



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/06537/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams (hybrid)
On 18 October 2021

Decision & Reasons Promulgated
On 15 November 2021

Before

UPPER TRIBUNAL JUDGE SMITH

Between

S I
[Anonymity direction made]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Ms A Patyna, Counsel instructed by Reeves & Co solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge G Mitchell promulgated on 15 January 2020 (“the Decision”) dismissing the Appellant’s appeal against the Respondent’s decision dated 18 June 2019 refusing the Appellant’s (second) protection claim.
2. This appeal first came before me with near the start of the Covid-19 pandemic with a view to considering whether a decision could be made on the error of law issue on the papers. By a decision dated 28 May 2020 (“the Previous Decision), I determined that this would not be an appropriate course and gave directions for an oral hearing. I directed that the oral hearing should not take place until after the Tribunal’s consideration of further country guidance in relation to Sri Lanka. A decision has now been given in that regard in KK and RS (Sur place activities: risk) Sri Lanka [2021] UKUT 0130 (IAC) (“KK (Sri Lanka)”). The Previous Decision contains details of the Appellant’s protection claim, the history of the appeal and in broad summary the grounds of appeal. Rather than repeat those matters, I have annexed the Previous Decision to this decision.
3. Following the directions given in the Previous Decision, the appeal was listed before me for a face-to-face hearing on 18 October 2021. Immediately prior to the hearing, I was informed that, due to an oversight, Ms Patyna had only just become aware of the hearing. She asked that she be permitted to attend remotely. I acceded to that request. The hearing therefore proceeded with Ms Patyna’s attendance via Microsoft Teams. There were no technical difficulties affecting the conduct of the hearing. Ms Cunha attended in person on behalf of the Home Office. The Appellant also attended in person. He was not required to participate but I ensured that he was aware of the way in which the hearing would proceed, and I explained the outcome to him briefly at the end of the hearing.
4. The hearing came before me at this stage only to determine whether the Decision contains an error of law and if so whether it should be set aside. However, as a result of the concession made by Ms Cunha, I determined (with her consent) that the appropriate course was to find an error of law, set aside the Decision whilst preserving some of the findings of fact and to go on to allow the appeal on protection grounds. I indicated that I would provide reasons for that decision in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

Ground Two

5. As I indicated at [8] of the Previous Decision, the Appellant appeals the Decision on two grounds. Although I heard from Ms Patyna in relation to both, given the

concession made by Ms Cunha I need only deal with the second ground. That concerns the risk to the Appellant based on his sur place activities.

6. Judge Mitchell set out his factual findings in relation to the nature and extent of the Appellant's involvement in specific events whilst in the UK at [74] of the Decision. He prefaced those findings with a finding that the reason for the Appellant's involvement in sur place activities is "not an expression of genuine political opinions" but rather "a desire to create a risk on return" ([69] of the Decision). As Ms Patyna was constrained to accept, that finding might impact on what would be the Appellant's truthful reply to any enquiries made by the Sri Lankan authorities about the reason behind his activities and to the application of HJ (Iran) principles to the case. However, as she also submitted and I accept, whether the Appellant's involvement is or is not motivated by genuine political beliefs may be of little moment in terms of the interest in him by the Sri Lankan authorities.
7. The first of the Appellant's grounds challenges the Judge's findings in relation to past persecution and the credibility of the Appellant's claim in that regard. In light of Ms Cunha's concession, I do not need to deal with that aspect of the claim. I proceed on the basis that the risk to the Appellant which is accepted arises only from his sur place activities. That has no effect on the outcome of the appeal. The risk is based on political opinion or imputed political opinion and therefore falls within the Refugee Convention whether or not the Appellant has faced persecution in the past.
8. The Appellant has been accepted to have been a member of the British Tamil Forum which he joined in August 2013 ([68] of the Decision). Judge Mitchell accepted that the Appellant began to show an interest in the Transnational Government of Tamil Eelam ("TGTE") in 2016. He attended meetings and volunteered by distributing leaflets for the organisation. He was one of about 2000 such volunteers ([70]). He became a member of TGTE in February 2018 ([71]). Judge Mitchell found that, whilst the Sri Lankan authorities would have an interest in anyone known to be a member of TGTE, they would not know unless told by the Appellant (who would not have to tell them in order not to lie given the lack of genuine belief) or "if he had behaved in UK in such a way that there would be a real risk of the Sri Lankan authorities concluding he is or was a TGTE member" ([72]). It is this latter risk which Ms Cunha accepts arises on the facts as subsequently found.
9. At [74] of the Decision, Judge Mitchell makes his findings about the Appellant's involvement in individual events. The Appellant's face appears in newspapers, social media reports and videos of events on 22 October 2017, 28 July 2018, 30 August 2018, 11 December 2018, 4 February 2019 and 25 September 2019. He is recognisable as one of those involved in stewarding an event on 16 November 2019 although Judge Mitchell did not accept that this event was publicised. More importantly, the Appellant was named as a volunteer for the TGTE in a brochure publicising an event on 28 July 2018. It is the Judge's finding in relation to this

event which Ms Cunha accepted to be problematic for the Respondent. The finding is as follows:

