



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

Appeal Number: HU/09062/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 January 2022**

**Decision & Reasons Promulgated  
On 27 January 2022**

**Before**

**THE HON. MRS JUSTICE HEATHER WILLIAMS  
(sitting as a Judge of the Upper Tribunal)  
UPPER TRIBUNAL JUDGE GILL**

**Between**

**MR KANDEEPAN PONNAMPALAM  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Mackenzie, Counsel, instructed by Duncan Lewis, solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a citizen of Sri Lanka born on 8 February 1975, appeals against a decision of Judge of the First-tier Tribunal Moore (“the Judge”) promulgated on 2 July 2021, following a hearing on 17 June 2021, by which she dismissed his appeal from the Respondent’s decision of 23 April 2019, refusing his 27 April 2010 application for leave to remain.

2. As the Judge identified at para 17 of her decision, the Appellant's case before her was based on four limbs, namely that:
  - (1) He had a genuine and subsisting relationship with a qualifying child for the purposes of s. 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA");
  - (2) There would be very significant obstacles to his integration into Sri Lanka for the purposes of para 276ADE(1)(vi) of the Immigration Rules;
  - (3) Outside of the rules, his removal to Sri Lanka would be a disproportionate interference with his rights under Article 8 ECHR to a private and/or family life;
  - (4) His removal to Sri Lanka would breach Article 3 ECHR by reason of his mental health.
3. The Judge accepted that the Appellant had established a family life with his sister and nieces, with whom he had lived for the previous 18 years. However, she rejected each of these contentions.

### **The issues**

4. As we identify in further detail below, the Appellant's grounds of appeal focused on the Judge's decision in respect of the Article 3 claim and upon aspects of her Article 8 assessment. In his skeleton argument, Mr Mackenzie summarised the six grounds of appeal as follows:
  - (1) Erred in rejecting the agreed findings of a consultant psychiatrist ("Ground 1");
  - (2) Applied the wrong legal test to the Appellant's mental health claim ("Ground 2");
  - (3) Reached unsustainable conclusions on the availability of mental health treatment in Sri Lanka ("Ground 3");
  - (4) Failed to take account of the Appellant's long residence ("Ground 4");
  - (5) Reached unassailable conclusions on delay in the Appellant's case ("Ground 5");
  - (6) Failed to consider relevant factors cumulatively for the purposes of Article 8 ("Ground 6").
5. At the outset of the hearing, Mr Melvin accepted that the permission to appeal granted by Judge of the First-tier Tribunal Aziz on 12 October 2021 extended to all six grounds (and that he did not pursue the contention in para 3 of his skeleton argument that it was confined to Ground 2). This coincided with our own understanding of the position, given the guidance in **Safi (permission to appeal decisions)** [2018] UKUT 00388 (IAC) and the absence of any express limitation on the grant of permission in this instance.

## Immigration history

6. On 23 March 2003 the Appellant arrived in the UK and claimed asylum on the basis of his alleged prior membership of the Liberation Tigers of Tamil Eelam (“LTTE”) and his work in military intelligence, particularly the Long-Range Reconnaissance Patrol (“LRRP”). His claim was refused on 9 May 2003 and an appeal against that decision was dismissed by a judgment of the First-tier Tribunal (“FTT”) on 29 September 2003. Adjudicator John Molley found the credibility of the Appellant to be poor and he did not accept that he was associated with the LTTE or the LRRP. Permission to appeal was refused and the Appellant became appeal rights exhausted on 2 January 2004.
7. On 4 September 2006 the Appellant made a further asylum claim. By letter of 15 November 2006 the Secretary of State declined to treat the application as a fresh asylum claim. The Appellant subsequently applied for, and was granted, permission to apply for judicial review on the basis that the Secretary of State had not focused on fresh evidence which showed that the Adjudicator's assessment of credibility was flawed. The Secretary of State then agreed that the Appellant's fresh asylum claim would be considered.
8. Accordingly, on 17 November 2006 the Appellant made a new asylum claim, which was refused on 3 May 2007. An appeal against that decision was dismissed by a judgment of the FTT on 10 October 2007. Judge G Jones QC found that the claim put forward was not significantly different from that made in 2003, and that he was being asked to reverse the Adjudicator's findings of fact and accept the Appellant as a credible witness, when there was no justification for doing so.
9. On 27 April 2010 the Appellant lodged submissions asking for his case to be listed under the legacy cases criteria. In May 2010 an internal decision was initially taken to grant the Appellant Indefinite Leave to Remain, however this was reversed the following day without either decision having been communicated to the Appellant. He subsequently became aware of these matters as a result of a letter in March 2012 to his MP and he instituted proceedings for a judicial review. Permission to bring judicial review was refused by Upper Tribunal Judge Gill on 9 April 2014. As part of her reasoning, Judge Gill concluded that the Appellant's representations of 27 April 2010 remained outstanding, as neither the 2012 letter to his MP nor the 2010 internal determinations constituted the valid communication of a decision (para 31 of her judgment). An appeal against Judge Gill's decision was dismissed by the Court of Appeal in December 2015.
10. In the meantime, by way of decision made on 13 May 2014, the Secretary of State refused the Appellant Leave to Remain under the legacy provisions. The Appellant challenged this decision by way of judicial review on the basis that the Secretary of State had not taken into account certain submissions in his letter of 27 April 2010 that engaged Article 8 ECHR. Having agreed to consider those Article 8 submissions, on 14 October

2014 the Secretary of State made a further decision refusing the Appellant Leave to Remain. The Appellant subsequently sought to amend the grounds of his judicial review to challenge this further decision and permission was granted by Upper Tribunal Judge Plimmer on 7 September 2017. That judicial review claim was settled by consent; the Secretary of State agreed to reconsider her decision on the Appellant's submissions of 27 April 2010, with the Appellant being given the opportunity to submit further evidence.

