



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

Appeal Number: PA/03868/2018

THE IMMIGRATION ACTS

**Heard remotely at Field House
On 5 May 2021 via Skype for
Business**

**Decision & Reasons Promulgated
On 10 June 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**JS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Jegarajah, Counsel, instructed by Aask Solicitors
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were the grounds of appeal, written submissions from the parties, the decision of the First-tier Tribunal, the grant of permission to appeal by Upper Tribunal Judge Hanson, and the decision of Deputy Upper Tribunal Judge Deborah Taylor, the contents of which I have recorded. The order made is described at the end of these reasons.

The parties said this about the process: no fairness concerns were raised arising from the proceedings being conducted remotely.

1. This matter was originally listed before me solely to address the issue of the appellant's risk on return to Sri Lanka, the First-tier Tribunal having previously found that the appellant was excluded from the Refugee Convention in what were thought to be undisturbed findings of fact, following a decision of a deputy judge to set aside the decision of the First-tier Tribunal.
2. For the reasons set out below, properly understood, there were no preserved findings of fact from the judgment of the First-tier Tribunal. The task facing the Upper Tribunal was, therefore, to redetermine the appellant's asylum claim in its entirety. Under the circumstances, consistent with paragraph 7.2(b) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, I was satisfied that the nature and extent of the judicial fact-finding that would be necessary for the decision to be remade was such that it would be appropriate to remit the matter to the First-tier Tribunal, to be reheard afresh, by a different judge. This decision sets out my reasons for remitting the case to the First-tier Tribunal, and also for refusing a recusal application made by the appellant.

Factual and procedural background

3. The appellant is a citizen of Sri Lanka, born on 3 January 1969. He initially claimed asylum on 12 August 2009 on the grounds that he had been falsely accused of being a member of the LTTE. That claim was refused on 17 May 2010 and he withdrew a subsequent appeal against that refusal. On 2 April 2012, he made a fresh claim for asylum, which was refused by the Secretary of State on 5 March 2018.
4. In his fresh claim, the appellant said worked as a prominent fundraiser for the Tamil Coordinating Committee ("the TCC") in Italy, placing him at risk of being persecuted by the Sri Lankan Government upon his return. In her decision, the Secretary of State considered the appellant to have been a member of the LTTE, a proscribed terrorist group for which the TCC was one of several front organisations, and that he was thereby excluded from the Refugee Convention under Article 1F(b) (serious non-political crime committed outside the appellant's country of refuge). She certified under section 55 of the Immigration, Asylum and Nationality Act 2006 that the appellant was not entitled to the protection of Article 33(1) of the Refugee Convention. In any event, the Secretary of State considered that the appellant would not be at risk upon his return to Sri Lanka.
5. The appellant appealed against the Secretary of State's decision of 5 March 2018. His appeal was heard by First-tier Tribunal Judge Moxon who, in a decision promulgated on 19 August 2019, dismissed the appeal. The judge found that the appellant was excluded from the Convention

pursuant to Article 1F(b) and that he would not face a risk of serious harm upon his return.

6. The appellant applied for permission to appeal against the decision of Judge Moxon, challenging both the decision concerning exclusion and the finding in relation to risk on return. Permission to appeal was granted by Upper Tribunal Judge Hanson in a decision dated 8 October 2019. The operative grant of permission was unrestricted. However, the reasons given by the judge considered the grounds of appeal in relation to the judge's findings on exclusion to be unarguable. Having addressed the arguability of the grounds of appeal concerning risk on return, the reasons for the grant of permission concluded in these terms:

“Permission to appeal is granted on this limited issue.”

It is clear that the grant of permission to appeal was intended to be limited in scope.

7. The appellant's appeal to the Upper Tribunal was heard by Deputy Upper Tribunal Judge Deborah Taylor on 20 January 2020 in Bradford. She stated the following at [10] to [12] of her decision:

“10. The appellant sought permission to appeal on the grounds that the judge had erred in law in failing to direct himself where the burden of proving Article 1F(b) falls and misapplied relevant case law in relation to the application of exclusion clauses.

11. Permission to appeal was refused on both those grounds.

12. Upper Tribunal Judge Hanson, on 8 October 2019, did grant permission on the final ground, namely that the judge had failed to make any or adequate findings in relation to the claimed risk on return on the basis of the appellant's prominent role within the TCC. The appellant had claimed to be at risk on return to Sri Lanka as a result of the TCC's proscription and the new emergency laws of 22 April 2019, separate from any risk he might face as a result of his membership of the LTTE.”

