Case No: C5/2013/2607

Neutral Citation Number: [2014] EWCA Civ 829
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGES GLEESON, DAWSON AND O'CONNOR
AA/12647/2011, AA/03791 and AA/02916/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2014

Before:

LORD JUSTICE MAURICE KAY
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE ELIAS
and
LORD JUSTICE UNDERHILL

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Between:

MP (Sri Lanka)	**1st Appellant**
NT (Sri Lanka)	**2nd Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

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Raza Husain QC, Alasdair Mackenzie and Alison Pickup (instructed by **Birnberg Peirce & Partners**) for **MP & NT**
Raza Husain, Rudolph Spurling and Sara Anzani (instructed by **HK Solicitors**) for **NT**
Jonothan Hall and Will Hays (instructed by **Treasury Solicitors) for the Respondent**
Ms Parosha Chandran and Shivani Jegarajah (instructed by **Wilsons Solicitors) for the Intervener (Tamils against Genocide)**

Hearing dates: 17-18 March 2014

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Judgment

Lord Justice Maurice Kay:

1. In recent years the political situation in Sri Lanka has changed. 25 years of civil war came to an end in May 2009. In order to assess the need for international protection, country guidance has had to be updated. Whilst the conflict was still ongoing, the Asylum and Immigration Tribunal promulgated guidance in LP (LTTE Area – Tamils – Colombo – Risk) Sri Lanka CG [2007] UKAIT 00079. That guidance was updated soon after the end of the civil war in TK (Tamils, LP Updated) Sri Lanka CG [2009] UKAIT 00049. This appeal is concerned with the most recent guidance which was promulgated by the Upper Tribunal (Immigration and Asylum Chamber) on 8 July 2013: [2013] UKUT 00319 (IAC). Permission to appeal was granted by Sullivan and Davis LJJ following an oral hearing. The issues raised are partly generic but also individual in relation to MP and NT. The lead appellant in the Upper Tribunal (UT) was GJ but his appeal was allowed by the UT and he is not a party to the proceedings in this Court.

The guidance

2. The UT noted that there had been real change, "both good and bad", since the end of the civil war. The present position was described as follows (at paragraph 354):

> "The LTTE is now a spent force within Sri Lanka and considered unlikely to rise again from within the unitary Sri Lanka, which is tightly controlled by the Sri Lankan security forces. The perceived risk against which the government of Sri Lanka (GOSL) works now concerns the possibility of LTTE resurgence and efforts to restart the internal armed conflict, from outside Sri Lanka, led by diaspora activists. The GOSL no longer relies principally on checkpoints and searches; its approach is intelligence-led and it has sophisticated extensive intelligence as to those who are seeking to destabilise the unitary state, within the diaspora and in Sri Lanka itself. "

In order to produce guidance to meet the changed circumstances, the UT considered a vast amount of material, including Eligibility Guidelines which had been produced by the UNHCR in December 2012 (the UNHCR Guidelines) and the evidence of experts, including Professor Anthony Good, Dr Chris Smith and others. The hearing took place over nine days. Approximately 5000 pages of documentary evidence were considered. The determination of the UT is a formidable piece of work running to 457 paragraphs plus a further 100 pages of Appendices.

3. The country guidance is set out in paragraph 356 of the Determination. It is appropriate to set it out in full:

> "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.

<u>The generic grounds of appeal</u>

4. Essentially, the central complaint of the appellants in relation to the country guidance relates not to what it includes but to what it is said to exclude. Their case is that the undisputed evidence was that a far wider range of people are at risk than those who might benefit from paragraph 356 which, it is said, concentrates too much on diaspora activism. It is submitted that the UNHCR Guidelines are more protective but the UT did not follow them and did not explain why it was not doing so. There was no contradictory evidence. Moreover, there was significant evidence concerning actual returnees, some of it available from decisions of the Secretary of State or the First-Tier Tribunal and the UT, which was excluded or not given appropriate weight by the UT. Also, evidence from human rights organisations, in particular Freedom from Torture (FFT) and Human Rights Watch (HRW) received flawed consideration. A further organisation – Tamils against Genocide (TAG) – had appeared as an intervener in the UT (and in this Court) and had made important submissions about witnesses to, or victims of, war crimes which did not receive proper consideration.

The UNHCR Guidelines

5. The UNHCR published new Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka on 21 December 2012. In HF (Iraq) v Secretary of State for the Home Department [2013] EWCA Civ 1276, this Court was invited to confer special evidential status on such UNHCR publications. It declined to do so. Elias LJ said:

> "43…The Court must assess all the evidence affording such weight to different pieces of evidence as it thinks fit. No principle of international or domestic law dictates any different approach. The authorities which demonstrate the considerable respect which the Court affords to UNHCR material are entirely consistent with the conventional view that questions of weight are for the Court…
>
> 44. There is, in my view, no justification for conferring… presumptively binding status on UNHCR reports merely because of their source."