11. On 20 March 2018 the Secretary of State made a further decision refusing the Appellant Leave to Remain. It was not accepted that the Appellant satisfied paragraph 276ADE(1) of the Immigration Rules, that he would face very significant obstacles on his return to Sri Lanka, or that he was exceptionally dependent on his sister. The Appellant brought a judicial review of this decision. Permission was initially refused, but it was then granted on review by Upper Tribunal Judge Rintoul on the basis that the Secretary of State had arguably erred in not treating the Appellant as having a protected family life with his sister and nieces and in not taking into account the best interests of his nieces. On 24 January 2019 the Secretary of State agreed to reconsider the decision of 20 March 2018 and make a new decision, and the Appellant withdrew his judicial review application.
12. On 23 April 2019 the Secretary of State made a new decision refusing the Appellant's human rights claim. This is the decision that was appealed in these proceedings. Hearings before the FTT were listed for 16 August 2019 and 10 January 2020 but adjourned to enable the Appellant to obtain funding. Further hearing dates of 10 March 2020, 21 July 2020 and 1 February 2021 were also adjourned.
13. The Appellant submitted further evidence to the Secretary of State comprising: (i) an Independent Country Expert Report on Sri Lanka prepared by Susanne Riggaard Pederson dated 25 January 2021 on the question of whether he would face very significant obstacles on his return to Sri Lanka; (ii) a report of an independent Social Worker, Mr Peter Horrocks, dated 11 March 2020 on the impact that removing him to Sri Lanka would have on his sister, his nieces and their various relationships; and (iii) a Psychiatric Report prepared by Dr Naresh Kumar Buttan dated 5 January 2021 stating that he suffers from depression and anxiety and raising the question of whether removing him to Sri Lanka would breach Article 3 ECHR.
14. The Secretary of State issued a Supplementary Letter dated 8 February 2021 and a second Supplementary Letter dated 19 May 2021 responding to the expert reports and maintaining her refusal of the Appellant's claim.
15. Given the grounds of appeal, it is necessary to refer to Dr Buttan's assessment in some detail. He interviewed the Appellant on 8 January 2021. Broadly, the Appellant gave him the history of his involvement with the LTTE and LRRP that had been rejected in the determination of his

asylum claim. Dr Buttan considered that the Appellant was suffering from symptoms of depression and anxiety (which he listed). His diagnosis was that he was suffering from Mixed Anxiety and Depressive Disorder and Post Traumatic Stress Disorder. The Appellant had not sought nor received medical assistance for his symptoms. Dr Buttan considered that:

“8.3.3 Given his uncertain immigration status and the constant threat of being removed back to Sri Lanka where he faced persecution is adding to his distress and worsening his depression and anxiety which triggered his PTSD. Hence, in my expert opinion, he is to be considered as a 'seriously ill person'.”

16. Dr Buttan then addressed the question “Would the absence of such treatment lead to a ‘serious, rapid and irreversible decline in his state of health resulting in intense suffering?”. He said:

“8.3.4 Given that his psychiatric conditions have not yet fully recovered in absence of the recommended treatment including antidepressants, his mental health would definitely worsen in absence of such recommended treatment. As his conditions have been present over more than two years, they have become chronic in nature and need the ongoing and more aggressive treatment including medications and counselling/therapy.

8.3.5. In absence of such treatment, his mental health would face a serious, rapid and irreversible decline leading to intense suffering. He still has fleeting suicidal thoughts due to his feelings of helplessness and hopelessness. He has not been able to share his feelings with professionals such as GP due to his fears of authority and his language and cultural barriers where men are not supposed to cry.

8.3.6. Hence, it is also important to bear this cultural implication in mind while engaging him in any therapeutic work to treat his conditions. In absence of such support which can understand all his problems and help address his needs, he would be at the risk of further deterioration leading to serious, rapid and even irreversible decline in his mental health resulting in intense suffering.”

17. Dr Buttan was asked whether there were “any clinical factors which might prevent or impede his access to such treatment in Sri Lanka”. His response was:

“8.3.7. Based on his history and current presentation, I believe that the following clinical factors may prevent or impede his access to such treatment in Sri Lanka:

a) The nature of his illnesses: due to ongoing symptoms of depression and anxiety, he is less likely to feel motivated to go out and seek help, his poor concentration, sleep difficulties, getting anxiety when seeing authority figures and being reminded of his past will interfere with him seeking out help and develop any trusting therapeutic relationships.

b) Fear: As he would be living in constant fear of being persecuted by the Sri Lankan army/ Police/ LTTE, he would avoid going out and accessing help and treatment there. It is clear from his history that though he had some symptoms of his illnesses even before coming to

the UK he did not seek any help or treatment while living in Sri Lanka. He reported that before coming to the UK he was living every day in constant fear and trying to secure his safety. He also reported that if he is sent back to Sri Lanka he would make sure that he is safe before thinking about the treatment of his illnesses.

c) Insight: he reported that while living in Sri Lanka, he did not recognise his symptoms and attributed them to his situation as he was being persecuted by Sri Lankan army/Police/ LTTE. Now that he understands the concept of mental illness but still has not sought treatment here in the UK. However, he reports that he is still very unlikely to go out and ask for help what is mental health if he is sent back to Sri Lanka due to fear of being persecuted. He believes that even the healthcare facilities and doctors are under the control of Sri Lankan army and there is no concept of confidentiality or privacy of information. In my professional opinion, his perception of risk of persecution is strongly held and not amenable to any suggestions or advice.

d) Guilt and culture: He reported feeling guilty about leaving his elderly parents behind in Sri Lanka and worries about their safety. He also reported that it was not acceptable in his culture for men to cry or seek help for their mental health, it is considered as a weakness."

18. Dr Buttan was also asked to address "presuming that appropriate treatment would not be available/adequate/accessible, would removing our client to Sri Lanka result in a significant reduction in his life expectancy". His conclusion was as follows:

"8.3.8 If he is forced to return to Sri Lanka it is highly likely that his mental health conditions of anxiety, depression and PTSD will worsen. He has not received any treatment so far and has limited understanding about the impact of his situation on his mental health

8.3.9 If he is returned to Sri Lanka at this stage he is very unlikely to seek any help or treatment as he would try to hide to stay alive. Under the constant fear of authorities, he will find it difficult to engage with any authoritative figure including doctors and mental health professionals.

