



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/04775/2016

**THE IMMIGRATION ACTS**

**Heard at North Shields  
On the 25 September 2019**

**Decision & Reasons Promulgated  
On the 18 October 2019**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**SN  
(ANONYMITY DIRECTION MADE)**

Appellant

**AND**

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

Respondent

**Representation:**

For the Appellant: Mr H. Davies, Counsel instructed on behalf of the Appellant

For the Respondent: Ms R. Petterson, Senior 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. 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 is a national of Sri Lanka. He appeals with permission against the decision of First-tier Tribunal (Judge Holmes) ("FtTJ"), promulgated on the 28 December 2017 dismissing his appeal against the decision to refuse his protection and human rights claim.

The procedural background:

2. The appellant applied for a tier 4 student Visa on the 6 September 2010 which is granted into 1 December 2013.
3. He entered the United Kingdom on 25 September 2010. On the 1<sup>st</sup> February 2013 the tier 4 sponsor revoked their sponsorship but on 17 December 2013 the appellant was granted further leave remain as a student until 30 November 2015.
4. On 25 November 2015 the appellant claimed asylum. The basis of his claim was that if returned to Sri Lanka he would face ill-treatment as a result of imputed political opinion in that the authorities believed that he was trying to resurrect the LTTE. He claimed that between 2004 and 2009 he was a member of the LTTE and was an informer because he spoke Sinhalese, Tamil and English. He would tell a friend about troop movements and the friend would then tell the LTTE. He received basic training and learn karate but was not taught how to use weapons and was never involved in fighting.
5. On 18 November 2006 he went to India because he had been threatened by the army. He left using his own passport and returned after one week. He then went to Colombo.
6. He claimed to have helped members of the LTTE escaped between 2009 and 2010.
7. He was detained on 20 June 2010 for a period of 10 days during which time he was ill- treated and made to confess that he was in LTTE Cadre. He was released when his family paid a 15-lakh bribe. He was told to report to the army in three months' time but remained for two months and 20 days before coming to the UK on 20 September 2010 as a student.
8. The respondent refused his claim for asylum in a decision letter issued on 28 April 2016. In that decision the Secretary of State did not accept his claim that he was a member of the LTTE or that he was involved in informing against the Sri Lankan army. The Secretary of State set out a number of credibility points adverse to the applicant including the period of six years delay in claiming asylum. The respondent also considered his claim at its highest and by reference to the recent political developments in Sri Lanka and the new government in place. It was said that the background evidence demonstrated that the current situation had vastly improved since the installation of the new government in January 2015 and that the current government was taking steps to combat malpractices

and human rights violations in the security establishment. It was also noted that senior commanders of the LTTE had been released by the government after undergoing rehabilitation and/or after acquittal and as such, it was not considered that given the evidence which post-dated the country guidance decision in Gj and others that someone of the appellant's profile would be subjected to treatment amounting to persecution on return to Sri Lanka.

9. The appellant submitted grounds of appeal and the appeal came before the First-tier Tribunal (Judge Hands) on 22 December 2016. In a decision promulgated on 5 January 2017 the FTT J dismisses appeal on all grounds.
10. The appellant then sought permission to appeal that decision and permission was refused on 10 April 2017 but on renewal to the Upper Tribunal was granted on 9 May 2017.
11. Upper Tribunal Judge Rintoul granted permission for the following reasons:

“it is arguable, in the light of UB (Sri Lanka) v SSHD [2017] EWCA Civ 85, at [23] in particular (a decision not available to FTT J Easterman when refusing permission) that FTT J Hands erred in the assessment of the risks the appellant on account of his involvement with the TGTE, a prescribed organisation. While there is less merit in the other grounds, I do not consider it appropriate to limit the grant of permission. Permission is granted on all grounds.”
12. Following the grant of permission, the appeal came before deputy Upper Tribunal Judge Doyle on 31 July 2017.
13. In his decision promulgated on 8 August 2017 he considered the grounds advanced on behalf of the appellant. He reached the following conclusions on those grounds:
  - (i) The first ground of appeal relied upon the case of UB (Sri Lanka) v SSHD [2017] EWCA Civ 85. The deputy UTJ recorded that in that case both the First-tier Tribunal and the Upper Tribunal had not been referred to the 2014 Home Office policy guidance entitled “Tamil Separatism” which was material to the decision and might realistically have affected the outcome. The appellant, in that case, had claimed membership of the TGTE and the material in the policy guidance indicated that to be an organisation proscribed by the Sri Lankan government. He further recorded that that decision had been handed down after the promulgation of the FtTJ 's decision. The deputy UTJ considered the decision of the FtTJ at paragraphs 27 – 29 and reached the conclusion applying the case of UB (Sri Lanka) that the judge was “prevented from making a full assessment of the risk created by the appellant's place activities because the respondent did not refer the judge to the respondent's own country information guidance data December 2016. The judge's fact-finding was hampered because

neither parties' representatives referred to that country information and guidance" (see paragraph [11]).

