



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/00593/2020

THE IMMIGRATION ACTS

Heard at Field House, London  
On Tuesday 23 November 2021

Decision & Reasons Promulgated  
On Wednesday 15 December 2021

Before

UPPER TRIBUNAL JUDGE LINDSLEY  
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

NR  
(ANONYMITY ORDER MADE)

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms Antonia Benfield, counsel

For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

**BACKGROUND**

1. The Appellant is a citizen of Sri Lanka, born in April 1990. He arrived in the UK on 24 November 2010 with leave to enter as a student. His leave was curtailed on 17 June 2012 as his college had its sponsor licence revoked. He then remained in the UK unlawfully.

2. On 20 September 2013 the Appellant made a protection claim when he was encountered working illegally. The Respondent refused his claim on 6 January 2020. His appeal against that decision was dismissed by First-tier Tribunal Judge AM Black (“the Judge”) in a determination promulgated on 26 March 2021.
3. Permission to appeal to this Tribunal was granted by Upper Tribunal Judge Gleeson on 22 June 2021 on the basis that it was arguable that the Judge erred in law in light of both the Appellant’s grounds of appeal and also what was said in KK and RS (sur place activities: risk) Sri Lanka GC [2021] UKUT 130 (IAC) (“KK”), given that it was found by the Judge that the Appellant had become a member and attended meetings of the Transnational Government of Tamil Eelam (“TGTE”), facts which KK held increase the risk of someone’s ill-treatment by the Government of Sri Lanka (“GoSL”).
4. It is right to note at the outset that neither party suggested that the Judge’s failure to apply KK, a country guidance case decided after her decision had been promulgated, could amount to an error of law. As the Court of Appeal has very recently reaffirmed (see MA (Iraq) v Secretary of State for the Home Department [2021] EWCA Civ 1467 at [79]), they were correct not to do so. KK is however relevant to any re-making of the Judge’s decision which we undertake pursuant to section 12(2)(ii) of the Tribunals, Courts and Enforcement Act 2007. As was also common ground, any such exercise must be carried out as at the date of the hearing of the appeal before us.
5. The matter came before us to determine whether the Judge had erred in law, if so, whether the decision and any findings should be set aside, and if so, whether the decision should be re-made. At the hearing, we began by hearing submissions from each party as to whether the decision of the Judge involved the making of an error on a point of law. Having done so, we informed the parties that that we were satisfied that there was such an error, as set out in more detail below.
6. Having made that decision, we were of the preliminary view that we could proceed to re-make the decision in light of KK on the basis of the factual findings made by the Judge that were unaffected by the error found and without hearing further evidence. We therefore canvassed such an approach with the parties. Ms Benfield and Mr Tufan indicated that they were content to proceed straight to submissions on how the decision should be re-made on those preserved findings and without the need to take further evidence. This is therefore the approach we adopted.
7. After hearing this second set of submissions, we deliberated briefly and then informed the parties that the appeal would be allowed on protection and human rights grounds for reasons that we would set out in writing, which we now do.

## **ERROR OF LAW**

### Submissions

8. In the grounds of appeal and her oral submissions, Ms Benfield submitted in summary as follows. It was argued firstly that inadequate reasons had been given why only limited weight was given to the evidence of Mr RP, an elected member of the

parliament of the TGTE. He had provided a written statement and gave oral evidence in support of the Appellant before the First-tier Tribunal. The Judge had found him a credible and reliable witness and noted that there was no challenge to his reliability. She found however that he had limited knowledge of the Appellant from April 2019 to March 2020 when lockdown occurred. However, Mr RP's witness statement goes to the sincerity of the Appellant's beliefs and his attendance at meetings, and concludes that he is extremely committed to the cause of Tamil Eelam. Secondly, Ms Benfield argued that the Judge gave inadequate reasons why the Appellant's political opinion was found to be contrived. There were, it was submitted, no adequate reasons given why the pandemic was not a good reason for failing to be involved with TGTE activities during that period, particularly as there was medical evidence that the Appellant is asthmatic and needed to shield and there was no evidence of volunteer involvement virtually during this period of time. It was accepted by the Judge that the Appellant had supported the LTTE in the period 2006-8, that he had family in the LTTE and had engaged in protests in the UK supporting Tamil Eelam. Ms Benfield emphasised orally that it had never been the case that an assessment of an individual's motivation for engaging in sur place activities was a relevant factor in determining risk on return to Sri Lanka. Thirdly, Ms Benfield argued that on the findings set out at paragraphs 67-111 of the decision it was irrational to have found that the Appellant would not be of adverse interest to (and therefore at risk from) GoSL. In particular, it was accepted that the Appellant is a member of a proscribed organisation, the TGTE, and that he had historically supported the LTTE and been in the UK for 11 years and that therefore it was an unsafe conclusion that the GoSL would not believe he was a genuine supporter of the TGTE. Given the 'paranoid' (Ms Benfield's word) nature of the GoSL, the assessment of the Appellant's ability to persuade the GoSL that his activities for the LTTE and membership of the TGTE were contrived for the purposes of his asylum application was speculative and unreal.