8.3.10. Overall, WHO estimates that the average life span of people with mental illnesses are 10-20 years shorter than those with no ailments... If he is returned to Sri Lanka, it will reduce his life expectancy significantly as he will be living in constant stress which can increase his acute risk of suicide and developing other physical illnesses.

8.3.11. In the absence of his recommended treatment, his suicidal risk is highly likely to increase significantly as his illnesses- PTSD, Anxiety and Depression will worsen and all these conditions have inherent suicide risks individually and more when combined together. He also will feel completely hopeless, helpless and worthless and this combined with fear of persecution would escalate his suicide risks in immediate period."

19. Noting that he was not currently prescribed any anti-depressant, Dr Buttan recommended that the Appellant should have a detailed discussion with his GP as in his view he required medication and psychological

interventions. Referring again to his current lack of treatment at para 8.4.6, Dr Buttan commented that: "Further lack of treatment due to non-availability is highly likely to affect his well-being adversely". He also opined that:

"8.5.4. In my clinical opinion, separating him from his sister and her family will have an adverse effect on his mental health as he feels supported by them and valued as a family member and will lose his identity on separating from them. His current untreated mental health problems make it difficult to see himself living on his own in the future as it induces a sense of helplessness and worthlessness and this anxiety of separation makes his PTSD, Anxiety and Depression worse."

20. In the first Supplemental Letter the Secretary of State indicted that she accepted that Dr Buttan was a qualified, experienced clinician and health care professional (para 72). She said that:

"77. There is no reason to dispute the findings of Dr Buttan and consideration has been given to the availability of mental health care in Sri Lanka.

21. The letter then quoted the Country Policy and Information Note Sri Lanka: Medical treatment and healthcare Version 1.0 dated July 2020 ("the CPIN"). Mr Mackenzie emphasised the following passage from this:

"Despite some improvements, mental health services, overall, are considered inadequate, particularly in former conflict areas, and there remain ongoing challenges in accessing mental health care. Mental illness is not widely discussed in Sri Lankan society and carries stigma at the community level. This, in turn, deters victims from revealing and seeking treatment for mental illness."

22. After referring to the CPIN, the letter set out the following conclusions:

"80. In light of the above it is considered that there is health treatment available in Sri Lanka for you to access including treatment for mental health.

81. It is noted that you have failed to show that you are undergoing treatment at present.

82. You have failed to show that there are **substantial grounds** for believing that you would face a real risk of being exposed to a **serious, rapid and irreversible decline** in your state of health **resulting in intense suffering; or a significant reduction in life expectancy as a result of:**

83. the **absence of appropriate treatment** in the **receiving** country; or

84 the **lack of access to such treatment.**

85. You have failed to show that you were a victim of, or upon return to Sri Lanka would face, persecution or discrimination because of your health.

86. You have failed to show that you are unable to access the health care available within Sri Lanka.

87. It is therefore not accepted that within the guidelines laid down in the case law of **PAPOSHVILI** and **AM (ZIMBABWE)** that the impact of your return in relation to the level of suffering likely to be experienced would be one that would amount to a breach of Article 3 of the ECHR” (Bolded emphasis in the original text.)
23. In the second Supplemental Letter dated 19 May 2021, the Secretary of State observed that whilst there was no reason to dispute the medical findings of Dr Buttan, he had made no reference to knowledge, if any, of Sri Lanka and it was not accepted that he was qualified to comment on the availability of treatment in Sri Lanka or on facts in the Appellant’s account which had previously been found not be credible (paras 21 – 27). She reiterated her conclusion that the Appellant’s return to Sri Lanka would not entail a breach of Article 3 ECHR. The core of her reasoning was that:
- “33. In light of the above it is considered that there is health treatment available in Sri Lanka for you to access including treatment for mental health.
34. It is noted that you have failed to show that you are undergoing treatment at present
35. You have failed to show that there are **substantial grounds** for believing that you would face a real risk of being exposed to a **serious, rapid and irreversible decline** in your state of health **resulting in intense suffering; or a significant reduction in life expectancy as a result of:**
36. the **absence of appropriate treatment** in the **receiving** country; or
37. the **lack of access to such treatment.**
38. You have failed to show that you were a victim of, or upon return to Sri Lanka would face, persecution or discrimination because of your health.
39. ...
40. As shown previously your account of persecution within Sri Lanka has not been found to be credible. You have failed to show and it is not accepted that you would be unable or unwilling to seek medical assistance upon return to Sri Lanka. You have by your own admission parents within Sri Lanka who you have failed to show would be unable to offer you the moral support and valued relationship comparable to that of your sister within the UK.
41. You have failed to show that you are unable to access the health care available within Sri Lanka.” (Bolded emphasis in the original text.)

### The Judge’s decision

24. In terms of her conclusions, the Judge began by considering whether the Appellant had a genuine and subsisting parental relationship with a qualifying child. She had earlier referred to his domestic circumstances which, in short, were that he had lived with his sister, Bawalanjali Ponnappalam since 2006. She was separated from her husband and had been bringing up her daughters, Athulyaah Varatheeswaran (born 2



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August 2002) and Architha Varatheeswaran (born 23 January 2004). The Appellant had played an important role in their lives and had formed close and loving relationships with them. However, the Judge was not satisfied that he had stepped into the shoes of his nieces' biological father such that his relationship to them could be described as a parental one (para 50). It followed that the Appellant could not avail himself of s. 117B(6) NIAA. That assessment is not challenged in this appeal.

