



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

Appeal Number: PA/02906/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 3 February 2020**

**Decision & Reasons Promulgated
On 2 March 2020**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

JS

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. R. Halim, of counsel, instructed by Fadiga & Co Solicitors

For the Respondent: Ms A. Everett, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Sri Lanka, who was born and was brought up in Killinochchi. He is of Tamil origin. It is his case that in 2001, when he was 12 years old, his mother and sister were killed in a bomb blast caused by the Sri Lankan authorities, which destroyed the Appellant's home. His father was working abroad at the time and his brothers were away. He

had no one to assist him and he was taken in by the LTTE, who took him to a camp where he received some basic military training.

2. When his father came back, he and the Appellant's elder brother visited him but the Appellant was not permitted to leave the camp. The Appellant had to undertake work around the camp and was also taught Sinhalese. He was then told that he was going to be sent to collect intelligence on behalf of the LTTE. He was placed as a servant in the home of [KB], an army officer, near Colombo. When he was permitted to have some time off, he would pass any information that he had discovered to his LTTE handlers.
3. The fact that the Appellant was acting as a spy was disclosed by the army officer's cook, when he was interrogated over a separate matter, in August 2004. The Appellant was detained by the Sri Lankan authorities in a military camp, where he was tortured on a very regular basis. In November 2005 the LTTE arranged for him to be assisted to escape from the camp and he then went into hiding with a family.
4. An agent then assisted the Appellant to obtain a student visa, which was valid from 21 September 2006 until 30 June 2009, and he arrived in the United Kingdom on 30 September 2006. From then until March 2011, the Appellant lived with and worked for a Sri Lankan family in their home. He was not able to stay with them after they were allocated social housing and became homeless. He also began to abuse alcohol at that time.
5. On 24 November 2011 the Appellant was convicted on one count of assault occasioning actual bodily harm and one count of theft and sentenced to 9 months in prison. On 5 June 2013 he was convicted of destroying or damaging property and being drunk and disorderly and given a conditional discharge. On 28 July 2014 he was convicted of using threatening, abusive or insulting words and sentenced to 16 weeks in prison, suspended for 12 months. Then on 13 July 2015 the Appellant was convicted on one count of assault occasioning actual bodily harm and one count of breach of a suspended sentence and sentenced to a total of 18 months imprisonment.
6. On 27 July 2015 the Appellant was served with a decision to make a deportation order and on 9 March 2016 his subsequent protection and human rights claims were refused and the Respondent maintained her decision to deport him from the United Kingdom.

7. The Appellant appealed and First-tier Tribunal Judge Grant dismissed his appeal in a determination promulgated on 6 March 2017. The Upper Tribunal subsequently refused the Appellant permission to appeal on 9 November 2017 and the Appellant challenged this decision and on 17 December 2018 Lord Justice Henderson granted him permission to apply for a judicial review of the Upper Tribunal's decision. On 2 April 2019 the Upper Tribunal set aside the Upper Tribunal's previous decision and remitted his appeal to the First-tier Tribunal. First-tier Tribunal Chana then dismissed his appeal once more in a decision promulgated on 19 September 2019.
8. The Appellant appealed and her decision was set aside by consent at a hearing before Upper Tribunal Judge Rintoul on 18 December 2019.

RESUMED HEARING

9. In his decision, dated 17 December 2019, Upper Tribunal Judge Rintoul recorded that the Respondent had indicated that there was no objection to the Appellant raising as a new matter his relationship with his partner but had stated that this had to be confirmed in writing. In an email, dated 24 December 2019, the Respondent confirmed that she had no objection to the Appellant raising his relationship with his partner as a new matter.
10. Upper Tribunal Judge Rintoul has also directed that any new material upon which either party wished to rely had to be served at least 10 working days before the hearing. No such material has been filed and served. However, counsel has helpfully put the documents previously emailed to the Home Office on 31 July 2019 into a ring binder and he also handed in a skeleton argument, dated 2 February 2020, at the hearing. In addition, he handed up a Country Evidence Bundle, which I admitted as it was of use to the Upper Tribunal and was material of which both the Upper Tribunal and the Respondent would have previously been aware.
11. The Home Office Presenting Officer accepted that the Appellant was a vulnerable witness and that subjecting him to cross examination was unlikely to add much to the Respondent's case. However, she made it clear that she would be relying on the refusal letter, dated 9 March 2016. She also submitted that, even taking the Appellant's case at its highest, he had not

established that he would be at risk on return to Sri Lanka. Therefore, the Appellant's witness statement, dated 31 July 2019, was formally put to him and he adopted it. He was not asked any further questions.