6. The UNHCR Guidelines of 21 December 2012 were designed to replace previous Guidelines published in July 2010. The Preamble to the 2012 Guidelines noted "ongoing human rights concerns…including in particular with regard to reports of post-conflict justice, torture and mistreatment, disappearances, arbitrary detention and freedom of expression". The UNHCR summarised its recommendations as follows:

> "All claims…need to be considered on their individual merits…More specifically, the possible risks facing individuals with the profiles outlined below require particularly careful examination. UNHCR considers that individuals with these profiles – though this list is not exhaustive – may be, and in some cases are likely to be in need of international refugee protection, depending on the individual circumstances of this case."

A list of eight groups then followed, of which the first five received the specific attention of the UT in the present case. They were:

> "(i) persons suspected of certain links with the …LTTE;
>
> (ii) certain opposition politicians and political activists;
>
> (iii) certain journalists and other media professionals;
>
> (iv) certain human rights activists;
>
> (v) certain witnesses of human rights violations and victims of human rights violations seeking justice."

In the UT it was accepted on behalf of the Secretary of State that those who were detained were likely to be ill-treated.

7. The first category – persons suspected of certain links with the LTTE – was further considered in the body of the UNHCR document (at pages 26-27) under the heading "Risk Profiles". The following passage is of central importance in the submissions on behalf of the appellants:

> "…previous (real or perceived) links that go beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment which may give rise to a need for international refugee protection, depending on the circumstances of the individual case. The nature of these more elaborate links to the LTTE can vary, but may include people with the following profiles:
>
> 1) Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the Northern and Eastern Provinces;
>
> 2) Former LTTE combatants or ' cadres';
>
> 3) Former LTTE combatants or 'cadres' who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, 'computer branch' or media…;
>
> 4) Former LTTE supporters who may have never undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
>
> 5) LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE;

6) Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles

When assessing claims of persons with the profiles above, it may, depending on the individual circumstances of the claim, be important to examine the applicability of the exclusion clauses. "

8. In the present case, the UT rejected a submission that, read as a whole, these passages mean that "any former links with the LTTE are determinative of an asylum claim today". The UT said (at paragraph 290):

> "the effect of that passage is that these categories remain fact-specific. We shall set out later, in the light of the wide-ranging expertise we have heard and read, what we consider to be the fact-specific risk groups, some of which overlap with the general categories set out in the UNHCR guidelines…"

It is plain that the guidance expounded by the UT at paragraph 356, set out at paragraph 2 above, does not simply recycle the UNHCR text.

9. The question which now arises is whether the UT either failed to give appropriate weight to the UNHCR Guidelines or failed to explain why it was departing from them. Mr Raza Husain QC submits that the promulgated country guidance could not, at least without rational explanation, contradict the UNHCR Guidelines in circumstances where the evidence before the UT did not contradict them. He further submits that even if it was permissible to exclude certain matters amounting to "more elaborate links" with the LTTE as dispositive risk categories, it was not permissible to exclude them as indicative risk factors – relying on the conceptual distinction drawn by SIJ Storey in TK (at paragraph 4). The difficulty is said to be compounded by the fact that in a later case – KK (Application of GJ) Sri Lanka [2013] UKUT 00512 (IAC) – the UT held that the assessment of current risk is constrained by and limited to the matters set out in paragraph 356.

10. The issue at the heart of this case is the relationship between the country guidance promulgated by the UT and the UNHCR Guidelines. It is clear that the guidance provided by the UT does not expressly reflect the part of the Guidelines which address "those with more elaborate links to the LTTE" and the six examples of such persons set out in the Guidelines. Paragraph 356 (7) of the UT's determination, which lists the risk categories, focuses first on individuals "who 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". The other three categories are more specific – critical journalists and human rights activists; individuals who have given evidence to the Lessons Learned and Reconciliation Commission (LLRC) implicating the Sri Lankan authorities in war crimes; witnesses of war crimes in the No-Fire Zones who have identified themselves by giving evidence; and those whose names are on the computerised "Stop" list. Thus, persons such as former LTTE combatants and cadres are not included in the risk categories. This is consistent with the UT's overriding view that the current objective of the Sri Lankan government is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state.

11. The primary submission on behalf of the Secretary of State is that there is no inconsistency between the UT's country guidance and the UNHCR Guidelines. Paragraph 356 (7) is consistent with them. By not expressly adding to the list of risk categories, the UT was not excluding the UNHCR's "more elaborate links" examples as risk factors. They remain appropriate for consideration in an individual case. Accordingly, as there was no departure from the UNHCR Guidelines, there was no need to explain or justify such a departure.

12. It seems to me that the way to understand what the UT intended is to be found in the way in which it applied its guidance to the three appeals before it. In allowing the appeal of GJ it said:

> "396. Given the close connections the appellant's family had with Prabhakaran, and his irregular exit from Sri Lanka, we are satisfied that he is a person with what the UNHCR Guidelines describe as 'more elaborate links with the LTTE' and that there remains a real risk that he would be of interest on return….
>
> 397. The authorities within Sri Lanka have knowledge of the appellant's previous role within the LTTE, and in particularly his significant involvement in the LTTE's finance wing and its fuel supply. This, coupled with his sister's close connections to the former leader of the LTTE, his pro-Tamil separatist activities in the United Kingdom, and the nature of the enquiry made by the Sri Lankan authorities with the appellant's family since his departure from his homeland, lead us to conclude that it is reasonably likely that the Sri Lankan authorities perceive the appellant as having a significant role in relation to post-conflict Tamil separatism within the diaspora."

