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

Appeal Number: AA/10772/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 25 August 2015

On 9 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**J S
(ANONYMITY DIRECTION MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Jeygarajah, counsel, instructed by Duncan Lewis

For the respondent: Mr Wilding, Senior Home Office Presenting Officer

Decision and Reasons

1. The appellant is a citizen of Sri Lanka of Tamil ethnicity born on 28 September 1982.
2. An anonymity direction was made in the First-tier Tribunal and remains appropriate. I make a direction accordingly.
3. For ease of reference, I maintain the descriptions of the parties as appellant and respondent, as they were in the First-tier Tribunal's decision and reasons, albeit it is the respondent who pursues this appeal.

Background

4. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of the First-tier Tribunal panel (“the panel”) promulgated on 8 September 2014, in which it allowed the appellant’s appeal against the refusal of his asylum claim.
5. The matter has a protracted history which I summarise as follows. The appellant arrived in the UK in 2007 and claimed asylum. His claim was refused in 2007 and he was excluded from the protection of the Refugee Convention under Article 1F. Nonetheless, he was granted discretionary leave for six months valid until March 2008 (later extended to January 2009). Various proceedings followed, culminating in judicial review proceedings and the Supreme Court’s judgment of 10 March 2010 (**R (on the application of JS) (Sri Lanka) v SSHD [2010] UKSC 15**). The Supreme Court ordered a re-determination by the respondent of the asylum claim and Brown LJ stated as follows (paragraph 40): “... in re-determining the respondent’s asylum application, the Secretary of State should direct himself in accordance with this Court’s judgments, not those of the Court of Appeal”.
6. The respondent reconsidered the appellant’s claim and, in a letter dated 17 November 2013, found that the appellant was excluded from the protection afforded by the Refugee Convention pursuant to Article 1F(a), (b) and (c). The respondent nonetheless considered the asylum claim and dismissed it on all grounds.
7. The appellant’s appeal against that decision was heard by a panel consisting of First-tier Tribunal Judges Keane and Griffith on 15 July 2014. The appellant attended that hearing but did not give oral evidence. The panel heard the oral submissions of the parties’ representatives. It found that it “did not agree with the statements made by the respondent in support of the certificate that the appellant is not entitled to the protection of the Geneva Convention” (paragraph 57). The panel found “the respondent has failed to establish that the appellant is excluded from the protection of the Convention under Article 1F and [did] not uphold the certificate” (paragraph 68). The panel went on to allow the appeal against refusal of his asylum claim on the grounds that he was at risk on return to Sri Lanka.
8. The respondent applied for permission to appeal the panel’s decision on the following grounds which I summarise (numbering as in the application):
 1. The panel erred in noting and accepting the submission of the appellant’s representative that the appellant “was not a commander”. That submission was in direct conflict with the agreed facts before the Supreme Court.
 2. The panel concluded at paragraph 47 that the respondent had “imputed” high rank to the appellant whereas the respondent’s

decision on this was based on the statement of agreed facts before the Supreme Court and the appellant's own evidence.

3. There was no adequate explanation as to why the panel found no evidence of the appellant's involvement in aiding crimes.
 4. The content of paragraphs 49 and 8 were in conflict as regards the finding that the appellant was not a commander within the intelligence unit. The panel did not explain why they found the appellant had no knowledge of the LTTE's commission of crimes in government controlled territory.
 5. The panel failed to deal adequately with conflicts and inconsistencies as between the agreed statement of evidence before the Supreme Court and the appellant's post-2010 evidence before the tribunal. The panel made no negative findings as a result of those inconsistencies and his failure to participate in further interviews.
 6. The panel erred in finding that the appellant was not obliged to attend further interviews which had been requested by the respondent as a result of the Supreme Court's guidance.
 7. The panel misrepresented the respondent's argument as regards the appellant's role as bodyguard to Pottu Amman, namely that it was a criminal offence to offer protection to a convicted criminal or fugitive. The panel made no assessment as to why it did not consider it to be a crime for the appellant to provide protection to a man who was subject to an Interpol 'Red Notice'.
 8. The panel noted that the respondent had not followed the Supreme Court's instruction as to what "needed to be investigated and focussed on" yet made no negative findings against the appellant for his failure to attend interviews which would have assisted the respondent to follow the Court's instructions.
 9. The panel noted the respondent had not pinpointed the exact crimes the appellant had committed; if the respondent had been able to identify specific crimes, criminal proceedings would have been instigated. The test for exclusion purposes is "serious reasons for considering".
 10. The panel failed to conduct a proper consideration of the case against the appellant in dismissing the Article 1F(b) argument in that it only assessed one of the three points raised. The panel failed to address the "terrorism for the purposes of 1F(b) argument or the argument about the illegal possession and transfer of weapons".
9. Permission to appeal was granted by Designated First-tier Tribunal Judge Macdonald in the following terms:
- "4. It can readily be seen that the rank held by the appellant might be a matter of considerable importance as adverse inferences could more readily

