



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/03646/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 15 November 2017

Decision & Reasons Promulgated  
On 28 November 2017

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

T M  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Halim, Counsel, instructed by M & K Solicitors  
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka and his date of birth is 25 July 1978. The Respondent made a deportation order against him on 26 November 2015 pursuant to Section 32(5) of the UK Borders Act 2007. The Respondent refused the Appellant's claim for protection on 27 November 2015.
2. There is a long history. The Appellant arrived in the UK in a lorry on 1 April 2002. On 2 April 2002, he made a claim for asylum. This was refused by the Respondent on 17 May 2002. His appeal was dismissed by the then Adjudicator Mr M B Hussain. The Appellant met SS. Their first child was born on 31 March 2007. There is a

second child of the family born on 12 September 2008 and a third on 25 September 2010. All children are British citizens.

3. The Appellant's brother was granted refugee status following a successful appeal in July 2001. On 17 November 2008, the Appellant submitted further submissions and these were treated as a fresh claim under paragraph 353, but refused. The Appellant did not appeal against this decision. He made an application for leave to remain on 17 February 2009 and was granted indefinite leave to remain based on long residency on 28 May 2010.
4. The Appellant left his family in 2011. He was cautioned for shoplifting on 20 August 2011. In August 2011, he returned to Sri Lanka to marry a Sri Lankan woman. They married on 13 September 2011 in Colombo. The Appellant returned to the UK on 21 September 2011 and was joined here by his wife in February 2013. On 4 July 2013, the Appellant was convicted of conspiring to dishonestly make false representations and on 4 September 2013 sentenced to imprisonment of fifteen months. The sentencing judge commented as follows;

"I have to sentence you both for your part in a very substantial fraud. This involved using specially converted lorries to steal large quantities of Diesel which were then siphoned off and doubtless sold, Diesel being a highly sought after property these days because of the price. This was quite a sophisticated fraud involving cloned cars and this particular fraud appears to have netted over £100,000 over a period of about six months.

...

I bear in mind what was said by the judge on the last occasion. I have to sentence you for your role in this fraud. It was similar to that of the co-defendant. You were caught red-handed having fraudulently obtained a large amount of petrol as a driver and were busy siphoning it off into drums. However in your case I bear in mind the basis of plea, that you were involved for a limited period, a more limited period than your co-defendant. Some of the aggravating features of his case were not present in yours. It is not said that you committed offences on bail. You do not have serious convictions for dishonesty, as far as I am aware. Nevertheless there has to be a custodial sentence for your part in such a serious and premeditated fraud.

In your case the sentence is one of fifteen months' imprisonment. You are not a British national. You should be subject to a deportation order under current provisions but for the same reasons that I have just given to your co-defendant I am going to make a recommendation. It is plain to me that your continued presence in this country is not consistent with the public good. I trust that the Home Office will on this occasion perform, carry out their duty.

..."

5. The Appellant responded to the Notice of Liability to Automatic Deportation dated 23 September 2013 by on 16 December 2013 raising asylum and human rights. The Appellant appealed against the decision to deport him and the refusal of his asylum claim. His appeal was dismissed on 13 June 2016 on asylum grounds and allowed on human rights grounds. The Respondent was granted permission to appeal and at a hearing before Upper Tribunal Judge Hanson on 28 November 2016 the decision of the First-tier Tribunal was set aside in relation to both the asylum and human rights claim. Following a fresh hearing the appeal was dismissed by Judge of the First-tier Tribunal Agnew and dismissed on asylum and human rights grounds. Permission was granted by Judge of the First-tier Tribunal Saffer in a decision of 14 September 2017. Thus, the matter came before me.
6. The Appellant's relationship with his wife broke down. In April 2015, the Appellant was reconciled with his former partner, SS.

#### The Decision of the First-Tier Tribunal

7. The Appellant's claim can be summarised. In 1989 his brother joined the LTTE. He was injured and he left the LTTE in 1994, returning to live with his family. In the middle of 1998 he was ordered to rejoin which he did. He then deserted in February 1999. LTTE fighters visited the Appellant's home looking for his brother and arrested the Appellant. The Appellant was detained.
8. In the meantime, the Appellant's brother was found and arrested but he escaped and fled Sri Lanka, arriving in the UK on 11 June 1999. On 10 November 1999, the Appellant escaped from LTTE custody. He was subsequently arrested by the authorities and detained in JOSFH camp in Vavuniya where he was accused of being an LTTE member and tortured. The Appellant's uncle bribed an officer to secure his release. He was taken to hospital where his wounds were treated. He then returned to the camp. He was released subject to monthly reporting on 3 October 2000. The Appellant lived with his parents in Vavuniya whilst reporting to JOSFH camp. The LTTE sent a letter to the Appellant's parents' address demanding that the Appellant return and stating that if he did not do so he would be shot. The Appellant went to live with his uncle in a camp which belonged to PLOTE. He continued to report to JOSFH camp.
9. In February 2001, the Sri Lankan authorities cancelled the Appellant's reporting conditions on the basis that he continued to live in the PLOTE camp. The Appellant feared he would be abducted by the LTTE and his father arranged for an agent to take him to a safe country. The Appellant's uncle, who was acting as surety for him, informed the Appellant's mother that he had told the Sri Lankan authorities that the Appellant had escaped from the PLOTE camp and that he must have joined the LTTE.
10. When the Appellant returned to Sri Lanka in 2011 the Sri Lankan Army visited his home looking for him. They interrogated his father. An agent was arranged to send him to the UK. The Appellant's father, when reporting to the police station in

December 2012, was interrogated about the Appellant's activities in the UK. He was shown a photograph of the Appellant participating in political activities. He was released after two days and continues to report.

11. The Appellant attended the Mullivaikkal Genocide Remembrance Day rally on 8 May where he was urged to join the Transnational Government of Tamil Eelam (TGTE). He now works with that organisation, attending meetings and helping them mobilise British Tamils towards the Tamil cause. On 20 December 2015, the Appellant attended a rally at Westminster demanding that the government release all Tamil political prisoners. On 24 December 2015, the authorities arrested the Appellant's father from his home and he was interrogated about the Appellant's political activities in the UK. He was shown several photographs of the Appellant participating in anti-Sri Lankan activities in the UK. His father was detained for four days and made subject to more onerous reporting. The Appellant continues to work for TGTE. The Appellant suffers from depression. He is on anti-depressants.
12. The appeal was listed on 27 April 2017 before the First-tier Tribunal. My understanding is that this hearing was converted to a case management hearing at the request of the parties. A number of directions were made including that the Respondent file and serve the determination relating to the Appellant's brother dating back to July 2001. As a matter of fact, that direction was not complied with. It may be that there have been more adjournments than one, but the position is not entirely clear to me from the documents before me. What is clear is that the parties made a joint application at the hearing before Judge Agnew for an adjournment because of the Respondent's failure to serve the Appellant's brother's determination. The judge engaged with that application in the following way;
  - "11. At the outset it was noted that previous directions made by the Tribunal had not been followed. In particular, it was noted that the file in relation to the appellant's brother's claim for asylum which included a decision by this Tribunal had still not been provided by the respondent. Mr O'Callaghan submitted that the Tribunal needed to know what the previous findings of fact were in relation to the appellant's brother and he referred to the case of Devaseelan [2002] UKIAT 00702. He insisted that it was necessary to have the previous Tribunal decision and then a statement could be taken from the appellant's brother on the findings of facts. I was informed by Mr Briant that the file could be obtained, albeit it had not been obtained despite requests for it to date.
  12. I took a short break to consider the request for an adjournment whilst noting that on first consideration I was inclined, bearing in mind the overriding objective of the Tribunal Procedure Rules, to refuse the request.
  13. In relation to the request to adjourn because it was essential in Mr O'Callaghan's submissions, bearing in mind the Devaseelan point, that I see the decision of the Tribunal in the appellant's brother's case, I was not referred by Mr O'Callaghan to other cases which have suggested the