A full copy of the decision may be found in the [Annex](#) to this decision.

8. The deputy judge allowed the appeal in relation to what she considered was the sole issue before the Upper Tribunal, namely the findings of the First-tier Tribunal in relation to the appellant's risk on return to Sri Lanka. At [16] she stated:

“The judge's decision is set aside.”

9. She added at [17]:

“The underlying facts, so far as the appellant's historical activities are concerned, are not in dispute. The question to be decided is whether those activities would make the appellant a person of interest to the authorities today.”

10. The judge directed that the decision be remade in the Upper Tribunal. She did not expressly preserve any findings of fact reached by the First-tier Tribunal.
11. At case management review hearings conducted on 2 July 2020 and 10 December 2020 by Upper Tribunal Judges Grubb and Keith respectively, and later before me on 18 January 2021, the issue for consideration at the resumed hearing was said to be that identified by the deputy judge at [17] of her decision, namely the appellant's risk on return to Sri Lanka. At each of those hearings, the appellant was directed to apply to adduce additional evidence pursuant to an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. No such application was ever forthcoming, as set out below.
12. This matter was listed for a resumed hearing before me on 29 March 2021. Ms Jegarajah's primary submission on that occasion was that it was necessary for me to adjourn the proceedings in order to enable the appellant to adduce further evidence going to the issue of exclusion, and his risk on return to Sri Lanka, which could be made the subject of an application under rule 15(2A). Some new evidence had been provided, including an expert report, and a copy of the Sri Lankan *Gazette*, which was said to proscribe the appellant by name. None of the new evidence was the subject of an application under rule 15(2A).
13. Ms Jegarajah also advanced a range of submissions contending that it would be irrational and unlawful for the focus of the resumed hearing to be the appellant's risk on return to Sri Lanka alone, without considering the issue of his exclusion from the Refugee Convention in the round. The arguments advanced by Ms Jegarajah in support of that submission were that it was open to me to review Judge Hanson's restricted grant of permission to appeal under rules 45 and 46 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and that the deputy judge's approach involved a "*Robinson obvious*" error. I rejected those submissions. A rule 46 review is engaged only in the context of an application for permission to appeal to the Court of Appeal, once the Upper Tribunal has completed the process required by section 13 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). The proceedings had not reached that stage. In any event, the criteria for a review in rule 45(1) upon which Ms Jegarajah sought to rely were engaged where the Upper Tribunal had either overlooked a binding authority, or a court had made a decision which was binding on the Upper Tribunal. The "binding" decision upon which Ms Jegarajah sought to rely was a judgment of an Italian court (in relation to which she was yet to obtain a certified translation) which could not, on any view, be categorised as binding on this tribunal.
14. Nor could it be said that there was a *Robinson obvious* error in the deputy judge's decision, contrary to the submissions of Ms Jegarajah. There is simply no authority I have been alerted to which holds that it would be unlawful to consider the issue of risk on return in circumstances where the issue of exclusion had already been determined.

15. However, there were considerations, not raised by Ms Jegarajah, which supported her goal of securing a full reappraisal of the issue of the appellant's exclusion from the Refugee Convention, which I drew to the parties' attention following the luncheon adjournment. They were as follows.
16. First, although Judge Hanson plainly intended to restrict his grant of permission to appeal to the issue of the appellant's risk on return, he did not so restrict the operative grant of permission to appeal. He simply stated, "permission to appeal is granted." Pursuant to Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC), in the absence of a restriction in the operative grant of permission to appeal, it will only be in very exceptional circumstances that the Upper Tribunal will consider the otherwise unrestricted grant of permission to appeal to be restricted. It follows, therefore, that the deputy judge was incorrect to state that the appellant had not obtained permission to appeal on all grounds: he had. Although Safi preserves the possibility "in very exceptional circumstances" for the Upper Tribunal to construe an otherwise unrestricted grant of permission to appeal as restricted, it is clear that the deputy judge did not address her mind to the issue. Nothing turns, therefore, on the small degree of flexibility inherent to the principle enunciated in Safi.
17. Secondly, by setting aside the decision of the First-tier Tribunal with no express provision to preserve any findings of fact reached by Judge Moxon, in particular in relation to the issue of exclusion, the deputy judge set aside the entirety of the findings reached by the First-tier Tribunal.
18. The above factors had not been considered by either party, so I adjourned the hearing and gave directions for written submissions on the point, set out in a *Note and Directions* dated 30 March 2021. The hearing resumed on 5 May 2021 to consider legal argument on the issues raised in the note.
19. In my *Note and Directions*, I implored the appellant to make the application under rule 15(2A) to rely on new evidence that he had been directed to make on multiple occasions by different judges.