“(e) On 28 July 2018 [SI] was one of a large number of people who volunteered at a community event in Harrow organised by the TGTE. Although billed as a sports day, I accept this was in part an event to promote the TGTE and Tamil separatism. The TGTE produced a brochure relating to this event and on one of the pages of this brochure there is a list of approximately 70 or 80 volunteers. [SI]’s name appears in this list. The brochure was distributed to those who attended the sports day and to businesses who had helped to fund the event. A video of the event was posted online by National Tamil TV. It was viewed over 1000 times. There is insufficient evidence for me to conclude [SI] appeared in this video.”

10. The complaint made by the Appellant about the Judge’s conclusion in relation to the sur place claim is in broad terms that, notwithstanding the finding about the Appellant’s opportunistic intention, the issue is whether the activities in which he has been involved and identified as involved give rise to a risk of identification and interest by the Sri Lankan authorities. It is said that the Judge failed to consider that issue when the totality of the evidence is considered, and the findings are judged holistically. In particular it is pointed out that the Judge’s findings about the level of sophistication of the intelligence methods employed by the Sri Lankan authorities run contrary to what was found to be the case in the previous country guidance case of GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (“GJ”).
11. Judge Mitchell’s findings about risk arising from the Appellant’s sur place activities appear at [77] to [81] of the Decision as follows:

“77. [SI] has participated in multiple protests which the Sri Lankan authorities would perceive as supporting Tamil separatism. However, in only one of these protests would he be perceived as anything other a member of the crowd. As to the one protest in which he would be perceived as having more of a role, he would be perceived as a marshal and not as the organiser and the protest in question is not one which is likely to have come to the attention of the Sri Lankan authorities because it was not reported on and did not occur outside the Sri Lankan High Commission.

78. In any event, the risk of identification arising from [SI]’s participation in these protests is low. Given his relatively low profile in the protests, it is unlikely that significant identification resources would be focused upon him. As to the prospect of him being identified as a protestor when he submits a photograph for a travel document, the risk of this happening is very low given that it is unlikely facial recognition software is in use and given the prospect of manual recognition is very low given the frequency of Tamil anti-government protests in London and the numbers of people who attend them.

79. Furthermore, even if [SI] were identified as a person present at these protests, GJ is clear that attendance at demonstrations is unlikely to be sufficient to create a real risk that a person will attract adverse attention on return. As to [SI]’s attempts to portray himself as being more than a protest participant, I do not accept that is how he will be perceived based upon the evidence [SI] has relied upon in this

appeal. In particular, I do not think there is any risk of him being perceived '*to have a significant role in relation to post-conflict Tamil separatism within the diaspora*', which is the GJ risk category Ms Patyna relies upon.

80. I do not regard [SI]'s membership of the BTF to be significant now that it is no longer a proscribed organisation. As for [SI]'s membership of the TGTE, there is not in my judgement any real risk of the Sri Lankan authorities concluding that [SI] is a TGTE member as a result of his sur place activities. First, because none of those activities would be likely to demonstrate membership of the TGTE. Second, because I do not think there is a real risk of [SI] being identified in connection with these activities for the reasons set out above. As to the brochure from the TGTE sports day, [SI] was identified not as a member, but as a volunteer and, in light of the country evidence, I am satisfied the risk of persecution arises in relation to those '*belonging to*' the TGTE and does not extend to those with a more indirect association.

81. In light of the processes described at paragraphs 345 to 347 of GJ, I accept [SI] is likely to be interviewed by the Sri Lankan authorities if he is removed and, as a result, that he is likely to be asked some general screening questions in response to which a person genuinely committed to the cause of Tamil separatism would, if answering truthful [sic], be likely to have to disclose their protest activities and membership of any separatist organisation. However, in light of my conclusion that [SI]'s sur place activities have not been motivated by genuine political beliefs but by a desire to create a risk on return, it would reasonable [sic] to expect [SI] not to mention his sur place activities or his BTF and TGTE memberships."

