IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002963
First-tier Tribunal No:
PA/00306/2016

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 24 October 2022

Decision & Reasons Promulgated
On the 03 February 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR M A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A Ahmed, Home Office Presenting Officer
For the Respondent: Mr N Paramjorthy, Direct Access

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described in the First-tier Tribunal that is Mr M A as the appellant and the Secretary of State as the respondent.

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Bunting which on 13 June 2022 allowed the appellant's appeal on asylum and human rights grounds. The appellant is a national of Sri Lanka born on 3 January 1981 and he appealed the decision made by the Secretary of State dated 14 December 2021 to refuse his claim for international and human rights protection.

3. The appellant came to the United Kingdom in 1999 and claimed asylum. This was refused in 2001 and his appeal was unsuccessful. He made a further claim on the basis of sur place activities in the United Kingdom and that he had a private and family life protected under Article 8.

4. Since being in the United Kingdom, the appellant has accrued eight convictions starting with a fine in June 2001 for having an offensive weapon in public, a further conviction in 2001 for affray, a further conviction for attempting to obtain property by deception in 2002, a conviction in 2003 for having a bladed article, and a nine month imprisonment in 2004 for handling stolen goods (for which he was recommended deportation). His appeal against this was allowed on 27 October 2005. In 2007 he was convicted for threatening words and behaviour with intent to cause fear and violence and in 2008 he was convicted again of affray and received a nine-month suspended sentence.

5. The appellant's last conviction which is the index offence was on 21 October 2013 at Harrow Crown Court for a Section 18 wounding with intent and he was sentenced to five years and ten months in prison. A concurrent sentence of six months for possession of an offensive weapon was also imposed. He was served with a notice of liability to deport him together with a notice under Section 72 of the Nationality, Immigration and Asylum Act 2002 (a notice that the appellant was presumed to have been convicted of a particularly serious crime and to constitute a danger to the community of the UK).

6. The appellant again claimed asylum on 1 July 2014 and a substantive interview was conducted on 19 September 2014. On 25 April 2016 a stage 2 deportation decision was issued, and his asylum claim refused. Further submissions were made which finally generated the decision currently under challenge.

7. The appellant's asylum claim is based on his membership of the Transnational Government of Tamil Eelam, and he states that he attended numerous demonstrations in London and his involvement dated back fifteen years and had become increasingly frequent. He maintained that his actions had brought him to the attention of the Sri Lankan authorities who have recorded him as being a known Tamil separatist. He relied on a number of Facebook posts that show, he says, agents of the Sri Lankan government have identified him as such.

8. He is married to a British citizen, and he has a daughter born on 28 June 2019. He maintains contact with his daughter albeit he had separated from his wife. He lives with his mother and brother.

9. The Secretary of State submitted that there were misdirections of law and a lack of reasoning in the decision.

Grounds of Appeal

Ground (i)

Section 72 of the Nationality, Immigration and Asylum Act 2002 – inadequate reasoning

The judge erred at [109] finding that the appellant is not a danger to the community. Section 72(2) of the 2002 Act states that for the purposes of Article 33(2) of the Refugee Convention a person should have been presumed to have been convicted by a final judgement of a particularly serious crime and to constitute a danger to the community where he has:

a. been convicted in the United Kingdom of an offence and

b. sentenced to a period of imprisonment of at least two years.

The appellant had been sentenced to five years and ten months' imprisonment for offences that the judge accepted were serious. It was submitted that the appellant had not demonstrated he would not be a danger to the community. Given that the judge found at [104] that the "*question of the risk that he presents to the community is less clear. If there were to be a repetition of that offence, then the danger would be clear*", that previous sentencing had not deterred him, that he had been previously convicted for carrying weapons, that for the index offence he intentionally inflicted really serious harm on his victim with a Samurai sword, and his OASys assessment stated that he represents high risk of serious harm to the public, it was submitted that inadequate reasoning had been provided for the finding at [109] that the appellant was not a danger to the community. It was submitted that the judge had erred by not considering that the determination contained no evidence of remorse. It was submitted that the appellant only completed his licence in April 2019 and therefore it was too soon to say that he had reformed. It was also submitted that Section 72 of the 2002 Act applied, and the Refugee Convention did not prevent the appellant's removal from the United Kingdom.