- (ii) The grounds also asserted that the credibility findings made by the FtTJ were flawed. The deputy judge considered those submissions but reached the conclusion that the findings of fact made at paragraph 21 were findings that were open to the judge to make on the evidence before her. The deputy judge therefore rejected the second third and fourth grounds of appeal stating that the judge had given "clear reasons for drawing her conclusions. The judge carefully analyses each strand of evidence and provides adequate reasons for drawing the conclusion is that she does. The conclusions are well within the range of reasonable conclusions available to the judge. The second, third and fourth grounds of appeal amount to nothing more than a disagreement with the facts as the judge found them to be" (see paragraph 12).
- (iii) As to the fourth ground, it had been argued on behalf of the appellant that the FTT J incorrectly applied Section 8 of the Asylum and Immigration (Treatment of Claimants et cetera) Act 2004. The deputy judge stated that the FtTJ had set out a "comprehensive fact-finding exercise. Between paragraphs 22 and 24 of the decision the judge considered the psychiatric evidence. At paragraph 25 the judge takes a holistic view of each strand of evidence before concluding that the appellant is neither a credible nor a reliable witness. It is only then that, at paragraph 26, the judge turned her attention to section 8 of the 2004 Act. She reminds herself of the limits of the application of section 8 of the 2004 act, before finding the delay as a factor which undermines the appellant's credibility. There is nothing wrong with the judge's assessment of credibility. The fourth ground of appeal has no substance" (see paragraph 14).
- (iv) At paragraphs 15 - 20, the deputy judge then summarised the issues and the basis upon which the remittal to the FtT was to be made. The deputy judge said this:
  - "15. Although there is no flaw in the judges fact-finding, difficulty that is created is that, because parties agents agree that the judge did not have the benefit of the respondents country information guidance, and because I am told that the country information guidance could have made a difference to the decision, there is a flaw in the judges assessment of risk. An error in the assessment of risk is a material error of law. I therefore set aside the decision.
  - 16. Although I set the decision aside, I preserve the judge's findings of fact (contain between 21 and 26 of the decision). Even though this appeal succeeds on the basis of the respondent's up-to-date country information guidance is critical to the risk assessment,

that up-to-date country information guidance is not made available to me today by either representative.

17. What is required in remaking of this decision is a fully informed assessment of the risk. There is nothing wrong with the judge's fact-finding. The judge's findings of fact between 21 and 26 of the decision therefore stand. It is the risk created by sur place activity which requires reconsideration".

(v) the deputy judge set out the practice statement AT [18] and at paragraph 19 stated:

"19. In this case I have determined that the case should be remitted because both parties require the opportunity to lodge and make submissions on the up-to-date country information guidance so that the assessment of risk can be completed."

14. It is therefore plain from that decision of the deputy UTJ that he had rejected the grounds of appeal advanced on behalf of the appellant save for ground one where it was accepted that in the light of the decision of UB (Sri Lanka) (as cited), that relevant country information and guidance had not been put before the FtTJ when reaching his conclusions on the issue of the appellant's asserted sur place activities and the consequent risk on return against that background material .
15. It is also plain from that decision that the judge found that the findings of fact made at paragraphs 21 - 26 of the decision were to be preserved findings of fact and were the starting point of the risk assessment that was to be carried out by the FtT when the case was to be remitted (see paragraphs 12, 15 and expressly paragraph 16).
16. The deputy judge set out the basis upon which the remittal was therefore to take place before the FtT.

#### The decision of First-tier Tribunal Judge Holmes:

17. The appeal then came before First-tier Tribunal judge Holmes on 19 December 2017. He recorded at paragraph 2 that the challenge to the decision reached by Judge Hands had only been partially successful before the Upper Tribunal in 2017 and that the findings of fact were preserved and there was no remittal of the Article 8 ground of appeal.
18. At the hearing before FtTJ Holmes, it was argued on behalf of the appellant that the remittal of the appeal extended to Article 8. The FtTJ considered that argument but made a legal ruling that this was not open to the appellant because the grounds of the application for permission to the Upper Tribunal had not raised a challenge to the decision upon this ground and also that the decision of the Upper Tribunal did not extend to a decision to set aside the dismissal of the article 8 ground of appeal (see

the determination at paragraph 4). Following this legal ruling, the appeal was adjourned because Counsel sought to rely upon further evidence which was either illegible or had not been translated.

19. When the appeal came before the FtTJ for hearing, he set out that there was no issue over the scope of the remittal in the light of the decision of the deputy judge of 8 August 2017 and on the basis that he was not seized with any challenge to the decision to dismiss the article 8 appeal and that he had not set aside that aspect of the decision.
20. At paragraph 11 he set out his summary of the preserved findings of fact as follows:
  - (i) The appellant's claim to have been recruited by the LTTE as an informer whilst living in Sri Lanka in 2004 was untrue.
  - (ii) The appellant been able to acquire a legitimate Sri Lankan passport through legitimate means, and been able to travel to India in 2006, passing through Colombo airport on both the outward and return journeys. He had no difficulty doing so, and had not needed to resort to bribery to be able to do so.
  - (iii) The appellant's claim to be detained by the authorities in Sri Lanka was untrue.
  - (iv) The appellant was of no interest to the Sri Lankan authorities when he left Sri Lanka for the UK in 2010.
  - (v) The appellant entered the UK in 2010 having acquired a student visa. He had no difficulty in doing so and did not needed to resort to bribery to be able to do so. Nor had he needed to do so to pass through Colombo airport.
  - (vi) The appellant had not completed any course of study in the UK and gained no qualifications in the UK as a result.
  - (vii) The appellant had undertaken no sur place activity within the UK prior to 2016.
  - (viii) In 2016 the appellant had attended one demonstration held in support of Tamils in Sri Lanka, where he had been one of about 20,000 people attending. He had photographic proof of his presence, but he was not an organiser of the event, or one of those who'd acted out roles for the event. It was not suggested to FtTJ Hands that the appellant's presence at the event (by use of his name or his photograph), was evidenced by any website content.
  - (ix) The appellant did not claim asylum until 25 November 2015.
21. At paragraphs 22 - 24 the FtTJ recorded the appellant's case. In particular, that the appellant did not accept the preserved findings of FtTJ Hands and

maintained that the account given in evidence was true and sought to rely upon it.