Plainly, the UT was not seeking to distance itself from the UNHCR's concept of "more elaborate links with the LTTE".

13. NT had been an LTTE cadre who had been detained and tortured around the time of the end of the civil war. His release had been prompted by the payment of a large bribe. He had not taken part in Tamil separatist activity in the United Kingdom. The UT said:

> "430….We must ask ourselves…whether, having regard to his known low-level activities during the conflict (bunker digging and transporting the wounded), there is a real risk that [he] will be perceived as a diaspora activist with a significant role in diaspora activities designed to destabilize the unitary Sri Lankan state and revive the internal armed conflict."

It answered that question in the negative and dismissed his appeal without reference to the UNHCR's "more elaborate links" criteria, although it accepted that there would be a record of his detention and a relative remained in a prison for high-risk LTTE personnel.

14. MP's appeal was allowed on ECHR Article 3 grounds (mental health and suicide risk) but his asylum appeal was dismissed. The UT said:

> "447. [He] is a person with an LTTE history and with what the UNHCR Guidelines refer to as "more elaborate links" to the LTTE (if the account of his missing brother is accepted). He has another brother who is a successful asylum seeker on LTTE and suicidality grounds. He bears both combat and torture marks on his body, but he was released in 2002 and seems to have been of no further interest to the authorities in Sri Lanka thereafter.
>
> 448. Since arriving in the United Kingdom, this appellant has taken no part, still less a significant role, in United Kingdom diaspora activities: he is not reasonably likely to be perceived as a person seeking to destabilise the single Sri Lankan state or revive the internal armed conflict. We remind ourselves that the GOSL has sophisticated sources of intelligence and would be aware of this lack of involvement, certainly by the time a travel document is issued. There is no real risk that this appellant falls within the new country guidance set out in this determination. "

As I read that reasoning, my impression is that the UNHCR's "more elaborate links" were considered as risk factors but were of little or no consequence because they did not equiparate with paragraph 356 (7) of the UT's guidance.

15. Analysing these three decisions, it is difficult to escape the conclusion that the UT was effectively closing the door to those who do not fall within paragraph 356 (7). Merely to have one or more of the features listed in the "more elaborate links" part of the UNHCR Guidelines is not enough. The UNHCR Guidelines, on the other hand, state that:

> "Previous (real or perceived) links that go beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment which may give rise to a need for international refugee protection, depending on the specifics of the individual case. The nature of those more elaborate links to the LTTE can vary, but may include people with the following profiles…"

The six criteria set then follow. The implication appears to be that whilst all cases are fact-sensitive, someone with an elaborate link or a combination of elaborate links might be judged for that reason alone to be at risk, whether or not they satisfy the test in paragraph 356(7). Nowhere do the UNHCR Guidelines relate these criteria to "a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka".

16. I am unable to escape the conclusion that the UNHCR Guidelines are indeed less demanding than the UT's guidance, although no doubt it will be easier to infer that the paragraph 356(7) test is satisfied where elaborate links are established than where they are not. The next question is whether the UT's guidance is nevertheless legally

sound. I do not consider that it is susceptible to the analysis that it permits or provides for the application of the six UNHCR criteria outside the ambit of paragraph 356 (7) of the guidance. The way in which the guidance was applied to NT's appeal convinces me of that. I think that the UT in KK (application of GJ) Sri Lanka [2013] UKUT 00512 (IAC) was right to conclude that the UT in the present case was endeavouring to provide "definitive" guidance on risk. That is why, in paragraph 356, it stated that the risk categories then set out "are" rather than "include" those listed. It was therefore rejecting the notion that those currently at risk might embrace, for example, former LTTE combatants or cadres who lack current potency, real or perceived, to threaten the unitary Sri Lankan state.

17. It seems to me that what this ground of appeal comes down to is whether there was evidence which was capable of justifying the UT's departure from the more generous UNHCR Guidelines and, if so, whether the UT adequately reasoned that departure. I have read with great care paragraphs 295-352 of the UT's determination. They contain a detailed explanation of why the UT had come to its more restrictive conclusion. Without overloading this judgment, I refer to the following passages:

> "303. The GOSL is reasonably confident that there is a low risk of resurgence of the internal armed conflict from within Sri Lanka. Its concern is with the risk of resurgence coming from the diaspora, of which London, Paris, Toronto and Oslo are major centres ('the diaspora hotspots'). There are approximately one million Tamils outside Sri Lanka, mostly in the diaspora hotspots.
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> …
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> 311…. The majority of the examples which the parties produced of those who were ill-treated on return, were of persons who had significant LTTE links (whether direct or familial). The evidence is that although LTTE cadres were screened out and rehabilitated in May 2009, the government's concern now is not with past membership or sympathy, but with whether a person is a destabilising threat in post-conflict Sri Lanka.
>
> …
>
> 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.
>
> 325. It is not established that previous LTTE connections or sympathies (whether direct or familial), are perceived by the GOSL as indicating now that an individual poses a destabilising threat in post-conflict Sri Lanka…