9. There was no rule 24 response from the Respondent. Mr Tufan sought to defend the conclusions, reasoning and reasons of the Judge. He however accepted that, as the Court of Appeal held in Danian v Secretary of State for the Home Department [1999] EWCA Civ 3000, if the Appellant would otherwise be at risk as a result of sur place activities, the fact that they had been undertaken in bad faith did not prevent that person from being at such risk, and therefore from falling within the definition of a refugee.

## Discussion

### *Ground 1: Mr RP's evidence*

10. In relation to the Appellant's first ground, relating to the evidence of Mr RP, the Judge summarised that evidence and her assessment of it at §§73-75 as follows.

*"73. I heard the oral evidence of Mr [RP] who is 'an elected Member of the Parliament of the Transnational Government of Tamil Eelam' ('TGTE'). Mr [RP] first joined the TGTE in 2014 and was elected a member of parliament in 2019. [He] first met the appellant in August 2019; he was introduced by a mutual friend 'Deni' who described the appellant as a person*

*who 'used to be very active within the Tamil Diaspora community supporting the cause of Tamil Eelam'. Mr [RP]'s evidence is that he had 'been involved within the Tamil Diaspora Community for a while; but he did not recognise the appellant, so DENI explained that the appellant used to be active before [RP] became active in this field. When they first met the appellant told Mr [RP] about the cricket ground protect and the actions of his cousin. It is perhaps telling that this was not an event at which the appellant ran onto the cricket field; he merely attended the event with protesters. I do not consider his attendance at that event to be a mark of any political activity within the Tamil diaspora at that time. That said, I do accept the appellant had attended some annual pro-Tamil events, such as Martyrs' Days.*

*74. Mr [RP's] evidence is that, from talking to the appellant in 2019, he realised the appellant was committed to Tamil Eelam; he invited the appellant to join the TGTE and 'restart his activities'; at that time the appellant was 'not ready to join' the organisation. Since that meeting the appellant has attended Sunday TGTE meetings to which Mr [RP] gave him a lift. Mr [RP's] evidence is that the appellant attended 4-5 meetings with him before volunteering at the Martyr's Day event on 27 November 2019. At that event the appellant collected signatures for the 'Refer Sri Lanka to the ICC' campaign. Mr [RP's] evidence is that the appellant worked with him to organise the protest outside the Sri Lankan High Commission on 4 February 2020; the appellant designed placards for this protest and 'led slogans during the protest'. Mr [RP] has not seen the appellant since the onset of the COVID-19 pandemic as the appellant is classed as a vulnerable person. He expected the appellant to actively support the cause of Tamil Eelam once the lockdown had eased.*

*75. There is no challenge to the reliability of Mr [RP's] evidence but it is limited: his involvement with the appellant has been limited in the period between August 2019 and the start of lockdown in March 2020, some 7 months. His assessment of the appellant's commitment to the Tamil political cause is, to some extent, based on what he has been told by others, including the appellant himself. There is no suggestion in this witness' evidence that he has given thought to the possibility that the appellant might be engaging in pro-Tamil activities to bolster his asylum claim."*

11. No criticism was made of the Judge's summary of Mr RP's evidence. As can be seen from that summary, the evidence he gave contained factual elements and elements of opinion. Both are admissible (see Rule 14(2) of the First-tier Tribunal (Immigration and Asylum Chamber) Rules), but in considering the Appellant's first ground of appeal, it is important not to conflate the two. As the Judge noted, there was no challenge to the reliability of Mr RP's evidence and she appears to have accepted the evidence of fact, e.g. his evidence of the encounters that he had with the Appellant, what he had been told by the Appellant and others about the Appellant, his invitation to the Appellant to join the TGTE, and the Appellant's initial reluctance but subsequent decision to do so.
12. The core of the Appellant's complaint to this Tribunal however is in relation to the Judge's consideration of Mr RP's "assessment of the appellant's commitment to the Tamil political cause", that is, Mr RP's opinion as to the Appellant's subjective reasons and motives for engaging in his sur place political activity. It is however open to a Tribunal, while accepting as true the factual account underpinning an opinion reached by a witness as to the state of mind of an appellant, not to accept that witness' ultimate opinion as to that state of mind: in respect of similar such opinion evidence about the

genuineness of an individual's professed religious conversion, see MH (review; slip rule; church witnesses) Iran [2020] UKUT 125 (IAC).