22. As to the sur place issue, the appellant claimed have become in the UK a member of the TGTE, a proscribed organisation and that his activities were evidenced in photographs publicly available on the Internet. Therefore as a consequence, he had already come to the adverse attention of the Sri Lankan authorities and faced detention and ill-treatment upon return. In support of this he relied upon a letter from his mother. It was also stated that his commitment to the aims of the TGTE are genuine and he wished to pursue those political beliefs and on return he would be unable to do so without attracting the adverse attention of the authorities.
23. At paragraphs 25 - 29, the judge recorded the case on behalf of the respondent. It had been argued that the appellant was "demonstrably one who was prepared to lie to the Tribunal in evidence" that the Tribunal should approach evidence of caution. That he had grossly exaggerated the nature of his political activity within the UK and that the Tribunal could not be satisfied that he genuinely held any real political conviction. There was no real risk that had come to the adverse attention of the authorities as a suspected LTTE activist and if he has come to their attention, it would only be as one who is seeking to create a bogus asylum claim. It was recorded at paragraph 28 that to the extent that it was accepted that the appellant had attended any TGTE meetings or events within the last three months, then he is simply a face in the crowd and has never held any position on behalf of the TGTE and is not a member. The Tribunal should be slow to accept that any of the material relied upon is publicly available or available to the authorities.

#### Summary of the finding of facts made by FtTJ Holmes:

24. The FtTJ set out his findings of fact at paragraphs 30 -69 of the decision.
25. The FtTJ began his consideration of the assessment of the evidence by relying on the preserved findings of fact made by Judge Hands which he stated were a "series of findings that he lied to her in evidence" about his experiences in Sri Lanka and were the "starting point for an assessment of his evidence concerning his sur place claim". The FtTJ stated, "I approach his evidence on the basis that he is perfectly comfortable with lying when he considers it expedient to do so" (see paragraph [31]).
26. As to the evidence of Mr K, set out in a letter dated 7 October 2017, the FtTJ recorded that Mr K did not suggest that he had any knowledge of the appellant undertaking any sur place activity in the UK. He had not attended the hearing, had not been tendered for cross-examination and that "even if it were open to me to revisit the findings made by Judge Hands in relation to the appellant's account of his experiences, I would be unable to place any significant weight upon the evidence of Mr K."

27. As to the appellant's evidence of sur place activity in his witness statement, the FtTJ set out that appellant gave no details of any event, meeting protest or demonstration he attended in the UK but states that he is involved with them but makes no claim to membership and whilst he claimed to be an active supporter campaigning on its behalf by issuing leaflets and collecting signatures, he provided no details of when and where he did so. The judge recorded his oral evidence paragraph 35 that he only travelled to London to participate in any TGTE activity when a friend gave him the bus money. However there is no evidence from such friend and there is no documentary evidence of activity in his bank account to explain when he travelled and to tie his travel to the events when they occurred (see paragraphs [34 - 35]).
28. The appellant relied upon a supporting letter written by his mother dated 11 November 2017 in which it was claimed that the authorities had visited the family home asking for the appellant and warning that he was wanted by the authorities because they knew that he was working against the government. The letter was relied upon as evidence that his sur place activities and come to the attention of the Sri Lankan authorities and therefore he was at risk on return.
29. The FtT J observed that this was not the first letter said to have been written by the appellant's mother and that an earlier letter (although plainly written by another hand) dated 19 December 2016 was before FtTJ Hands. It purported to confirm the appellant's account of his experiences in Sri Lanka, his LTTE involvement and detention. At paragraphs 40 - 41 the FTT J set out that the appellant accepted that his mother and two unmarried sisters continue to live in the family home, that he remained in telephone contact with them whilst he claimed that the telephone calls were intercepted by the army and that they were then visited by the army and questioned, he was unable to explain why the army would travel to ask his mother where he was if they were intercepting his calls and/or knew that he was in the UK undertaking activity on behalf of a Tamil separatist organisation.
30. The FtTJ then considered the evidence of Mr NS, who did not attend the hearing. The judge reviewed the documents that the appellant claimed to be genuine and written by him dated May 2016 and November 2017. His findings in relation to these documents are set out at paragraphs 43 - 46 and summarised as follows:
- There is no evidence one way or another to suggest that he is the same person who had written letters in support of the applicant in UB;
  - whilst the letters purported to be written by an MP of the TGTE (a senior member), neither letter stated in terms of the author having ever met the appellant, nor does either letter details source of the information presented within it.

- The letter dated May 2016 purported to confirm that the appellant been an activist promoting the TGTE for 22 months (since July 2014), but offered no explanation of what (if any) check the TGTE had undertaken upon him before accepting me as an activist; no details of the dates of the meetings he is said to have attended, their location or the subject. It gives a bold assertion that he distributed leaflets and raised awareness amongst the public of Tamil genocide, without offering any information about when and where and how we did so.
- The same points were made in relation to the letter dated 27 November 2016 but suggested in addition, without any detail, that the appellant had taken part in organising demonstrations and giving logistical support. The FtTJ observed that given that he had not claimed to have undertaken any political activity in the area which is currently housed in claimed that he could only travel to London occasionally to attend a TGTE event if someone gave the money, it is difficult to identify what the author of the letter meant by this. The appellant made no claim in his most recent witness statement or oral evidence that he taken part in organising demonstrations and indeed he denied it in cross-examination.
- The judge also observed that while the letter provided information that the appellant seems to get tired and go into a depression but was able to overcome it because of his passion, the judge did not think he could attach any significant weight to it.