Ground (ii)

Risk on return

Given that at [56] it was noted that the appellant had been convicted for offences of dishonesty, it was submitted that the judge had provided inadequate reasoning for finding that the appellant was now sincere in his beliefs. It was submitted that the appellant was offending in the UK while at the same time seeking protection from the UK government.

The judge erred in finding at [97] that the appellant would be seen as having a "significant role" in the TGTE under **KK** and **RS (sur place activities: risk) Sri Lanka [2021] UKUT 130 (IAC)** for the following reasons:

a. The judge failed to consider that there was no evidence to substantiate that the appellant had come to the adverse attention of the Sri Lankan authorities.

b. As set out in the decision of 12 December 2017 it was submitted that the appellant's answers and lack of knowledge of response to the questions regarding the locations and organisation of the British Tamil Forum demonstrated that he was not a significant or high-profile member.

c. It was submitted that the evidence of Sockalingam Yogalingam from the TGTE was of limited use as he knew the appellant but not well [69].

d. It was submitted that the findings regarding Ms Collum Hawcroft were speculative.

e. It was submitted that the judge had failed to consider the refusal point made in the decision letter of 14 December 2021 that the appellant's mother visited Sri Lanka in 2009 and suffered no ill-treatment during her stay.

It was submitted that there was no reason to believe the appellant would be on a stop list and if he did appear on a watch list it is submitted that he would fall into the second sub-category and be monitored which did not amount to persecution or ill-treatment contrary to Article 3 ECHR.

10. The grounds cited paragraph 536 of **KK and RS**. **KK and RS** which held that the monitoring undertaken by the authorities in respect of returnees would not in general amount to persecution or ill-treatment contrary to Article 3 ECHR paragraph 536(22).

11. At the hearing Ms Ahmed submitted an application to amend her grounds of appeal which included that the judge had failed to comply with Section 72(10) of the 2002 Act and which was confirmed in **IH (Section 72 particularly serious crime) Eritrea [2009] UKAIT 0012** at paragraph 25. The Tribunal must *begin* the substantive deliberation on the appeal by

considering the Section 72 certificate. I grant permission to amend the grounds of appeal without objection from Mr Paramjorthy.

12. Ms Ahmed accepted that parts of the grounds came across as disagreement but given the judge's flawed findings in relation to Section 72, these rendered the whole determination unsafe. She also submitted that there was a distinction between those who held a passport and those who did not, and it was not necessarily the case that the appellant would be interviewed prior to being returned to Sri Lanka.

13. Ms Ahmed cited from **KK and RS** particularly at paragraphs 307 to 308 and 411 to 414. She noted that at paragraph 414 that the Sri Lankan government is reasonably likely to obtain information on various matters on individuals prior to their return but the judge had not dealt with any of that. It was possible for the appellant to go through the airport unquestioned. Ms Ahmed added that the authorities were aware that there were those who claimed asylum for economic purposes and the judge needed to engage which category the appellant fell under and whether he was on the stop or watch list.

14. She submitted that the judge's findings influenced him in relation to the Section 72 findings, but she could not explain how taking the wrong order of consideration in relation to Section 72 and asylum would actually affect the consideration of Article 3 save to say that the judge was distracted by the asylum appeal. She submitted that there were significant gaps between the appellant's offending, in other words his lack of offending in recent years could not be relied upon to show he was at no risk to the community and his offending had increased in severity and this had not been taken into account.

15. Mr Paramjorthy confirmed that the appellant did not have a passport and indeed he had been in the UK since 2001. He submitted that there may have been a more elegant setting out of the sequential findings by the judge but nevertheless there was no error in the judge's handling of Section 72. The judge carefully looked at the scores which he had presented in the OASys Report at [87]. The judge he submitted had looked carefully at the nature and gravity of the offences and particularised them.

16. In relation to the protection claim under Article 3 the activity of the appellant was far more serious than that of the appellants in **KK and RS**. There were photographs of him being involved in sur place activities as long ago as 2009. There were a number of photographs of him demonstrating outside the Sri Lankan High Commission and of him attending various events. He had thirteen years of sur place activity and there was the very unusual feature of the evidence in relation to Ms Collum Hawcroft which the judge addressed at [78]. She is someone who was permitted to go in and out of the Sri Lankan High Commission and had taken photographs of the appellant and there were specific Facebook posts from her accusing the appellant of being a Tamil Tiger which the judge had noted at [81]. The appellant was a member of a proscribed organisation

and previously Judge Kamara had found him to be credible as to his account of being arrested during a round up. It had never been in dispute that the appellant did not have a passport and the rationale in **KK and RS** was that information would already have been known in relation to those who had engaged in demonstrations.