be taken against the appellant the higher the rank that he had obtained. Accordingly, from what is said in the grounds, the panel's factual finding is a material one and it is said to be a factual error which in this case may translate into an arguable error of law.

5. On this basis permission to appeal is granted and in line with Ferrer (limited appeal grounds; Alvi [2012] UKUT 00304 (IAC) [sic] permission is granted on all grounds. ..."

The Hearing

10. I was provided by Ms Jeygarajah with a copy of the appellant's supplementary witness statement which had been before the panel in July 2014. It was agreed by both parties that this, although dated 16 February 2008, should be dated 16 February 2009, given the content.
11. I heard lengthy submissions by both parties' representatives and have taken these into account.

The Submissions

12. Mr Wilding adopted the grounds summarised above. He referred me to **JS** which, he said, set out the correct approach to Article 1F. He noted the wider approach than that relating to criminal liability. He submitted that there was a "sliding scale of culpability"; it was not necessary for the appellant to be a high ranking official. The issue was the appellant's complicity in crime. He referred to the headnote to **AA (Art 1F(a) - complicity - Arts 7 and 25 ICC Statute) Iran [2011] UKUT 00339(IAC)** in that "*in establishing this (wider) form of complicity liability under international criminal law it was not necessary to establish that the appellant's acts formed 'part of' a crime against humanity committed by others in the sense that the appellant's acts were of such a character as, in themselves, to fall within one or more of the categories of acts which if committed as part of a widespread or systematic attack directed against any civilian population were capable of amounting to a crime against humanity under Art 7 of the ICC Statute.*" He submitted that it was not a question of what acts the appellant had done but the end game to which he had contributed.
13. I was also referred by Mr Wilder to various paragraphs of **MT (Article 1F(a) - aiding and abetting) Zimbabwe [2012] UKUT 00015 (IAC)** and headnote (iii) to the effect that commission of a crime against humanity or other excludable act can take the form of commission as an aider and abettor, as a subsidiary (or non-principal) form of participation. He emphasised that the respondent's case, put to the panel, had been set out fully in the reasons for refusal letter, applying the relevant law and particularly Article 1F(a), (b) and (c). Detailed consideration had been given to the appellant's role in an LTTE intelligence group, predicated and based on the agreed facts before the Supreme Court. The case against the appellant was, he said, clearly identified in paragraphs 73-79 of the refusal letter and was to the effect that the appellant had contributed to

the LTTE's ability to carry out widespread and indiscriminate attacks, notwithstanding the respondent accepted the appellant could not be linked to any specific event. The respondent's position was that this was not fatal to the application of Article 1F and the respondent's case was set out at paragraphs 82-84 of the refusal letter. The respondent's position was that criminal responsibility extended to lesser participants who enable the crimes to be perpetrated; they were indispensable cogs. The respondent then went on to list the seven factors identified by the Supreme Court as indicative of accomplice activity and to apply those in paragraph 88 of the refusal letter. She identified that whilst the appellant did not have a direct personal involvement in the crimes, he made a significant contribution to the activities of the LTTE's intelligence wing and thus a significant contribution to three specified international crimes. Mr Wilding submitted that the respondent had applied the test identified by the Supreme Court at paragraph 38 of the judgment.