limited applicability of Devaseelan to other parties' cases, in this case the appellant's brother rather than the appellant himself. I am aware, for example, of AA (Somalia) v SSHD and AH (Iran) v SSHD [2007] EWCA Civ 1040 in which the Court of Appeal said that the Devaseelan guidelines extended to cases where the earlier decision involved different parties and where there was a 'material overlap of evidence' in the sense of matters arising out of the same factual matrix. In that case it was said that that there must be a material overlap of evidence, rather than just an overlap; that the second Tribunal should have regard to the factual conclusions of the first Tribunal; but that the second Tribunal still had to evaluate the evidence as it would in any other case and independently decide the second case on its own merits.

14. In this case it did not appear to me there was a material overlap in evidence. There is some overlap regarding their arrests as there are also credibility issues raised by the appellant's evidence in this regard and noted by Adjudicator Hussain in his decision to dismiss the appellant's appeal heard on 22 October 2002. I consider it has been established that the appellant's brother was found credible in at least some aspects of his claim, given that he was granted asylum. I noted from the copy of representations made by the appellant's former legal representatives on 17 November 2008 in the respondent's bundle that an Adjudicator had found the appellant's brother had been tortured on more than one occasion and he had a well-founded fear of persecution because of scars he had on his body and the amputation of his lower left leg. I drew the attention of the representatives to this extract of the Adjudicator's decision.
15. Nevertheless, that the appellant's brother was found credible does not establish that what is claimed went on to happen with the appellant was true. It is at most a starting point to consider the evidence before me. I note below why I do not consider the absence of the decision of a previous Adjudicator in relation to the appellant's brother's appeal precluded his brother himself giving written and oral evidence in this appeal.
16. Both parties have failed to comply with directions in this appeal. For example, I note the matter was adjourned at the request of both parties on 27 April 2017 and both were directed on 12 May, in order to assist the Tribunal, to file and serve new evidence bundles containing all of the material upon which they intended to rely by 22 June 2017. This direction was no doubt given because of the large amount of documentary evidence submitted over a period of time and to ensure all that was relevant was contained in one bundle for each party. As this direction was not complied with by either party considerable time had to be spent by me both before the hearing and at its commencement with the representatives, in particular Mr O'Callaghan given the bulk of the documents were those lodged on behalf of the appellant, going through all the documents to ascertain what was intended should still be relied upon.

17. On 12 May separate directions were made adjourning the matter to a date after 29 June. The respondent was directed to make enquiries regarding the letter from a lawyer in Sri Lanka, to lodge the result of such enquiries, a decision relating to the appellant's brother and any other documents relating to that case and the OASys report. Regarding this I should note that Mr Briant submitted at the outset of the hearing that the Court were no longer willing to disclose reports to the respondent, and the resources of the offices in Sri Lanka had been reduced so that entry clearance officers were no longer able to provide a facility of verification of documents. Regarding the direction that the respondent lodged the determination relating to the appellant's brother's case, Mr Briant was unable to ascertain if the Home Office had received the file from storage or not. He said he either expected to receive it or, if not, he could 'read the Riot Act' and say the file was needed.
18. Directions for the appellant's representatives on 12 May were to lodge photographs of his sur place activities upon which he intended to rely, a statement from the appellant's brother, and the decision of the Tribunal in relation to his brother's appeal and related evidence including details of his grant of asylum status. I take it from this that the appellant's representatives were also directed by the Judge to attempt to obtain the papers relating to the appellant's brother's claim for asylum and appeal. The directions have not been complied with by the appellant's legal representatives. Mr O'Callaghan appeared to submit that this was because they were waiting for the respondent to provide the appellant's brother's file and decision of the Tribunal but that is not how I read the Directions of 12 May.
19. I considered the adjournment request made bearing in mind the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, in particular rule 2. This matter was first listed for a full hearing on 27 April and several directions made to the parties with which they have failed to comply. Whilst I was reassured that the papers relating to the appellant's brother's appeal would be shortly forthcoming some way or another, a considerable period has elapsed since the appellant's brother was granted asylum and I was not confident of the most recent assurances that his papers could be obtained or that this justified a further adjournment.
20. I noted that the papers had not been produced before, either when the appellant had his first appeal or apparently when it might have been expected they would in July 2015, given that the fresh representations centred around the appellant's brother's case. Both parties had had ample time to produce the papers yet they had still not been produced despite it must having been obvious to at least the appellant's representatives from the outset that it could have been helpful to the appellant to have sight of

them. I was not provided with evidence of the efforts they had made to obtain them since instructed by the appellant in his asylum appeal.

21. There was no claim that the appellant had been involved with any activities for the LTTE or otherwise with his brother. The evidence related to what happened to the appellant after his brother had escaped. On the information and evidence I had before me I did not consider the appellant would be deprived of a fair hearing if the adjournment request was refused. I decided to refuse the adjournment request for these reasons.
22. Regarding the evidence before me, I went through the voluminous documentary evidence with Mr O'Callaghan to ensure I had all before me on which the appellant wished to rely. I also had the respondent's bundle.
23. A contemporaneous typed record of proceedings was made by me. I heard evidence from the appellant and his wife using a Tamil interpreter whom they confirmed they understood. I refer to the evidence and submissions as relevant below. I reserved my decision."

13. The judge again referred to the brother later in the decision;

- "76. The appellant relies on the fact that his brother was granted refugee status in 2001. The background regarding this claim has not been provided as he did not provide a statement. This was justified by Mr O'Callaghan on the basis that they were awaiting a copy of the decision of the Tribunal in relation to the appellant's brother's appeal before preparing a statement for him. However, I do not see why this justifies him either not providing a statement to describe what happened to him and his knowledge of the appellant's and other family members' problems, as well as appearing as a witness. The decision was made in 2001. From that date and the arrival of the appellant in 2002 when he first claimed asylum, based on his brother's activities which caused in turn, it is claimed, his own detention by the LTTE, there has been ample time for the appellant's brother to request from his own legal representatives, if he did not keep a copy himself, a copy of the decision of the Tribunal and other papers relating to his claim. It was noted in the skeleton argument that when the appellant made a fresh asylum claim on 17 November 2008 he relied, in part, upon the grant of refugee status to his brother. I have noted above that it is quoted in the representations made. So that whilst the papers may no longer be available from the Tribunal and the appellant's former legal representatives now, they could have been obtained previously, when he made his first claim for asylum or since. There has been ample time to obtain them.
77. As I noted above I do not consider the absence of the decision of a previous Adjudicator in relation to the appellant's brother's appeal precluded his brother himself giving written and oral evidence in this appeal. Nor do I do find that the lack of material in relation to the

brother's claim can be laid at the feet of the respondent. I do not agree with Mr O'Callaghan's submission that because the respondent did not produce the decision for the hearing of this appeal, the credibility must be taken at its highest and this is the danger of the respondent not abiding by directions. The appellant bears the burden, albeit low, on establishing the credibility of his claims and as I have noted, he has had ample opportunity from 2002 to obtain this document relating to his brother's case as well as produce his brother as a witness for his own appeal."