12. The Appellant's partner, M.D., was then called and adopted her witness statement, dated 11 December 2018. When cross-examined, she said that the Appellant had told her that he was not in touch with anyone in Sri Lanka and that he had only ever told her about the torture which he had experienced in Sri Lanka, as a child.
13. Both the Home Office Presenting Officer and counsel for the Appellant then made oral submissions and I have taken these into account then reaching my decision below.

DECISION

THE APPELLANT'S VULNERABILITY

14. In paragraph 30 of *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, Sir Ernest Ryder, Senior President of Tribunals noted that:

“To assist parties and tribunals a Practice Direction ‘*First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses*’, was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law...”

15. He continued in paragraph 31 to explain that:

“The PD and the Guidance Note [Guidance] provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:

- a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);
- b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that “the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so” (PD [2] and Guidance [8] and [9]);
- c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);
- d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and
- e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).

16. Paragraph 32 also states that:

“In addition, the Guidance at [4] and [5] makes it clear that one of the purposes of the early identification of issues of vulnerability is to minimise exposure to harm of vulnerable individuals. The Guidance at [5.1] warns representatives that they may fail to recognise vulnerability and they might consider it appropriate to suggest that an appropriate adult attends with the vulnerable witness to give him or her assistance. That said, the primary responsibility for identifying vulnerabilities must rest with the appellant’s representatives who are better placed than the Secretary of State’s representatives to have access to private medical and personal information. Appellant’s representatives should draw the tribunal’s attention to the PD and Guidance and should make submissions about the appropriate directions and measures to be considered e.g. whether an appellant should give oral evidence or the special measures that are required to protect his welfare or make effective his access to justice. The SRA practice note of 2 July 2015 entitled ‘Meeting the needs of vulnerable clients’ sets out how solicitors should identify and communicate with vulnerable clients. It also sets out the professional duty on a solicitor to satisfy him/herself that the client either does or does not have capacity. I shall come back to the guidance to be followed in the most difficult cases where a guardian, intermediary or facilitator may be required.

17. In the current appeal, counsel for the Appellant invited the Upper Tribunal to make a ‘vulnerability direction’ and to apply the guidance in *AM*. When doing so he relied on passages from the medical evidence in the Appellant’s Bundle. The Appellant was firstly examined by D. Naomi Hartree and in her report, dated 3 February 2016, she concluded that the Appellant had post-traumatic stress disorder, significant depression, anxiety with panic attacks and that he had current symptoms suggestive of psychosis including auditory hallucinations and visual flashbacks and paranoia.
18. The Appellant was also examined by Dr Frank Arnold on 3 April 2018, whilst he was detained in HMP Wormwood Scrubs. In his report, dated 20 April 2018, Dr Arnold concluded that the Appellant was suffering from post-traumatic stress disorder. In paragraph 41 he also noted that the Appellant reported having intrusive memories of, and flashbacks of, burying his mother and sister and being tortured and hearing voices telling him to kill himself.
19. Finally, Dr Rachel C. Thomas, a Consultant Clinical Psychologist and Consultant Adult Psychotherapist, had assessed the Appellant on 28 July 2018. At paragraph 154 of her report, dated 15 October 2018, she found that the Appellant was “a considerably traumatised man, who presented in this consultation in a manner entirely consistent with an individual suffering from severe symptoms of a Major Depressive Disorder with additional moderate-severe symptoms of PTSD”.
20. At paragraph 106, she had also found that:

“His dual diagnosis with PTSD also renders him poorly orientated to time and place with recurrent flashback phenomena. I consider that both these factors will render him a poor historian, especially in relation to traumatic experience which, due to post-traumatic avoidance, he will rather choose to avoid and dissociate than recall accurately. In summary, I consider that the credibility issues highlighted by the SSHD are highly likely to be due to the presence of psychiatric disorder rather than to adverse credibility as has been deemed to be the case to date”.
21. In the light of this psychiatric evidence which was collected over two to three years, I find to the requisite low standard of proof that the Appellant is suffering from a number of over-

lapping severe and chronic disorders, which will have impacted on his ability to provide a cogent and consistent account of past events. There is no indication that any of these conditions have been successfully treated and resolved. Therefore, his ability to give cogent and consistent oral evidence at the hearing is clearly compromised and any attempt to do so would be likely to exacerbate his symptoms and cause him additional trauma. As noted above, the Home Office Presenting Officer did not dispute that this was the case or seek to cross examine the Appellant.