12. I do not regard what is said at [81] of the Decision as containing any errors of law. There are no implications arising from HJ (Iran) factors. The Appellant has been found not to have any genuine political motivation for his actions. He could reasonably be expected not to disclose those activities. The issue is rather whether, based on the country guidance at the time of the Decision, it was open to the Judge to find that the Sri Lankan authorities would show no interest in the Appellant in light of the activities in which he has been involved, at the level of that involvement and given the publicity which that involvement has attracted. The risk has of course to be considered on the basis of that involvement viewed holistically.
13. The Appellant draws attention in his grounds to what is said at [351] and [354] of GJ about the level of sophistication of the Sri Lankan intelligence. Those paragraphs read as follows:

"351. Our overall conclusion regarding diaspora activities is that the GOSL has sophisticated intelligence enabling it to distinguish those who are actively involved in seeking to revive and re-fund the separatist movement within the diaspora, with a view to destabilising the unitary Sri Lankan state. Attendance at one, or even several demonstrations in the diaspora is not of itself evidence that a person is a committed Tamil activist seeking to promote Tamil separatism within Sri Lanka. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.

...

354. The LTTE is a spent force within Sri Lanka and considered unlikely to rise again from within the unitary Sri Lanka, which is tightly controlled by the Sri

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

14. Based on the findings made by the Judge and irrespective of the Appellant’s motivation, based on that guidance, the Sri Lankan authorities are likely to become aware that the Appellant has attended protests due to the number of events at which his face was shown and which were publicised. As is said in GJ, attendance at a protest taken alone might not matter. However, at one of those protests, the Appellant would be identifiable as someone with a formal role due to his wearing of a fluorescent vest and carrying of a megaphone. Although the Judge found that this protest did not receive any press attention ([74(k)], that does not mean that the Sri Lankan authorities would be unaware of it. The Appellant had also been a member of the BTF. Whilst not proscribed at the date of the Decision, it had been previously (and it appears is now – see below). Moreover, he was also identified by name as a volunteer for the TGTE. Given that the interest of the Sri Lankan authorities is in those supporting the separatist cause, I cannot see that the distinction between volunteer and member would make any difference. There are likely to be many more members who demonstrate little if any support than volunteers who provide such support.
15. I am persuaded that in reaching the findings he did the Judge failed to consider the risk to the Appellant on a holistic basis in light of the findings in GJ about the level of intelligence employed by the Sri Lankan authorities. As I have already indicated, Ms Cunha conceded there was an error established by the Appellant’s ground two. For that reason, I set aside the Decision. There has however been no challenge to the Judge’s findings in relation to the Appellant’s involvement in individual events whilst in the UK and I therefore preserve the findings made in that regard.
16. Ms Cunha also accepted Ms Patyna’s submission that, based on the recent country guidance decision of KK (Sri Lanka), the risk to the Appellant is more evident. I need only refer to the headnote of that decision to make out that case. That reads as follows (so far as relevant):
 - “(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. In respect of organisations which have never been proscribed and the organisation that remains de-proscribed, it is reasonably likely that there will, depending on whether the organisation in question has, or is perceived to have, a separatist agenda, be an

adverse interest on the part of GoSL, albeit not at the level applicable to proscribed groups.

(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. Global Tamil Forum (“GTF”) and British Tamil Forum (“BTF”) are also currently proscribed and whilst only the former is perceived as a “front” for the LTTE, GoSL now views both with a significant degree of hostility.

...

(8) GoSL continues to operate an extensive intelligence-gathering regime in the United Kingdom which utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media. At the initial stage of monitoring and information gathering, it is reasonably likely that the Sri Lankan authorities will wish to gather more rather than less information on organisations in which there is an adverse interest and individuals connected thereto. Information gathering has, so far as possible, kept pace with developments in communication technology.

(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 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.

(11) Those in possession of a valid passport are not interviewed at the SLHC. The absence of an interview at SLHC does not, however, discount the ability of GoSL to obtain information on the matters set out in (10), above, in respect of an individual with a valid passport using other methods employed as part of its intelligence-gathering regime, as described in (8). When considering the case of an individual in possession of a valid passport, a judge must assess the range of matters listed in (10), above, and the extent of the authorities’ knowledge reasonably likely to exist in the context of a more restricted information-gathering apparatus. This may have a bearing on, for example, the question of whether it is reasonably likely that attendance at one or two demonstrations or minimal fundraising activities will have come to the attention of the authorities at all.