14. Mr Wilding further submitted that, as regards Article 1F(b), the respondent's case was that this was engaged on three limbs: the appellant had acted as bodyguard to Pottu Amman and had committed serious non-political crimes; he had been involved in the illegal possession and transfer of weapons and he had been involved in terrorism for the purposes of 1F(b). He relied on **Re T (HL) (1996) 2 WLR** for the definition of political crimes and terrorism. He identified paragraphs 108 and 109 of the reasons letter as applying the relevant law to the appellant's circumstances. He submitted that these matters had been drawn to the attention of the panel in oral submissions.
15. As regards the decision itself, Mr Wilding submitted the panel made several errors of law. With regard to the application of Article 1F(a), the appellant was agreed to have been second in command of a combat unit; he had described himself as a person who would be made a major or lieutenant colonel if he died. It was not open to the panel to find he was not a commander as this finding went against the agreed facts which suggested he was in a position of authority; he was not an ordinary foot soldier.
16. At paragraph 49 of the decision, the panel relied on the respondent's acceptance she had not identified any crime committed by the appellant; this, Mr Wilding submitted, was to misconstrue the respondent's case. The panel had misunderstood the concept of complicity in exclusion cases; there was no requirement for a specific crime to be involved; the issue was the appellant's role and responsibility and his contribution. The panel had, he said, erred in seeking to identify a specific crime; there was no requirement for this. It was irrelevant that, as stated by the panel, the appellant says he did not have personal involvement: the appellant significantly contributed to the LTTE's crimes against humanity. It was, he submitted, difficult to reconcile the case put in the reasons for refusal letter with the appellant's evidence that he had no personal involvement. The principal error of law was that there was no need for the panel to search for a particular crime. Furthermore, paragraph 49 of the decision

was the “beginning and end” of Article 1F(a); paragraphs 50 and 51 dealt with inconsistencies in the appellant’s evidence and not with 1F(a). In any event, the panel’s finding as regards the appellant’s role, activities and knowledge did not rebut the respondent’s case against the appellant. The tribunal should have looked at whether those activities in themselves meant the appellant was complicit in the LTTE’s activities and their campaign; that is, whether it amounted to aiding and abetting.

17. Mr Wilding submitted that the panel’s paragraph 48 did not address the issue raised by Article 28 as to whether he had been involved in the commission of crime generally, and not just a specific crime, as identified in **JS** and **MT**. The panel had misapplied the law by failing to engage with the issue of whether the appellant had made a significant contribution.
18. It was submitted that paragraph 50 contained inadequate reasoning: there was no resolution of the inconsistencies in the appellant’s evidence or explanation for failure to accept the respondent’s submissions on the issue. The panel had not engaged in a proper assessment of the case put for the respondent. Furthermore, the panel had failed to draw any negative inferences from the failure of the appellant to participate in further interviews with the respondent whilst criticising the respondent for failing to follow the Supreme Court’s guidance and produce an accurate analysis based on the evidence. Whilst it was accepted that the panel’s failure to draw negative inferences might not be material to the outcome, it should have been considered in paragraph 50 where the panel addresses the inconsistencies in the evidence.
19. As regards the findings on Article 1F(b), it was submitted that the panel had failed to make findings on material matters, particularly two of the three heads. This was a material error of law. Secondly, the panel had misunderstood the case put with regard to the appellant’s work as a bodyguard to Pottu Amman which was that he was intentionally keeping Pottu Amman away from justice.
20. In summary, the panel had failed to take a holistic approach to the activities and involvement of the appellant. Mr Wilding submitted that, if his submissions on errors of law in relation to Article 1F(a) were successful, it followed that the findings of the panel in relation to 1F(c) were infected.
21. Ms Jeygarajah opened her submissions by saying that the issue in this case had always been about indirect participation. She submitted that the respondent had identified, post-appeal, issues which had not been developed in the lengthy reasons for refusal letter or before the panel.
22. With regard to the appellant’s decision not to attend further interviews, she said that the appellant had understandably become exasperated by the questioning. The respondent’s issue as to the inconsistency of the appellant’s evidence was before the panel and had been addressed in the decision. At no stage had the respondent submitted to the panel that there were inconsistencies as between the appellant’s evidence and the agreed

statement of facts before the Supreme Court. The respondent had not suggested that the appellant lacked credibility. The respondent's ground 5 was not grounded in the reasons for refusal and appeared to be an attempt to relitigate the matter. There was no requirement on the panel to make negative findings, given that the respondent did not suggest it. In any event, she submitted, a high court judge had decided in JR proceedings that there was no requirement on the appellant to attend further interviews. To suggest that the respondent had not been able to comply with the Supreme Court's instructions for failure of the appellant to attend further interviews was an excessive interpretation of the judgment.