22. I am aware that the Appellant was able to give his solicitors a very detailed account of his time in the LTTE, his escape from detention and his past life in the United Kingdom. I do not take an adverse point in relation to the additional detail contained in this statement, as it is clear from the record of his substantive asylum interview that it took place on 22 October 2015 in HMP Pentonville between 14.30 and 16.05 and without the presence of any legal representative. In addition, the account which the Appellant gave in this interview was not inconsistent with the witness statement on which he now relies, but did not provide anywhere near the level of detail later provided. It is also clear from paragraph 93 of the record of the interview, that the Appellant had written down further details which he wanted to tell the interviewer but that the Prison Service insisted that the interview was brought to an end before this could happen. The Appellant does not appear to have been given an opportunity to provide this evidence at a later date.
23. At paragraph 33 of *AM* Sir Ernest Ryder also found that where an appellant's credibility is in issue "... there is particular force in the Guidance at [13] to [15]:

"13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.

14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those [who] are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.

15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and this whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind.”
24. In the refusal letter the Respondent stated that the Appellant’s “claim to have been involved in espionage activities...[was] considered to be without merit or foundation”. However, when reaching this finding the Respondent did not take into account the fact that the Appellant was a child when he had been acting as a spy and this will necessarily have impacted on his understanding of events. In addition, the Appellant was later diagnosed with a severe mental disorders, which both Dr. Hartree and Dr. Thomas concluded had a clear impact on his cognitive abilities. Therefore, throughout my consideration of the merits of the Appellant’s appeal I have taken into account the fact that he is a vulnerable witness whose mental health has compromised his ability to meet the case made against him and explain what appears to others to be implausible.

LIABILITY TO DEPORTATION

25. When the Appellant was sentenced to a total of 18 months imprisonment on 13 July 2015, he became liable to automatic deportation pursuant to section 32 of the UK Borders Act 2007, as a person who was not a British citizen and who had been convicted of an offence in the United Kingdom and had been sentenced to a period of imprisonment of at least 12 months.
26. Section 32(5) of the Act states that “the Secretary of State must make a deportation order in respect of a foreign criminal” and sub-section 32(6) also states that “the Secretary of State may not revoke a deportation order made in accordance with subsection 32(5) unless-
- (a) he thinks that an exception under section 33 applies”.
27. The Appellant relies on section 33(2) of the Act which outlines that Exception 1 occurs “where removal of the foreign criminal in pursuance of the deportation order could breach-

- (a) a person's Convention rights, or
- (b) the United Kingdom's obligations under the Refugee Convention".

THE APPELLANT'S ENTITLEMENT TO REFUGEE STATUS

28. The Appellant continues to submit that he has a well-founded fear of persecution in Sri Lanka on the basis of political opinion and relies on past persecution, the fact that he previously acted as a spy for the LTTE, that he was helped to escape from detention and the fact that he supports the TGTE.. The Respondent does not accept that the Appellant acted as a spy for the LTTE or that he would have been sufficiently proficient in Sinhalese to do so. Furthermore, she did not accept that the Appellant had ever been detained, tortured and ill-treated by the Sri Lankan authorities. At the time of the Respondent's decision the Appellant had not provided her with any expert medical evidence about his scarring or his psychological conditions.
29. She also did not find that the Appellant would be at risk on return as he had not ever been detained by the Sri Lankan authorities, had been able to apply for entry clearance as a student and had left Sri Lanka using his own passport. In addition, she did not accept that any diaspora activities the Appellant had been involved with would have attracted the attention of the Sri Lankan authorities.
30. There have been two previous appeal hearings in the Appellant's case but the decision by First-tier Tribunal Judge Grant was set aside by the Upper Tribunal in a decision promulgated on 2 April 2019. Upper Tribunal Judge Rintoul also set aside First-tier Tribunal Judge Chana's decision and explicitly stated that none of her findings of fact were to be preserved.