31. The FtTJ then considered the photographs -loose. He produced a colour photocopy of a photograph showing him standing within a room talking to 6 seated men who appear to be of Tamil ethnicity. Behind there was a poster entitled "in the name of Buddha." The appellant claimed that this had been taken on 17 December 2017 at a TGTE meeting in London (at their offices). However the judge noted, there was no evidence from the individual who took the photograph or from anyone else within it or who was present at this location upon that occasion. The witness statement made on 15 December 2017 made no reference to any such forthcoming occasion and it was not suggested by the appellant that his name as a speaker at any event ever been published nor did he suggest that the photograph had ever appeared on any publicly available website. The judge also recorded the appellant's response to having been asked how he had obtained the photograph. The appellant initially said it was sent to him by someone within a WhatsApp group which he was a member but the FTT J observed that no evidence had been reduced to identify the members of the group, the content of the discussion/messaging or the material circulated between them all the privacy settings apply to their social media contact. The judge also recorded that in re-examination, the appellant's evidence went further claiming the photograph was taken by a TGTE MP and circulated within a WhatsApp group of which he is a member.

32. The FtTJ then considered a website which included colour photographs. This was an article said to have been published upon the TGTE website on the 12 December 2017 concerning a conference held by them in December of that year. There are nine photographs within the article and one photograph appears twice which shows the appellant seated in the front row of a room full of people. The judge recorded “he is not shown in any of the photographs of the speakers at the event.” The judge recorded that the appellant accepted that his name did not appear within the article and he had made no claim in evidence that his name appeared in any relevant website or article. There was no evidence from the individual who took the photograph or from anyone else who was present at the location upon this occasion. The appellant’s own witness statement (December 2017) made no reference to this occasion. Whilst it was argued on behalf of the appellant that the article appeared on a publicly available website, there was no evidence to show that the page was freely available rather than accessible only to a restricted group.
33. The judge then turned to a further document said to be an article published upon another website. This was a six-page document containing 11 colour photographs. The date of the publication is not identified. At paragraph 55 the FtTJ recorded the appellant’s evidence that the article and photographs contained therein relate to a demonstration at Downing Street on 30 August 2017. He claimed the demonstration was organised by the TGTE and the article’s content suggested some involvement by the TGTE. There were 11 photographs and the appellant appears once at the head of the article. He is not shown in any photograph as being a speaker but is shown holding a photograph. The judge observed that this was not an enlargement of the photograph that appeared at the head of the article, but a photograph taken from a quite different angle which places the appellant at the centre. It shows him as having lowered the photograph he was holding and the other is shown to be wearing one of the yellow/red polo shirts worn by a large proportion of the crowd present. The appellant accepted his name did not appear within the article in question. The judge found that there was no evidence from the individuals who took the photograph, or anyone else present at the location. The witness statement made only the “baldest reference” to this occasion, stating simply that the appellant attended the protest. Whilst it been argued that the article and photographs appeared upon a publicly available website, there was no evidence to show the page would be freely available rather than accessible only to a restricted group.
34. At paragraph 61 to 63, the FtTJ considered two photographs of the appellant beside a pedestrian crossing which was said to have been taken on 30 August 2017. He claimed that they recorded him as being with a TGTE MP (not Mr S). The judge observed that it did show him alongside another man, but the photographs recorded no interaction between them and there was no other evidence as to who the individual was or whether he had ever met the appellant or knew who he was. The judge recorded also “the appellant is clearly placed centrally to the photographs and knows that they are being taken – the same cannot be said for the man recorded

and standing alongside at that moment.” The FtTJ considered that there was no evidence from the individual who took photographs or from anyone else present stop the witness statement made no reference to and it was not clear how the appellant acquired these photographs or why they were taken. It was not suggested they appeared on a publicly available website.

35. At paragraph 64 – 67 the judge considered four photographs said to recorded TGTE blood donation event. They consisted of two further colour photographs showing the appellant wearing a white TGTE sports and community T-shirt and to close ups of the banner alongside which is standing. He said they were taken on 22 November 2017 at a TGTE event and the appellant was clearly placed centrally and alone in one of these photographs and have been “clearly been taken to record his presence”. There was no evidence from the individual took the photographs or anyone else who was present at the location. The witness statement made no reference to them or what they showed but simply stated that he attended the event. There was nothing to corroborate the appellant’s claim made for the first time in re-examination that he acquired his photographs to his Facebook page once someone had “tagged him” as being present. He claimed individuals are TGTE MP, it is not suggested on the p behalf they appeared on a publicly available website or that his Facebook page is publicly accessible.
36. At paragraph 68 the FtTJ considered a single page containing four photographs printed from the website of an event held at Downing Street. However, it is not suggested that the appellant appeared in any of the photographs nor was it clear what event had been recorded from them.
37. Paragraph 69 considered to photographs said to be taken on 18 May 2016. These were documents before judge Hands. The FTT J recorded that the photographs were so poor that nothing could be discerned from them.
38. Having conducted a thorough assessment of all the material provided to the Tribunal since the decision of Judge Hands, the FtTJ then considered the evidence as a whole when reaching his conclusions which were set out at paragraphs 70 – 85.