23. Ms Jeygarajah submitted that no point had been taken at the time, before the panel, with regard to her submissions as to the appellant's lack of status as a commander. This was a matter which had assumed importance since the decision had been promulgated. If the respondent's rejection of this submission had not been postulated before the tribunal, there could be no error of law. In the words of Ms Jeygarajah: if the respondent downplays a point she can't up-play it on appeal.
24. It was submitted that if the respondent wished to pursue a ground of appeal to the effect that one or more errors of law in relation to Article 1F(a) and/or (b) would impact on the findings regarding Article 1F(c), she should apply to amend her grounds of appeal, particularly as this was such an important issue and there has been lengthy litigation.
25. Ms Jeygarajah disputed Mr Wilding's use of the words "complicity" and "sliding scale" as being of little assistance post-**JS**. There was, she said, no concept of a sliding scale. She referred me to various paragraphs of **JS** emphasising that mere membership of the LTTE was not sufficient to engage Article 1F. She identified the need to demonstrate that any contribution be intentional. She noted Brown LJ's comments as to the material which might justify a decision. She submitted that a connection with the LTTE's intelligence wing, as a bodyguard, was not sufficient to exclude engagement of the Convention and the panel had recognised this.
26. The panel had noted, according to Ms Jeygarajah, that it could not fix the appellant with responsibility even for indirect participation in terrorist acts committed by the LTTE; it recognised that there had to be some common purpose or plan. Ms Jeygarajah noted paragraph 27 of **JS** to the effect that there could be no question of presuming that the appellant's voluntary membership of the LTTE amounted to complicity in the crimes in question. Nor could the appellant's command responsibility be a basis for regarding him as responsible for war crimes: it was a combat unit and there was no suggestion here of Article 28 liability. She had conceded at the hearing that, if the appellant were found to have had responsibility as a commander in the intelligence wing, direct or indirect contribution would be deemed.
27. According to Ms Jeygarajah, paragraphs 101-3 of the refusal letter illustrated the weakness of the respondent's case, namely that it was

recognised that weapons could be used for military purposes (ie legitimate use) but also for suicide bombings etc. If they could be used for either purpose, the respondent could not demonstrate justification for exclusion. There had to be individual responsibility yet the appellant was a military man, as set out in his supplementary witness statement: nothing he described amounted to more than acting as a bodyguard. He was not permitted as a military man to know more. In any event, it could not be said that the LTTE was predominantly a terrorist organisation. Intelligence activities covered military and civilian matters, such as protecting borders.

28. My attention was drawn to the appellant's evidence as to the nature and extent of his activities whilst in the LTTE. It was submitted his role in the organisation and his contribution was insufficient for exclusion. Exclusion clauses were to be read restrictively. I was also referred to **AH (Article 1F(b) - 'serious') Algeria [2013] UKUT 00382 (IAC)**. It was submitted that the respondent could not rely on the appellant having contributed to the commission of serious crime because no crime had been identified by her; the respondent referred to the appellant's transporting members of the intelligence wing as being a substantial contribution to terrorism but his mere involvement was not sufficient for such a finding; his actions could have been for military intervention which is outside the exclusion criteria. The appellant had set out his personal experience in his supplementary witness statement which had been provided in response to the War Crimes Unit report received by the appellant in 2009; he said it was considered important to avoid contact with civilians; he described himself as a military man who was not part of the intelligence unit. Ms Jeygarajah described in detail the appellant's evidence as regards his LTTE military career and submitted that the panel's findings were based on evidence which was before the respondent at the date of decision. Ms Jeygarajah took me to various answers given by the appellant in interview. She referred to the appellant's evidence [Q141] that he was not in the intelligence wing, that he was a fighter in the commando wing of the intelligence unit. He was a commander on the battlefield but not the intelligence wing. He had no knowledge of the operations of the intelligence wing. He referred to periods when he was in command of a sub unit yet not active at that time [Q230]; he had admitted to moving military equipment and claymores but denied transporting such equipment during the ceasefire.
29. Ms Jeygarajah noted that the respondent's representative at the hearing had conceded that, if the appellant's claim were not excluded under Article 1F, he would be at risk on return and would face persecution.
30. Finally, Ms Jeygarajah submitted that all the relevant reasons for refusal had been considered by the panel. She submitted that the tribunal was not required to produce detailed reasons on every point at issue. It had correctly used the **JS** judgment as its starting point and had been guided by paragraphs 30, 33-39 of that judgement. Contrary to the terms of the R24 reply, Ms Jeygarajah submitted that she had not called the appellant to give oral evidence because his case had been fully set out. As regards