PAST PERSECUTION

31. The Appellant has submitted a very significant amount of medical evidence in relation to his claim to have been extensively tortured by the Sri Lankan authorities in or around 2004-2005.
32. Dr. Hartree assessed the Appellant for five hours on 5 January 2016 and used the Istanbul Protocol to assess the possible causation of the multiple scars on the Appellant's body. She

also prefaced her detailed findings with a general and useful explanation of how scars and lesions are formed. She found that the majority of the scars on his head, face, upper body and the back of his arms and torso were highly consistent with the ill-treatment in detention in Sri Lanka, as reported to her by the Appellant. Other scars were found to be consistent with his account. She also noted that the good condition of the Appellant's remaining teeth and the position of his missing teeth was highly consistent with two of his canine teeth, one on each side, having been removed by pliers, as asserted. She also found that scars on his hand were consistent with a cut caused by glass, which had been stitched and then the sutures being deliberately pulled during an interrogation.

33. In paragraph 7.56 of her report, Dr. Hartree concluded that the Appellant's overall scarring pattern was highly consistent with his account of torture. In particular, she noted that he had a "large quantity of scarring: 43 numbered lesions, many of which are groups of multiple scars, meaning he has well over 100 individual scars". She also noted that "the scarring is distributed extensively over his body, and includes scarring in sites not commonly injured accidentally, such as the top of the head, the left eye socket, the base and back of the neck, tops of the shoulders, front/inner aspects of the upper arms, the forearm near the fold of the elbow, and non-protruding areas of the back".
34. She accepted that scars on his left forearm were typical of a history of self-harm but that overall the scarring pattern was not suggestive of infliction by another person at his request for the purpose of faking torture. She also accepted that some of his scars could have been as a result of his being homeless and involved in fights and assaults and she specified which these were. However, in paragraph 7.6.1 she concluded that he also had scarring which was suggestive of deliberate ill-treatment rather than street assaults and she listed these.
35. At paragraph 8.12 of her report she also found that the manner in which the Appellant gave his history and his psychiatric symptoms did not appear exaggerated or faked and that he had to be encouraged to talk about his experience of torture and trauma it has caused. She discussed that inconsistencies which had arisen in his account to the Respondent and various clinicians and concluded at paragraph 8.20 that:

"Overall, my assessment is not able to exclude the possibility of a feigned or exaggerated history or symptoms. However, I am concerned that [the Appellant's] scarring and his

psychiatric history, medical records and psychological presentation to me, combine to raise clinical suspicion of severe interpersonal trauma such as torture, with proportionately severe mental illness, and that his overall clinical psychological picture is highly compatible with past torture. In my opinion further psychiatric or psychological assessment is required, by a clinician experienced in working with survivors of torture or ill-treatment”.

36. Dr. Arnold also examined in the Appellant on 3 April 2018 and provided some useful body maps. His findings mirrored those of Dr. Hartree. In addition, he found that the Appellant’s testes were abnormally tender and that the sole of his feet were also tender. He concluded that all of his clinical findings accorded with the history of abuse given by the Appellant and none were in conflict with it. When doing so he applied the Istanbul Protocol. He also found it clinically plausible that the Appellant’s PTSD may have been exacerbated by his ill-treatment.

37. I was also greatly assisted by Dr. Thomas’ report., dated 15 October 2018. In paragraph 105 of her report she stated:

“I am aware that the SSHD has considered [the Appellant] not to be psychologically credible due to various inconsistencies in his evidence given within Home Office interviews. However, as noted above, it is my view that these can be entirely explained by his severe cognitive impairment (in concentration and memory) as described above”.

38. She added at paragraph 110 “the fact of [the Appellant] not claiming asylum immediately on arrival in the UK can also be correlated psychologically with his reported extreme fear of all authority personnel, including in the UK. [He] reported in this interview that he had no way of knowing, on arrival in this country, that the British police and immigration authorities were safe and would not arrest, torture and/or deport him in the way he had been reportedly abused in his native country”.

39. She concluded:

“155. I consider the principal cause of [the Appellant’s] psychiatric disorder to be the alleged traumatic experiences of incarceration and torture, which he reports enduring in Sri Lanka, against the background of the deaths of his close family members and which I consider to be psychologically credible”.