> 342…The risk of LTTE resurgence does not come from within Sri Lanka now…
>
> 345…In practice, all of those who lived in areas where the LTTE was the de facto government during certain periods of the civil war will have LTTE connections…
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> …
>
> 349. The rehabilitation process was applied to all identified LTTE cadres at the end of the civil war. That is not its purpose now: it is used where a person is considered to be involved in possible resurgence of the LTTE or contacting the active diaspora. Sri Lankan Tamils returning from the diaspora who did not undergo rehabilitation during 2009-11 are not for that reason at risk now, unless they can be shown to come within the risk factors presently identified."

It was these features which led the UT to conclude that there had been "real changes" since the LP/TK factors were propounded and that the general picture is as described in paragraph 354 (set out at paragraph 2 of this judgment).

18. Although the case for the appellants is that these findings were unsupported by the evidence and that there was no material to contradict the more generous UNHCR Guidelines, I do not feel able to accept that submission. The UT had and was entitled to accept the evidence of Professor Gunaratna. Whilst the evidence of, for example, Dr Smith was more to the effect that little had changed since the LP/TK guidance, the UT undertook a detailed analysis of his evidence (paragraphs 264-272) and it is clear that, whilst the reasoning does not address each and every point, it demonstrates why some of Dr Smith's evidence was not accepted. As to Professor Good, the UT explained (paragraph 262) that he had not been to Sri Lanka since 2010 and that "when pressed on areas of more difficulty, in many cases [he] was unable to assist as his information was not up to date". I shall return later to the NGO evidence. Suffice it to say that, for present purposes, when it was rejected, the rejection was reasoned.

19. All this leads to the conclusion that it was rational and permissible to narrow the risk categories. The UT could have explained its difference in approach from that of the UNHCR more fully and more directly but, in my judgment, it is plain from a careful consideration of the determination as a whole that it had identified an important change as to the "present objective …to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state". I am bound to say that, in the light of much of the undisputed evidence, this chimes with common sense and it is not at all counter-intuitive. Three years after the end of the civil war and after the completion of the large-scale rehabilitation programme, it is entirely understandable that the Sri Lankan authorities, seeing that the LTTE within the country was "a spent force" and in the absence of significant acts of terrorism, decided to turn its attention to the group identified by the UT as separatists and destabilisers. As to the adequacy of the reasoning, whilst it could have been more explicit, its basis was sufficiently demonstrated. The UT had heard a great deal of evidence which was subjected to forensic examination. In some respects, it had advantages not enjoyed by the UNHCR. Moreover, as the Supreme Court has made

clear on a number of occasions, this court should not readily interfere with the conclusions of an expert tribunal, for example, AH (Sudan) v Secretary of State for the Home Department [2008] 1 AC 678, per Baroness Hale at paragraph 30.

20. I therefore conclude that the UT gave due consideration to the UNHCR Guidelines but was entitled to adopt the less generous approach to risk demonstrated by its guidance and the explicit and implicit reasoning underlying it.

No change since TK

21. I have to say that I consider this ground of appeal to be unmeritorious and pedantic. It goes without saying that extant country guidance which was valid when promulgated should not be changed when the position on the ground remains unchanged. The practice of the UT and, before that, the AIT, was explained by the then President, Blake J, in EM (Returnees) Zimbabwe CG [2012] UKUT 98 (IAC) (at paragraph 72):

> "…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."

In the present case, the position on the ground in Sri Lanka had changed dramatically since the earlier country guidance. When TK was decided, the protracted civil war had only recently ended. The new guidance in the present case came three years later. No doubt some people who were in need of protection in 2009 and 2010 remained in need of protection in 2013. However, it is fanciful to suggest that there had not been significant changes in the intervening years. The UNHCR plainly thought that there had been. That is why the 2010 Eligibility Guidelines were revised in December 2012. It is not surprising that, in the present case, the UT was influenced by the approach of the UNHCR. The changes in the Eligibility Guidelines:

> "[contribute] to our view that now is the time for the [UT] to revise its guidance on Sri Lanka." (paragraph 47).

It added (at paragraph 48):

> "We considered that it was appropriate, in the light of the perceived changes and new UNHCR guidance, for the [UT] to reassess its own guidance on Sri Lanka. We wanted to consider whether the situation remained as it had been in TK, that is to say that the country is settling down into a peaceful recovery from a long and brutal civil war, or whether the situation in Sri Lanka was indeed deteriorating as suggested and new guidance was needed. For the reasons we have set out in this determination, we have concluded that the guidance needs to be replaced on the basis of the situation now."

22. I do not propose to rehearse all "the reasons we have set out". However, it is a striking feature of the new guidance that the UT found that "the focus of the Sri Lankan

government's concern has changed since the civil war ended in May 2009" and that its "present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state…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" (paragraph 356 (2) and (3)).