(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, 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.

(16) Those in possession of a valid passport will only be questioned on arrival if they appear 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).

...

(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.”

17. As was the case in GJ, if an individual is at real risk of being detained by the authorities, then that person will be subjected to treatment contrary to the Refugee Convention and Article 3 ECHR.
18. In this case, in light of the findings made by Judge Mitchell at [68] to [74] of the Decision, which were not challenged by the Respondent and which I therefore preserve, Ms Cunha accepted that there was sufficient evidence that the Appellant is someone who is likely to be of interest to the Sri Lankan authorities and to have come to their attention. Although he may not be a committed activist due to his lack of genuine motivation that is unlikely to be a relevant consideration of the Sri Lankan authorities who will regard his activities as showing a commitment to the separatist cause of a proscribed organisation. I note also based on the guidance in KK (Sri Lanka) that BTF is now also proscribed, and the authorities regard that organisation also with hostility. The Appellant was also a member of that organisation.
19. As I have already indicated, in light of the concession made by Ms Cunha that the Appellant would be at real risk based on his diaspora activities, I do not need to consider the other element of the Appellant’s case based on his claim of past persecution. As Ms Patyna accepted, the Appellant’s claim based on sur place activities can succeed whether or not coupled with his claim to have been persecuted in the past.
20. For those reasons, and as conceded by the Respondent, I am satisfied that the Decision contains an error of law and should be set aside (whilst preserving the findings of fact made about the evidence in relation to sur place activities as those are not challenged). As also conceded by the Respondent, I am satisfied that the Appellant’s appeal should be allowed. The Appellant is accepted to be at real risk on return to Sri Lanka based on his sur place activities.

DECISION

I am satisfied that the decision of First-tier Tribunal Judge Mitchell promulgated on 15 January 2020 discloses an error of law. I set aside that decision (whilst preserving the findings of fact made on the evidence regarding the Appellant’s sur place activities). I re-make the decision. The Appellant’s appeal is allowed on protection grounds.

Signed: *L K Smith*
Upper Tribunal Judge Smith

Dated: 20 October 2021

APPENDIX: PREVIOUS DECISION



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

Appeal Number: PA/06537/2019 (T)

THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE SMITH

Between

S I

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

NOTE AND DIRECTIONS

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

BACKGROUND

1. The Appellant appeals against the decision of the First-tier Tribunal Judge G Mitchell promulgated on 15 January 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 18 June 2019 refusing the Appellant's (second) protection claim.
2. The Appellant is a national of Sri Lanka of Tamil ethnicity. He first claimed asylum on 6 December 2011. That claim was refused by the Respondent on 5 April 2011. The Appellant's appeal was dismissed by Immigration Judge Traynor on 28 July 2011. Permission to appeal was granted by First-tier Tribunal Judge Froome on 27 October 2011 but Upper Tribunal Judge Manuell dismissed the appeal on 15 June 2012. The Court of Appeal refused permission to appeal that decision.
3. The Appellant's protection claim is based on events which he claims occurred in Sri Lanka in October to November 2010. The Appellant says that he joined the LTTE in August 2007 and was involved in various non-combat roles for that organisation until February 2009 when he ran away to avoid having to serve in a combat role. In April 2009, he, his wife and his parents-in-law surrendered to the Sri Lankan government forces. They were placed in a camp for internally displaced people but were released after six months.
4. The Appellant claims that he was arrested by Sri Lankan CID in October 2010 and held for just over one month. He says that their interest was due to his past involvement with the LTTE and arose due to disclosure by a LTTE member turned informer. The Appellant says that he was tortured, fingerprinted, photographed and his personal details recorded. He claims to fear the Sri Lankan authorities on that account. He says that he was released in November 2010 on payment of a bribe.
5. The Appellant's second protection claim is predicated on the same facts as before. However, he relied on the subsequent country guidance case of GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 ("GJ and others") against which his case must be assessed. He also relied on events occurring in the UK. He says that he has participated in protests against the Sri Lankan government and is involved with the Transnational Government of Tamil Eelam ("TGTE").
6. The Appellant's claim was found in his first appeal not to be credible. The Judges had before them on that occasion medical evidence in the form of a scarring report of Dr Martin, dated 16 May 2011. Judge Mitchell (correctly) took the previous Judges' decisions as his starting point. The Appellant relied on further evidence including medical evidence in the form of a report of a psychiatrist, Dr Balasubramanian and a letter from his GP, Dr Ahmed.
7. Judge Mitchell rejected the credibility of the Appellant's claim to be at risk on return due to past events ([59]). In so doing, he saw no reason to depart from the