40. Taking all of this evidence into account and applying the requisite low standard of proof of a serious possibility or a reasonable degree of likelihood I find that the Appellant was tortured and ill-treated, as claimed, after being detained by the Sri Lankan authorities.

THE CREDIBILITY OF THE ACCOUNT OF THE EVENTS LEADING UP TO THE APPELLANT'S DETENTION

41. For the reasons given above when concluding that the Appellant was a vulnerable appellant, his mental health means that the Appellant will have found it very difficult to give a consistent and cogent account of all of the events which lead to him claiming asylum. It is in this context that the role of an expert witness becomes a useful and relevant tool.
42. When considering whether the Appellant was detained as claimed by the Sri Lankan authorities on account of his membership of and activities on behalf of the LTTE, I have been assisted by the report provided by Dr. Algar-Faria. I have taken into account his academic qualifications, the time he has spent in Sri Lanka, his own military background and his relevant publications and have concluded that he is well qualified to prepare his expert report. I have also noted that his report addressed the key issues in a very clear and concise manner and that his opinions were heavily footnoted to relevant and well-respected sources.
43. His report outlines his instructions and clearly states that any decision about the credibility of the Appellant's account is for the court to make. In the substance of his report, he confirms that the Sri Lankan authorities were bombing the LTTE controlled Vanni area, which included Kilinochchi in and around 2000, which supports the Appellant's account of his mother and sister being killed. He also confirmed that the LTTE did recruit a number of child soldiers, sometimes as young as nine. He also quoted from a Human Rights Watch report which noted that at this time recruits underwent stringent basic training and were then allocated to different units or tasks; one of which was intelligence gathering. In addition, he referred to an OHCHR report in 2015 which confirmed that child soldiers were known to have been used for espionage work and a news report of another boy being used to spy on an army officer in 2002.

44. Interestingly, he also provided a context for the visits the Appellant said that he had witnessed during his time in the army officer's house. The expert referred to an article entitled *Fueling the Sri Lankan conflict: Arms transfers to Sri Lanka* in a book entitled *Arms Trade with Sri Lanka – global business, local costs*. In particular, it stated:

“what little equipment was supplied could be considered or at least presented as quite defensive – an [offshore patrol vessel] and several air surveillance radars. However, India still seems to have felt uneasy about these transfers. Very little publicity was given to them”.

45. The chapter also noted:

“India reacted to Sri Lankan plans to buy JY-11 air search radars by complaining that these would ‘intrude’ in Indian airspace since the radars would cover part of Southern India, which was until then out of range for Chinese and Pakistani radar eyes. It was probably feared that the radars would come with some Chinese operators and that information would be used also by China. Subsequently, India offered its own Indra air search radar to Sri Lanka”.

46. The expert also noted in paragraph 5.5.4. of his report that “the LTTE was thoroughly reliant on their maritime fleet ‘in supplying explosives arms, ammunition, and other war-related material to the LTTE theatre of conflict. In my opinion, it is therefore plausible that the LTTE would have been interested in information collected by [the Appellant] such as information about the sale of a radar system between India and Sri Lanka”.

47. The expert also confirmed in paragraph 5.6.2, that there is a difference in the dialect spoken by Sri Lankan Tamils and Indian (or Upcountry) Tamils but he added that it would be relatively easy for the Appellant to modify his manner of speaking as the dialects were more or less mutually intelligible and the differences were grammatical, relating to the formation of plurals and the conjugation of verbs.

48. In her refusal letter, the Respondent had relied upon the fact that there was a ceasefire in place in Sri Lanka between 2002 and 2006 and that, therefore, the Sri Lankan government would not have been buying military supplies at that time and the LTTE would not have been spying on them. However, in paragraph 5.5.1. of his report, the expert refers to reports of Sri Lanka buying equipment from India in the early to mid 2000s. In paragraph 5.7.1. he also refers to a

news report about the use of a spy in 2002 and stated that it was “plausible that the LTTE continued to gather evidence on the Sri Lankan army during the ceasefire period”.