23. It seems to me that, in any event, this ground of appeal is superfluous. If the first ground of appeal had been made out, this ground would have added nothing. The first ground having failed, it must follow that the new guidance is justified by the established changes and the complaint enshrined in this ground of appeal is misconceived.

Political activities in the diaspora

24. I find this somewhat elusive as a free-standing ground of appeal. There is plainly an overlap with the first ground. On its own, its target seems to be paragraph 336 of the determination of the UT:

> "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."

And paragraph 351:

> "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."

The issue here is not that of the politically indifferent who seek to bolster an asylum claim by opportunist participation in sur place demonstrations in the hope of being photographed and perceived as suspicious (as to which, see, for example, KS (Burma) v Secretary of State for the Home Department [2013] EWCA Civ 67). The concern is with genuine diaspora demonstrators who may be put at risk on return as a result of surveillance and video recording or photography.

25. There was evidence before the UT of such intelligence-gathering by the Sri Lankan authorities and that it has reached a level of sophistication. However, it did not take the form of a cogent correlation between mere participation in such demonstrations and persecution on return. Nor, for that matter, do the UNHCR Guidelines put it so low. The reference to LTTE "propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE" seems to assume a higher level than mere participation in one or more demonstrations. No doubt it can form a part of the picture but I do not consider that it was legally erroneous of the UT to conclude that it needs more to qualify as a risk category or operative risk factor. The real issue in this case is how much more – essentially the basis of the first ground of appeal.

Returnee evidence

26. The material produced before the UT included material which, if accepted, demonstrated mistreatment of a significant number of people who had actually returned to Sri Lanka since the end of the civil war. It included information that (1) some thirteen people who had been returned to Sri Lanka had made allegations of torture on return which was later accepted by the Secretary of State or on appeal, resulting in grants of asylum; (2) a further twenty or so had been granted asylum in similar circumstances by regional UKBA officers; (3) a solicitor, Jamie Kerr referred to four further grants of asylum without appeals; (4) over forty appeals had succeeded before the FTT or the UT; (5) medical evidence supported allegations of torture on return in twenty four cases; and (6) news reports also supported other such allegations.

27. I do not propose to trawl through all the underlying documents. The primary submission made on behalf of the appellants under this heading is that the UT erred in law by holding that this material was inadmissible. It is sufficient to focus on the question of the admissibility of unreported determinations. They were presented in the form of a tabular analysis, the contents of which were not disputed: UT, paragraph 27. The UT stated:

> "27….Given that the contents of the …analysis are not in dispute, we have had regard to the information there summarised.
>
> 28. The weight that we give to this evidence is shaped by our conclusion that the underlying determinations are not admissible. At best this data is reliable as evidence that a number of appeals by Sri Lankan nationals have been allowed in the light of country guidance which we are reconsidering.
>
> 29. The fact of the appeals having been allowed indicates that certain past ill-treatment by the Sri Lankan authorities was accepted by Tribunal judges in individual cases. The data is part of a wide range of evidence that we have heard and read; this assists us in examining the situation today. However, had there been any dispute as to the contents of the tabular analysis, we would have excluded it for the same reasons as we have excluded the determinations from which that material was drawn."

I have to say that these paragraphs are not easy to follow. I think they mean that (1) the tribunal determinations were treated as inadmissible but (2) the tabulated analysis of them, being undisputed, was given some weight and was found to be of some assistance.

28. The exclusion of the tribunal determinations appears to have been based on paragraph 11 of the Senior President's Practice Direction of 15 February 2010 and the authority of AA (Somalia) and AH (Iran) v Secretary of State for the Home Department [2007] EWCA Civ 1040. Paragraph 11 of the Practice Direction prohibits the citation of unreported tribunal decisions unless (for present purposes) "the Tribunal gives

permission". Paragraph 11.3 then provides that permission will be given "only where the Tribunal considers that it would be materially assisted by citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination". The issue in AA (Somalia) was not admissibility in circumstances such as obtain in a country guidance. Its concern was more with the application of the Devaseelan [2002] UKIAT 00282 principle to cases involving different, albeit related, appellants.

29. For my part, I do not consider that AA (Somalia) was an impediment to considering the recent unreported tribunal decisions in the present case. That confirms the truism that fact-sensitive decisions are likely to be of very limited, if any, value in determining other factually distinct asylum claims. But the purpose here is to use the evidence from a range of cases to draw certain conclusions about risk in general. It seems to me that where there is a pattern in recent tribunal determinations it is capable of providing material assistance (to use the words of paragraph 11.3) to the UT when it is considering fresh country guidance. In one sense, the material has been tried and tested forensically and may be considered to be more cogent than subjective material. Nor do I see the logic in excluding the determinations but admitting a tabular analysis of them. In my judgment, the narrowness of the UT's approach was wrong.