14. The Appellant relied on expert evidence from three witnesses; Dr Saleh Dhumad (a consultant psychiatrist), Dr Andres Izquierdo-Martin (in respect of scarring) and Dr Chris Smith (his evidence related to the country situation in Sri Lanka). In respect of the medical evidence the judge made findings at paragraphs 25 to 46:

"25. I must assess whether I find the appellant's claims regarding his current reasons for fearing to return to Sri Lanka to be well-founded. The appellant's account and the fears he expresses must be assessed in the context of the background material, case law and other evidence before me. The whole evidence must be looked at in the round bearing in mind the low standard of proof. I consider it appropriate to begin with consideration of the psychiatric evidence produced for the appellant. I say this for 2 reasons. Firstly, because the conclusions of the medical expert in asylum cases should be borne in mind when considering all the evidence. Secondly, the appellant's reasons for the various inconsistencies highlighted in the decision of the Adjudicator, Mr M B Hussain, on 22 October 2002 were essentially that he claimed he became confused because of his mental health. Despite this I should note that for this appeal the appellant has explained at length and is specific regarding various matters where he has previously been found to be inconsistent.

26. I have 3 reports from Dr Saleh Dhumad, who works as a full time substantive consultant psychiatrist in central & North West London Foundation NHS Trust, according to his CV. In this he states he has assessed more than 400 individuals with PTSD from Iraq, Syria and Sri Lanka and provided expert opinion and oral evidence to Tribunals. He does not cite any cases in which he was expert or any adverse or positive comments made by the Tribunal regarding his role as an expert in such cases. I cannot see that Dr Dhumad has had any specific post graduate training or obtained qualifications in the diagnosis or treatment of PTSD since qualification in Iraq in 1994 albeit he must, as a psychiatrist, have experience in this condition and he states that he has a special interest in it. I note Dr Dhumad has received Medico-legal training and that his lists of 'Specialities' amount to some 15 areas.

27. The first report of Dr Dhumad can be found in Bundle 'A', item 6, pages 46 to 60 followed by a CV and Appendices. Of the 11 questions posed to Dr Dhumad by the appellant's legal representatives, none asked him to



comment on how the appellant's current mental state may have affected the appellant's ability to recall events and provide contradictory evidence I his previous claim for asylum in 2002. Dr Dhumad sets out his 'Interview Method' at section 5 but he does not state how long he spent with the appellant.

28. The appellant claimed to Dr Dhumad that he had been ill treated by the LTTE, beaten with wooden rods and forced to clean the camps. During detention by the Sri Lankan authorities he was tortured, kicked with military boots, burned with a coil heater used to boil water and beaten with a cricket wicket pole. They also used water torture, pouring water on his face until he felt suffocated. The appellant reported that his mental health deteriorated after torture in 2000, feeling scared and worried, lack of sleep due to nightmares. He said he felt safe in the UK and his symptoms gradually settled. He told Dr Dhumad that he did not feel he needed treatment. The appellant also said, however, that his mental health had deteriorated over the past 6 months after the deportation order was served on him. He felt low in mood and was not sleeping well due to nightmares. He is worried about the separation from his partner and children and frightened he might be arrested and tortured by the Sri Lankan authorities. Dr Dhumad notes that the appellant's general practitioner 'started him on antidepressant medication' but does not state when this was prescribed. He does not appear to have seen the appellant's GP notes. The appellant told Dr Dhumad he was thinking of ending his life and he could not live without his partner and children. I note Dr Dhumad states at paragraph 16.4 that 'There is no evidence of delusions (false unshakeable beliefs). He has been experiencing PTSD symptoms nightmares, but no flashbacks, avoidance, or hyper vigilance. His concentration was poor; this is mainly due to anxiety and depression. There was no evidence of cognitive impairment'. Dr Dhumad noted that the appellant was willing to engage in therapy.
29. At paragraph 17 b) Dr Dhumad states that whilst the appellant suffers from Post-traumatic symptoms such as nightmares, his symptoms do not meet the criteria for Post Traumatic Stress Disorder. The diagnosis is of 'Moderate Depressive Episode, with psychotic symptoms - this is explained as the appellant 'feeling low in mood, he feels lethargic; suicidal; hopeless; unable to sleep with poor appetite and concentration; he is hearing voices' (a). Also, it is the opinion of Dr Dhumad that the appellant is suffering from 'an adjustment disorder' (c). The current risk of suicide was assessed by Dr Dhumad to be moderate. The main risk factors are depression and hopelessness. His main concerns are separation from his family and fear of deportation. Dr Dhumad expresses the opinion that if the appellant were deported his risk of suicide would reach a much higher level and much damage caused to his mental state by being separated from his family. Dr Dhumad noted the recommended treatment for the appellant's condition was antidepressants and trauma

focused Cognitive Behavioural Therapy. He noted he had recommended the appellant sees his GP and asks for a referral for psychological therapy.

30. Although according to the questions he reported were put to him by the appellant's legal representatives a question was not raised about previous evidence given by the appellant, Dr Dhumad did give his opinion on this. He said that the appellant was fit to attend a hearing now and give oral evidence although because his concentration was poor and likely to worsen if cross-examined about traumatic events. He recommended that the appellant was not questioned about past traumatic events. Dr Dhumad then went on to report, 'As regards the difficulties he faced in providing a coherent and consistent account at the appeal hearing before Judge M B Hussain in October 2002, I would like to point out that he found it difficult to give information to me clearly, even in the relatively relaxed and unthreatening setting of my consulting rooms. Therefore, in my opinion, he would have found it difficult to give a clear account of himself and answer questions in the court setting, as he might have experienced such a setting as threatening, stressful, adversarial and fear provoking'.
31. Later on in noting that he has considered the possibility that the appellant may be feigning or exaggerating his mental illness, Dr Dhumad states that 'It is my clinical opinion that his clinical presentation is consistent with a diagnoses of depression and adjustment Disorder'.
32. The Addendum report of Dr Dhumad is dated 23 April 2017 so is just under a year from the previous report (item 1, bundle C). Dr Dhumad saw the appellant on this date. At this point the appellant told Dr Dhumad that he remains anxious and depressed. He feels lethargic. Not sleeping or eating well. He has not been out alone. His partner accompanies him all the time. He remains on anti-medication Sertraline 50mg' and has not been referred for psychological therapies as yet'.
33. The appellant told Dr Dhumad that he had frequent suicidal thoughts, had not acted on them, but would if he were sent back to Sri Lanka. The opinion of Dr Dhumad is that the appellant 'remains moderately depressed and continues to suffer from PTSD symptoms due to the incident of torture in Sri Lanka'. Dr Dhumad had still not seen the notes of the appellant's GP. He makes no reference to asking the appellant if he asked to be referred for psychological therapy, as recommended by him almost a year previously. Rather he simply states that the medication should be increased and the appellant 'referred urgently for psychological therapy'.
34. I am unclear why a further report was considered necessary but Dr Dhumad saw the appellant again on 6 August 2017. There is no reference to any instructions or questions posed by the representatives of the

appellant. Dr Dhumad reports that the appellant stated his mental health had deteriorated since he saw him in April. He is more anxious and depressed. Basically, the symptoms are repeated including the position of the appellant that he would commit suicide if returned to Sri Lanka. Dr Dhumad repeated his opinion that the appellant remains moderately depressed and continues to suffer from PTSD symptoms which he attributes to 'the incident of torture in Sri Lanka'. His conclusions, he reports, are overall similar to the ones he arrived at in his previous reports. Dr Dhumad makes no mention of psychological therapy recommendation in this report despite the previous recommendation in the first report of May 2016, and the urgent recommendation in April 2017.