the respondent's concerns about the lack of findings with regard to alleged inconsistencies in the appellant's evidence, that issue had been addressed by the panel in paragraph 50 and was, in any event, considered irrelevant by the panel. Read in the context of the panel's summary of the reasons for exclusion, it had given adequate reasons; there was no misunderstanding of the respondent's case.

31. Mr Wilding made no application to amend the grounds of appeal.

Error of Law

32. The tribunal identified it was for the respondent to demonstrate the exclusion criteria applied. It also recognised (paragraph 36) that Article 1F was to be interpreted restrictively and used cautiously. It noted that Kerr LJ, in **JS**, had stressed the need to examine the appellant's personal role and his actual involvement in the relevant criminal activity. It noted Kerr LJ's statement that the appellant's "participation in the relevant criminal activity can only be determined by focusing on the role he actually played. Only in this way can a proper enquiry be undertaken into the question of whether the requirements of Articles 25 and 30 of the ICC Rome Statute have been met." (paragraph 58 of **JS**). The panel also noted paragraph 20 of **JS** that "not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability". The panel took into account the relevant provisions of Articles 25, 28 and 30 which are set out at paragraphs 37-39 of its decision. It also noted the provisions of the UNHCR Guidelines on International Protection insofar as they relate to the operation of exclusion under Article 1F (paragraph 40). The panel indicated it was guided by paragraphs 33-39 of **JS** as to the approach to be taken to the application of Article 1F. The panel clearly identified at paragraph 42 the basis on which the respondent had concluded there were serious reasons for considering the appellant had made a substantial contribution to the commission of war crimes.

33. The panel's starting point in its decision-making process was the statement of agreed facts prepared for the Supreme Court hearing which is quoted at paragraph 8 of the determination. Whilst it is not stated specifically in the decision that the statement is adopted by the panel and forms part of its findings, by inference that is the case. Indeed neither party, before me, suggested otherwise.

34. Paragraph 39 of **JS** cites

"Article 1F's reference to there being "serious reasons for considering" the asylum-seeker to have committed a war crime". It goes on to say that "serious reasons for considering" obviously imports a higher test for exclusion than would, say, an expression like "reasonable grounds for suspecting". "Considering" approximates rather to "believing" than to "suspecting". I am inclined to agree with what Sedley LJ said in *Yasser Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, para 33: "[the phrase used] sets a standard above suspicion. Beyond this, it

is a mistake to try to paraphrase the straightforward language of the Convention; it has to be treated as meaning what it says.”

It is clear that the panel had in mind this guidance in its decision-making.

35. I am unable to find that the submission of the appellant’s counsel to the panel, to the effect that the appellant was not a commander, is inconsistent with the agreed statement of facts: the summary of that statement, at paragraph 8 of the panel’s decision, refers to the appellant as being a team leader of a 9-man combat unit, the leader of a 45-man platoon and the leader of a mobile unit and a chief security guard to Pottu Amman, the intelligence division’s leader. Later he was a “second in command” of the combat unit of the Intelligence Division. The statement does not refer specifically or impliedly to the appellant as a “commander”. Indeed when he held two of those leadership roles he was still a minor, being under 18. This suggests that it would be inappropriate to identify his roles as command roles merely on the basis of their description. This is consistent with the panel’s observation that “the Supreme Court gave a clear pointer that the appellant’s three years with the mobile unit was the “better case” against him”. Given that pointer by the Supreme Court it was not unreasonable for the panel to focus its attention primarily on that period. Furthermore, the panel noted the terms of Article 28 which is concerned with the responsibility of commanders and other superiors and the reference to “effective command and control” and “effective authority and control” and the requirement that they “knew or should have known that such crimes were being or were about to be committed”. Throughout the decision the panel gives weight to the appellant’s own evidence as regards his activities. Thus its decision to accept the submission of the appellant’s representative, which was not challenged at the time as being inconsistent with the agreed statement of evidence before the Supreme Court, is sustainable on the evidence. Nor was it an error of law for the panel to identify the respondent’s case as being that she had imputed high rank to the appellant as a result of his circumstances (paragraph 47 of the decision). For the reasons set out above, that finding is not at odds with the statement of agreed facts which makes no reference to any particular rank or indeed the appellant’s seniority. Nor are the findings in paragraph 49, as regards the appellant’s role in the mobile unit, in conflict with the agreed statement of facts. According to the agreed statement:

“At 18 he was appointed to lead a mobile unit responsible for transporting military equipment and other members of the Intelligence Division through jungles to a point where armed members of the division could be sent in plainclothes to Colombo. He continued to do this for some three years from September 2000 until early 2004 except for some two and a half months (from late April to early June 2002) when he was appointed one of the chief security guards to Pottu Amman the Intelligence Division’s leader, whom he accompanied as a trusted aid on visits to the LTTE District Leader Colonel Karuna, and other prominent LTTE members. From early 2004 to September 2006 he served as a second in command of the combat unit of the Intelligence Division. ...”

The panel finds in paragraph 49 that the

“... respondent has speculated about the nature and extent of the appellant’s knowledge and awareness, based on his long service with the LTTE and his association with the Intelligence Unit. We find that he was a part of a small unit responsible for transporting or escorting unidentified agents and military equipment from place to place as ordered and that that was the extent of his activities and his contribution to the LTTE’s strategy. We find he was not a commander within the Intelligence Unit and are not satisfied on the evidence that there is sufficient nexus between the activities of the appellant and the actions of the LTTE’s intelligence Unit to find that he meets Article 28 or to clothe him with the requisite level of knowledge and awareness (*mens rea*) necessary to meet Articles 30 [sic]. It follows that we do not find that the appellant’s personal contribution to the LTTE’s aims were sufficient to meet Article 1F(a).”

This finding, that the appellant did not have sufficient knowledge that crimes were being committed such as to engage Article 28, is not inconsistent with the agreed statement of facts. In effect, the panel accepted the evidence of the appellant as regards his state of knowledge at the time. This is set out at the end of paragraph 44: “... when asked to transport military equipment he did not know what the equipment was being used for. He never asked questions and was forbidden from discussing his orders with anyone. He said they told him nothing and kept their faces hidden”.

36. Whilst there is no specific reference in paragraph 41 to Article 25, that paragraph follows from various citations which include Article 25 at paragraph 37. Paragraph 41 starts “In light of those provisions...” which suggests the panel had Article 25 in mind when making the findings at paragraph 41. Furthermore, it is implicit from the panel’s findings generally that it considered the appellant’s activities and knowledge to be limited. The panel has cited the respondent’s case (which includes Article 25) and focussed principally on the “better case” against the appellant, namely his three years within the mobile unit working for the Intelligence Division. The panel addresses this “better case” by reference to the appellant’s own evidence and applying the correct standard of proof. It also notes the Supreme Court’s observation that the respondent had been entitled to conclude that the LTTE in general and the Intelligence Division in particular were guilty of widespread criminal acts and atrocities. It goes on to address the conclusions of the respondent in that respect and considers the respondent has “imputed” certain characteristics to the appellant as a result of his personal experiences and circumstances.
37. The panel correctly identifies at paragraph 48 that the matters listed in Article 28 are in the alternative (and this includes aiding and abetting) but states it “can find no or no compelling evidence that he personally participated in or had sufficient knowledge, if any, of the war crimes or crimes against humanity particularised in the Special Cases Unit report of October 2013 and repeated in the refusal letter”. Whilst this is a somewhat blanket finding, it is supported and justified by the subsequent paragraphs

(49 - 51). What follows is also consistent with the agreed statement of evidence and the earlier findings at paragraphs 43-44. Taking the decision and reasons as a whole, there is adequate explanation for the panel's finding that there was no evidence of the appellant's involvement in aiding and abetting crimes. In doing so it gave weight to the evidence of the appellant.