30. However, I am not convinced that, standing alone, it would amount to a material error of law because, in the event, the tabular analysis was admitted, it was undisputed and it was accorded some weight "in examining the situation today". Furthermore, even if the determinations had been adduced, the evidence would have been of limited value. The appendix shows that most of the individuals had been picked up in 2010 and 2011, still relatively soon after the ending of the war when the risks may have been greater; and whilst the evidence showed that many returnees to Sri Lanka had been tortured, their asylum claims were assessed under the old guidance. It is not possible to know whether their claims would have succeeded under the new guidance. Nor is it possible to put these statistics in context without some information about the number of returnees who were not of interest to the GOSL, or indeed the number of asylum claims where torture was alleged but the application failed. Nonetheless, I would observe that, for future reference, the UT may be expected to be more inclined to receive this kind of evidence on a country guidance appeal in preference to hearing the live evidence of previous successful appellants describing their experiences for a second time (which, it is common ground, would be admissible). Documentary evidence of a pattern of recent tribunal determinations will often be cogent. One or two would probably not be.

The treatment of NGO evidence

31. The appellants submit that the UT was too dismissive – to the point of legal error – of certain NGO evidence, in particular that of Freedom from Torture (FFT) and Human Rights Watch (HRW). It is well known that these bodies have provided helpful evidence in many asylum appeals. However, that does not mean that it will always be accepted and reflected in country guidance.

FFT

32. The UT acknowledged the scale of the important work done by FFT in helping individual torture survivors and providing medico legal reports (paragraph 68).

However, at paragraphs 243-246 of the determination, the UT explained why, in the context of this country guidance case, it felt "unable to give the same weight to the composite reports" (paragraph 246). The reasons were the smallness of the sample, "extreme redaction" and "serious concern about the reliability and research methods adopted in the preparation of the composite FFT reports". The appellants (and FFT) may not agree with these criticisms but it is quite impossible for us, a reviewing court with a jurisdiction confined to legal error, to say that the expert tribunal was not entitled to conclude as it did.

HRW

33. The same is true of the HRW evidence. It came in part from Mr Brad Adams, who is based in California and, for logistical reasons, could not give oral evidence or be cross-examined. The UT was concerned about the timing of his reports which had been released close to arranged charter flights and had been intended, at least in part, to influence the arrangements for returns and to provide material for judicial review (paragraph 248). It cannot be said that the UT fell into legal error by not accepting his untested evidence.

34. The other witness connected to HRW was Ms Charu Lata Hogg, who works not at HRW but at Chatham House. Her contractual position inhibited some of her evidence which resulted in a great deal of redaction. The UT considered that the "level of redaction and voluntary constraint in Mr Hogg's evidence was such that we were, again, forced to choose whether to simply take her evidence at face value" (paragraph 249); and "the outcome of these [contractual] restrictions is that there is no means of our assessing whether an adequate analysis of the underlying material was made" (paragraph 252). The UT was entitled to view the evidence in this way.

Witnesses of war crimes

35. This ground of appeal relates to paragraph 356 (7) (c) of the UT's guidance. Its factual matrix starts with the following (paragraph 315):

> "Between 40,000 and 100,000 Tamil civilians died in government-designated NFZs [No-Fire Zones] in the final days of the civil war in May 2009. There were three successive NFZs, progressively smaller and moving further east. Supplies of both food and water in NFZs were inadequate. Shelling of the field hospital at Mullaivaikkal caused many deaths. The GOSL has consistently blamed the LTTE for the deaths; the Tamil community attributes the deaths to the action of the GOSL. The GOSL continues to describe this [as] a period when they were seeking 'humanitarian' protection of those in the NFZs, but its account is overwhelmingly rejected in the material we have seen…"

The guidance contained in paragraph 356 (7) (c) protects:

> "Individuals who have given evidence to the Lessons Learned and Reconciliation Commission [which reported in November

> 2011] implicating the Sri Lankan authorities in alleged war crimes."

However, the protection is limited to:

> "those who have already identified themselves by giving such evidence,"

because only they 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 crime witnesses."

Thus, the protected group are those who gave evidence to the LLRC before arriving in this country and who would, if now returned, be at real risk of persecution as a result of their having given evidence.

36. The complaint in relation to this risk category is that it is too narrow. The ground of appeal is advanced on behalf of the appellants and it is also vigorously supported by submissions made on behalf of the Intervener, Tamils against Genocide (TAG), represented by Ms Shivani Jegarajah and Ms Parosha Chandran. Their submissions essentially seek to extend the need for the protection to (1) individuals who did not give evidence to the LLRC but wish to give evidence to any future inquiry or investigation and (2) individuals who may never give such evidence but who may wish to speak out about egregious conduct witnessed by them – whether for therapeutic, political or other personal reasons. As to this second group, it is submitted that their protection needs are comparable with those of homosexuals who might be returned to Iran (see HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31) or citizens of Zimbabwe who might feel obliged to simulate support for ZANU/PF on return (RT (Zimbabwe) v Secretary of State for the Home Department [2012] UKSC 38).