35. In submissions, Mr Briant commented that the appellant is likely to be suffering from anxiety at the prospect of being returned to Sri Lanka after such a long time in the UK as well as being potentially separated from his family. However, he submitted this as a result of his own criminal activities in the UK and not because of a fear to his life in Sri Lanka.
36. Mr O'Callaghan concentrated more on the scars on the appellant's body which he submitted the evidence established was a result of torture. He submitted in that regard there was a simple point. If the appellant had not been tortured, why did he have scars. If he had, it is not surprising that the appellant has got PTSD. He noted that part of the difficulties the appellant may have had in giving evidence flowed from untreated PTSD.
37. In his skeleton argument Mr O'Callaghan makes brief reference to the reports of Dr Dhumad of 22 May 2016 and 23 April 2017 which, he writes, confirms that the appellant is suffering from PTSD and Moderate Depressive Episode as well as taking antidepressant medications (paragraphs 27 to 30). I do not agree with this argument based on what Dr Dhumad has stated in his reports. He has not made a diagnosis of PTSD for the appellant. Dr Dhumad concluded in his first report that the appellant suffered from Post-traumatic 'symptoms' such as nightmares, but that his symptoms did not meet the criteria for PTSD. This conclusion did not change over the period Dr Dhumad provided his reports. He provides a diagnosis of depression and 'adjustment disorder'. There was no evidence before me that the appellant has ever requested a referral for psychological therapy either urgent or otherwise.
38. Mr O'Callaghan referred me to paragraph 339K of the Immigration Rules as quoted at paragraph 48 of his skeleton argument. This provides that 'The fact that a person has already been subject to persecution or serious harm ... will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated'. He submitted that the medical evidence established

the appellant had been tortured. Mr Briant submitted that the scars could have had any number of causes. He noted that none were on the appellant's back, an area where scars are commonly found in those seeking asylum from Sri Lanka and claiming torture. Also the areas of scars were on areas often uncovered in warm weather, that is, on the appellant's legs and arms, so may have been caused otherwise than by deliberate torture.

39. I have a medical report of Dr Andres Izquierdo-Martin at pages 26 to 45 of Bundle A. I note that at the outset of his report whilst Dr Izquierdo-Martin states he has become proficient over the years in recognising and considering the causation of scars, 'there is no way scientifically one could confidently establish how an injury occurred to cause a scar'. Much later in the report Dr Izquierdo-Martin notes that determining the age of scars by just visual inspection is not a precise science and often it is just possible to say that the injuries are mature or immature, enough to give a very approximate range of time when the injuries could have been caused. He notes that the appellant's scars are matures which is consistent with injuries that are more than 6 to 12 months old. Dr Izquierdo-Martin examined the appellant on 5 May 2016.
40. In his report, Dr Izquierdo-Martin concluded that scars 1, 2, 4, 5 and 6 (1 and 2 on the arms, 4, 5 and 6 of the lower leg going down to just above the foot) were highly consistent with the events described by the appellant of being unwillingly and intentionally burned. The rest of the scars on the legs were less specific and the appellant was not sure which ones were caused by childhood injuries or by beatings and kickings. It was possible that all of them could have been caused by accidental injuries although the significant number of scars was in a number possibly greater than would be expected in ordinary life.
41. I note that in the appellant's first substantive asylum interview on 19 April 2002 the appellant showed scars to the interviewing officer. He said he had burn injuries on his arms and a scar (question 30). He also had a scar on his right leg by his foot. The appellant is noted to have shown the interviewing officer a scar, approximately measuring 4 to 5 centimetres wide and 5 cm in length by his foot. He was asked if he had any other injuries and said 'No other visible scars'. He was asked how he sustained the scar on his foot and said it was caused by an electric heater, 'the coil type', (question 33). He said the injury to his foot was caused one month after his arrest by the army.
42. The amount of scars the appellant had when examined by the doctor appears to have increased significantly by the time Dr Izquierdo-Martin examined the appellant. From a reference to one scar on his foot caused by burning in 2002, now he has numerous scars on his lower legs and told

Dr Izquierdo-Martin that the various scars on both legs (4, 5 and 6) were all caused by burning by a hot coil element in 2000.

43. The appellant was not asked why he appeared to have by the examination in 2016 far more scars than he had claimed and shown to the interviewing officer in 2002. The interviewing officer is not medically trained and cannot be expected, nor should they, to note down every scar shown to them or examine them in detail, but having acknowledged both these things, I still consider it relevant to note that the appellant seemed clear in the interview as to the specific scarring he bore as a result of his injuries in 2002 (on his arms and one on his right leg near his foot) yet there seemed significantly more by 2016, most of which he claims were from deliberate burning.
44. I accept that these scars as described are reasonably likely to have been caused by the application of a hot instrument. However, Dr Izquierdo-Martin did note that 'it is scientifically impossible to differentiate self-inflicted injuries by proxy (SIBP) from injuries caused by torture'. He went on to say that there were not presenting facts to make SIBP more than another possibility but did not explain what such facts might be.
45. There is information contained within case guidance on Sri Lanka that certain persons will inflict injuries to themselves or, for example, enlist the help of family members to do so in order to assist in their asylum claims, the most recent case guidance being KV (Sri Lanka) v SSHD [2017] EWCA Civ 119. It cannot be wholly ignored that the appellant appears to have incurred a number of scars since he arrived in the UK, and that could have been inflicted by himself and/or possibly with the assistance of another with his consent to improve his claim for asylum. I bear in mind that the appellant was examined by a medical expert some 14 years after he arrived in the UK as well as his first interview in 2002 when he claimed to have less scars than have now been identified by a medical expert. It is not possible to say when the injuries were inflicted other than it is unlikely that they were inflicted in the last 6 to 12 months. I note that other explanations for the scarring cannot be excluded because the submissions of Mr O'Callaghan appeared to be that as the appellant has several scars, not caused accidentally, they must have been caused by torture in the manner and at the time he claimed. My point is that this is not always so. Not only could the injuries have been inflicted deliberately in the UK since the appellant's arrival in 2002 but also, even if he had them all on his arrival, the appellant could have been the victim of an attack by persons in Sri Lanka or detained and tortured by the authorities under other circumstances than those he claimed.
46. Having taken full cognisance of the medical evidence albeit with some reservations which I have included above, I turn now to consider what I regard as a crucial issue with regard to the appellant's claim that he

arrived in the UK fearing for his life and that in 2017 he continues to have that fear.”