Recusal application

20. In her skeleton argument dated 22 April 2021, Ms Jegarajah applied for me to recuse myself from the case on two bases.
21. First, on the basis that I had countenanced the possibility of separating the issue of risk on return from exclusion, which amounted to a misapprehension of a fundamental aspect of refugee law, thereby disqualifying me from hearing the appeal: see [16] of Ms Jegarajah's skeleton argument.
22. Secondly, on the basis of the bias, or apparent bias, I was said to have manifested towards the appellant in my *Note and Directions* concerning

the need for the appellant to comply with the directions previously given to make an application under rule 15(2A). In those directions, I included the following passages, under the heading *Further case management directions: procedural rigour*:

“11. A recurring theme in these proceedings has been the appellant’s failure to comply with directions of both tiers of the tribunal. In his decision at [7], Judge Moxon outlined the appellant’s failure to comply with directions given by the FTT: an initial hearing in November 2018 was adjourned for the appellant to obtain expert evidence, which was not provided. A further adjournment followed on 14 May 2019, again for the appellant to adduce evidence. The deadline was not met. The matter eventually proceeded on 29 July 2019.

12. There has been a similar pattern in the Upper Tribunal in relation to the evidence required for the decision to be remade. At a CMRH on 2 July 2020, Upper Tribunal Judge Grubb gave the appellant until 1 October 2020 to make an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence. The appellant did not comply with that direction. Upper Tribunal Judge Keith held a further CMRH on 10 December 2020, at which Ms Jegarajah said the appellant would be able to comply by 8 January 2021. The appellant did not comply with that direction. At a further CMRH, on 18 January 2021, the appellant undertook to make the application by 15 March 2021. That deadline was breached, as was a direction to serve a skeleton argument on the respondent by the same day, with the effect that the respondent’s consequential obligations could not be met. In the event, the appellant did not serve a skeleton argument on the respondent until 25 March 2021, with the understandable consequence that Mr Lindsay was unable to provide a skeleton argument in response. Very shortly before the resumed hearing, still absent a rule 15(2A) application, the appellant served a large quantity of additional materials on the tribunal and the respondent.

13. While those representing the appellant sought to explain these failures by reference to their personal circumstances at the time, the reasons given were not good reasons, and were simply a continuation of the procedurally lacklustre approach the appellant’s legal team has taken to its duties to both chambers of this tribunal throughout these proceedings.

14. Ms Jegarajah had applied for a further adjournment at the hearing before me, in order to obtain a translation of a judgment of an Italian court, which was said to be relevant to the issue of exclusion, and possibly the appellant’s risk on return. In light of the proceedings having been adjourned, the appellant now has more time to secure a certified translation to use in this court. However, as I identified at [3] of my note of the CMRH on 18 January 2021, the appellant has sought a translation of that judgment for some time. He has had ample time to secure funding to obtain the translation. If it is not available by the resumed hearing, the Upper Tribunal is likely to conclude that no amount of further adjournments would lead to a translation being

made available, such that no further adjournments would be necessary for that reason.”