37. At the moment, the evidence about these circumstances is understandably vague and speculative. It may well be that, if international pressure were to lead to the establishment of a different form of inquiry, the position would call for further consideration in a case in which appellants could give and adduce evidence about specific difficulties. However, we are not in that position (although Ms Jegarajah was able to point to current developments at the United Nations and elsewhere which could give rise to such developments). Nor is the evidence of the second putative group in concrete form. It rests on a passage in the report of Dr Smith which, on analysis, seems to relate to those who have provided evidence of war crimes. At this stage, there is no evidence of an evidence-receiving body beyond the LLRC, in relation to which protection is established. In this respect, the principal witness would appear to be Dr Suthaharan Nadarajah, a London-based expert. However, his evidence was given limited weight on these issues because, "his expertise is terrorism and he has not researched the position of returned asylum seekers". He has not been to Sri Lanka for ten years.

38. I tend to the view that counsel for the appellants and for TAG have identified a potential risk category which is not protected by paragraph 356 (7) (c). I reject the

submission on behalf of the Secretary of State to the effect that any necessary protection would be provided by paragraph 356 (7) (a) which, in my judgment, does not address these situations. However, I do not think that the UT fell into legal error by not confronting these concerns at this stage. The position is either hypothetical, un-evidenced, or both. It may need to be revisited by the UT in the future.

Conclusion on the generic grounds of appeal

39. In my judgment, the country guidance promulgated by the UT is not vitiated by material legal error. The UT "had regard to all of the material before [it], written and oral" (paragraph 17). It produced sustainable guidance after full consideration of that material.

The individual appeals

40. In addition to the generic ground of the appeal, both appellants raise grounds specific to their factual circumstances.

NT

41. The UT noted the following matters in relation to NT (paragraph 421):

> "(i) This appellant was rounded up with others including his parents and taken to Chettikulam Camp, where he was rapidly identified as an LTTE cadre and moved to Anuradhapura Camp, where conditions were worse. His parents were not moved and were released quickly.
>
> …
>
> (ii) [He] was not ill-treated while at Chettikulam Camp; if it was there that he signed the Sinhalese document or documents, we consider that indicates that it (or they) was probably a benign document (perhaps a release or transfer to Anuradhapura Camp), not a confession;
>
> (iii) [His] evidence that he signed such a document both on his arrival and after his release indicates to us that it is reasonably likely that this was a form of record keeping of his entry and exit from the camp;
>
> (iv) [He] did not sign any confession or adverse document in Anuradhapura Detention Camp;
>
> (v) He was released informally after payment of a huge bribe to the CID at Anuradhapura and left Sri Lanka on a passport to which he was not entitled."

Having considered that and other evidence the UT concluded (paragraph 426):

> "We have considered what interest the authorities might have in this appellant today. It is not suggested that [he] is among

> those in the London diaspora who are actively seeking to destabilise the single Sri Lankan state. The appellant was not a fighter; his activities for the LTTE did not include weapon training; he was a bunker digger and transporter of the wounded. One of [his] brothers is among those who disappeared in the closing days of the civil war and is presumed dead. "

The UT noted that his cousin, who was in the LTTE, "is still in detention four years after the civil war". It further noted that the appellant would be returning from London, a diaspora hotspot. Its ultimate conclusion was stated in these terms (paragraph 430):

> "Given the sophisticated intelligence available to the Sri Lankan authorities, within and without Sri Lanka, we consider that they will know what separatist activities he undertook in Sri Lanka and what his activities have been in the United Kingdom. We must ask ourselves, therefore, whether having regard to his known low level activities during the conflict (bunker digging and transporting the wounded), there is a real risk that [he] will be perceived to be a diaspora activist with a significant role in diaspora activities designed to destabilise the unitary Sri Lankan state and revive the internal armed conflict."

The UT considered it possible that his name may appear on a "watch" as opposed to the "stop" list on the airport computers. It also referred to the fact that he had not taken "any part, still less a significant part, in Tamil separatist activity in the United Kingdom". In all these circumstances, it continued (paragraph 433):

> "We do not consider, on the facts we have found, that [he] has established that there is a real risk, or that it is reasonably likely, that the Sri Lankan authorities would now regard him as a threat to the integrity of Sri Lanka as a single state. We do not consider that he would be perceived as having a significant role in relation to post conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri lanka."

On this basis, his appeal was dismissed.

42. It is not disputed that this appellant's separation from his family in the Chettikulam Camp occurred only two days after their arrival. Nor is it disputed that he was transferred by the CID to the Anuradhapura Camp where he was interrogated under torture many times. There was medical evidence corroborative of his evidence in this respect. There is, however, one feature of the determination of the UT which causes me concern. It stated (paragraph 424):

> "it appears from the evidence that [he] was not of sufficient concern in 2009 to be one of the 11,000 active LTTE cadres who were considered to require re-education through the 'rehabilitation' programme before being reintroduced into Sri Lankan civil society."

This inference also played a part in the UT's scepticism about evidence from his mother that the security forces had visited the family home looking for the appellant and describing him as an escapee and "hard core LTTE member". The UT (paragraph 422) referred to the appellant not having been put into the rehabilitation programme in 2009 as having some significance and justifying scepticism in relation to the mother's evidence.

