure in Ground (i) the judge failed to look at the content of the report in the round. It was an error to reject the report merely because it was based on the appellant's own account. The judge failed to give adequate reasons for concluding that the trauma had nothing to do with her fear of returning to Sri Lanka.

13. In relation to Ground (ii) it was insufficient for the Tribunal to look at **GJ** which did not in turn consider the TGTE or links thereto. It did not consider how, having links with a proscribed organisation would affect the risk on return. There was a misapplication of **GJ and Others** particularly in relation to the requirement for there to be a significant role in that organisation.

14. In relation to Ground (iii), the judge had no rational basis to reach the conclusion about the way people behaved if they had suffered from sexual violence. There was no indication that the judge had expertise in this area of law or that it was made known to the parties.

15. Mr Clarke submitted that the challenge was misconceived. The appellant had an appeal in 2008 and a central part of that determination found the appellant not to be credible. One of the things taken into account was the brevity of the witness statement, her numerous inconsistencies and the vague evidence, but at paragraph 29 the judge had this to say:

> "29. *No evidence of the appellant's mental state was placed before the Judges who heard her appeal but there is no reliable evidence before this Tribunal that the appellant was suffering from any mental health issues when she left Sri Lankan or indeed for many years after she left Sri Lanka. Her medical records which is before this Tribunal makes no reference to the appellant having any mental health problem before 2016. Prior to August 2016, the appellant's main contact with her GP was to do with general matters."*

16. Additionally, the report of Dr Dhumad made no reference to the 2008 determination. The assertion was that she was supressing her mental health and one would expect the expert to comment on the non-disclosure of mental health. That was not done. When the judge states there was no reliable evidence to go behind the 2008 findings that was patently fair. The judge approached the evidence correctly and did find that she is a vulnerable witness but there was nothing to unsettle the determination of 2008. The further medical evidence was dated 2019 and nothing in that evidence which suggests that the mental health issues undermined the evidence in relation to the determination in 2008. The burden of proof was on the appellant. That is why **Mibanga [2005] EWCA Civ 367** was immaterial and what the judge said was not

probative of central issues because the medical report does not comment on the issue of 2008. The same case was put forward in 2008.

17. In relation to Ground (iv) the expert report had no Istanbul Protocol findings. **KV** made reference to sliding scale in regard to the Istanbul Protocol findings and how much the expert believed but at 14.2 of the report it was impossible to discern anything regarding the Istanbul Protocol findings or in respect of causation. Further the doctor did not consider the determination from 2008.

18. At Ground (ii) Mr Clarke accepted that at pages 34, 35 and 36 there were photographs of the appellant in relation to the TGTE but there was no evidence that the Sri Lankan authorities would be aware of the appellant's return or that the low-level association with the TGTE would cause her to be arrested and detained. There was no evidence of her membership and there was no submission in relation to her being identified.

19. In relation to Ground (iii) there was a charge of irrationality but that was a very discrete challenge at paragraph 32 and the point was immaterial and had no bearing on the point at 35. At 32 the judge was looking at inconsistencies in the medical and witness evidence.

20. Mr Bandegani responded that the judge was required to take note of the medical evidence in order to assess the inconsistencies from the evidence such as at paragraph 34.

21. Further, **UB (Sri Lanka)** [2017] EWCA 85 should be read logically from paragraphs 23 to 25 and in order. The appellant would not be expected to lie on her return and she would be very vulnerable should she be questioned. None of this was considered by the judge and there was no authority in **GJ** or **UB** that anyone associated with TGTE is not at risk and the judge's failure must be material.

22. The fundamental point was that there was late disclosure in this case and secondly there was no way that the doctor in 2019 could diagnose the person's mental health condition a decade before. At that point she did not disclose the trauma. It was necessary to look at the other evidence. The judge stated at paragraph 38 that no issue was taken with the diagnosis but merely rejected that the trauma was suffered in Sri Lanka. The judge's reason for not following the expert opinion was that surrounding her immigration status but the reasons for that conclusion were not well-founded against the weight of the evidence pointing to a different conclusion.