25. The Judge also rejected the proposition that the Appellant would face very significant obstacles in integrating into Sri Lanka for the purposes of para 276ADE(1)(vi) of the Immigration Rules. Her reasons included that both of the Appellant's parents were alive and living in Sri Lanka and that he was in regular contact with them. He also had wider family in Sri Lanka, so that there were "a significant number of people who are potentially able to help and support the Appellant adjust to life back in Sri Lanka" (para 55). The Judge referred to his sister's evidence that his parents had a flat in Colombo which they had given to her to stay in and that it would be an option for the Appellant to live in the flat, now owned by his sister. He had lived in Colombo before and was familiar with the city (para 56). At para 57 the Judge said that she did not accept that he had a genuine fear of persecution, for the reasons she later addressed in para 82; and also that she did not accept that his mental health would prevent him from seeking out work or functioning in society.
26. From para 60 - 71 the Judge addressed the Article 8 ECHR claim outside of the Immigration Rules. After correctly directing herself as to the applicable legal framework, including s. 117B(4) and (5) NIAA, she indicated that she accepted that family life had been established as the Appellant had lived with his sister and his nieces for the last 18 years, albeit at a time when his immigration status was precarious (para 65). She also accepted that the Appellant had established a strong private life with his sister and his nieces, given the important role he had played in their lives (para 65). She recognised that she must give primacy to the best interests of Artcitha, who was still under 18 years old (unlike her older sister). She considered that Artcitha's best interests would be served by remaining in the UK with her mother. She noted that Artcitha would soon go to University. She accepted that her older sister's life was now largely independent of the Appellant and that whilst all involved would miss each other, relationships could be maintained by modern means of communication (paras 66 - 67). She considered that the Appellant's activities with his friends in London and his sporting interests did not amount to exceptional circumstances: "whether considered on their own or together with the other circumstances of the case, that would render the removal of the Appellant to Sri Lanka a disproportionate interference with his right to family or private life under Article 8" (para 68).
27. The Judge then addressed an argument based on delay at para 69. We set this out in full because it forms the basis of Ground 5:
- "69. Finally, as regards delay, the Appellant has never been given any valid leave to remain in the UK. His application for asylum was dismissed in

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2003 and he should have returned home when he became appeal rights exhausted on 2 January 2004. A further asylum application was dismissed by Judge Jones QC, following which the Appellant again became appeal rights exhausted. He lodged further submissions on 28 April 2010 and Mr MacKenzie states that the period from then until 23 April 2019 is best characterised as one of delay by the Respondent. I do not accept this submission. In view of the history set out above in paragraphs 2-10, I agree with the Respondent's description of that time as being a period of contested decision-making. In any event, I do not consider that the length of time taken to reach the point of the contested decision now under appeal affects, of itself, the assessment of the proportionality of returning the Appellant to Sri Lanka to any significant extent. This is not a case where delay should reduce the weight to be "accorded to the requirements of a firm and fair immigration control"; it is plainly not an example of an individual being affected by a "dysfunctional system" that has yielded "unpredictable, inconsistent and unfair outcomes" (cf **EB (Kosovo) v SSHD [2008] UKHL 41 per Lord Bingham at [161]**)." (Bolded text in the original)

28. The Judge's conclusion on the Article 8 ECHR claim was set out in the next two paras:

"70. Accordingly, for all the above reasons I reach the conclusion that there is insufficient evidence of compassionate and compelling circumstances to justify a grant of leave outside the rules and that requiring the Appellant to return to Sri Lanka would not be a disproportionate interference with the right to a private or family life under Article 8(2).

71. The appeal on Article 8 grounds is therefore dismissed."

29. The Judge then turned to the Article 3 ECHR issues. As there is some disagreement between the Appellant and the Respondent as to the extent of the latter's acceptance of Dr Buttan's conclusions, we set out her summary of the Respondent's submissions:

"72. As regards the Appellant's mental health, whilst the Respondent did not seek to dispute the medical findings of Dr Buttan that the Appellant suffers from Mixed Anxiety and Depressive Disorder, and Post Traumatic Stress Disorder, the Supplementary Letter of 19 May 2021 pointed out that the scores on the rating scales used were based on subjective reporting and subject to an individual's understanding and expression of their symptoms. Further it was not accepted that Dr Buttan had personal knowledge of the Appellant's circumstances or those within Sri Lanka to submit a qualified opinion that outweighed the previous credibility findings by an Immigration Judge. In particular, the Appellant's claim to fear persecution upon return to Sri Lanka has not been found to be credible and that lack of credibility undermines Dr Buttan's opinion that the Appellant would be reluctant to seek medical help because of such a fear. In the same letter the Respondent relied on a Country Policy and Information Note (CPIN), Sri Lanka, Medical Treatment and Healthcare version 1.0 July 2020 as evidence of there being mental health treatment available in Sri Lanka. Further, the Appellant was not taking any medication or having any treatment for his mental health in the UK, and he had failed to show that there were

substantial grounds for believing he would face a real risk of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or a significant reduction in life expectancy. Ms Akbar further submitted that there was no basis for overturning the previous findings of the IAT that the Appellant's asylum claim, and the supposed basis of his fear of the Sri Lanka authorities, was not credible. Further, the Appellant had not been to his doctor or sought any treatment for his mental health in the six months since the date of Dr Buttan's report, yet his mental health had not declined as Dr Buttan predicted. The further prediction of Dr Buttan that the Appellant would, on return to Sri Lanka, be at risk of death from suicide was pure assumption."