38. As regards the ground that there were conflicts and inconsistencies as between the appellant's evidence before the Supreme Court and his post-2010 evidence before the tribunal, the panel took into account paragraphs 91-94 of the refusal letter and those purported inconsistencies are addressed by the panel at paragraph 50 of its decision. The panel's consideration in that regard is more than adequate and its findings are sustainable on the evidence: the panel found that, in two cases, on examination of the evidence, there were no inconsistencies, the respondent having misrepresented the evidence. The panel noted that, in any event, the inconsistencies identified by the respondent did not serve to establish the appellant's knowledge of what the intelligence officers would be doing once they had reached their destination or the intended use of the weapons, such that he could be found to have furthered or contributed to the commissioning of war crimes by his actions. There is no error of law as regards the panel's findings on this issue.
39. Nor is there an error of law in the panel's finding that the appellant was not obliged to attend further interviews when requested by the respondent: I have not been referred to any guidance, case law or legislation in support of this proposition. The appellant had attended various interviews, including after the Supreme Court judgment, and it was not incumbent on the panel to make an adverse, or indeed any, finding as a result of his failure to attend further interviews, particularly as the reason for his failing to attend further interviews was clear from the latest record of interview: he was becoming increasingly distressed by the process. By that stage the respondent had already made one decision that the appellant's asylum claim was certified and the Supreme Court had ordered that that the respondent make a fresh determination. The appellant had provided a supplementary witness statement addressing the issues raised by the respondent's War Crimes Unit Report dated 1 June 2007 insofar as it related to him personally. I do not consider that the appellant ought to have been criticised by the panel for failing to continue to attend interviews which he found distressing and in circumstances where such interviews were for the purpose of enabling the respondent to build her case for exclusion against him and there was no requirement on him to attend. It was open to the respondent to cite those inconsistencies in support of her position on exclusion and she did so. The fact that the panel found that some of those inconsistencies did not actually exist and the remainder were of no relevance suggests that the failure of the appellant to attend further interviews was not considered by the panel to be of any relevance to its findings and that there was no adverse inference to be drawn. It follows also from the panel's findings on the purported inconsistencies and their relevance, that it was open to the panel to place

reliance on the appellant's evidence in making its findings. This it did.

40. The respondent claims the panel misrepresented her position as regard the appellant's role as bodyguard to Pottu Amman, namely that it was a criminal offence to offer protection from justice to a convicted criminal or fugitive. It is alleged that the panel made no assessment as to why it did not consider this to be a crime. The panel noted this issue in paragraph 10 of the decision, when listing the reasons for refusal. It is also identified at paragraph 53. It can be inferred that the panel had this issue in mind albeit it made no specific findings on it. It noted the appellant was not assigned to guard Pottu Amman at the time of the relevant murders and found that there was no evidence that the appellant had any knowledge of the criminal proceedings against Pottu Amman arising from the bombings. It is implicit from this that the panel did not accept the respondent's proposition that the appellant "willingly acted as bodyguard to an individual who had been listed by India as an "absconding offender" in the crime of murder ... and was a fugitive from justice" (as stated in the reasons for refusal). Thus the panel's finding is grounded in the appellant's own evidence on his involvement in Pottu Amman's security unit and after application of the correct test, namely "serious grounds for considering". Its findings were open to it on the evidence.
41. Mr Wilding submitted that the panel had failed to conduct a proper consideration of the respondent's case against the appellant in dismissing the Article 1F(b) argument, in particular that the panel only addressed one of the three points raised, namely the appellant's role as bodyguard to Pottu Amman; the panel did not consider the appellant's illegal possession and transfer of weapons or his role in acts of terrorism. It is the appellant's evidence that for three years he provided weapons to LTTE intelligence wing members operating in government controlled territory. At paragraph 101 of her reasons for refusal letter, the respondent stated "once the weapons were left in government controlled territory [he] had no further control over how they were used or who they were used by. As such, there are serious reasons for considering that [he] could not know whether the weapons were used for legitimate military purposes (i.e. attacks on the Sri Lankan military), terrorist attacks such as attacks on civilians, or criminal activity." The respondent concluded that the nature of the appellant's clandestine operations for the LTTE gave rise to serious reasons for considering that the weapons in question had been illegally imported and held by the LTTE and that neither the appellant, nor those individuals to whom the appellant had provided weapons, were in possession of the requisite documentation to allow them to legally possess firearms; the illegal transportation of weapons through a state would generally be perceived as unlawful at the international level. The respondent went on to say at paragraph 103 that "by transporting these weapons into government controlled territory, you made a significant contribution to the process by which LTTE members were able to acquire arms and explosives and, as a logical extension of this, to commit the crimes noted by the Supreme Court ("suicide bombings, attacks upon

civilians, assassinations, kidnappings and the forcible recruitment of children.””.