13. In this case, the Judge did not accept Mr RP's opinion of the genuineness of the Appellant's commitment to the Tamil political cause because of the limited involvement he had had with the Appellant, the fact that Mr RP's opinion was based to some extent on what he had been told by others, including the Appellant, and because he did not appear to have considered the possibility that the appellant might be engaging in pro-Tamil activities to bolster his asylum claim (see §75 of her determination set out above). We consider that the Judge was entitled to reach this conclusion in respect of Mr RP's opinion evidence on that basis and that the reasons given for doing so were clear and adequate. We accordingly reject the Appellant's first ground of appeal.

*Ground 2: The Appellant's account of his political motivation*

14. Similarly, we do not consider that the Appellant's challenge to the adequacy of the Judge's reasons for rejecting the Appellant's own account of his political motivations and his reasons for not engaging in TGTE activity during 'lockdown' to be made out. The touchstone as to whether reasons given are adequate is whether they leave room for genuine, as opposed to forensic, doubt as to why a particular conclusion was reached (see R (CPRE Kent) v Dover District Council [2017] UKSC 79 at §42 per Lord Carnwath) and we do not consider that the Judge's reasons for her conclusions in these respects leave room for anything more than merely forensic doubt. At §91 the Judge explained why she did not accept the Appellant's professed political motivations, namely that his involvement with pro-Tamil groups since his arrival in the UK "sprung from a desire for social contact with other Tamils", rather than as a result of strong political opinions. When read in the context of the determination as a whole, the Judge's reasons for this are, in our judgement, sufficiently clear. The Appellant had been involved in pro-Tamil events in the UK through his cousin, with whom the Judge considered it was to be expected the Appellant would socialise (§78); he did not then undertake any pro-Tamil activity after he fell out with his cousin in 2015 until, by chance, he met a Tamil friend in August 2019 whom he had previously known from protests. Through this friend he met Mr RP and got involved with the TGTE. The Judge considered at §83 that the Appellant's evidence "suggest[ed] he appreciated the social contact" of TGTE meetings. The Appellant then again ceased any pro-Tamil activity when lockdown began, i.e. when the opportunity for socialisation through pro-Tamil activity came to a halt. This paints a picture of someone who is engaged with pro-Tamil activity out of a desire to socialise, rather than because of a political motivation and the determination sets this out.
15. The Appellant is critical of the Judge's approach to his political inactivity during lockdown. However, there was no evidence at all before the Judge of any on-line or other remote contact by the Appellant with pro-Tamil activists during the lockdown, and the Appellant's asthma does not begin to explain why he did not engage in this, as the Judge held. The Judge's inference from the Appellant's lack of involvement with the TGTE during this period, when Mr RP was "very busy looking after TGTE affairs",

is in our view one which she was entitled to make. The submission in the Grounds of Appeal that there was no evidence of substantial ongoing volunteer involvement in TGTE during this period fails to recognise that the Appellant's own evidence was not that there was no such volunteer activity to be undertaken, but rather that he could not participate in it because he had asthma. Given that, on the Appellant's own evidence, there was such activity (albeit in which his asthma prevented him from participating) and it was reasonable for the Judge to draw the above inference from the lack of any contact between the Appellant and any pro-Tamil organisation or individual.