30. The Judge then turned to the legal framework regarding Article 3 claims based on the impact of removal upon the applicant's health. She referred to paras 181 and 183 in the Grand Chamber's judgment in **Paposhvili v Belgium** [2016] ECHR 113 and then to the test which the Court of Appeal had abstracted from that decision in **AM Zimbabwe v SSHD** [2018] EWCA Civ 64. She made no reference to the subsequent decision of the Supreme Court in the latter case. This is the subject of Ground 2.
31. In light of Grounds 1 – 3 it is necessary to set out the Judge's reasoning and conclusion on this issue in some detail:
- "80. The Appellant is not dying and does not satisfy the test set out in **N v UK**. Therefore, in accordance with **Paposhvili** and **AM (Zimbabwe)**, the issue is whether his removal to Sri Lanka would result in a serious and rapid decline in his health leading either to intense suffering (to the Article 3 standard) or death in the near future.
81. In this respect, the only evidence I have of the Appellant's mental health is the report of Dr Buttan who has diagnosed the Appellant with Mixed Anxiety and Depressive Disorder and Post Traumatic Stress Disorder on the basis of one examination. There is no evidence, or even suggestion, the Appellant has ever been prescribed medication for his mental health in the UK, or ever sought medical help for it from his GP (or anywhere else). Neither is there any evidence that his mental health has impeded him from having an active life in the UK and participating in sports or social events. Further, although Dr Buttan opined that in the absence of treatment, including antidepressants, the Appellant's "mental health would face a serious, rapid and irreversible decline leading to intense suffering" the Appellant has not been treated for his mental health in the six months since that report, either with antidepressants or otherwise, and there is no evidence of any decline in his mental health, let alone a serious, rapid and irreversible one.
82. As regards, the question of whether the Appellant would or could seek treatment for his mental health in Sri Lanka, Dr Buttan's opinion that the Appellant would be reluctant to seek medical help because of fear of persecution by the authorities is undermined [by] the finding of Judge Molley that the Appellant's claim to fear persecution upon return to Sri Lanka was not credible. When I suggested to Mr MacKenzie that the inevitable implication of that finding was that the Appellant did not have a genuine fear of persecution by the Sri Lankan authorities (or anyone else), he submitted that the findings of Judge Molley were

merely a starting point. However, since the Appellant's asylum claim has not been re-opened and I have heard no evidence in respect of it, let alone any new evidence that was not before Judge Molley, I must regard that issue as settled and make my findings in line with that determination (**Devaseelan** [20021 UKIAT 00702]). I therefore do not accept the proposition that the Appellant would be prevented from seeking medical help in Sri Lanka because of his fear of persecution by the authorities.

83. As regards the availability of mental health care in Sri Lanka, it is true that the CPIN describes mental health services as being, "overall... inadequate, particularly in former conflict areas" and notes "there remain ongoing challenges in accessing mental health care". However, mental health care in Sri Lanka is plainly not non-existent. The CPIN also notes that the government "is devoting progressively greater attention and resources to mental illness" and that the National Institute of Mental Health (NIMH) in Colombo has 1,500 beds and admits over 8,000 beds annually. It also operates a National Mental Health Helpline. The report records that the NIMH has 24hr emergency care and a 24-hour outpatient facility and provides comprehensive treatment for people with all ranges of mental health problems. Further, at the time of the fact-finding mission there was no waiting list for the services. The CPIN also states that District-level hospitals have mental health facilities; the fact-finding mission was told that psychiatric care was provided in mental health units in all general hospitals across the 25 districts of Sri Lanka and University hospitals also had psychiatric care. Further some non-governmental organisations provide psychological support services, including in Tamil-populated areas (para 8.1.1-8.1.9). As regards treatments available, the CPIN records that mood disorders including depressive disorders are commonly seen in Sri Lankan mental health settings, with antipsychotic and mood-stabilizer medication available. Medication specifically used for the treatment of PTSD is available from most larger government hospitals while newer medications are available from private sector pharmacies (para 8.3.1-8.4.3).
84. In the light of the above I consider the Appellant would, if necessary, be able to access medical treatment for his mental health, particularly since there is accommodation available to him in Colombo so that he could attend the NIMH if he wished to seek treatment there.
85. I further consider that in the circumstances set out above at paragraphs 81 and 82, Dr Buttan's opinion, and/or Mr Mackenzie's submission, that if returned to Sri Lanka it is highly likely the Appellant would be at risk of death from suicide and/or of "intense suffering" resulting from a "serious, rapid and irreversible decline in his mental health" is an unjustified assumption. Overall, in my judgment, the evidence before me falls very far short of showing there are substantial grounds for believing that the Appellant would face a real risk, on account of the absence of appropriate treatment in Sri Lanka, or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy."

## Grounds of appeal

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32. Grounds 1 - 3 concern the Judge's dismissal of the Article 3 ECHR claim and Grounds 4 - 6 her rejection of the Article 8 ECHR claim.
33. Ground 1, which is headed "Judge erred in rejecting agreed findings of psychiatrist", begins with the proposition that the FTT was not entitled to go behind matters agreed between the parties. It contends that the Judge erred in the conclusion she expressed in para 85, as she rejected the agreed findings of Dr Buttan that, if removed, the Appellant's mental health would face a serious, rapid and irreversible decline leading to intense suffering and/or that his suicide risk was likely to increase significantly.
34. Further or in the alternative, this ground is based on the proposition that even if the material aspects of Dr Buttan's opinion were not agreed, the FTT could not depart from uncontradicted medical evidence without good and objective reason for doing so, citing the judgment of Sedley LJ at paras 11 - 12 in **Y & Z (Sri Lanka) v SSHD** [2009] EWCA Civ 362. Mr Mackenzie submits that the Judge failed to take into account Dr Buttan's expert opinion that the Appellant's mental health would deteriorate and/or that the reasons she identified in paras 81 - 82 for departing from his assessment were erroneous. In particular, she wrongly conflated the position in the UK, where the Appellant had not experienced a downturn in his mental health, despite not seeking treatment, with the identified likelihood of deterioration if he was removed to Sri Lanka; and in para 82 she failed to have regard to the fact that Dr Buttan had not identified fear of the authorities as the only reason why the Appellant would not seek treatment in Sri Lanka.
35. As we have already foreshadowed, Ground 2 alleges that the Judge erred in law in failing to apply the Supreme Court's decision in **AM (Zimbabwe) v SSHD** [2020] UKSC 17 and consequently had wrongly identified the test to be applied at para 80. Specifically, she did not appreciate that the second limb was not confined to "death in the near future" but encompassed "a significant reduction in life expectancy" and that this was a free-standing basis for reaching the threshold, without a need to show "a serious, rapid and irreversible decline". Mr Mackenzie told us that he accepted that in order for this error to be material we would have to uphold one or both of Grounds 1 and 3.
36. Ground 3 concerns the Judge's conclusions in paras 83 - 84 regarding the availability of mental health treatment in Sri Lanka. Mr Mackenzie submits that the Judge applied an incorrect and too demanding test, as shown by her reference to the fact that medical treatment was "not non-existent" in Sri Lanka, when she should have asked whether there was a real risk that appropriate treatment would be unavailable. Further or alternatively, he contends that the Judge's determination on this issue was irrational, as the only reasonable conclusion that could be drawn from the CPIN (in particular the assessment that mental health services, overall, were inadequate in Sri Lanka and difficult to access) was that the requisite test was met. He also submits that there was a failure on her part to give

adequate reasons for not accepting the CPIN assessment and for concluding as she did.