Analysis

23. The difficulty for the appellant's case is that it attempts to unsettle the findings of the First-tier Tribunal in 2008 on the basis of delay in disclosure. As Mr Bandegani indicated. it was not possible for a doctor in 2019 to diagnose a person's mental health condition a decade before. The essence of her claim in 2008 was similar, that she was questioned by the LTTE and detained and tortured. Albeit that the judges in the First-tier Tribunal in 2008 identified that she was in a state of distress at the

hearing there was no evidence that the appellant at that date was suffering from posttraumatic stress disorder or that she was unrepresented or that she failed to give oral evidence. The Tribunal in 2008 made adverse credibility findings against the appellant not least because of her inconsistent answers, bearing in mind there was no indication of or confirmed mental health issues at that point, and because her evidence was inconsistent with the background country information. The inconsistencies addressed in the respondent's refusal were not addressed. Further at paragraph 35 of that determination in 2008 it was evident that country background material had been assessed and for example there was no explanation why the LTTE wished to take the appellant when they had a quota policy of person per family and her brother had already been taken. It was open to the judge to apply **Devaseelan v SSHD** [2002] UKIAT 00702 as s/he did.

24. The medical report produced by Dr Dhumad did not address the issue of the delay in disclosure concentrating as it did on her current psychological state. Nor did the report make reference to the previous determination of 2008. There was no explanation in the report as to the delay of disclosure and merely a brief reference at 10.3. that "she saw her GP in the UK but was not able to talk about the torture or the sexual assault, she felt ashamed and could not talk about it". Nor was there any explanation about why she decided to disclose sexual assault ten years later. There was indication of a psychotic episode in 2016 and a referral to hospital for psychotic episode where she was diagnosed with PTSD and paranoid schizophrenia, depression and anxiety but there appeared to be no hospital report. At 10.6. of the report, it was concluded that the appellant had a diagnosis of bipolar illness and schizophrenia and was being treated with olanzapine. As the doctor records at 10.6. she also has a family history of a mental health condition and that her sister committed suicide.

25. The doctor at 14 of his report set out the following:

> *"14.1. MRS [RS'] presentation, in my opinion, is consistent with a diagnosis of severe Depressive Episode, with psychotic symptoms as defined in the international classification of disease 10th Edition, Mental and Behavioural Disorder, ICD10 F 32.3. (Appendix II).*
>
> *14.2. She also has Post Traumatic Symptoms but her psychotic symptoms are prominent at this stage and it is difficult to assess her PTSD symptoms. In my opinion her traumatic experience, torture at the hands of the authorities in Sri Lanka is the primary cause of her mental health issues.*
>
> *14.3. Her medical records noted that she was admitted 3 times detained under the provision of the MHA. Her symptoms appears to be a mixture of schizophrenic and affective symptoms (elated and depressed mood), therefore in my opinion she is suffering from Schizoaffective Disorder appendix (III), as stated in the ICD10 'A diagnosis of schizoaffective disorder should be made only when both definite schizophrenic and definite affective symptoms are prominent simultaneously."*

26. The report of the doctor is geared primarily to the assessment of her psychosis rather than her PTSD, which he stated was difficult to assess and which the judge recorded, and thus whether she was fit to attend court and give oral evidence and whether she was fit to fly. There was passing reference to her contact with the GP and that she was not able to talk about the torture but nothing in relation to any assessment of her symptoms in accordance with the Istanbul Protocol, despite an affirmation that the principle set out in the Istanbul Protocol had been followed, and a mere reference that she had not mentioned the sexual assault to the Home Office or to her GP. There was no analysis of the delay in disclosure or any explanation for it.

27. In the absence of clear and specific findings by the medical professional, it was thus open to the judge to make the finding at [27] that facts personal to the appellant that were not brought to the attention of the first Immigration Judge, and were relevant to the issues before him, should be treated with a greater circumspection. The appellant was under medical treatment and had legal representation at the time and there was no evidence before the Tribunal to suggest that she had mental health issues in 2008. The judge accurately records at paragraph 29 that her mental health problems were documented in 2016 some eight years later. That was a finding open to the judge.