15. The judge directed herself in respect of *Devaseelan* in relation to the 2002 decision. The then Adjudicator found the Appellant to be lacking in credibility and rejected his evidence. The judge found that it was damaging to the Appellant’s credibility that, despite claiming asylum in 2002 and 2008, once he had obtained leave to remain he returned to Sri Lanka in August 2011, having obtained a passport from the Sri Lankan Embassy in London.
16. The judge considered the Appellant’s own evidence that he was been questioned and he did not experience any problems at the airport on his arrival in Sri Lanka in 2011. Despite the claim that the authorities were looking for him, he could travel from Vavuniya to Colombo and leave from the airport using the same ticket that he had purchased to enter Sri Lanka.
17. The judge found that the evidence that the Appellant returned to Sri Lanka believing the situation to have improved to the extent that he felt safe, lacking in credibility considering his claim that he had been detained by the LTTE and government authorities and tortured and that he had been involved in political activity since his arrival in the UK in 2002. The judge had regard to the country information relating to 2011, regarding returned asylum seekers with scarring who had been engaged in political activities or suspected of supporting LTTE. The judge found that none of the background country evidence provided by the Appellant, including Dr Smith’s evidence, established the Appellant, if his circumstances were as he claimed in 2011, could have considered the country situation improved to the extent that he would be able to safely return to Sri Lanka.
18. The judge concluded in respect of Dr Smith’s evidence that he had failed to address the crucial issue of how the Appellant could consider that she could safely return to Sri Lanka in 2011 if his claims regarding earlier events were true. Dr Smith’s opinion was that the Sri Lankan authorities continued to be adversely interested in those suspected of past LTTE connections and that LTTE suspects continue to be detained and ill-treated and many cases were documented between 2009 and 2014.
19. The judge also considered that the Appellant claimed to have been involved in Tamil groups in the UK at this time. The judge concluded at paragraph 67 as follows:

“67. Bearing in mind the Appellant’s claims regarding events and ill treatment he received before leaving Sri Lanka and his claimed continued interest and involvement in Tamil politics after his arrival in the UK, I find the appellant returning to Sri Lanka in 2011 in light of the background information as to the political climate at the time seriously and crucially damaging to his claims of what had occurred before he left or that he had any fear of the authorities in Sri Lanka when he left.”

20. The judge considered the evidence of the Appellant about what happened once he returned to Sri Lanka and concluded, at paragraph 71, that he had given two very different scenarios. Mr O'Callaghan, who represented the Appellant before Judge Agnew, in submissions accounted for the inconsistencies on the basis that the Appellant has posttraumatic stress disorder. However, the judge found at paragraph 72 as follows:

“72. Whilst bearing in mind that this was some time ago, and that the appellant has been diagnosed with depression, some PTSD symptoms (although not from the condition of PTSD itself) and an ‘adjustment disorder’, I decline to accept that he would be inconsistent with the sequence of events at such a crucial time.”
21. The judge found that the Appellant had given an account lacking in credibility in respect of what had happened to him on return to Sri Lanka in 2011. The judge considered that there were inconsistencies in respect of the timing of the marriage and the circumstances generally.
22. The judge considered a letter from an attorney-at-law which the Appellant sought to rely on to support his claim. The attorney's asserted that he was contacted by the Appellant's mother and asked to make representations to secure the release of her husband from police custody. The judge did not accept this document as being reliable for reasons that she gave at paragraphs 78 and 79.
23. The judge considered *sur place* activities at paragraphs 80 to 88, considering evidence that he was involved in political activities against the government in support of Tamils. The judge considered that the Appellant did not refer to having been engaged in *sur place* activities at the hearing in 2002 or when he made fresh submissions in 2008. In addition, there was no reference to *sur place* activities in the submissions made by the Appellant's legal representatives in 2013 in response to the Respondent's intention to deport the Appellant.
24. The judge noted at paragraph 81 that the first time the Appellant raised *sur place* activities was in a letter from his legal representative on 3 July 2015, in which it is asserted that the Appellant “should have a full asylum interview focusing on his activities in the UK amongst the Sri Lankan Tamil Diaspora”. The Appellant was interviewed on 10 September 2015 and the judge recorded what the Appellant said in respect of *sur place* activities, namely that since 2002 he had taken part every year in Heroes Day remembrance activities.
25. The Appellant's evidence was that during 2009 when the Mullivaikkal incidents were taking place he took part in demonstrations every day at Parliament Square and continued to do so annually. The judge concluded that such involvement since 2002 as the Appellant now claims did not sit well with the Appellant claim to have anticipated no problems in returning to Sri Lanka in 2011.

26. The judge at paragraph 84 considered a letter from the TGTE of 10 June 2016 and the judge stated as follows:

“84. I have before me a letter from ‘Transnational Government of Tamil Eelam’ dated 10 June 2016. Although provided as an original and the signature of the writer (Mr Sockalingham Yogalingam) is in pen, the document is a photocopy. That is, the letter heading has been copied and thereafter the typing inserted. The first page relates to the TGTE and its activities in general and it is only on page 2 that it is written that the appellant joined the organisation as a volunteer. It is not stated when he joined. It is written that the appellant volunteered in organising ‘several public events in the UK’ and that he not only attends many meetings but also takes an active role in organising events and public demonstrations’ but no details are provided of any specific events he has organised or demonstrations attended. It is unfortunate that in the penultimate sentence reference is made to the appellant continuing ‘to express her political aspiration publicly’. Mr Yogalingam did not appear as a witness to be asked details of the appellant’s activities. This is in the main a standard letter, printed on a photocopied letter headed paper, with no specific details of the appellant’s activities for the organisation and when he performed them. I attach no weight to it as supportive of the appellant’s claims that he is extensively involved and active in this group.

85. In his submissions Mr Briant noted that the evidence of such activities as the appellant had been involved in the UK were limited to meetings involving large numbers of people. There was a photograph showing him at a hunger strike with others in London and another of a tree planting in Wales. Mr Briant submitted that these hardly showed the appellant was in the main public eye involved in extensive activities in support of a Tamil homeland and likely to disturb the Sri Lankan public authorities. The appellant had admitted he had given no speeches so it was unlikely his activities had come to their attention. He noted that despite directions given to the appellant’s representatives that photographs be lodged of the appellant’s activities these had not been complied with.”

27. The judge considered photographic evidence and made conclusions about this at paragraph 86. The judge concluded in respect of *sur place* activities the following:

“87. I decline to find on the very limited evidence provided that the appellant has established he has had extensive involvement with the diaspora Tamil organisations in the UK. He can no way be perceived as a prolific activist. Having considered the risk factors as set out in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 I find the appellant has failed to establish with the low burden of proof resting with him that what extremely limited activities he has engaged in whilst living in the UK has come or will come to the adverse attention of the authorities or that he



falls into a category of persons at real risk of persecution or serious harm on return to Sri Lanka.