Recusal: discussion

23. In relation to the first recusal request, there can be no suggestion that seeking to approach the issues involved in the remaking of this appeal as envisaged by both Judge Hanson in granting permission to appeal, and Deputy Judge Taylor, when considering the error of law decision, could possibly give rise to any concerns about bias towards the appellant, or the tribunal’s understanding of refugee law. While it can be helpful to consider exclusion and the risk of being persecuted in the round in the context of taking an overall decision, Ms Jegarajah has pointed to no authority to the effect that merely suggesting the two matters be dealt with separately necessarily disqualifies a judge from hearing the appeal.
24. In relation to the second recusal request, Ms Jegarajah did not refer to any authorities to substantiate her submissions, but I consider the test for apparent bias to remain that articulated by the House of Lords in Porter v Magill [2001] UKHL 67 per Lord Hope at [103]:
- “The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”
25. In her skeleton argument Ms Jegarajah was particularly critical of paragraph [13] of my *Note and Directions*. Ms Jegarajah submitted that good reasons *had* been given by both her instructing solicitor, Mrs S. Kirupakaran, who provided a witness statement outlining the matters arising as a result of her clinical vulnerability during the pandemic, and in the course of an oral statement that she, Ms Jegarajah, gave at the hearing concerning her family circumstances arising from the health conditions of one of her children. The appellant was not confident that he could receive a fair trial in light of my comments. The Secretary of State was receiving favourable treatment in comparison, she submitted.
26. Applying the test in Porter v Magill, I considered that Lord Hope’s fair minded observer would know and consider the following facts:
- a. The fair minded observer would be aware of the emphasis by the senior courts on the need for procedural rigour, and in particular the observation of the Court of Appeal in WA (Pakistan) v Secretary of State for the Home Department [2019] EWCA Civ 302 at [33] that, “[e]ven in asylum claims, adherence to the rules of the court and procedural rigour are necessary.”
 - b. The fair minded observer would also know that there had been a number of instances of procedural non-compliance by the appellant’s legal team, as summarised at [11] and [12] of my note, quoted above. The explanations provided by the appellant’s legal team ahead of the hearing on 29 March 2021 addressed, at best,

the late compliance with some of the directions issued at a case management hearing held before me on 18 January 2021, in particular in relation to the service of the appellant's skeleton argument, and some of the additional evidence he sought to rely on. The late service of the skeleton argument was not the only example of procedural non-compliance by the appellant.

- c. The fair-minded observer would know that, despite repeated extensions of the direction requiring the appellant to serve an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to new evidence he sought to rely upon, to date no application under rule 15(2A) had been made. By the time of the resumed hearing on 5 May 2021, there still had not been an application under rule 15(2A). The explanations purportedly provided by the appellant's legal team as outlined in the previous paragraph did not even attempt to engage with the repeated non-compliance with the requirement that an application under rule 15(2A) must be made in order for new evidence to be relied upon.
- d. The fair minded observer would know that the reason the *Note and Directions* did not go into detail about the reasons provided by the appellant's legal team was due to the sensitive personal information upon which the explanations were based; the explanations did not address the matters set out in paragraph (b), above.
- e. The observer would know that, read as a whole, the aim and purpose of the *Procedural Rigour* part of the *Note and Directions* was to ensure that the appellant was able to present his case on the basis of the best possible evidential foundation, pursuant to the overriding objective to deal with cases fairly and justly. The observations were raised in the context of the tribunal having identified, of its own motion, a significant procedural point in favour of the appellant which had not been identified by his own legal team.
- f. Finally, the fair minded observer would know that no discourtesy was intended towards the appellant's legal team, as explained at the hearing on 5 May 2021.

27. Ms Jegarajah's submission that the appellant had no confidence that he could receive a fair trial was, with respect, not the question for my consideration. Quite apart from the fact there was no statement from the appellant to that effect, the test for recusal is objective, by reference to what the fair-minded observer, in possession of the facts, would consider, rather than the subjective fears of a party to the litigation. It was nothing to the point that the Secretary of State had been "allowed" not to engage with the evolving case advanced on behalf of the appellant, as Ms Jegarajah submitted; the Secretary of State cannot be criticised for not

engaging with evidence that had not been the subject of an application to put before the tribunal. If an appellant repeatedly fails to make an application under rule 15(2A) of the procedure rules, he cannot complain when his opposing party has not engaged with the very material he has failed to apply to rely on. It would be inappropriate to expect or otherwise direct the Secretary of State to respond to parts of an appellant's case that were not before the Tribunal.

28. Drawing these factors together, I concluded that Lord Hope's fair-minded observer would conclude that there was no appearance of bias in my conduct of the proceedings, and I refused the application to recuse myself.