#### The conclusions reached by FtTJ Holmes:

39. Those conclusions were as follows:
  - (1) he could not place any significant weight on the appellant’s evidence and the evidence given to FtTJ Hands and repeated in this hearing concerning experiences in Sri Lanka were untrue. Consequently the FtTJ found that the appellant had no adverse profile with the Sri Lankan authorities when he came to the United Kingdom and was not of interest to

them. He found that he had not been detained by them as claimed (at [70]).

- (2) The FtTJ was not satisfied that the appellant undertook any involvement in LTTE events upon arrival in the UK. Nor did he claim asylum until much later. The judge found that both of these elements were “cogent indications” that he had then no genuine political conviction in panel separatist politics and was not committed to the breakup of the Sri Lankan state ( at [71]).
- (3) The FtTJ was not satisfied that the appellant ever became an officer of the TGTE or a member. He could not place any significant weight upon the letters purportedly written by Mr S and he was not satisfied that he had any personal first-hand knowledge of the appellant. He was not satisfied that there was any reliable evidence of the appellant undertaking any activity on behalf the TGTE in 2014 or 2015 as claimed (at [72]).
- (4) The FtTJ found that if the appellant genuinely been an activist or a leafleteer or anyone who had helped organise events or meetings as claimed then it would be expected for him to be able to give clear details of when this occurred and what precisely he did. The judge found that the appellant had not been able to offer any such details. The appellant lived 300 miles away from the centre of the TGTE operations and accepted that he is dependent upon someone giving him bus fare to travel and does not claim to have undertaken activity on behalf of the organisation in the area in which he lived since making his asylum claim. The judge stated, “put simply I am not satisfied that he has told the truth when making these claims” ( at [73]).
- (5) The judge found that it was extremely difficult to identify any date for any other event within the UK that is said to give rise to a sur place claim until 18 May 2016; that event follows the refusal of the asylum claim on 20 April 2016 and the inference drawn is that if the appellant did genuinely attend the event held on that occasion, he did so purely in response to the refusal of his asylum claim and with the aim of bolstering his case and appeal. The judge stated, “the chronology is in my judgement a cogent indication that he had prior to May 2016 no genuine political conviction and no interest in Tamil separatist politics” (at [74]).
- (6) The appellant was one of 20,000 people who attended the 18 May 2016 event (according to FtTJ Hands decision). Judge Holmes was not satisfied that even if he did attend, that he was an organiser of that event or that he did anything whilst

present at it that would have drawn attention to himself or would have been likely to create a real risk that he will be perceived by the Sri Lankan authorities as an activist for either the TGTE in particular or more generally for Tamil separatism (at [74]).

- (7) As to sur place events thereafter the appellant offered no dates for any other event within the UK until 30 August 2017, which was after the DUTJ's decision that remitted the appeal. The clear inference drawn is that even if the appellant did genuinely attend events on 30<sup>th</sup> August 22<sup>nd</sup> November 10<sup>th</sup> December and 17 December 2017 he did so purely to bolster his case this appeal hearing. The judge stated "the chronology is in my judgement a cogent indication that he still holds no genuine political conviction and no genuine interest in the promotion of Tamil separatist politics, or the creation of a separate Tamil state, or more generally the overthrow of the Sri Lankan regime" (at [76]).
- (8) The appellant's presence at the events on 30<sup>th</sup> of August and 10<sup>th</sup> of December is recorded in photographs that are said to be published upon the Internet but that there was no evidence that satisfied the FtTJ that the webpages were publicly available rather than hidden behind security walls or password protected. In the alternative, even if they were publicly available (as the appellant contended) the text that accompanied the photographs does not identify him by name and the activity recorded in the photos of him holding a photograph of the demonstration or of sitting in the front row at a conference would not be sufficient to place him at risk of being perceived as an activist for the TGTE or one committed to the breakup of the unity of the Sri Lankan state or the resumption of the Civil War ( at [77]).
- (9) The FtTJ considered the ability of the authorities to undertake within the diaspora in the UK sophisticated intelligence gathering and the monitoring of opposition activities. The judge concluded that if it was the position, then the authorities would be well aware that the appellant's mere presence in the photographs was not indicative of a larger role and that "in short they would see him for what he is, someone who is simply seeking to create a sur place claim, without any genuine interest in the activities of the TGTE or Tamil separatism and generally" (at [78]).
- (10) The FtTJ was not satisfied that the photographs said to show the appellant standing alongside a TGTE MP on 30<sup>th</sup> of August or at a blood donation event on the 22 of November or at a meeting on the 17<sup>th</sup> December are publicly available. Nor was he satisfied that the man shown beside the

appellant either knew him or that the male presence alongside one another in a public street would indicate that they knew each other to any observer. Giving a blood donation would not of itself indicate a commitment to Tamil separatism or the resumption of the Civil War. Nor was the judge satisfied that the photograph of the appellant speaking to others recorded the TGTE event or that is anything other than a “staged photograph for the purposes of this hearing”. The judge stated that he was unable to identify any reason why any of those photographs had come to the attention of the authorities or why they would do so in the future ( at [79]).

40. His omnibus conclusions were set out at [80-81]:

“80. Drawing these findings together, I am not satisfied that the appellant has yet come to the adverse attention of the Sri Lankan authorities, or that there is a real risk that he is currently perceived to be a member or activist or officer of the TGTE. It follows that I am not satisfied that the appellant’s name appears upon a “stop list”, or that he faces the prospect detention at the airport upon return he does not for within the category of persons listed in paragraph 7 or 9 to the summary guidance in GJ (post-Civil War returnees) CG [2013] UKUT.