*Ground 3: GoSL's approach to Appellant's contrived claim*

16. We turn now to the Appellant's third ground regarding the Judge's findings as to the approach that the GoSL would adopt in relation to the Appellant. Before turning to our consideration of the ground, it is worth setting out the factual findings in relation to the Appellant's pro-Tamil activity, which provide the context to the Judge's assessment of GoSL's likely approach to the Appellant if he were returned to Sri Lanka.
17. In relation to the facts prior to the Appellant's arrival in the UK, the Judge found in summary that: the Appellant's family were known in Kantale as a Tamil family and the Appellant provided low level assistance to the LTTE when he was a minor between 2006 and 2007 (§64); he was stopped at a roadblock in Wellawatta and arrested and detained as a result of his failure to carry a pass to travel into Colombo; he was released after 24 hours without charge and was beaten while in detention (§70); however, the authorities were not seeking the Appellant due to his LTTE activities and he had not come to the adverse attention of the authorities as a result thereof prior to his departure from Sri Lanka in November 2010 (§67, §70); the Appellant's family were involved in LTTE activities (§71); two of the Appellant's relatives were shot in 2006, but the manner of their death did not indicate that they were LTTE supporters and these deaths do not suggest that the Appellant was of adverse interest to the GoSL (§54, §96).
18. In relation to the Appellant's sur place activities in the UK, the Judge found that: the Appellant attended pro-Tamil events in the UK, such as Martyrs' Days in November 2011 and 2012 (§73, §77); he travelled to Cardiff to engage in a protest outside a cricket stadium in June 2013, but he did not take part in the protest on the field and was not a prominent member of the group (§77); the Appellant went to protest at Heathrow airport in November 2019 at the time of President Rajapaska's visit to the UK (§77); the Appellant attended Mullivaikal Remembrance Day on 18 May each year (§82); in August 2019, the Appellant regained contact, by chance, with a Tamil friend, Deni, whom he had previously met at protests; they exchanged telephone numbers and the Appellant then met up with some of his former friends and new people involved with Tamil activities, including Mr PR, who invited the Appellant to become involved in TGTE meetings; the Appellant started attending such meetings in August 2019 (§83) and attended 4-5 such meetings prior to lockdown (§89); on 27 November 2019 the Appellant attended the Martyrs' Day celebrations in London; he was a volunteer and collected signatures for a campaign to refer Sri Lanka to the ICC; he took part in a demonstration outside the Sri Lankan High Commission on 4 February 2020; this event was coordinated by Mr RP with the assistance of the Appellant; the Appellant

designed placards and led slogans at the protest (§84); the Appellant may well have been photographed by the Sri Lankan authorities there (§105); the Appellant joined the TGTE in October 2020 and it is likely that his name features in TGTE records as a member (§85).

19. Notwithstanding the above, the Judge considered that the Appellant's political support for Tamil separatism was contrived and not genuine. The Judge noted (at §108) that the Appellant's passport has expired and that he would therefore be returned to Sri Lanka on an emergency travel document. She also found that he may be questioned at the airport in Colombo (§109). However, because the Appellant's political activities were not honestly motivated, he could "be expected to admit to having supported the LTTE between 2006 and 2008 and to explain what he did for the LTTE as a schoolboy". Similarly, "[i]f the appellant were asked about his links to pro-Tamil organisations in the UK, he would, in accordance with my findings above, state he had engaged in such activities, including within the TGTE, in order to persuade the respondent and this tribunal that he was entitled to protection in this country, ie as a means to remain in the UK." The Judge then considered the response of the GoSL to being told this and concluded that "his activities would be seen by the authorities, if at all, as very low level, consistent with his having engaged in them for the purpose of bolstering his asylum claim and the prospects of a successful appeal. The appellant would not be perceived to be a threat to the Sri Lankan state" (§111).
20. The Judge's assessment of the GoSL's response to being told by the Appellant that he was a member of the TGTE, albeit for the purpose of bolstering his asylum claim, is based on an extract from the Respondent's 2020 CPIN which recorded that "genuine members and supporters of the TGTE may face problems on return such as arrests and other reprisals as the groups [sic] is proscribed... [H]igh profile members of the TGTE could be questioned and may face arrest on return" (see §109). The Judge then states that as the Appellant is not a genuine member or supporter of the TGTE "it can reasonably be inferred therefore that he would not face problems on return. Nor is he a high profile member of the TGTE" (§110). This passage, in our judgement, involved the making of an error of law in two respects.
21. First, the inference which the Judge draws here (that because genuine members may face problems, non-genuine members will not) is not supported by evidence, but rather rests on an underlying assumption about the ability of the decision-making processes undertaken by the GoSL, and willingness of its decision-makers, reliably to be trusted to distinguish between those members or supporters of the TGTE (and others perceived as a threat to the unity of the Sri Lankan state or the government) who commitment to the Tamil separatist cause is subjectively genuine and, on the other hand, those who had joined and/or attended meetings and protests simply to bolster an asylum claim. As this Tribunal emphasised in KK (as a general point of principle, not as part of the assessment of country conditions), judicial fact-finders must guard against legitimate extrapolation and reasonable inferences crossing over into impermissible speculation (see §314). Whilst that general comment might be said to apply to all judicial fact finders, it applies a fortiori in cases involving protection claims where the lower standard of proof applies. On the Judge's findings, the Appellant