Scope of the resumed hearing

29. Having refused the appellant's application to recuse myself from the proceedings, it was necessary to determine the scope of the hearing before the Upper Tribunal, in light of the deputy judge having set aside the decision of the First-tier Tribunal in its entirety, with no findings of fact preserved, as I had identified on 29 March 2021. It may be that the deputy judge intended to preserve the findings of fact relating to exclusion, but she did not say so; certainly, the reference to the appellant's "historical activities" not being disputed did not amount to a preservation of Judge Moxon's findings that the appellant was excluded from the Refugee Convention. It simply recorded the common ground between the parties concerning the fact of appellant's prior activities on behalf of the TCC in Italy. Unless I were to revisit that decision, the deputy judge's decision would stand.
30. Ms Jegarajah supported any procedural course that would enable the matter to be remitted to the First-tier Tribunal.
31. On behalf of the Secretary of State, Mr Lindsay submitted that the Upper Tribunal's task under section 12 of the 2007 Act is only complete once the process set out in section 12 of the 2007 Act (proceedings on appeal to Upper Tribunal) is complete, pursuant to VOM (Error of law - when appealable) Nigeria [2016] UKUT 410 (IAC). I enjoyed the discretion to revisit the deputy judge's error of law decision, such that I could clarify that the decision of the First-tier Tribunal was set aside only to the extent that it concerned the appellant's risk on return, and not the issue of exclusion, he submitted.
32. While I accept that the jurisdiction does exist to revisit the reasoning of so-called "error of law" decisions pursuant to AZ (error of law: jurisdiction: PTA practice) Iran [2018] UKUT 245 (IAC), that is a jurisdiction to be exercised only in very exceptional cases: see paragraph (2) of the Headnote.
33. There is established jurisprudence of this tribunal relating to the scope to set aside its previous decisions, as opposed to merely revisit the reasons given for a decision: see, for example, Jan (Upper Tribunal: set-aside

powers) [2016] UKUT 336 (IAC). I consider that I should approach any power to revisit the deputy judge's "error of law" reasons in light of the general constraints of the Upper Tribunal to set aside its own decisions as outlined in Jan and calibrate what amounts to "very exceptional cases" accordingly. The deputy judge set aside the decision of Judge Moxon in its entirety with no findings preserved. I see no basis to put the clock back and reconduct the error of law hearing. The decision of the First-tier Tribunal has been set aside. It no longer exists. I must abide by that procedural reality. I consider that it would be inappropriate to seek to resurrect parts of a decision of the First-tier Tribunal that has been set aside in its entirety.

34. It follows that the task of the Upper Tribunal in relation to the appellant's appeal in these proceedings is to hear the appellant's appeal against the Secretary of State's refusal of his fresh claim in its entirety. That entails a complete factual reappraisal of the appellant's historical activities from the perspective of the exclusion clauses, and also to assess his risk on return to Sri Lanka in any event.
35. In light of the scope of the findings of fact that it is now clear are required, I consider that it would be appropriate to remit this appeal to the First-tier Tribunal to be heard by a different judge, with no findings of fact preserved. In that respect, I consider that it would be appropriate to depart from the findings of the deputy judge that the matter be reheard in this tribunal. In light of the scope of the findings of fact required, the required very exceptional circumstances are present justifying a departure from the deputy judge's decision that the matter be reheard in this tribunal.
36. There was some discussion at the hearing before me as to the location of the remitted appeal. Ms Jegarajah asked for the matter to be remitted to a London hearing centre. I remit the appeal to Taylor House.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside with, as held by Deputy Upper Tribunal Judge Taylor, no findings of fact preserved.

It is remitted to the First-tier Tribunal to be heard at Taylor House, before a different judge.

In light of the procedural and evidential complexities of this matter, I direct that the file be referred to the Resident Judge at Taylor House for further case management directions.

I maintain the anonymity order already in force.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Stephen H Smith*

Date 24 May 2021

Upper Tribunal Judge Stephen Smith



IAC-AH-SAR-V1

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

Appeal Number: PA/03868/2018

THE IMMIGRATION ACTS

Heard at Bradford

**Decision & Reasons
Promulgated**

On 20th January 2020

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Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

**JS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jegarajah instructed by Ask Solicitors

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Moxon made following a hearing at Bradford on 29th July 2019.

Background

2. The appellant is a citizen of Sri Lanka born on 3rd January 1969. He initially claimed asylum in the UK on 12th August 2009 on the grounds that he had been falsely accused of being a member of the LTTE. His claim was

refused on 17th May 2010 and a subsequent appeal against that decision was withdrawn.

3. He made further submissions to support his claim for asylum on 15th April 2012 asserting that he had not been truthful initially and that he had in fact been a prominent member of the TCC which is a fundraising organisation working with the LTTE.