17. The findings contained no error of law.

18. I invited the parties to address me on the remaking of the decision should I find an error of law and I was asked to remake the decision on the findings which had been made.

Analysis

19. It is clear that the judge failed to apply Section 72(10) of the Nationality, Immigration and Asylum Act which sets out as follows:

> "*the Tribunal commission hearing the appeal –*
>
> *(a) must begin substantive deliberation on the appeal by considering the certificate, and*
>
> *(b) if in agreement that a presumption under Section (5A) applies having given the appellant an opportunity for rebuttal must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a)."*

20. As confirmed in **IH (Section 72 particularly serious crime) Eritrea,** Section 72(9) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") permits the Secretary of State to issue a certificate that the presumption under Section 72 applies. When this is done, Section 72(10) requires the Tribunal to determine whether the presumptions do in fact apply to the asylum appeal and if they do dismiss the appeal. Thus a court or Tribunal considering an appeal against the refusal of a protection claim must begin by considering whether the person has rebutted the presumption that he is a danger to the community. If the court or Tribunal considers that the person has failed to rebut the presumption the appeal must be dismissed to the extent it relies on Refugee Convention grounds because if a person fails to rebut the presumption that person's removal would not amount to a breach of the United Kingdom's obligations under the Refugee Convention if refoulement is permitted under Article 33(2).

21. The leading case on this is **EN (Serbia) v Secretary of State for the Home Department [2009] INLR 459**. This confirmed that both elements of the test must be shown: first that a person has been convicted of a particularly serious crime (where imprisonment of 12 months or more is imposed in the UK section 72(2) of the 2002 Act as amended) and second, that they constitute a danger to the community. Both presumptions were rebuttable and so far as the "danger to the community" is concerned the danger must be real. Having been convicted of a particularly serious crime, if there was a real risk of its repetition then

the person was likely to constitute a danger to the community [45]. The Court of Appeal acknowledged that the danger would normally be demonstrated by proof of a particularly serious offence and the risk of its recurrence or the risk of recurrence of a similar offence.

22. In this instance the judge followed an order in determining the appeal not permitted by Section 72(10). He considered the risk on return under Article 3 prior to the asylum claim. The judge did set out **IH** and **EN (Serbia)** but failed to follow them. It is clear that the appellant had been convicted of a particularly serious crime under Section 72 owing to his length of imprisonment.

23. The judge from paragraphs 86 to 93 and immediately prior to consideration of Article 3 and the asylum claim addressed the appellant's offending. He noted that the last offence (that of causing grievous bodily harm by use of a Samurai sword) was "*by far the most serious one*" and "*it must be seen through the prism of the previous ones which include him carrying knives or offensive weapons in public twice previously and engaged in a violent and threatening way towards the public on three others*". The judge then referred to the OASys tool which assessed the appellant as presenting "*a high risk of serious harm to the public*" and that "*he is high risk because of the fact that a repetition of his previous offending would lead to serious harm being caused*".

24. The judge noted at [88]:

> "*The actuarial scores are that he presents a medium risk of proven reoffending (OGRS3), a low risk of proven non-violent offending (OGP) and a medium risk of proven violent reoffending (OVP).*"

25. The judge even noted that neither party challenged these assessments at the hearing.

26. At that point the judge recorded, and appeared to factor into his reasoning

> *"he [the appellant] was released from that sentence in May 2016 on licence, which he successfully completed in April 2019. There has been no reoffending in the six years that he has been in the community".*

27. Having recited the extent of the appellant's offending, seriousness of his offending, and the OASys description of the risk posed by the appellant, which was not inconsiderable, the judge failed to give an adequate explanation of why he accepted [92]-[93] the appellant's statement that he was reformed and wished to live a law-abiding life. In the face of the very serious offending and grave predictor scores, the probability of reoffending and the likelihood of serious harm to the public as outlined, the judge failed to follow **EN (Serbia).** Had he done so he would have had to find that the appellant was a danger to the community. If there was a real risk of its repetition, as was evident here owing to the risk

assessment, then the person was likely to constitute a danger to the community. Indeed at [87] the judge noted that Probation assessed the appellant as *'presenting a high risk of serious harm to the public and a low risk in all other categories*. 'All other categories' cannot be as material or significant as the 'public'.