49. Taking this evidence into account in its entirety I find that it rebuts the findings made by the Respondent in her refusal letter and that on the requisite low standard of proof that the Appellant did act as a spy for the LTTE, as claimed.
50. In her refusal letter, the Respondent did not accept that the Appellant would have been able to escape from detention. However, in paragraph 5.9.2. of his report, the expert stated that “it was common at the time of [the Appellant’s] detention for detained individuals to be offered an option to ‘escape’ in return for a bribe from the detainee themselves or an associate of the detainee”. He based this on extracts from the Human Rights Watch report *We Will Teach You a Lesson*. He also added at paragraph 5.9.3. that the Appellant’s claim to have been shot at whilst he was ‘escaping’ was also consistent with the report and he commented that “a detainee’s erstwhile captors would not want to be perceived to have assisted someone in escaping, particularly if that detainee was a suspected LTTE member”. I also note that the account the Appellant gave of his escape in answer to question 65 in his substantive asylum report was clear and that he has not deviated from this account since.
51. Taking this and the totality of the evidence into account, and applying the requisite low standard of proof, I find that the Appellant did escape from detention as claimed.
52. The Respondent also took into account the fact that the Appellant had left Sri Lanka with a student visa and using his own passport. It is his account that the LTTE managed to facilitate his departure. Again, his account has remained consistent. I also note that he was a child at the time and it was reasonable for him to rely on adults to assist him and that is especially the case in the light of my findings in relation to the evidence relating to the torture and trauma he had experienced whilst in detention, which are likely to have made him particularly vulnerable at that time. In addition, as stated above, I have accepted his account of other events in Sri Lanka on the requisite low standard of proof and I find, applying the same standard of proof, that there is no basis upon which to doubt his account about his departure from Sri Lanka.

53. When reaching my credibility findings above, I have taken into account the delay by the Appellant before he applied for asylum. However, it is clear from the detailed medical evidence above and the opinions of the three doctors that the Appellant is suffering from post-traumatic stress disorder and that one of the elements of this disorder is that the individual will seek to avoid any situations which will necessitate him re-living his past trauma, such as explaining his past in an asylum application. I find that this is a reasonable explanation for his delay in the context of my findings above about the credibility of his accounts and the physical evidence of him being tortured.
54. Furthermore, the test for entitlement to international protection under the Refugee Convention is a prospective one and I must decide whether he will be at risk of persecution and ill-treatment if removed to Sri Lanka in the context of the findings I have made above about his past ill-treatment and torture.
55. I have reminded myself that *GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC) remains current country guidance and that in that case the Upper Tribunal found that:

“(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.

RISK ON RETURN

56. As found above, the Appellant was an active member of the LTTE when he was a child, acted as a spy for them, was detained and tortured and then escaped.

57. In paragraph 5.9.4. of his expert report, Dr. Algar-Faria referred to a March 2014 report by the Bar Human Rights Committee of England and the International Truth & Justice Project, Sri Lanka entitled *An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009* which explained that those who accepted a bribe from a detainee were "responsible for ensuring the reason for the suspect's release is recorded. A person recorded as having escaped or being missing would be of significant adverse interest to the authorities".

58. This finding was echoed in paragraph 10 of *RS (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1796, where Lord Justice Floyd noted that:

"Paragraph 25.32 of the March 2012 Country of Origin Information (COI) Report for Sri Lanka issued by the UKBA contains extracts from a Foreign & Commonwealth Office (FCA) Report on the FCO information gathering visit to Colombo in August 2009. The extracts relate to whether specific factors would affect the way in which an individual is treated at the airport. One of the extracts reads:

“If an individual has jumped bail/escaped from custody. The senior intelligence official said that the person would be produced at Court. The Superintendent, Criminal Investigations Department (CID) agreed. The representative from Centre for Policy Alternatives said that the individual would definitely be stopped”.

59. Lord Justice Floyd also added at paragraph 26, when considering the particular and similar circumstances of the appellant in that case, that “...The authorities obviously have an interest in an LTTE member, who they have kept in detention for 18 months, and are unlikely to cease to have that interest if the detainee escapes”. Taking this and the totality of the evidence into account and applying the requisite low standard of proof, I find that there will be an official record of the Appellant’s ‘escape’ which could lead to him being detained on arrival in Sri Lanka.