4. The respondent refused the application on 5th March 2018 asserting that the appellant was excluded from the protection offered by the Refugee Convention by virtue of Article 1F(b) and that in any event, he was not at risk of mistreatment upon return to Sri Lanka.

5. At paragraph 15 of the reasons for refusal letter the respondent stated:

“In the substantive consideration of your claim for asylum which follows it has been accepted that you were a member of the LTTE (a proscribed terrorist group) and you had a prominent role for the LTTE. It is your membership and work carried out for the LTTE which gives rise to your exclusion from the Refugee Convention under Article 1F(b)”.

6. At paragraphs 40 and 41 of the same letter the respondent continued:

“You have stated that you joined the TCC when you went to Italy and even was in command of other people whilst fundraising. Considering the objective information on the LTTE and TCC above and the accounts you gave about your role in TCC goes to show that you played a prominent role for the TCC in which you raised money to further finance terrorism and terrorist activities carried out by the LTTE in Sri Lanka.

This is considered to be a serious non-political crime which would attract imprisonment in the UK. It is therefore concluded that you have committed a serious non-political crime outside of the UK prior to your admission which would constitute your exclusion under Article 1F(b) of the Refugee Convention”.

7. The judge made a number of adverse credibility findings stating that the appellant was unable to provide the full names of people who gave him instructions, which was not credible. Moreover in his position within the LTTE it was not credible that he would not have known the nature of their activities and the use to which the funds which he raised were being put. At paragraph 49 he said:

“He has adduced a version of the Sri Lankan Gazette version which names him and I give that document weight, but the weight and reliability must be considered in the round with all of the evidence in the case”.

8. The judge accepted the appellant's role within the LTTE as a fundraiser but did not consider that he could bring himself within the risk categories set out in the country guidance case of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319. He did not accept that the appellant had ever been detained by the Sri Lankan authorities.
9. The judge concluded that the appellant would not be at risk on return to Sri Lanka and dismissed the appeal on all grounds.

The Grounds of Application

10. The appellant sought permission to appeal on the grounds that the judge had erred in law in failing to direct himself where the burden of proving Article 1F(b) falls and misapplied relevant case law in relation to the application of exclusion clauses.
11. Permission to appeal was refused on both those grounds.
12. Upper Tribunal Judge Hanson, on 8th October 2019, did grant permission on the final ground, namely that the judge had failed to make any or adequate findings in relation to the claimed risk on return on the basis of the appellant's prominent role within the TCC. The appellant had claimed to be at risk on return to Sri Lanka as a result of the TCC's proscription and the new emergency laws of 22nd April 2019, separate from any risk he might face as a result of his membership of the LTTE.

Consideration as to whether there is a Material Error of Law

13. Mr McVeety defended the determination. He acknowledged that the judge had not considered the appellant's membership and role within the TCC per se but submitted that there was no evidence to show that membership of that organisation created a distinct risk from membership of the LTTE. The judge had properly applied the country guidance case of GJ and concluded that, since the appellant has done nothing within the Sri Lankan diaspora to promote the Tamil cause since 2008, he could not establish that the authorities in Sri Lanka would have any interest in him in any event.
14. I am, however, persuaded by Ms Jegarajah's argument that the fact that the judge did not address or engage with her argument that the TCC is a distinct organisation and accordingly any risk to the appellant should have been assessed. I accept her submission that the Sri Lankan government's attitude towards those involved in diaspora activities is nuanced, and the fact that the government proscribes a host of different organisations, proscriptions which are reassessed from time to time, sometimes lifted, sometimes re-imposed, indicates that the government does not have the broad-brush attitude suggested by both the respondent and the Immigration Judge.
15. Moreover, the landscape in Sri Lanka has clearly changed since the Tribunal made its decision in GJ, not only in relation to proscription but

also the issuing of the new emergency regulations on 22nd April 2019. I therefore conclude that the judge's error in not engaging with those arguments is material.

Disposal

16. The judge's decision is set aside.
17. The underlying facts, so far as the appellant's historic activities are concerned, are not in dispute. The question to be decided is whether those activities would make the appellant a person of interest to the authorities today. Accordingly, this matter is referred to the Principal Resident Judge who will decide whether this is a suitable case for a panel of Upper Tribunal Judges to decide. The case is transferred to London.
18. An anonymity direction is made.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 27 January 2020

Deputy Upper Tribunal Judge Taylor