43. The problem with this approach is that the appellant was released following payment of a "huge" bribe only three months after the commencement of his detention. The selection process for rehabilitation or prosecution was still taking place at least until mid 2010. It seems to me that the UT failed to have regard to this fact when concluding that the appellant "was not of sufficient concern in 2009 to be one of the 11,000 active LTTE cadres who were considered to require re-education through the 'rehabilitation' programme." It is plain that the authorities knew enough about the appellant to move him to Anuradhapura Camp within two days. It is also not without significance that his cousin was still in detention four years after the end of the civil war. The UT was entitled to attach significance to the fact that the appellant has not participated in Tamil separatist activity in the United Kingdom but that is not an absolute prerequisite for protection under the guidance. Paragraph 356(7)(a) is in disjunctive form and embraces the possibility of an applicant who has or is perceived as having "a significant role in… a renewal of hostilities within Sri Lanka", absent some diaspora activity, even though such activity will usually be the touchstone. In considering whether the appellant would be perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan government, it was necessary for the Upper Tribunal to consider his case on the correct factual basis. Whilst his case was not as strong as that of GJ (whose appeal was allowed), I consider that it was a material error of law for the UT to attach significance, both in relation to the appellant and in its rejection of his mother's evidence, to his not having been of sufficient concern to be one of those considered to require rehabilitation. Accordingly, I would allow his appeal and remit his case to the UT for reconsideration.

MP

44. This appellant's case has the distinguishing feature that his appeal on Article 3 grounds was allowed because of his mental health and suicide risk. He pursues his asylum appeal, which was dismissed, because, if successful, he would obtain additional benefits, most obviously a much earlier eligibility to apply for settlement in the form of indefinite leave to remain, which would arise after five years on a grant of asylum but probably only after ten years following successive shorter grants of leave in relation to his success under Article 3.

45. Although this appellant had been involved with the LTTE in the 1990s and he had been detained and tortured in 2001 to 2002, when he signed a confession prior to his release, there is no evidence of his involvement thereafter. He obtained a Sri Lankan passport openly and without difficulty in 2003 and came to the United Kingdom on a student visa in 2005. He has not participated in diaspora activities in support of LTTE resurgence. Applying the country guidance, it seems to me that his asylum appeal was correctly dismissed. There was an issue about the relationship between his case and that of his brother who won an asylum appeal in 2011 in relation to which this appellant gave evidence which was accepted. However, I am not persuaded that the

UT committed a material legal error in relation to its treatment of this aspect of the case.

46. The more important issue in this appellant's case is whether his Article 3 success ought to have led inexorably to his being granted humanitarian protection pursuant to Council Directive 2004/83/EC (the Qualification Directive). The relevant provisions are as follows:

> Article 2 (e): " 'person eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds had been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15…and is unable, or, owing to such risk, unwilling to avail himself or herself of protection of that country."

Article 15: " 'serious harm' consists of:

> (a) Death penalty or execution; or
>
> (b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

The submission of behalf of MP is a simple one. By reason of his Article 3 success he has been found to be a victim or potential victim of "inhuman or degrading treatment" as those words form the essence of Article 3 of the ECHR. If returned to Sri Lanka he would face a real risk of suffering serious harm as defined in Article 15. He is therefore "eligible for subsidiary protection" pursuant to the Qualification Directive. A recipient of subsidiary protection is essentially in the same position as a successful applicant for asylum in relation to eventual settlement and in other respects.

47. I am not persuaded that the Qualification Directive and the concept of "subsidiary protection" have the reach submitted on behalf of MP. The Recitals to the Directive make it clear that it was conceived as a step towards "a common policy on asylum", following a meeting in Tampere in October 1999, where the Council "agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees… thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution" (Recital (2)). Recital (9) then provides:

> "Those third country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a

> discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive."

48. In many cases, there is, of course, an overlap between protection under the Refugee Convention and protection under Article 3 of the ECHR. However, they are not completely co-extensive. In my judgment, the Qualification Directive was not intended to catch Article 3 cases where the risk is to health or of suicide rather than of persecution. That "health" cases form a subset in Article 3 is apparent from the judgment of the European Court of Human Rights in the leading case of N v United Kingdom (2008) 47 EHRR 39, where it is stated (paragraph 43):

> "…in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country."

Mr Husain seeks to circumnavigate this by holding the Sri Lankan authorities responsible for MP's post traumatic stress disorder and depression, together with the resultant suicide risk. However, in my judgment that is to stretch the concept too far. I am satisfied that the Qualification Directive does not do that. Accordingly, I would dismiss MP's appeal in relation to asylum and humanitarian protection. He remains properly protected under Article 3.

Lord Justice Elias:

49. I agree with both judgments.

Lord Justice Underhill:

50. I agree. I would, however, like to emphasise one point. The clear message of the Upper Tribunal's guidance is that a record of past LTTE activism does not as such constitute a risk factor for Tamils returning to Sri Lanka, because the Government's concern is now only with current or future threats to the integrity of Sri Lanka as a unitary state; and that that is so even if the returnee's past links with the LTTE were of the kind characterised by UNHCR as "more elaborate". I respectfully agree with the Vice-President that that is a conclusion which it was entitled to reach. 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.