88. Applying the burden and standard of proof as set out in paragraph 24 above in considering the evidence in the round I do not find the discrepancies and implausibilities which go to the crux of the appellant's claim have been addressed satisfactorily in the appellant's statement, oral evidence, submissions or with the assistance of the expert reports lodged. I have been led to conclude, having considered all the evidence before me, and bearing in mind the low standard of proof, that the evidence of the appellant is not plausible and I did not find him to be a credible witness. My reasons are set out above. The appellant has failed to establish that his account of events in Sri Lanka before he left in 2002 and on return in 2011 are true or that he has a well-founded fear of persecution if returned to Sri Lanka now. This in turn leads me to the finding that whilst I accept the appellant has some anxiety issues regarding his prospective deportation and separation from his family, he has falsely presented the reasons for and exaggerated his symptoms including the suicide risk to Dr Dhumad. I find he does not pose a high suicide risk or suffer from the serious mental health problems he claimed as a result of alleged ill treatment in Sri Lanka. The Refugee Convention is not engaged."

28. The judge went on to consider Article 8 in the context of the Appellant's family life here with his partner and their children. The Appellant has been here 2002. The judge heard evidence from both the Appellant and his partner. In relation to credibility of the Appellant's partner the judge stated as follows:

"93. I find there is an issue in relation to the credibility of [SS] with regard to her claimed responsibility as the sole owner of a significant business with employees compared with the earlier description of her on the children's birth certificates as either not in occupation or as a full-time mother. Her oral evidence and response to the question I asked her about the business indicated to me that she was not capable of running a business as claimed. It is likely that her name is being used as the owner in name only when it is in fact being run by others, presumably relatives.

94. I note from the refusal letter that the date the relationship between the appellant and [SS] began is very confused for the eldest child she had with the appellant was born on 31 March 2007 whereas in February 2007 the Home Office records noted that she was in a relationship with a British citizen which was how she obtained ILR in the UK.

95. According to the statement of [SS] she fell in love with the appellant in 2005 after she was estranged from her husband. They lived together, and after prolonged divorce proceedings she finally got a divorce from her husband in 2007. After the birth of their 3<sup>rd</sup> child, the appellant apparently

left [SS] and their children and married a woman in Sri Lanka although the oral evidence was that this relationship lasted only one year.

96. The reason I make these comments is to highlight that I found the evidence from [SS] lacking in credibility and her claimed circumstances both historically and current somewhat questionable.”
29. The judge considered the Appellant’s children, recording at paragraph 97 that Mr O’Callaghan submitted that the children “are at the forefront of this appeal”. The judge noted that all three children were born here and considered copies of an annual report from the school relating to the eldest child. The judge noted that there was no full school report, which he expected to see considering that the child was now aged 10. The judge noted that there were no letters from schools and no statements from friends or relatives and that although the Appellant mentioned his children in his statement he did not go into any detail regarding how he is involved in their lives or what they do together or anything about the children themselves such as their interests and needs and that the same applied to the statement of his partner (see paragraph 99).
30. The Respondent accepted that the relationship was genuine and subsisting and the judge did not seek to go behind this, but concluded that the evidence relating to the children was extremely limited. The judge noted that the children are now aged 10, 8 and 6 and there was evidence that Tamil is spoken by the family at home. The judge considered that the relationship between the Appellant and his partner broke down in 2011. He then returned to the family in 2015. He committed various offences and spent time in prison
31. The judge acknowledged that the children were British citizens and she stated as follows in relation to their best interests:

“103. Given the length of time they have been here and that they are British citizens I find it is in the children’s best interests to remain with their parents in the UK. Nevertheless, it has not been established that it would be unreasonable for them to accompany their parents to Sri Lanka. They are not, as British citizens, required to accompany him. This is a question of choice. The evidence of their mother appeared to be that if the appellant went to Sri Lanka this was an irreversible and permanent split of the family. But this is to ignore that the children and she could accompany him to a country where the couple were both born, have spent most of their lives and have extended families. Many families uproot from one country for economic and employment reasons taking their children with them. I find that the children are of a sufficiently young age that with the support of their parents and extended family members in Sri Lanka it would not be unreasonable for them to accompany their father to that country albeit it is marginally in their best interests, as British citizens, that he remains in the UK with them. Of course, if SS with her children chooses to remain in the UK without the appellant then this is indeed a

split in family life. But that is a matter of choice. The appellant is not automatically entitled to remain in the UK simply because his children's interests, marginally, are likely to be better served by him remaining with them here. It has not been established SS and the children could not live without the support of the appellant in the UK, as they did during the period of his imprisonment."

32. The judge found that the children are young and not at a critical stage in their education but as British citizens they have rights and privileges (see paragraph 108) but she concluded that it would not be unduly harsh for the children to live in Sri Lanka. The judge stated as follows at paragraph 108:

"108. The children are young, and not at a critical stage in their education. Of course as British citizens they have the rights and privileges attached thereto. But I have not found in considering the children's best interests that it would be unduly harsh for them to live in Sri Lanka.

109. As to remaining in the UK with their mother, as noted the children have been able to live in the UK not supported by the appellant given his committal of a serious criminal offence which rendered him imprisoned for a period of 15 months. It appears that his partner was able to work and support herself and her children. I was not provided with any independent evidence other than that from the parents as to the effect any separation from their father would have on the children. Without speculating as to what evidence could have been provided it would have been helpful to have had, for example, full school reports, letters or statements from the head and teachers at their school, their doctor, any social worker or other professional involved. I am not suggesting this evidence as an opportunity for the appellant now to obtain further evidence. He has, with experienced legal representatives, had that opportunity and the evidence is not before me.

...

125. Despite the lack of independent evidence or indeed any evidence regarding the children save the brief evidence from their parents, on the assumption that they have a close relationship with their father and would find his absence difficult and disruptive, nothing has been established to demonstrate that in the appellant's case, when balanced against the public interests considerations, it would be unduly harsh for the children to either join him in Sri Lanka or if their parents choose otherwise, that they remain in the UK with their mother after he is removed. In terms of the appellant's mental health whilst I accept he is depressed and anxious regarding the prospect of being deported to Sri Lanka because his intention since arrival has been to remain in the UK and his family are here, I have not found the evidence of the medical expert establishes that

he is at real risk of suicide if he is deported or that his mental health is such as to amount to compelling circumstances.”

### Ground 1

33. It is asserted that the judge erred in refusing to adjourn the case. It impacted unfairly upon the Appellant. It is asserted that the judge failed to lawfully explain why the failure by the Respondent to comply with the direction to produce the decision relating to his brother, would not deprive the Appellant of a fair hearing, particularly in the light of the acceptance by the Respondent that unfairness existed. Mr Halim relied on the case of *SH (Afghanistan) v SSHD* [2011] EWCA Civ 1284 with specific reference to paragraph 15 of *SH*. He submitted that the question for me was whether it can be concluded that had the evidence, namely the brother’s determination, been before the First-tier Tribunal Judge he would have reached the same conclusion. The salient paragraphs of *SH* are as follows;

“13. In relation to both the two issues I have identified, whether the Immigration judge erred in law in refusing an adjournment and as to whether he would have reached the same conclusion, in my judgement Judge King fell into serious error. First, when considering whether the immigration judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was *Wednesbury* unreasonable or perverse. The test and sole test was whether it was unfair. In *R v Secretary of State for the Home Department ex-parte the Kingdom of Belgium and Others* [CO/236/2000 15 February 2000] the issue was whether a requesting state and Human Rights organisations were entitled to see a medical report relevant to Pinochet’s extradition. Simon Brown LJ took the view that the sole question was whether fairness required disclosure of the report (page 24). He concluded that the procedure was not a matter for the Secretary of State but for the court. He endorsed a passage in the fifth edition of *Smith Woolf and Jowell* at pages 406-7:-

‘Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The *Wednesbury* reserve has no place in relation to procedural propriety.’ (page 24)

14. The question for Judge King was whether it was unfair to refuse the appellant the opportunity to obtain an independent assessment of his age; the question was not whether it was reasonably open to the Immigration judge to take the view that no such opportunity should be afforded to the appellant. Where an appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand? It is plain from reading his decision as a whole that that was not

the test applied by Judge King. His failure to apply that test was a significant error.