37. Ground 4 complains that at no point in her assessment of Article 8 ECHR outside of the Rules did the Judge take account of the Appellant's long residence in the UK. It was undisputed that this spanned a period of some 18 years and 3 months. Mr Mackenzie submits that this was a relevant factor to be considered, as very long residence, albeit falling short of the 20 year period contemplated in the Rules (which, if shown, would be dispositive in the applicant's favour) was nonetheless relevant to the assessment of proportionality and could be sufficient, when combined with other factors, to outweigh the public interest in removal.
38. Ground 5 relates to the way the Judge addressed delay in para 69. The Appellant says that she erred in accepting the Respondent's characterisation of the events as a "period of contested decision-making" and/or in finding that it did not in any event amount to what Lord Bingham in **EB (Kosovo) v SSHD** (above) had called "a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes". None of the delay was the Appellant's fault and he had to wait for the best part of a decade to get a decision from the Secretary of State against which he was entitled to appeal in respect of his April 2010 application. All decisions prior to that had not been lawfully communicated to him or were legally flawed, as the Secretary of State had accepted. Mr Mackenzie submits that the Judge was not reasonably entitled to find to the contrary and/or that she had failed to give adequate reasons for doing so.
39. Ground 6 is based on the proposition that when considering Article 8 outside of the Rules, the Judge failed to consider whether cumulatively the factors relied upon by the Appellant would entitle him to succeed, even if any individual feature of his case did not do so by itself. Mr Mackenzie said that the Appellant's case on Article 8 was largely based on the cumulative impact of the following features: (i) his poor mental health; (ii) his obstacles to re-integration in Sri Lanka; (iii) his long residence in the UK; (iv) the close relationship with his sister and his nieces; and (v) the Secretary of State's delay. As well as failing to consider the factors cumulatively (and in addition to the matters raised under Grounds 4 and 5), the Judge failed to take into account the features at (i) and (ii) when she addressed Article 8.
40. The Respondent took issue with each of the grounds of appeal. Mr Melvin says that whilst the Secretary of State did not disagree with the diagnosis as at the date of Dr Buttan's report in her Supplementary Letters, she had rejected the claimed effect on the Appellant returning to Sri Lanka for the reasons that were set out. Further, that the Judge had taken a similar approach in her conclusions in paras 84 - 85, which were legitimate and supported by the evidence. Mr Melvin does not accept that there was an error of law in terms of the Judge's self-direction on the **AM (Zimbabwe)** test, but in any event submits that any error was not material, given the lack of merit in Grounds 1 and 3. As regards Ground 4, he contends that

the Judge did take into account the Appellant's long residence in the UK. He says that Ground 5 is no more than an expression of disagreement with the Judge's conclusion on delay. Further, a careful reading of the Judge's decision showed that she considered all the relevant factors and assessed them cumulatively in respect of the Article 8 ECHR claim.

## Conclusions

### Grounds 1 - 3

41. As we have already indicated, Grounds 1 - 3 all relate to the Judge's rejection of the Appellant's contention that removal to Sri Lanka would breach Article 3 ECHR by reason of his mental health and the risk of deterioration. We begin with Ground 2 and the correct legal test.

42. The Judge rightly referred to the test identified by the Grand Chamber in **Paposhvili v Belgium** [2016] ECHR 1113 namely:

"183... situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."

43. However, we agree with Mr Mackenzie's submission that the Judge should have directed herself in accordance with the Supreme Court's exposition of this test in **AM Zimbabwe**. The Supreme Court decided that the Court of Appeal had arrived at an unduly narrow interpretation of the test identified in **Paposhvili v Belgium** in failing to appreciate the possibility of the requisite threshold being met by "a significant reduction in life expectancy", without the need to show either "a serious, rapid and irreversible" decline or imminent death. Lord Wilson, JSC explained this as follows:

"29 ... They [the Appellants] point out that the Grand Chamber was addressing exposure "to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (italics supplied); and they contend that the Court of Appeal has misinterpreted those words so as to refer to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or in a significant reduction in life expectancy. ...

30 There is, so I am driven to conclude validity in the criticism of the Court of Appeal's interpretation of the new criterion. In its first sentence the reference by the Grand Chamber to "a significant reduction in life expectancy" is interpreted as "death within a short time". But then, in the second sentence, the interpretation develops into the "imminence ... of ... death"; and, as is correctly pointed out, this is

achieved by attributing the words "rapid...decline" to life expectancy when, as written, they apply only to "intense suffering". The result is that in two sentences a significant reduction in life expectancy has become translated as the imminence of death. It is too much of a leap."