findings in the earlier appeal. At [61] of the Decision, he concluded that Dr Balasubramanian's report was of "limited probative value" due to "shortcomings" which he identified at [50] of the Decision. In relation to the Appellant's sur place activities, the Judge found these to be "motivated by a desire to create a risk on return" ([69]). As such, although the Judge accepted that the Appellant was likely to be interviewed by the Sri Lankan authorities on return and would be asked some general screening questions, the Judge concluded that the Appellant would not mention his involvement with the TGTE because he was not genuinely motivated by a political belief in that organisation. In conclusion, therefore, the Judge assessed that the Appellant would be returning as "an ordinary Tamil civilian" and who did not fall within any of the risk categories in GJ and others.

8. The Appellant appeals on two grounds. The first concerns the Judge's approach to the medical evidence, that is to say both the scarring report of Dr Martin and the psychiatrist's report of Dr Balasubramanian. The second challenges the Judge's findings on the sur place claim.

9. Permission to appeal was granted by Designated First-tier Tribunal Judge Macdonald on 18 February 2020 in the following terms so far as relevant:

"... The Judge provided detailed and lengthy reasoning for his decision. Nevertheless, as the grounds observe, the medical evidence was of particular importance in this case. Furthermore, it is well established that even an opportunistic sur place claim is not a bar to establishing a real risk on return. The grounds disclose clear arguable errors in law by the Judge and permission to appeal is therefore granted on both grounds."

10. The Respondent filed a Rule 24 response on 4 March 2020 making the following points:

"5. It is submitted that the FtT judge has adequately dealt with the new medical evidence. In Paragraph 18 the judge considers the points raised in Counsel's skeleton argument and makes findings on those points at p21. Finding that the evidence in relation to [SI]'s mental health does not come close to satisfying the article 3 of ECHR threshold. At B6 (p48-50) the judge considers the medical evidence.

6. In relation to the sur place claim the judge considers the evidence given by [Y] (p23) and proceeds to assess the country evidence from p28 and setting out the sophisticated intelligence concerning the Diaspora in the UK. In paragraph 34-35 the judge considers the evidence in UB Sri Lanka and the CPIN. From p62 the judge makes findings on the sur place activities particularly p67 onwards and (p70) accepts that [SI] became a member of the TGTE in 2018. In paragraph 74 (a-k) the FtT judge through to paragraph 81 makes lengthy findings.

7. It will be submitted that the conclusions drawn on those findings were open to the judge to make and reveal no material error of law."

11. By a Note and Directions dated and sent on 20 March 2020, having reviewed the file, I reached the provisional view that it would be appropriate to determine

without a hearing (pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 – “the Procedure Rules”) the following questions:

- (a) whether the making of the First-tier Tribunal’s decision involved the making of an error of law and, if so
- (b) whether that decision should be set aside.

Directions were given for the parties to make submissions in writing on the appropriateness of that course and further submissions in relation to the error of law. The reasons for the Note and Directions was the “present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules”.

12. On 14 April 2020, the Appellant filed written submissions setting out in considerable detail the substance of the two grounds. No express objection was made to the determination of the error of law issue on the papers. However, in particular in relation to the second ground, the Appellant drew my attention to two pending appeals (“KK and RS”) which are intended to deal in particular with risk based on membership of and activities on behalf of the TGTE and to give country guidance on those issues. The suggestion was made that it may be appropriate to stay this appeal to await the decision in KK and RS.
13. On 28 April 2020, the Respondent filed a very brief skeleton argument relying on her earlier Rule 24 response. However, in relation to the manner in which the error of law issue should be considered, the Respondent “recognise[d] that the complexity of the medical evidence would most likely require an oral hearing for the Tribunal to evaluate the error complained of in the FTT’s treatment of it”. She also sought permission to adduce two unreported Upper Tribunal decisions concerning the “issue of Facebook accounts and their relevance to sur-place activity”.
14. The Respondent’s submissions prompted a request by the Appellant’s solicitors for an extension of the time given by the directions to permit a response (particularly given the lateness of the Respondent’s submissions). Time was duly extended. In that application, the solicitors asked for the matter “to be substantively decided at a hearing rather than on the papers given the number and complexity of the matters in issue between the parties”. That was followed in the formal reply from the Appellant’s Counsel by a submission that the error of law issue should be dealt with at an (remote) oral hearing for the following reasons:
 - “2. The parties appear to agree that the question whether the FTT determination contains an error of law should be dealt with at an oral hearing. The Tribunal is asked to bear in mind that:
 - a. both parties appear to wish to make references to the evidence before the FTT; an oral hearing, at which the Tribunal could ask further questions of the representatives, is much more preferable in this respect;
 - b. beyond relying on her Rule 24 response (on which the Appellant commented in his written submissions) the Respondent’s submissions do not make

any clearer her position in respect of the appeal, and specifically fail to engage with the legal framework set out in the Appellant's written representations.