started engaging in regular pro-Tamil sur place activity soon after arriving in the UK, including attending some relatively high profile events (such as the protest in Cardiff cricket stadium where the pitch was invaded), though the role he played in them was relatively minor and there were not insignificant gaps in his participation. He then became a member of the TGTE and attended their meetings and protests with them, at which he was more than merely an attendee. The Appellant's sur place activity also follows on from the activities which the Judge accepted he had undertaken for the LTTE in Sri Lanka. In those circumstances, the inferential finding effectively that there is no real risk of the Sri Lankan authorities determining that the Appellant is lying to them about the contrived nature of his asylum claim in the UK is not one which in our judgement was open to the Judge. The Judge's assumption about the ability of the Sri Lankan authorities to determine who has undertaken pro-Tamil activity with a genuine belief in separatism and who has done so to bolster an asylum claim consists, in our judgement, of impermissible speculation rather than legitimate extrapolation or reasonable inference and there was no evidence before her on which to make such a finding.

22. Second, and in any event, in this passage the Judge has overlooked evidence cited to her about the approach taken by GoSL to proscribed organisations such as the TGTE. This is of particular significance, given that the applicable Country Guidance case at the time of the hearing (GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC), to which the Judge rightly referred) did not address the risk created by membership of proscribed organisations. In paragraph 38 of her Skeleton Argument for the hearing before the Judge, Ms Benfield referred the Tribunal to the Respondent's Country Information and Guidance of 28 August 2014, and in particular the passage at 2.3.6. This noted that,

*"On 1 April 2014 the government of Sri Lanka announced the designation of 16 Tamil diaspora organisations and 424 individuals under UN Security Council resolution 1373 on counter-terrorism. The order was issued by the Secretary of Defence...Among the organisations proscribed are the Transnational Government of Tamil Eelam (TGTE)... When making the announcement on 1 April, Brigadier Ruwan Wanigasooriya said that individuals belonging to these organisations would face arrest under anti-terrorism laws when travelling to Sri Lanka."*

This passage provides evidence from the Secretary of Defence in the GoSL that members (not, we note, "genuine members") of the TGTE would face arrest when travelling to Sri Lanka and the Judge's attention was specifically drawn to this. Given that there is no dispute that those arrested in Sri Lanka face a real risk of persecution, this was important evidence for the Judge to consider. This is particularly so because the evidence she did cite about "genuine members" is ambiguous. The Judge appears to have assumed that the reference to genuine members means those members whose *support* for the TGTE is genuine, but reference to a "genuine member" could instead refer to those whose *membership* is genuine (about which there was no issue, the Judge having accepted that the Appellant's name features in the TGTE's records as a member).



23. We do not consider that either of these errors can be properly said to be immaterial and we therefore set aside the Judge's decision. However, as the errors we have identified only concern the Judge's findings in relation to the approach that the GoSL would have adopted, we retain the Judge's findings in relation to the Appellant's pro-Tamil activities set out at paragraphs 16-17 above and proceed to re-make the decision ourselves on that basis.

## RE-MAKING THE DECISION

24. The up-to-date country guidance on members of the TGTE is contained in KK. Neither party suggested that we should depart from it. So far as relevant, the Guidance provides as follows:

- "(1) The current Government of Sri Lanka ("GoSL") is an authoritarian regime whose core focus is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam.*
- (2) GoSL draws no material distinction between, on the one hand, the avowedly violent means of the LTTE in furtherance of Tamil Eelam, and non-violent political advocacy for that result on the other. It is the underlying aim which is crucial to GoSL's perception. To this extent, GoSL's interpretation of separatism is not limited to the pursuance thereof by violent means alone; it encompasses the political sphere as well.*
- (3) Whilst there is limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of avowedly separatist or perceived separatist beliefs.*
- (4) GoSL views the Tamil diaspora with a generally adverse mindset, but does not regard the entire cohort as either holding separatist views or being politically active in any meaningful way.*
- (5) Sur place activities on behalf of an organisation proscribed under the 2012 UN Regulations is a relatively significant risk factor in the assessment of an individual's profile, although its existence or absence is not determinative of risk. Proscription will entail a higher degree of adverse interest in an organisation and, by extension, in individuals known or perceived to be associated with it...*
- (6) The Transnational Government of Tamil Eelam ("TGTE") is an avowedly separatist organisation which is currently proscribed. It is viewed by GoSL with a significant degree of hostility and is perceived as a "front" for the LTTE...*
- ...*
- (9) Interviews at the Sri Lankan High Commission in London ("SLHC") continue to take place for those requiring a Temporary Travel Document ("TTD").*
- (10) Prior to the return of an individual traveling on a [Temporary Travel Document ("TTD")], GoSL is reasonably likely to have obtained information on the following matters: (i) whether the individual is associated in any way with a particular diaspora*