28. Nor am I persuaded that without evidence before the Tribunal in relation to her mental state at that date in 2008, the judge erred in approach to the medical records. The judge painstakingly analysed the medical evidence from the GP notes which are the independent documentary records and specifically noted at paragraph 34 that in 2015 she stated that she had been married and trying to conceive for eight years which was contradictory to her recent statement that she did not meet her present partner until July 2010. The appellant did not give oral evidence but relied on a witness statement which was prepared with the assistance of her legal representatives but even so the comments made by the judge relate to information and evidence given prior to the record of any onset of significant illness. For example, in 2015 (prior to firm medical evidence of any significant mental condition) it was recorded that she had 'married and trying to conceive …For 8 years'.

29. The comments at paragraph 32 in relation to her miscarriage were no doubt not within the expertise of the judge but it is not material, being effectively superfluous, when considering the judge contrasted the statement in her witness statement at paragraph 31 with her evidence as recorded in her GP records at paragraph 34. The credibility findings at 34 and 35 were open to the judge, not least there was no firm evidence that there was any significant mental health problem prior to 2016 and this was compared with the no doubt carefully drafted statement by the representative for the court hearing in 2019.

30. It was open to the judge to give less weight to the report from Dr Dhumad for the reasons I have given and further because it was largely based on the appellant's own account. It is now said she is psychotic. **JL (medical reports-credibility) China [2013] UKUT 00145** in fact confirms that the more the doctor has relied on the appellant's own account the less weight the judge is entitled to accord to that report. There was no indication that the medical professional had read the previous

decision. In terms of documentation he merely referred to 'letters of instruction', Home Office bundle and Medical records and prescription from The Medical View Surgery'. However, the judge placed little weight on the report rather than no weight and finally comes to the conclusion at 39 that the appellant's medical records contradicted what she stated in her statement and undermined her credibility.

31. Further as Mr Clarke pointed out, the 2019 report did not undermine or unseat the adverse credibility findings made in the first determination and the report in the form that it was presented only cursorily referred to failure to disclose and made no attempt at explaining that failure to disclose until 2019. In the circumstances the "**Mibanga** point" taken by the appellant has no force. The report contained no Istanbul Protocol findings and **KV (Sri Lanka) v the Secretary of State for the Home Department [2019] UKSC 10** specifically refers to those Istanbul Protocol relevant findings when considering how much an expert is to be relied upon. There was no indication that the report contained an opinion about the consistency of the findings with the asylum seeker's account of the circumstances in which the injury was said to be sustained. This was not a scarring case but if an analogy is drawn one of the functions of a medical report is to offer a clear statement in relation to their consistency of presentation with the history given. As the Supreme Court stated at [20] of **KV**

> *'decision-makers can legitimately receive assistance, often valuable, from medical experts who feel able, within their expertise, to offer an opinion about the consistency of their findings with the asylum-seeker's account of the circumstances in which the scarring was sustained, not limited to the mechanism by which it was sustained'.*

And at [22] and [23]

> *'… In RT (medical reports - causation of scarring) Sri Lanka [2008] UKAIT 00009 the Asylum and Immigration Tribunal in para 37 described the SA (Somalia) case as a landmark authority in the identification of the purpose of a medical report in relation to alleged torture and in the indorsement of the Istanbul Protocol'[22].*
>
> *'… [T]he function of the report as being to provide expert opinion on the degree of correlation between the asylum-seeker's presentation and his allegations of torture. And indeed, no surprise that, in para 3.3 of his instruction to case-workers entitled Medico-Legal Reports from the Helen Bamber Foundation and the Medical Foundation Medico-Legal Report Service dated July 2015, the Home Secretary should have required them to give due consideration to medical opinions given on behalf of those organisations upon the degree of consistency between the clinical findings and the account of torture[23]'.*

32. There was no such clear statement of consistency with presentation and in line with the Istanbul Protocol. Contrary to the Istanbul Protocol the doctor did not consider the alternative causes for her medical state, **SA (Somalia) [2006] EWCA Civ 1302**.