15. The next question which Judge King resolved was whether the report which had been obtained by the time of the hearing before him dated 22 October 2010 would have made any difference. The judge, on that issue, concluded that even if that report had been obtained, 'it is reasonably likely' that Immigration Judge Froom would have reached the same decision. This was not the correct test. Judge King was, of course, not in the same position as Immigration Judge Froom. He had the advantage of considering the very report which, in my view, Immigration Judge Froom should have allowed the appellant to obtain. If that report had not been obtained the question for the Upper Tribunal on appeal from the First Tier Tribunal was whether it would have been pointless to wait for further independent evidence as to age. Tribunals, like courts, must set aside a determination reached by the adoption of an unfair procedure unless they are satisfied that it would be pointless to do so because the result would inevitably be the same. Both Simon Brown LJ and Dyson LJ reminded themselves, as all faced with the argument that the result would inevitably be the same must remind themselves, of Megarry J's evocation of the essence of justice in *John v Rees* [1970] Ch 345,402:-

'It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events. In the instant appeal it was impossible to say, at the stage an adjournment was requested, that any report obtained by the appellant could make no difference.'"

34. Mr Halim did not refer to *AA (Somalia)* [2007] EWCA Civ 1040 in oral submission, but the judgement is of relevance. I refer to the following paragraphs;

- '20. Absent any further authority, I find the reasoning of the AIT in AA's case very persuasive. Restrictions of the kind suggested by Mr Scannell are not necessary or desirable. If Mr Scannell were right, the second tribunal

would not be doing that which it has to do: examine the evidence before it and reach the appropriate conclusions of fact. Mr Scannell's approach would lead to numerous appeals in which the reviewing or appellate court would be asking itself: 'Was there a sufficient good reason here to justify departure?' Another layer of complexity would be added to an already far too complicated area of law. There would be numerous appeals in which the issue to be litigated would be: Was the second tribunal 'bound by' the decision of the first tribunal? There is a tension between the need for consistency in public law and the need to ensure that the right to stay in the country and not be deported is only granted to applicants who show (to a low standard of proof) that they are entitled to do so. In my view in this field the need for consistency should take second place. I bear in mind the variable quality of advocates before immigration tribunals (indeed in a significant number of cases the Secretary of State is not represented) and the inevitable effect this has on decision making. I therefore agree with the position adopted by the respondent: there are no principles here. The second tribunal should have regard to the earlier decision but only as a starting point.

...

29. In my judgment it is time for the Court of Appeal to adopt the submissions made by Mr Kovats. In cases where the parties are different, the second tribunal should have regard to the factual conclusions of the first tribunal but must evaluate the evidence and submissions as it would in any other case. If, having considered the factual conclusions of the first tribunal, the second tribunal rationally reaches different factual conclusions, then it is those conclusions which it must apply and not those of the first tribunal. In my view *Ocampo* and *LD* do not stand in the way of this simple approach. Both cases make it clear the first decision is not binding and that it is the fundamental obligation of the judge independently to decide the second case on its own individual merits. All that I am doing is simplifying and clarifying the law. Simplification and clarification have the advantages of making it easier for immigration judges for whom the law is already far more complicated than it should be and of making it less likely that there will be appeals on whether the second tribunal was, or was not, bound by the decision of the first. It also has the advantage that the same rule applies whether the previous decision was in favour or against the Secretary of State.
  
35. In *AA* case the Appellant called his sister to give evidence in support of his appeal. It became clear that she had been granted asylum after an appeal. The judge did not have that decision before him (neither party had produced it), but in any event rejected her credibility and that of the Appellant and dismissed the appeal. There was, in *AA* a material overlap in their cases; namely, clan membership. In respect of the previous decision which was not before the Tribunal the court of appeal stated;

“33. The AIT said:

75. In AA’s case, there had been a previous judicial determination. We reject the suggestion that it was for the Home Office to produce it, or for the Adjudicator to enquire for it. The case before the Adjudicator was that of the Appellant and the Adjudicator was to determine it on the material before him. The position is simply that a determination in Ouma’s case was not before him and in those circumstances he did not err in law by failing to take account of its contents. Whether he had the determination or not, we also reject the submission that it was binding on him in the sense that it regulated, or ought to have regulated, his determination of the appeal of the Appellant before him. He was bound to determine that Appellant’s appeal on the whole of the evidence before him, as an independent judge of fact and law. He did exactly that.

34. I agree.

35. The AIT then went on to consider whether the position would have been materially different if the appellant had decided to place before Mr Hulme the decision in the sister’s case.

76. For the avoidance of doubt, we do not consider that the position would have been materially different if he had had the determination in Ouma’s case before him. He would have seen from it that the Adjudicator had decided that Ouma was a member of the clan she claimed, but that that conclusion had been reached from a starting point that, in her case, the Secretary of State chose not to question it. Although in those circumstances he ought to have treated the determination in Ouma's case as the starting point, there was so much extra evidence before him that he would have been bound to move away from the starting point. When he had done that, the mere fact that on other evidence (or the lack of it) another Adjudicator had found that Ouma was of the clan she claimed could have no conceivable impact on his own task.

36. The AIT concluded that Mr Hulme did not make made a material error of law and so dismissed the appeal.”

36. The Appellant was not seeking an expert report in order to answer adverse material. He wanted to adduce a previous determination made by a judge who allowed his brother’s asylum appeal so that he could rely on the findings of fact. He had been aware of the appeal since 2001. He made further submissions in 2008 relying on it.