organisation; (ii) whether they have attended meetings and/or demonstrations and if so, at least approximately how frequently this has occurred; (iii) the nature of involvement in these events, such as, for example, whether they played a prominent part or have been holding flags or banners displaying the LTTE emblem; (iv) any organisational and/or promotional roles (formal or otherwise) undertaken on behalf of a diaspora organisation; (v) attendance at commemorative events such as Heroes Day; (vi) meaningful fundraising on behalf of or the provision of such funding to an organisation; (vii) authorship of, or appearance in, articles, whether published in print or online; (viii) any presence on social media; (ix) any political lobbying on behalf of an organisation; (x) the signing of petitions perceived as being anti-government.

...

- (12) Whichever form of documentation is in place, it will be for the judge in any given case to determine what activities the individual has actually undertaken and make clear findings on what the authorities are reasonably likely to have become aware of prior to return.
- (13) GoSL operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself. This database is accessible at the SLHC, [Bandaranaike International Airport ("BIA")], and anywhere else within Sri Lanka. Its contents will in general determine the immediate or short-term consequences for a returnee.
- (14) A stop list and watch list are still in use. These are derived from the general electronic database.
- (15) Those being returned on a TTD will be questioned on arrival at BIA. Additional questioning over and above the confirmation of identity is only reasonably likely to occur where the individual is already on either the stop list or the watch list.

...

- (17) Returnees who have no entry on the general database, or whose entry is not such as to have placed them on either the stop list or the watch list, will in general be able to pass through the airport unhindered and return to the home area without being subject to any further action by the authorities (subject to an application of the HJ (Iran) principle).
- (18) Only those against whom there is an extant arrest warrant and/or a court order will appear on the stop list. Returnees falling within this category will be detained at the airport.
- (19) Returnees who appear on the watch list will fall into one of two sub-categories: (i) those who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention once the individual has travelled back to their home area or some other place of resettlement; and (ii) those who are of interest, not at a level sufficient to justify detention at that point in time, but will be monitored by the authorities in their home area or wherever else they may be able to resettle.

- (20) *In respect of those falling within sub-category (i), the question of whether an individual has, or is perceived to have, undertaken a “significant role” in Tamil separatism remains the appropriate touchstone. In making this evaluative judgment, GoSL will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam.*
- (21) *The term “significant role” does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been “high profile” or “prominent”. The assessment of their profile will always be fact-specific, but will be informed by an indicator-based approach, taking into account the following non-exhaustive factors, none of which will in general be determinative: (i) the nature of any diaspora organisation on behalf of which an individual has been active. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it; (ii) the type of activities undertaken; (iii) the extent of any activities; (iv) the duration of any activities; (v) any relevant history in Sri Lanka; (vi) any relevant familial connections.*
- (22) *The monitoring undertaken by the authorities in respect of returnees in sub-category (ii) in (19), above, will not, in general, amount to persecution or ill-treatment contrary to Article 3 ECHR.*
- ...
- (27) *There is a reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to persecutory treatment within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR....*

25. From the above, it will be apparent that the analysis requires us to answer the following three questions:

- a. First, what information is the GoSL reasonably likely to have obtained about the Appellant?
- b. Second, as a result of having obtained that information, is the Appellant reasonably likely to be on its stop list or watch list (or neither)?
- c. Third, if the Appellant is reasonably likely to be on the watch list, has he, or would he be perceived by GoSL to have, undertaken a “significant role” in Tamil separatism?

What information would the GoSL have on the Appellant?

26. As the Judge found at §108, the Appellant’s passport has expired and he would therefore have to travel on a TTD. In accordance with sub-paragraph (9) of the Country Guidance, this means that the Appellant would be interviewed by GoSL at the SLHC and GoSL would be aware of the information set out in paragraph (10). In the Appellant’s case, this information includes:

- a. the fact that the Appellant is a member of the TGTE;
- b. that he has attended 4-5 TGTE meetings between August 2019 and the start of lockdown in March 2020;
- c. that he attended Martyrs' Day celebrations in November 2019, collecting signatures for a referral of Sri Lanka to the International Criminal Court;
- d. that he attended a demonstration outside the SLHC on 4 February 2020 where he assisted Mr RP in its organisation, designed placards and led slogans at the protest (we consider that it is tolerably clear that by this, the Appellant meant that he led the chanting of slogans at the protest, by, for example, shouting the call of typical protest call-and-response chants);
- e. that he had previously attended protests at Heathrow Airport against the attendance of President Rajapaska in November 2010 and Martyrs' Day celebrations in November 2011 and 2012 at the Excel Centre and Wembley Area respectively;
- f. we also consider it reasonably likely that in his interview at the SLHC the Appellant would be asked and would volunteer information about his previous activities for the LTTE in 2006-7 and his family members' involvement with the LTTE.