81. As a Tamil returned from the UK, the appellant is, I accept, likely to be perceived as a failed asylum seeker. Even as such the appellant is not likely be questioned at the airport upon return beyond securing confirmation of his home address in xxx, and his return to his family residence there will be then in due course be verified by the CID or police subsequently. No risk of harm attaches to that process of itself.”

41. The FtTJ then turned to what was described as the appellant’s “fallback position” based upon the country guidance case. The judge recorded that counsel for the appellant accepted that she could not advance the appeal on the basis that the situation within Sri Lanka had deteriorated to any significant extent since the guidance was issued. The judge stated that the guidance confirmed that the real focus of the shellacking authorities is to identify Tamil activists in the diaspora working for Tamil separatism, and for the destabilisation of the unity of the Sri Lankan state, in order to prevent the resurgence of the LTTE or any similar organisation, and the revival of the Civil War. Thus any enquiries, or any monitoring of the activities, of returnees is undertaken with that focus.
42. The FtTJ set out Counsel’s argument at [83] that as the appellant was generally a Tamil activist and interested in the promotion of such a state of affairs, any monitoring would reveal that and even if he could travel to his home area there would be a risk of detention and ill-treatment. In the alternative it was argued that as he was genuinely committed to such

beliefs, if unable to pursue them through fear of consequence of doing so. he will be entitled to protection relying on HJ(Iran).

43. The judge concluded as follows:

“84. In my judgement the appellant will not be obliged to lie to the Sri Lankan authorities if ever questioned about his diaspora activities; he is not a member of the TGTE, is not an officer of it, and has undertaken no organisational role on its behalf. He has grossly exaggerated to me his activities on its behalf. He is not in my judgement generally committed to the breakup of the Sri Lankan state, Tamil separatism, or a resumption of the Civil War. Accordingly I am not satisfied that he will actually do or say anything upon return to his home in xxx that would create the perception that he was, to anyone tasked with monitoring his activities. In turn I am not satisfied that he faces a future risk of detention or ill-treatment in his home area.”

#### The appeal before the Upper Tribunal:

44. Following the dismissal of his appeal, grounds of appeal were issued for permission to appeal but on 23<sup>rd</sup> January 2018 the First-tier Tribunal refused permission. On renewal, the application for permission was granted by a Judge of the Upper Tribunal (see the decision dated 22<sup>nd</sup> March 2019).
45. On the 31<sup>st</sup> May 2019, the Upper Tribunal heard the appeal against the decision of FtTJ Holmes. The UTJ recorded that the appellant was not present at the hearing and therefore heard the appeal in his absence and in his decision he gave reasons to why the FtTJ did not err in law.
46. An application was made to challenge the decision of UTJ Storey by way of an application for permission to the Court of Appeal.
47. On the 25<sup>th</sup> July 2019, UTJ Mandalia considered the grounds which included the reasons given for the applicant’s non- attendance, it being asserted that the representatives had not been served with the notice of hearing and therefore an order was made by UTJ Mandalia setting aside the decision of UTJ Storey.

#### The grounds:

48. It is as a result of that decision and order that the appeal comes before the Upper Tribunal. The grounds advanced by the appellant are those originally provided, and Mr Davies, Counsel on behalf of the appellant, relied upon the grounds which had formed the application.

49. The first ground asserts that the FtTJ erred in law in his assessment of the appellant's sur place activity and that he had inadequately engaged with whether the Sri Lankan authorities would perceive the appellant to be involved in post-war separatism in a significant manner. It is submitted that the appellant's actual involvement with the TGTE is not wholly determinative of risk.
50. It is further submitted that the judge failed to engage with the June 2017 Home Office guidance (CPIN) relating to Tamil separatism which demonstrated that the Sri Lankan government have a presence at pro-LTTE sur place activity. Mr Davies directed the Tribunal's attention to paragraph 13.1.2 -3 which cited a July 2015 ITJP Sri Lanka report on Sri Lanka's survivors of torture and sexual violence 2009 - 2015.
51. The grounds also challenge paragraphs 79- 80 of the FtTJ's analysis in which he set out that he was not satisfied that the appellant would be perceived to be a member, officer or activist of the TGTE and that his involvement with TGTE was staged and tactical. In this context it is submitted that the judge failed to engage with the evidence which showed him depicted in a series of photographs and that they had appeared on a number of websites. It is submitted also that the judge engaged with that evidence in an irrational manner by suggesting that there was no evidence of the websites readily accessible and that the websites might be restricted to a certain group.
52. The second ground relied upon is that the FtTJ failed to engage with the appellant's evidence that websites are not exclusive to any particular group. It is asserted at paragraph 8 of the grounds that the author was able to access websites with relative ease.
53. Mr Davies behalf of the appellant referred to the decision in UB (Sri Lanka) at paragraphs 23 and 24 where it was stated that the risk to the appellant did not turn merely on him showing that he was actually a member of the TGTE but relies on that membership being detected on arrival in Sri Lanka. In this context he submitted that he would be detected upon arrival as a result of the photographs and would be of interest to the authorities.
54. As to his activities, the grounds assert that the photograph submitted by him showing that he attended TGTE events and in the presence of LTTE flags and that the judge did not engage with the evidence. Furthermore, whilst the FtTJ made adverse findings against the appellant, even if his motivation was questionable, the judge failed to engage with the fact that the photographs of the appellant are readily accessible on the websites which show him being present at pro- LTTE events and events organised by an organisation opposed to the Sri Lankan state. As the guidance conceded that the authorities have a presence at such events the failure to engage with the guidance and his activity of sur place activity demonstrated a material error of law.