44. Lord Wilson went on to indicate that a "significant" reduction in life expectancy was one that was substantial (para 31). He also confirmed that for an applicant to meet the initial onus identified at para 186 in **Paposhvili** of adducing evidence "capable of demonstrating that there are substantial grounds for believing" that if removed, they applicant would be exposed to a real risk of subjection to treatment contrary to Article 3, required the applicant to raise a *prima facie* case of potential infringement of Article 3, that is to say a case which, if not challenged or countered, would establish infringement (para 32).
45. We turn next to consider Grounds 1 and 3 and whether, in turn, the error of law identified in respect of Ground 2 was material.
46. We reject the contention that the Judge went behind agreed evidence in respect of Dr Buttan's opinion.
47. The passages in the Supplemental Letters we have set out earlier show that the Secretary of State took issue with the proposition that appropriate treatment for his mental health condition would not be available in Sri Lanka and the proposition that the Appellant would be unwilling or unable to access such medical treatment. In consequence, she concluded that he had failed to show that there were substantial grounds for believing that he would face a real risk of being exposed to a serious, rapid and irreversible decline in his health resulting in intense suffering, or a significant reduction in his life expectancy. Paragraph 72 of the Judge's decision shows that the Respondent adopted a similar position before her.
48. Accordingly, in rejecting the proposition that the Appellant would be prevented from seeking medical help because of his fear of persecution (at para 82), the Judge was making a finding on a disputed issue, not going behind agreed evidence. The same applies to her conclusion at para 84 that the Appellant would, if necessary, be able to access medical treatment for his mental health in Colombo, where there was accommodation available to him.
49. Furthermore, her reasoning in para 81 that the Appellant had not been treated in the last six months and had not suffered a decline, was plainly something which both post-dated Dr Buttan's report and reflected the Respondent's submissions (as her summary at para 72 shows). Although we accept Mr Mackenzie's submission that paras 8.3.4 – 8.3.6 and 8.3.8 of Dr Buttan's report were focused on the Appellant's mental health deterioration if he was removed; his subsequent observations at paras 8.4.1 – 8.4.6, emphasising the Appellant's lack of current treatment, the need for this treatment and the likely adverse effect on his well-being if there was a further lack of treatment, do not appear to be similarly



confined. Accordingly, it was perfectly legitimate for the Judge to note that despite the absence of any treatment in the ensuing period, there had been no apparent deterioration in his condition and again this did not entail the rejection of agreed medical evidence. Finally, the other point made in the Judge's para 81, that the Appellant had never sought medical help in the UK for his mental health, was an undisputed fact and was, as Mr Mackenzie accepted, at least relevant context.

50. Accordingly, the Judge's conclusion at para 85 that the evidence did not show that there were substantial grounds for believing that the Appellant would face a real risk on account of the absence of appropriate treatment in Sri Lanka or lack of access to such treatment, did not involve any rejection of agreed medical evidence. Her conclusion did not take issue with Dr Buttan's diagnosis (which the Secretary of State had agreed); it was based on the conclusions in her paras 82 and 84 and the observations in her para 81 that we have just discussed.
51. Similarly, we do not accept that her conclusion involved ignoring Dr Buttan's expert opinion or departing from it without there being good and objective reason for doing so (as the Appellant submits). The Judge's reasoning shows that she paid close attention to his report. It is important to recall that Dr Buttan's own opinion as to the Appellant's likely deterioration was expressly predicated on a scenario in which the Appellant did not receive the recommended treatment, as the extracts we have earlier set out from his paras 8.3.4 - 8.3.6 and 8.3.8 - 8.3.11 indicate. Whereas her para 85 shows that the Judge did not accept the proposition that the Appellant would not be able to access such treatment and that it would be unavailable to him. Accordingly, unless the Appellant is able to show that one or both of those assessments was erroneous, there was a legitimate foundation for her conclusion.
52. Mr Mackenzie accepted during his oral submissions that no objection could be raised to para 82; the Judge was clearly right to proceed on the basis that the Appellant's alleged fear of persecution had been rejected and that this was now settled. However, the Appellant's professed fear of persecution plainly permeated Dr Buttan's assessment that there were clinical factors which may prevent or impede his access to treatment in Sri Lanka, as set out in his four sub-paragraphs of para 8.3.7. Sub-paragraphs (b) and (c) were explicitly founded on the fear of persecution he had described to Dr Buttan. Sub-paragraph (a) was implicitly based on this too, referring as it did to his past and to his difficulty with authority figures. The first part of sub-paragraph (d) was also based on the Appellant's alleged fear of persecution, referring as it did to concerns about his parents' safety. This simply leaves the short passage in the latter part of (d) that: "He also reported that it was not acceptable in his culture for men to cry or seek help for their mental health. It is considered a weakness." There is nothing to suggest that the Judge was unaware of this; she had referred to it earlier in para 40 when summarising Dr Buttan's report. In any event, given how heavily Dr Buttan's assessment was based on the fear of persecution, an issue already settled against the Appellant, there was

plainly good and objective reasons for the Judge to depart from that aspect of his report and to decide that she did not accept that he would be unable to access treatment, if available.

53. The Judge's reasoning on availability of treatment (the subject of Ground 3), was set out in para 83. We reject the submission that it was either irrational or unreasoned. She did not ignore the CPIN, rather she relied on its contents as regards the National Institute of Mental Health ("NIMH") in Colombo and the facilities that it afforded, in turn deciding that the Appellant would be able to live in Colombo and access this. As this was available to the Appellant, the fact that the CPIN referred, for example, to inadequate mental health services in former conflict zones or in other parts of the country, was not in point. Furthermore, we do not consider that the Judge failed to apply the "real risk" threshold. When she set out her conclusion in para 85, she expressed it in those terms. We consider that her reference in para 83 to mental health care being "not non-existent" was by way of commentary, not by articulation of an erroneous test. She went on to discuss in detail the facilities available at the NIMH. Had she thought that all that was needed was for the Secretary of State to establish that medical care was "not non-existent" that level of detail would have been superfluous.
54. Lastly on this part of the appeal, we have already examined the Judge's reasoning at para 82 in our para 48 above. For the reasons there set out, we do not consider that she impermissibly departed from Dr Buttan's opinion in this part of her reasoning either.
55. Accordingly, we reject Grounds 1 and 3. It follows that the Judge's error identified in Ground 2 was not material.