Is the Appellant on the stop or watch lists?

27. KK made clear that only those with an extant arrest warrant or a court order are likely to be on the stop list. On the preserved findings (or indeed the evidence which we have seen) there is nothing to suggest that there is an arrest warrant or court order in respect of the Appellant and we therefore find that he is not on the stop list.
28. In light of the Country Guidance given in KK in relation to the significant degree of hostility with which the GoSL views the TGTE, the generally adverse mindset with which the regime views the Tamil diaspora in general and the wide range of information which the GoSL has (as set out above) obtained in relation to the Appellant, we find that the Appellant is reasonably likely (indeed, we consider it to be a virtual certainty) to be included on the GoSL's watch list.

Is the Appellant perceived to have undertaken a significant role in Tamil separatism?

29. KK makes clear that the answer to this question involves an indicator-based approach, taking into account the factors set out in subparagraph (21) of the Country Guidance. As a general point, we note the Guidance that it is not necessary to for an individual to have a formal position, to be a member or to have undertaken high profile or prominent activities in order to be considered to have a "significant role". We also note the relevant contextual factors which frame this exercise, set out at §474 of KK. We now consider each of the factors in turn.

*The nature of any diaspora organisation on behalf of which an individual has been active*

30. As sub-sub-paragraph (21)(i) of the Country Guidance makes clear, that an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it. We also note that, as well as being proscribed, the TGTE is an avowedly separatist organisation which is viewed by GoSL with a significant degree of hostility and which is perceived as a front for the LTTE. We note that at §480 of KK the Tribunal considered that the holding of a particular role within an organisation may well increase the profile of an individual. This was said to include ad hoc organisational or promotional duties, or more regular responsibilities, albeit outwith any formal organisational structure. We note that the Appellant was a volunteer and collected signatures for a campaign to refer Sir Lanka to the ICC at the 2019 Martyrs' Day celebration and assisted Mr RP in the organisation of the 4 February 2020 demonstration at the SLHC, for which he also designed placards and at which he led the slogans. We are satisfied that this meets the threshold of 'active' involvement. We consider the Appellant's membership of and active involvement in the TGTE to be a significant factor in assessing the Appellant's perceived role in Tamil separatism to which we give significant weight.

*The type, extent and duration of activities undertaken*

31. At §482 of KK, Tribunal provided a non-exhaustive list of activities it regarded as relevant to an individual's overall risk profile. These include: (i) attendance at public demonstrations; (ii) attendance at meetings held in venues that may or may not be open to members of the public; (iii) actual membership of or particular roles within relevant organisations; (iv) distribution of promotional literature; (v) meaningful fundraising on behalf of and/or providing meaningful funding to relevant organisations; (vi) attendance at commemorative events such as Heroes Day; (vii) authorship of or appearance in articles; (viii) social media activity; (ix) political lobbying; and (x) the signing of petitions perceived as critical of the GoSL.

32. The Appellant has, as set out above, attended various meetings and protests over the years. As also noted above, the Appellant a member of the TGTE and has not been a mere attendee at TGTE protests. He has also attended commemorative events. The Appellant has not undertaken any of the other types of activities listed. In addition to the Appellant's TGTE activities already considered, the Appellant has attended a number of the commemorative events, the Appellant's attendance at Martyrs' Day celebrations has occurred on a number of occasions.

33. The Tribunal in KK held at §§486 that brief attendance at a single demonstration, even if known about, would not be capable of establishing a profile sufficient to disclose a risk on return. Further, it would be open to serious question whether someone who attended a few demonstrations standing passively at the back of a crowd and without having otherwise engaged in other diaspora activity, would be perceived to be a threat to the state. However, the Tribunal held at §487, there may be situations in which only a few attendances are capable of attracting great significance, such as where an

individual speaks publicly at them, or has taken on a prominent organisational role or held LTTE flags. Importantly, the number of demonstrations attended can bear relevance in another way. As the Tribunal said at §488, “whilst the overall assessment of an individual’s profile is not simply a quantitative exercise, a significant number of attendances may, depending on all the circumstances, go to inform a qualitative evaluation. It is, after all, the perception of GoSL which is important: if the authorities are aware that an individual has taken part in numerous demonstrations over the course of time, it may indicate a genuine commitment to the Tamil separatist cause.” We consider this latter point to be of significance in this case. The Appellant has attended protests and other events in the UK in support of the separatist cause over a 10-year period. Whilst we acknowledge that there have been gaps in his attendance, this period of involvement – as well as the increasing commitment to the cause which joining and becoming more involved with the TGTE might be perceived to indicate – is indicative in our judgement of a degree of consistency in the Appellant’s view which (even assuming it is contrived) increases the likelihood of being perceived by GoSL as underlining the Appellant’s commitment to Tamil separatism.