55. Ms Petterson on behalf of the respondent relied upon the rule 24 response opposing the appeal. In that document it stated that post hearing research cannot establish that the FtTJ was not entitled to make findings on the evidence as it was presented at the hearing. In any event, the judge did consider the appellant's account even if the website was publicly available to view (see paragraph 77).
56. It was further submitted that the judge had given valid reasons for finding that the Sri Lankan authorities alongside the preserved findings from the previous decision, demonstrated that they would have no prior interest in the appellant nor do they have any interest now other than as an opportunist who is disingenuously attending demonstrations in the United Kingdom.
57. In her oral submissions Ms Petterson submitted that the grounds did not engage with the clear and detailed findings of the FtTJ and that at paragraph 77 the judge analysed all of the photographs and those said to be published upon the Internet. He found that there was no evidence that the webpages were publicly available rather than hidden behind security walls or password protected but went on to state that even if they were publicly available, the text that accompanied the photographs do not identify by name and that the activities recorded in those photographs were not sufficient to place them at risk of being perceived as an activist for the TGTE. She submitted that paragraph 78 the judge made reference to the issue of monitoring and whilst counsel for the appellant made reference to the 2017 CPIN the FtTJ was aware of this but reached the conclusion that any assessment made by the authorities of any activities would demonstrate to them that he was someone who did not have any genuine interest in the activities of the TGTE (see paragraph 78).
58. In her submissions she distinguished the decision in UB (Sri Lanka) and that the issue was whether there was material which would properly demonstrate a fresh claim and the conclusion reached was the material could furnish a risk to the appellant. However, this does not take this appellant's case any further because the judge analysed the material and reach the overall conclusion that it would not be at any risk from the authorities should he come to their attention. She therefore submitted that decision should be upheld.

#### Decision on the error of law:

59. Having heard the submissions of the advocates and in the light of the issues raised in the papers before the Tribunal, I am not satisfied that the decision of the FtTJ demonstrates the making of an error on a point of law. I shall set out my reasons for reaching that conclusion.
60. The grounds assert that the FtTJ erred in or in his assessment of the appellant's sur place activity and that he had inadequately engaged with

whether the Sri Lankan authorities would perceive the appellant to be involved in post war separatism in a significant manner. The grounds advanced on behalf of the appellant center upon the activities carried out and the evidence that was before the FtTJ and whether that evidence would be accessible to the Sri Lankan authorities thereby leading to a risk on return.

61. This was a determination in which the FtTJ made a series of detailed findings of fact and analysis of risk based on all of the evidence that was before him, both the written documentation, photographs and the oral evidence of the appellant. Those findings are consistent with the guidance given in GJ and others which stated as follows:

*"(1) This determination replaces all existing country guidance on Sri Lanka.*

*(2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.*

***(3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.***

*(4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.*

*(5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.*

*(6) There are no detention facilities at the airport. Only those whose names appear on a "stop" list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.*

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

*(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are or are perceived to have a*

*significant role in relation to post conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.*

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

*(c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.*

*(d) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.*

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

*(9) The authorities maintain a computerised intelligence-led "watch" list. A person whose name appears on a "watch" list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual."*

62. The Judge's findings are entirely consistent with the guidance given in GJ, and in particular the following propositions: (a) the GOSL's concern now is not the past membership or sympathy, but whether a person is a destabilising threat in post-conflict Sri Lanka (paragraph 311); (b) 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 (paragraph 325); and (c) 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 which lacks in Government (paragraph 356).

63. The country materials indicate that the Sri Lankan authorities' approach is based on sophisticated intelligence, both as to the activities within Sri Lanka and the diaspora. The authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and that everyone in the Northern Province had some level of involvement with the LTTE during the civil war post-conflict.
64. 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 unity of the Sri Lankan state or Sri Lankan Government. Similarly, in terms of political activities in the diaspora, it was not considered by the Upper Tribunal in GJ as indicated in paragraph 336 of the determination that the attendance of demonstrations in the diaspora alone would be sufficient to create a real risk or reasonable degree of likelihood that a person would attract attention on return. An attendance at one or even several demonstrations is not by itself evidence that a person is a committed Tamil activist seeking to promote Tamil separatism within Sri Lanka. It was not for the political indifferent to seek to bolster an asylum claim by opportunist participation. Rather the concern is with genuine demonstrators who may be put at risk as a result of surveillance and video recording or photography. This was particularly so given the level of sophistication in the intelligence gathering.
65. The judge did not accept that the appellant had demonstrated by reference to his account as to events in Sri Lanka that there was any extant court order or arrest warrants against him or that he had been of any adverse interest to the authorities before he left Sri Lanka. The judge also rejected the appellant's evidence that following his attendance at events in the United Kingdom that members of his family had been visited by the authorities.
66. The risk category within which the appellant's circumstances *prima facie* would merit consideration would be whether he was a person who is, or is perceived to be, a threat because they are or are perceived to have a significant role in relation to post-conflict Tamil separatism
67. In this context, the grounds assert that the judge failed to engage with the parts of the CPIN dated June 2017 at paragraphs 13.1.2 and 13.1.3.
68. Those paragraphs read as follows:  
  
"13.1.2 in several cases witnesses mentioned that they or their family members had been questioned about their participation in anti-government protests or war commemoration events abroad. Some reported the Sri Lankan security forces showed them, or their families, photographs of themselves at these protests. This indicates the Sri Lankan security forces are monitoring these gatherings outside the country. In the

UK at least, some Tamil diaspora organisations have responded by banning cameras at annual Heroes Day commemorations for the safety of the participants.”