60. In the alternative, I have noted that in paragraph 5.10.2. of his report, the expert found that there was a risk that [the Appellant’s] name could appear on the ‘stop’ list but found that it was difficult to state this with any certainty. But he did conclude in paragraph 5.10.7 of his report that returnees who do not match the profiles listed in *GJ* are still being detained. He based this conclusion in part on the OHCHR report *Visit to Sri Lanka – Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms whilst countering terrorism*, 14 December 2018. In this report the Special Rapporteur found that:

“Entire communities have been stigmatised and targeted for harassment and arbitrary arrest and detention, and any person suspected of association, however indirect, with the LTTE remains at immediate risk of detention and torture”.

61. In paragraph 5.11.18.1 of his report the expert also referred to the Human Rights Watch Report, referred to above, which stated that:

“Since the end of the armed conflict, other Tamils living abroad, returned to Sri Lanka only to be arrested immediately or soon after arrival, and they too have been subjected to torture, including rape, while in custody. A number of these were questioned about alleged activities abroad, including peaceful criticism of the Sri Lankan government”.

62. Taking all of this into account I also find that the risk facing the Appellant would be heightened by the fact that there is likely to be a record of his escaping from detention and the fact that when he did so he was a suspected member of the LTTE. The Respondent also accepted in her refusal letter that the Appellant may have attended one or more demonstrations in London which had been organised by TGTE. The Appellant has not been able to produce any photographs of his attendance, as he does not like his photograph being taken. But in their witness statements his friends, TS and KJ, confirmed that they had met the Appellant at a number of TGTE meetings in London. Given the surveillance carried out by the Sri Lankan authorities of diaspora activities, it may be that his presence at these meetings has also been recorded. Furthermore, as noted by the expert in paragraph 5.11.20 of his report, the TGTE is a proscribed organisation in Sri Lanka and it is a crime to be associated with it anywhere in the world.

63. In addition, if the Appellant were to be stopped and questioned in Sri Lanka, his reaction in any such interview and any perceived unwillingness to answer questions, is likely to give rise to further suspicion. When reaching this conclusion, I have taken into account what was said by Dr Rachel Thomas at paragraph 2016 of her report, which is also quoted above:

“His dual diagnosis with PTSD also renders him poorly orientated to time and place with recurrent flashback phenomena. I consider that both these factors will render him a poor historian, especially in relation to traumatic experience which, due to post-traumatic avoidance, he will rather choose to avoid and dissociate than recall accurately”.

64. Taking this and the totality of the evidence into account and applying the requisite standard of proof I find that the Appellant will be detained by the Sri Lankan authorities if removed there. In paragraph (4) of *GJ* the Upper Tribunal found that “if a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection”.

SUFFICIENCY OF PROTECTION

65. The Appellant has a history of past persecution by the Sri Lankan authorities, as found above, and fears further persecution by them if removed to Sri Lanka. Therefore, I find on the

requisite low standard of proof that there would be no sufficiency of protection for the Appellant if he were to be removed to Sri Lanka.

INTERNAL FLIGHT

66. I have taken into account the finding by the Upper Tribunal in paragraph (5) of its headnote in *GJ* and note that “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”. Therefore, I find on the requisite law standard of proof that there would be no internal flight option for the Appellant within Sri Lanka.

HUMAN RIGHTS CLAIM

67. For the reasons given above I also find that removing the Appellant to Sri Lanka would give rise to a breach of Article 3 of the European Convention on Human Rights on account of the serious risk that he would be ill-treated by the authorities in detention.

68. Given that I have found that his removal would breach his rights under the Refugee Convention and Article 3 of the European Convention on Human Rights due to this treatment, I have not needed to consider whether his removal would give rise to a serious risk to his mental health or breach his Article 8 rights.

69. However, I accept on the basis of the medical evidence and, in particular, paragraphs 119 to 128 of Dr Rachel Thomas’s report that there is a serious risk that the Appellant would not be able to tolerate the trauma of being returned to Sri Lanka where he believes that he will be tortured once more. She concludes that his return would precipitate a psychiatric crisis and render him at considerable risk of suicide and also render him so psychiatrically unwell that he would not be able to access psychiatric treatment.

DECISION

(1) The Appellant’s appeal is allowed under the Refugee Convention.

- (2) The Appellant's appeal is also allowed under Article 3 of the ECHR for the same reasons.

Nadine Finch

Signed
Upper Tribunal Judge Finch

Date 24 February 2020