#### *Relevant history in Sri Lanka*

34. At §497 of KK, the Tribunal revisited what had been said about an individual’s history in Sri Lanka in GJ. The evidence before the Tribunal was, it said, replete with references to the LTTE and the belief on the part of the GoSL that the organisation remains a source of danger to the Sri Lankan state. Even in the post-civil war environment, actual or perceived links to the LTTE may still be deemed relevant. A history of links was therefore considered to be a relevant factor, though one the weight of which would depend on the facts of an individual case, and which would not, save in very exceptional circumstances, be determinative.
35. In this case, the Appellant’s own activity was low level and undertaken at a time when he was a minor. While this contributes to the consistent picture that the GoSL will perceive of the Appellant as someone committed to the cause of Tamil separatism, it is not a factor to which we accord great weight given the low-level nature of the activity and the Appellant’s age at the time undertaken.

#### *Familial connections*

36. In KK at §499 this Tribunal considered although that it would be artificial to exclude this factor, it is a factor that is in general likely to carry less weight than others. In this case, we have preserved the finding that the Appellant’s family were involved with LTTE activities. However, in the context of the Appellant’s own activities and particularly his membership and involvement with the TGTE, this is a factor to which we give little weight. No doubt in some cases familial connections may be important to how an individual is perceived. Here, there is no need for the GoSL to draw inferences about the Appellant’s attitudes and commitment to Tamil separatism from those of others, as he has undertaken his own activities which, in our view, will form a much more secure foundation for the perceptions of the GoSL. His family’s activities are no more than relevant background here.

*Motivation*

37. We mention motivation because it formed a significant part of the reasoning of the Judge. However, at §494 of KK, the Tribunal held that motivation is not relevant to the evaluation of whether an individual has a significant role in Tamil separatism. “This is because the authorities will have little or no inclination to enquire into an individual’s good faith or lack thereof.” We therefore do not take into account the contrived nature, as the Judge found, of the Appellant’s activities in the UK. This may mean, as the Tribunal held, that the Appellant is an “opportunistic hanger on”. As the Tribunal held however, that “cannot act as a valid basis for rejecting a risk.”

*Conclusion on significant role*

38. Drawing these threads together, we conclude that the Appellant would be perceived to have had a “significant role” in Tamil separatism within the meaning of that phrase as set out in KK. His current membership of and activity undertaken for the TGTE are the most significant of the factors contributing to this conclusion. There is however a consistency to his activity, both in Sri Lanka and in his early years in the UK, which adds to his profile.

39. In accordance with sub-paragraph (19) of the Country Guidance, the Appellant is therefore deemed by GoSL to be of sufficiently strong adverse interest to warrant detention once he has travelled back to his home area or some other place of resettlement.

Overall Conclusion

40. There is a reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to persecutory treatment within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR and there is no possibility of internal relocation in Sri Lanka (sub-paragraphs (27)-(28) of the Country Guidance in KK). Given that, our conclusion that the Appellant is someone of sufficient interest to be detained by GoSL, and given that there has been no suggestion that the Appellant is excluded from the Refugee Convention by Article 1F of the Convention, we conclude that the Appellant is a refugee and that his removal from the UK would breach the UK’s obligations under the Refugee Convention and would be unlawful under section 6 of the Human Rights Act 1998, as it would violate his rights under Article 3 of the European Convention. We therefore allow the appeal on the grounds set out in section 84(1)(a) and (c) of the Nationality, Immigration and Asylum Act 2002.

DECISION

**1. The Decision of First-tier Tribunal Judge A M Black promulgated on 26 March 2021 involved the making of an error on a point of law.**

2. We set it aside whilst preserving the factual findings made therein, save in relation to the approach that the government of Sri Lanka would adopt to the contrived nature of the Appellant's activities, set out at paragraphs 16-17 above.
3. We re-make the decision in the appeal by allowing it. Removal of the Appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention and would be unlawful under section 6 of the Human Rights Act 1998. We accordingly allow his appeal.

Signed: *P.R. Skinner*

**Deputy Upper Tribunal Judge Skinner**

Dated: 2 December 2021