37. Whilst the Appellant may not have been able to obtain the determination for good reasons, the decision to refuse the adjournment application is fair. The judge unarguably considered the fact that the brother's appeal had been allowed and he was a refugee as the starting point. The judge at no time went behind this. The dismissal of the Appellant's appeal does not undermine the brother's position. However, there was no evidence from the brother (I do not accept that a good reason has been advanced for this). It can be reasonably inferred that he can remember the basis of his asylum claim. Mr Halim asserted that there may be findings of fact that would have an impact on the Appellant's case. This is entirely speculative. The Appellant claims the LTTE were interested in him because of the activities of his brother. His brother fled Sri Lanka in 1999. The Appellant claims he was arrested in 1999. That is the extent of the overlap. The Appellant's evidence relating to his claim from this time up until the time of his appeal is entirely independent of his brother asylum claim. The brother's appeal was determined in 2001 and the decision can have no evidential value post 2001. At best, he may be able to give direct evidence of the Appellant's arrest in 1999, if he had not fled Sri Lanka by then. However, as he was not a witness in the Appellant's appeal, it can be reasonably inferred that he is not able to corroborate the Appellant's evidence in a material way.
38. Fairness did not demand the judge adjourned in the vain hope that the Respondent would produce the decision. Whilst I accept that Mr Briant gave the impression that it could be obtained, that it had not been by the time of the hearing very much suggested that a further adjournment would not be fruitful. In any event, the application was wholly speculative.
39. In contrast to the position of the UT in *SH*, there is no evidence now before me that was not before the FtT. Essentially the position I am in is the same as that of the FtT. I take the same view. I have not seen the decision relating to the Appellant's brother, but based on the Appellant's evidence (and the lack of evidence from his brother) and the absence of material overlap, it can be reasonably inferred that it can be of no material assistance to the Appellant. There were so many significant problems with this Appellant's evidence. The disclosure of judge's decision in respect of his brother, would make no conceivable impact on the Appellant's appeal, had it been before the judge.

## Ground 2

40. It is asserted in ground 2 that the judge erred in considering the medical evidence prior to the consideration of the oral and written evidence. I do not accept that this is the case. The judge was mindful that the evidence had to be considered in the round (see paragraph 25) and it is a matter of fact that the judge had to start her assessment of the evidence at some point and the order in which she chose to engage with it was a matter for her.
41. That the judge attached some weight to the amount of scars the Appellant had when he was examined by the doctor in comparison to those which he highlighted during his interview in 2002 does not give rise to an error of law. The Appellant was



represented by Counsel at the hearing before the First-tier Tribunal and it can be reasonably inferred that Counsel was aware of what the Appellant said during his interview in 2002. It is not a matter of the Appellant having been ambushed. The inconsistencies arose from what he said on a previous occasion. It was a matter for his legal team whether they wished to address this in evidence.

42. Dr Izquierdo-Martin concluded that the scars were highly consistent with the ill-treatment as explained by the Appellant. It is asserted that the judge erred in respect of SIBP. It is asserted that this was not an issue raised by the Home Office or indeed the First-tier Tribunal and the Appellant was not given the opportunity to address the issue.
43. The Secretary of State did not raise SIBP. This was raised by Dr Izquierdo-Martin in his report (see [44] of the decision). A number of scars were found to be highly consistent with the Appellant's account and others were "less specific". Dr Izquierdo-Martin overall conclusion was that it was possible that all of them could have been caused accidental injuries.
44. The judge did not conclude that the injuries were SIBP. The judge set out the possibilities at [45] including SIBP. What the judge says at [45] is in response to Mr O'Callaghan's argument that as the Appellant has several scars, not caused accidentally, they must have been caused by torture in the way the Appellant claims. The judge rejected this proposition because the injuries could be SIBP since his arrival in 2002 or because of an attack or torture. What is clear from a proper reading of the decision is that the judge did not accept, notwithstanding Dr Izquierdo-Martin's evidence, that the injuries had been caused in the way described by the Appellant and this was a conclusion that she was entitled to reach, bearing in mind the evidence as a whole and indeed Dr Izquierdo-Martin's evidence that it was possible that the scars could have been caused by accidental injuries (see paragraph 40). The conclusions were open to the judge on the evidence. He rejected the Appellant's evidence of causation. However, it was not for the judge to give an account or find an alternative scenario explaining causation of the scarring. There was no unfairness arising from the judge's assessment of the medical evidence.

### Ground 3

45. It is asserted in ground 3 that the judge's findings, at paragraphs 84 to 88, are flawed because the judge adopted a test of "extensive involvement" with Diaspora Tamil organisations in the UK so as to be identified as a "prolific activist" whilst this was not the test.
46. It is clear from paragraph 84 that the judge did not attach any weight to the letter submitted from the organisation and her reference to extensive involvement or being a prolific activist at paragraph 87, is a reference to how the Appellant's case was put rather than the judge having applied the wrong test. The judge concluded that the Appellant's activities in respect of *sur place* activities were extremely limited and as such he would not come to the attention of the authorities.

47. Despite Mr Halim's submissions to the contrary, the judge did not accept the Appellant was a member of the TGTE. The judge accepted the position was as advanced by the Respondent that the Appellant's activities were limited to meetings involving large numbers of people. This was the extent of the evidence that was accepted by the judge and unarguably does not put this Appellant at risk, with reference to GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319. I have also considered the case of MP [2014] EWCA Civ 829, on which Mr Halim also relied, specifically paragraphs 43 and 50, but as the judge did not find the Appellant was a member of a proscribed organisation it does not advance his argument.

#### Ground 4

48. Ground 4 asserts that the judge's finding at paragraph 93 in respect of the evidence of the Appellant's partner gives rise to an error of law because the concern raised by the judge was not directly addressed to the witness and she was not given the opportunity to address it. There is no substance in the argument. In any event, the conclusion at paragraph 93 is not in any way determinative of the outcome of this decision. The judge found the Appellant and his partner's evidence problematic for many reasons. The findings are grounded in the evidence and adequately reasoned. There is no unfairness.

#### Ground 5

49. Ground 5 asserts that the judge's assessment of the best interests is confused and not in accordance with ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 WLR 148. It is challenged for two reasons; first, the judge did not factor into the best interest's assessment that the children will lose benefits enjoyed through their British citizenship and secondly; the judge (at paragraph 103) concluded that it would be "marginally" in the best interests of the children for their father to remain in the UK and there should be no grading of the best interests. Deportation is either in a child's best interests or it is not. The assessment is flawed and therefore so is the assessment of unduly harsh.
50. The judge made a clear finding at paragraph 103 that it would be in the children's best interests to remain with their parents in the UK. She then went on to say that it would not be unreasonable for them to accompany their father to Sri Lanka albeit it is marginally in their best interests, as British citizens, that he remains in the UK with them, and she again makes reference their best interests being marginally likely served by him remaining with them here.
51. The judge made an unequivocal, child centred finding that the children's best interests would be to remain here in the UK with both parents. The subsequent reference to marginal is in terms of them remaining in the UK. It is unarguable that the judge did not properly consider that the children are British citizens and the loss of citizenship and benefits should they have to leave the UK (see paragraph 108). Mr

Halim, referred to the judgment of ZH specifically paragraphs 41, 46 and 47, but the argument he advanced has no substance. There is no flaw in the assessment of the children's best interests. It is not asserted that the judge failed to consider relevant material. The reference to marginal reflects the realities of the assessment which is fact sensitive. There was very little evidence relating to the children as found by the judge and this is not challenged.

52. The judge assessed unduly harsh, having made the uncontroversial, inevitable and lawful finding that it is in the children's best interests to remain with their parents here in the UK. There is no challenge to the unduly harsh assessment or Article 8 generally independently of the challenge to the best interest's assessment. There is therefore no need for me to consider this aspect of the decision which in any event was properly conducted in accordance with *MM Uganda* [2016] EWCA Civ 617.

### **Notice of Decision**

For the above reasons there is no arguable error of law. The decision of the judge to dismiss the appeal is maintained.

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

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

Signed

Date

Upper Tribunal Judge McWilliam