42. This is a significant plank of the respondent’s case that the appellant’s claim was excluded under Article 1F(b), namely that he “has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”. The respondent asserts (page 35 of her reasons for refusal letter) that the weapons had been imported illegally but she cites no evidence in support of this conclusion. Irrespective of whether the movement of weapons by the appellant was contrary to Sri Lankan law, the appellant’s own evidence, which was accepted generally by the panel throughout their decision and reasons, was that he did not know what the weapons were being used for; he was following orders; he was told not to ask questions. It is implicit from his evidence, which the panel accepted throughout its decision and reasons, that he undertook his duties on a need-to-know basis. There is no evidence to suggest that the weapons he was transporting had been “illegally imported”. If the panel had addressed this issue in its decision, it would have relied (as it had in all other aspects of the appeal) on the appellant’s own evidence in drawing conclusions as to the nature and extent of the appellant’s activities. It found at paragraph 49 with regard to this period of the appellant’s LTTE career, that the appellant “was part of a small unit responsible for transporting or escorting unidentified agents and military equipment from place to place as ordered and that that was the extent of his activities and his contribution to the LTTE’s strategy”. The panel also found at paragraph 49, albeit in relation to Article 1F(a), that there was not “sufficient nexus between the activities of the appellant and the actions of the LTTE’s Intelligence Unit to find that he meets Article 28 or to clothe him with the requisite level of knowledge and awareness (*mens rea*) necessary to meet Articles [sic] 30”.
43. The panel took into account, throughout its decision-making, the Supreme Court’s view that the better case against the appellant was this role as leader of a combat unit for three years and his activities in that role. As the Brown LJ says at paragraph 28 “As para 108 of *Gurung* concluded: “If, however, he has transported explosives for LTTE combatants in circumstances where he must have known what they were to be used for, there may well be a serious 1F issue.” The panel has given weight to the appellant’s own evidence as regards his state of knowledge and relied on it to make findings that Articles 1F(a), (b) and (c) were not engaged as regards the activities of the intelligence officers he was transporting and whose weapons he also carried. The panel’s general findings on the appellant’s state of mind, his role and activities (albeit in relation to other Articles) are sufficiently wide as to address the respondent’s case about the illegal possession and transfer of weapons. The panel accepted his evidence that he had no knowledge of the operations or activities of the intelligence wing, being a military man, and had not transported military equipment during the ceasefire. For these reasons, albeit there is no mention of this issue in relation to Article 1F(b) and the standard of proof is low, there is no material error of law, it being implicit from the

remaining findings of the panel that the appellant had insufficient knowledge or awareness for Article 1F(b) to be engaged.

44. As regards the respondents' assertion at paragraph 105-110 that there were serious reasons for considering that the appellant was engaged in terrorist activities, the panel's failure to address this is, for similar reasons, not a material error of law. In that regard, the definition of terrorism in Article 2 includes the requirement for "knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group". For the reasons set out in the preceding paragraphs in relation to the possession and transfer of illegal weapons, which I adopt in relation to this issue, the panel made no material error of law in its decision; it had already made general findings, which are of relevance to this issue, that the appellant did not have the necessary knowledge or awareness that his actions would contribute to criminal activities by the intelligence wing.
45. Given the panel's findings generally, which are based on the evidence before it, it was open to the panel to find, as it did, that the respondent had not followed the guidance of the Supreme Court as to what was needed by way of investigation and focus.
46. For these reasons, therefore, I find that there are no material errors of law in the decision of the panel.

Decision

47. The decision and reasons of the First-tier Tribunal panel did not involve the making of an error on a point of law.
48. I do not set aside the decision.

A M Black

Deputy Upper Tribunal Judge

Dated: 12 January 2016

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

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

A M Black

Deputy Upper Tribunal Judge

Dated: 12 January 2016