33. Finally, the Supreme Court confirmed that the ultimate decision on credibility rests with the judge by noting at [25]

> *'The conclusion about credibility always rests with the decision-maker following a critical survey of all the evidence, even when the expert has placed his conclusion within category (a) or (e). Indeed, in an asylum case in which the question is only whether there is a real possibility that the account given is true, not even the decision-maker is required to arrive at an overall belief in its truth; the inquiry is into credibility only of a partial character'.*

34. Overall I find thus that the judge's approach to the evidence in the light of the appellant 's vulnerabilities of which s/he was clearly aware was not a material error of law.

35. In this case the judge was also charged with falling foul of **Mibanga** and I note Mr Clarke's acceptance of that albeit it was not material. I agree for the reasons given above even if it were 'compartmentalised' it was not material, but looking at the decision as a whole it is clear that the judge in the course of setting out the evidence specifically cited the psychiatric report of Dr Saleh Dhumad at paragraph 12, at the outset of the findings, and recorded that the appellant was suffering from post-traumatic stress disorder. The judge also confirmed that he had made careful note of the submissions in the Record of Proceedings. Bearing in mind the problems with the report, as expressed above, I do not consider that the approach by the judge was flawed and undermines the assessment of the judge in his decision.

36. **HH (medical evidence; effect of Mibanga) Ethiopia** [2005] UKAIT 00164 confirms that a judge has to start somewhere and the references to the medical evidence at the start and throughout the decision indicate, contrary to the grounds that the judge did factor in the medical report from the onset and did weigh in that assessment when considering the evidence. As **HH** explains a judge has to start somewhere. 'As the judge reasoned at [29]

> '*there is no reliable evidence before this Tribunal that the appellant was suffering from any mental health issues when she left Sri Lankan (sic) or indeed for many years after she left Sri Lanka. Her medical records which is before this Tribunal makes no reference to the appellant having any mental health problem before 2016. Prior to August 2016, the appellant's main contact with their GP was to do with general medical matters'.*

37. Finally, the judge at paragraph 39 did state "I find the medical evidence carries little probative weight. In respect of her written evidence, I find that the appellant's medical records contradict what she stated in her statement and further undermine her credibility."

38. I do however, turning to Ground (ii), consider that the judge has not considered all of the evidence and Mr Walker conceded that at pages 34 to 36 had not been addressed by the judge. As Mr Bandegani pointed out, the appellant would not be expected to lie and **GJ and others (post civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)** does not address issues in relation to the TGTE. It would appear the judge

failed to consider that the TGTE is a proscribed organisation in Sri Lanka specifically dedicated to the promotion of a Tamil state and the ban is a criminal offence for Sri Lankans to maintain contact with organisations or its members and the relevance of this risk is acknowledged in the respondent's own policy guidance country information than Sri Lanka Tamil separatism dated 28th August 2014.

39. The judge stated at paragraph [41] "In any event, even if the appellant did attend a demonstration or is a member of the TGTE there is no evidence before me that either the appellant or her partner have a significant role in the TGTE or her role at the demonstration".

40. That does not grapple with the question of whether a significant role is required or how the appellant would be seen on return particularly bearing in mind her mental condition and **RT (Zimbabwe) [2012] UKSC 38**.

41. It is the perception of the authorities as to the appellant's activities in the UK which is key and as Mr Bandegani pointed out **GJ** acknowledges the reliance by the Sri Lankan authorities on sophisticated intelligence for the purposes of identification.

42. I thus find there is an error of law in the approach by the judge to the TGTE aspect of this claim and I direct that there should be a resumption before me in the Upper Tribunal on this point alone.

43. The Judge erred in law for the reasons identified, and, in a manner which could have a material effect on the outcome. Pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007), I set aside the decision in relation to the findings on the TGTE only specifically paragraphs [40] to [47].

Signed *Helen Rimington* Date 17th January 2020

Upper Tribunal Judge Rimington