c. there is potential complexity involved in respect of ground 2 – the sur place claim ground – and the Tribunal may wish to hear from both parties about how this case is to be approached in light of the pending Sri Lankan country guidance in appeals PA/09978/2016 and PA/13288/2018 (KK and RS); whilst the Appellant's submissions, at §36-37 address this point, the Respondent is silent on it);

3. The Appellant's position is that a remote hearing would be appropriate as it is not anticipated the error of law stage will require further evidence."

15. The fact that both parties are in agreement that an oral hearing is required to determine the error of law issue is not determinative. Rule 34 provides for the Tribunal to make a decision without a hearing and I am only required to have regard to the views of the parties when assessing whether I should do so. I have regard to the views which have been expressed. That the issues and underlying evidence are said to be complex is not a barrier to determination of the error of law issue on the papers. The Appellant has put forward very detailed written submissions which would enable me to consider those issues and the evidence without difficulty and most probably without the need for any further input from the Appellant's Counsel. Neither is it important for me to know the Respondent's views. Whilst those views might be helpful, it is likely, given what is said in the skeleton argument, that I would be faced only with reliance on the Rule 24 response even if a hearing were held to determine the error of law issue.
16. It is of course clearly the case that the Decision cannot be impugned by a decision of this Tribunal which was not existence at the time. Nonetheless, I bear in mind that KK and RS are cases which are intended to give country guidance on issues which are directly relevant to this appeal and to the second ground raised challenging the Decision. It is likely that the Tribunal hearing those appeals will have the benefit of direct and more detailed evidence on the type of sur place claim which arises in this case. I could of course determine whether the Decision contains an error of law in this regard and do so on the papers before the country guidance case is determined. However, if I were to find an error of law in the Decision in that regard, it is likely to be necessary to defer the re-hearing of this appeal until after the pending country guidance in any event and time would be wasted considering some of the evidence in the context of the error of law here. Although I could determine the error of law issue on the first ground separately, that exercise does not appear to be me to be a sensible use of resources, particularly in light of current circumstances.
17. For those reasons, I have decided that it is appropriate for there to be an oral hearing in relation to the error of law issue. In light of my previous comments, it makes sense for that to be held after the decision in KK and RS and I have given a direction to that effect. Although those appeals are no longer listed in June, it is anticipated that they will be listed in the next few months. That direction will then enable the error of law issue and re-hearing to be dealt with at the same time. It is likely given the complexity of both grounds of appeal that one hearing to deal with both issues would be a more efficient use of the Tribunal's time. Whether that is a

remote or face-to-face hearing will depend on circumstances at that time. I have therefore given a direction for the parties to file and serve written submissions as to the effect of the country guidance and in relation to the onward determination of this appeal. Further directions will then be given as necessary for listing. I have given liberty to the parties to apply in case there is any urgency in this case of which I am unaware.

DIRECTIONS

1. **This appeal shall be listed for an oral hearing (remote or face-to-face) of the error of law issue and, if an error is found, for the re-hearing of this appeal immediately to follow. The hearing shall not be listed until after the Tribunal's decision in KK and RS v Secretary of State for the Home Department (Appeal Nos PA/09978/2016; PA/13288/2018).**
2. **No later than 28 days after the date when the decision in KK and RS is promulgated, the parties shall file and serve written submissions dealing with the effect of the decision in those cases on this appeal (both in relation to the error of law and re-hearing if an error is found). Those submissions shall include also the parties' position as to the manner in which the further hearing should take place (whether by remote hearing if that remains necessary or by a face-to-face hearing). The Tribunal will then give further directions for the progress of this appeal.**
3. The parties are at liberty to apply to amend these directions, giving reasons, if any issues arise from the foregoing directions.
4. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.
5. Service on the Secretary of State may be to [email] and on the Appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Signed *L K Smith*
Upper Tribunal Judge Smith

Dated: 28 May 2020