#### Grounds 4 - 6

56. Grounds 4 - 6 all relate to the Judge's assessment of the Article 8 claim outside of the Immigration Rules. For the reasons that we will go on to identify we do not uphold any of these grounds.
57. As regards Ground 4, the Judge was plainly aware that the Appellant had resided in the UK for a lengthy period; she said at para 3 of her decision that he claimed to have arrived in the United Kingdom on 23 March 2003 and noted at her paras 18 and 65 that he had lived with his sister and nieces for 18 years since 2006. No basis has been identified for inferring that she did not bear in mind the length of his residence in the United Kingdom when considering the Article 8 aspect of the appeal before her. In general, an appeal tribunal should be slow to infer that a matter has not been taken into account, simply because it is not explicitly referred to in the decision under appeal or in the particular part of the decision: for example see the approach at para 49 in **MA (Somalia) v SSHD** [2010] UKSC 49.

58. We also reject Ground 5. In light of the fact that the Appellant did not receive an appealable decision from the Secretary of State in relation to his April 2010 application until nine years later in April 2019 and given the reasons for this, which we identified when we described the Appellant's immigration history, we accept that there is some force in Mr Mackenzie's concern that the Judge declined to accept his characterisation of this as a period of delay by the Respondent. However, that is not the end of the matter. As our earlier citation of her para 69 shows, the Judge went on to reject the Appellant's reliance on delay on the free-standing basis that: "In any event, I do not consider that the length of time taken to reach the point of the contested decision now under appeal affects, of itself, the assessment of the proportionality of returning the Appellant to Sri Lanka to any significant extent". She said this was because it was not a situation equivalent to that contemplated by Lord Bingham in **EB (Kosovo) v SSHD** [2008] 1 UKHL 41 where a "dysfunctional system" has yielded "unpredictable, inconsistent and unfair outcomes". We consider that this was an assessment that she was entitled to make. In order to identify an error of law, Mr Mackenzie is driven to put his case on the basis that the Judge "was not reasonably entitled to find to the contrary" (Ground 5, para 27). His complaint does not come close to that high threshold. In the present instance the Secretary of State had taken steps during the relevant period to determine the application, albeit arriving at successive decisions that she subsequently accepted were flawed. Additionally, there was no element of unexplained inconsistency of treatment, as discussed by Lord Bingham in para 16 in **EB (Kosovo)**. Furthermore, we note that Lord Bingham cited with approval Carnwath LJ's observation in **Akaeke v SSHD** [2005] INLR 575, para 25 that: "Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal..."
59. We do not accept that the Judge failed to undertake a cumulative assessment of the relevant factors, as the Appellant alleges at Ground 6. For the purposes of her analysis she went through them one by one; it does not follow from this that she did not take account of their collective weight. Indeed, she said in terms at her para 68 that she had done so when she was referring to the Appellant's reliance on his friendships and sporting activities in the UK (see para 26 above).
60. As regards the five features that Mr Mackenzie described the Appellant relying upon (see para 39 above), the third is covered by our rejection of Ground 4 and the fifth by our rejection of Ground 5. It is plain that the fourth feature, the Appellant's close relationship with his sister and his nieces was given detailed consideration by the Judge. The second feature, concerning the obstacles to re-integration in Sri Lanka, was considered in detail by the Judge at paras 55- 58; clearly she would still have had this in mind when she then turned to the Article 8 outside of the Immigration Rules claim. This just leaves the first feature that counsel identified.

61. In terms of the structure of her decision, the Judge did dismiss the Article 8 grounds (at her para 71), before she set out the detail of her consideration of the medical evidence and the Appellant's case on the impact of removal upon his mental health in the section of her decision entitled "Article 3 ECHR". However, there was some earlier reference to the Appellant's mental health. As we noted in para 25 above, when she explained why she did not consider that there were very significant obstacles to the Appellant integrating into Sri Lanka, the Judge cross-referred (at para 57) to her later para 82 (which we have already discussed in detail) and to her assessment that his mental health would not prevent him from seeking out work or functioning in society. Whilst her assessment of the medical evidence and impact of removal on the Appellant's mental health was set out in the later part of her decision, there is no reason to suppose that she did not have it in mind when she considered para 276ADE(1)(vi) and Article 8. Furthermore, at the end of her section on Article 8, in para 70, she made general reference to "all the above reasons" as supporting her conclusion. We are satisfied that, by cross-referring to para 82 and linking para 82 to her rejection at para 57 that the Appellant has a genuine fear of persecution and that his mental health would prevent him from seeking out work or functioning in society, the Judge was incorporating the conclusions she reached in the latter part of her decision entitled "Article 3 ECHR" into her assessment of para 276ADE(1)(vi) and the Appellant's Article 8 claim. Whilst it would have been preferable if she had adopted a different format, dealing first with the Appellant's Article 3 claim followed by the remaining issues, we are nevertheless satisfied, for the reasons we have given, that the Judge did not fail to take into account her reasoning and conclusions in the part of her decision entitled "Article 3 ECHR" when assessing the Appellant's case under para 276ADE(1)(vi) and Article 8.
62. In the event that we are wrong about this and the Judge erred by failing to take into account her assessment of the medical evidence and the impact of the Appellant's removal on his mental health when considering the Appellant's Article 8 claim, we do not consider that any such error is a material one. In that event, it is inevitable on any reasonable view that she would have reached the same decision on the Appellant's Article 8 claim had she considered all factors cumulatively, given the totality of her reasoning and findings, including her finding that the Appellant would not face very significant obstacles to his reintegration in Sri Lanka, that he has his parents and wider family in Sri Lanka, that he could live in his sister's flat in Colombo, that his parents have some capacity to support him whilst he finds his feet, that there was no reason why his sister could not continue to provide him with the same financial support that she gives him in the UK, and the reasons she gave in her assessment of his case regarding his mental health and the risk of deterioration under Article 3. We are satisfied that, on any reasonable view, this is not one of the cases in which the individual's Article 8 claim could succeed notwithstanding that the threshold for a successful Article 3 claim based on medical condition has failed.

63. For all the reasons given above we are satisfied that the Judge did not materially err in law.
64. We therefore dismiss the appeal.

### **Decision**

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside. We dismiss the appellant's appeal to the Upper Tribunal.

Signed:

Mrs Justice Heather Williams

Date 17 January 2022

The Hon. Mrs Justice Heather Williams  
sitting as an Upper Tribunal Judge

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#### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email