“13.1.3 In a January 2016 report on survivors of torture and sexual violence in 2015, the same organisation reported that: “there is evidence that the intelligence services have continued in 2015 to show detainees who have returned to Sri Lanka photographs of themselves attending heroes Day events and other commemorations abroad. This suggests there is continuing interest in surveillance of diaspora events.”

69. However in my judgement, it is implicit from the FtTJ’s decision that he had regard to that material in his assessment of risk and this is demonstrated by the detailed findings and his analysis of all of the evidence. As can be seen from the summary of the detailed findings set out earlier in this decision, the FtTJ began his consideration of risk by analysing the chronology and the events and the nature and type of activity undertaken. While the grounds appear to assert that the judge failed to have regard to the photographic evidence and the relevance of them, this is not the position. The judge properly assessed the photographic evidence in the context of the appellant’s overall account and reached conclusions that were open to him as to the extent of those activities.
70. In his summary findings the FtTJ found that the appellant had no involvement in Sri Lankan politics prior to his arrival nor in the six years before he claimed asylum. He was not satisfied that he was ever an officer or even a member of the TGTE and placed no weight on the evidence from Mr S for the reasons that he gave. The judge found that the appellant was not genuinely involved in any activities given his inability to give clear details of any activities undertaken. While the judge accepted that he had attended an event on 18 May 2016, the appellant was one of 20,000 people and had not drawn any attention to himself at that event. As regards the events in August, November and December, the judge was not satisfied that those photographs were published on the Internet or that the websites were publicly available rather than hidden behind security walls or password protected. In any event, and if they were accessible, he found that the text accompanying the photograph did not identify him by name and the activities undertaken (such as holding a photograph or sitting in the front row of a conference) would not be sufficient to place him at risk of being perceived as an activist or one committed to the breakup of the unity of the state or the resumption of the Civil War.
71. At paragraphs 77 and 78, the judge summarised his findings on the evidence and at paragraph 78 expressly made reference to the Sri Lankan authorities’ ability to undertake within the diaspora “sophisticated intelligence gathering” and the “monitoring of opposition activities”. Consequently the FtTJ did consider those highlighted paragraphs of the CPIN concerning the abilities of the authorities to undertake intelligence gathering at events. The grounds do not make reference to it, but the FtTJ

expressly rejected the appellant's claim that his mother had been visited by the authorities as a result of any activity carried out in the UK. Furthermore, the FtTJ was entitled to take into account that against the background of this particular appellant and the findings of fact made, that the authorities would be aware that his presence in the photographs was not indicative of any real role and that as the judge stated at paragraph 78 "in short they would seem that what he is, someone who simply seeking to create a sur place claim, without any genuine interest in the activities of the TGTE or Tamil separatism generally."

72. The judge also considered the claim made that the photographs were on accessible websites. It was open to the judge to find on the evidence before him that the appellant had not shown that the photographs were publicly available. Whilst the grounds refer to the author of them being able to access certain websites, this was not the evidence put before the FtTJ nor has it been demonstrated by any material attached to the grounds or before this Tribunal. In any event, the FtTJ went on to consider that even if those photographs were accessible, the text which accompanied the photographs did not identify the appellant by name and that the nature of the photographs (holding a photograph at a demonstration and sitting in the front row of a conference) would not be sufficient to place him at risk of being perceived as an activist for the TGTE or one committed to the breakup of the unity of the Sri Lankan state.
73. It is correct as the grounds contend that the FtTJ made strong adverse findings concerning the appellant's credibility and motivation and it is equally correct that even if his motivation to attend events was questionable, the activity undertaken by the appellant still had to be considered in the analysis of risk. However this is the analysis undertaken by the FtTJ who did engage with all of the evidence, both documentary and the oral evidence, concerning the appellant's activities which the judge had found to be "grossly exaggerated" (at [84]), and photographic evidence such as it was did not identify him by name. He concluded that when viewed as a whole it would not be indicative of any real role and that he would not be perceived or viewed as someone with a genuine interest in the activities of the TGTE or someone committed to the breakup of the unity of the Sri Lankan state.
74. Mr Davies raised a point that was not raised in the grounds based on the photographic evidence being available at the airport. However, the FtTJ considered this argument in his analysis at paragraphs 81-84. It had been accepted by Counsel that the situation in Sri Lanka had not deteriorated since the decision in GJ and others and that the real focus remained on those working for the destabilisation of the unity of the Sri Lankan state and that any enquiries or any monitoring of activities would be undertaken with that focus. Thus the FtTJ's findings of fact concerning his past history and profile, that he was not on any stop list and the level and extent of those activities were relevant to this issue and in the light of those findings it was open to the FtTJ to reach the conclusion that the appellant would not be perceived or viewed as someone with a genuine interest in the

activities of the TGTE or someone committed to the breakup of the unity of the Sri Lankan state, if either questioned or when viewed in his home area and that he would not be at risk on return.

75. For those reasons, it is not been demonstrated that decision of the FTT J does not involve the making of an error on a point of law and therefore the decision stands.

### **Notice of Decision**

76. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appeal is dismissed and the decision of the FtTJ stands.

### **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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds

Date 16 /10/2019

Upper Tribunal Judge Reeds