28. The judge noted at [87] that the appellant had completed the thinking skills programme in custody but failed to acknowledge that the appellant had also undertaken a thinking skills programme in 2008 and which predated the index offence. When the judge stated that there had been no reoffending in the six years that he had been in the community, the judge failed to acknowledge the fact that the appellant had been on licence until April 2019 and that throughout this period the appellant has been under the threat of deportation. That featured nowhere in the judge's determination and was a failure to take into account relevant facts and as a consequence give adequate reasoning.

29. The judge proceeded to make a finding that he was willing to accept the appellant was "reformed" at [93] but only then went on from [100] to consider the Section 72 certificate. The judge proceeded at [102] to describe the attack and the Samurai sword used as "*an extremely dangerous weapon that is designed to cause harm and there can be no good reason for him to have that in public*". Despite stating that the appellant used the sword "*to intentionally inflict really serious harm on his victim*", the judge then, curiously, concluded that the question of risk that he presented to the community was "less clear" and the judge, despite having identified the nature of the appellant's offending, reasoned that "*if there were to be a repetition of that offence then the danger would be clear*." The danger had been clearly set out in the OASys report.

30. The judge did not appear to appreciate the significant gaps between the conviction for affray in 2008 and a further offence of wounding with intent in 2013, which reflected a five-year gap. The judge merely factored in that the appellant had "engaged well in prison and undertook an accredited risk reduction course". The tipping factor for the judge appeared to be the fact that the appellant had been in the community "without issue of any kind for more than six years" but, I repeat, the judge did not take into account that the appellant throughout most of that period and until 2019 had been subject to licence. The appellant also remains subject to the deportation procedure.

31. I find that there is an error of law in the decision for the failure to take into account relevant facts and inadequate reasoning and the findings in relation to the Section 72 certificate are set aside.

32. When applying Section 72(10) of the 2002 Act and **EN (Serbia)** I find that the appellant has been convicted of a particularly serious crime and there is a real risk of its repetition and as such he is likely to constitute a danger to the community. This appellant has demonstrated through his pattern of offending as set out above, an increased severity of offending and a

repetition of offending. It is clear that the tendency to violence can be in remission for many years prior to reoccurrence. The OASys Report undertaken in 2015 identified his probability of proven reoffending to be 33% in the first year and 50% in the second year and was classified as medium. His probability of violent type reoffending was also classified as medium.

33. His thinking and behaviour, alcohol misuse and lifestyle and associates were linked to his risk of reoffending and albeit that he undertook a thinking and behaviour course in custody this was, as I have already indicated, was undertaken by the appellant in 2008 well before his last most serious index offence. The likelihood of serious harm to others was that of the highest level. I acknowledge that there are, as stated "different people who spoke well of his engagement and there do not appear to have been any behavioural issues in custody" but the appellant has been under threat of deportation and under licence and I find that he remains a danger to the community.

34. Therefore having failed to rebut the presumption the appeal must be dismissed insofar as it relies on the refugee convention grounds (and humanitarian protection) and I set aside the conclusions of the judge in relation to the Section 72 certificate and the notice allowing the claim on asylum grounds on the basis of inadequate reasoning because of a failure to consider material facts. In particular I set aside [92]-[93] and [108]-[109].

35. That said the judge made the following findings in relation to credibility:

> "*61. In relation to his asylum case, the respondent does not specifically take issue with much of his claim, although she does doubt the sincerity of his professed beliefs.*
>
> *62. Bearing in mind the standard of proof, I consider that I can accept the appellant's evidence, including his evidence as to the sincerity of his political beliefs.*
>
> *63. He was clear and consistent in the evidence he gave, and was able to articulate his desire for a Tamil homeland, and the reasons for that. He was cross-examined and stood up well to cross-examination.*
>
> *64. There is a large amount of photographic evidence as to his attendance in demonstrations and protests. More significantly, this evidence stretches back to 2009 where he participated in a hunger strike outside Parliament with other people.*
>
> *...*
>
> *66. I find that further support for the appellant's credibility comes from his former wife. Whilst there is that connection, they are separated and so there would be less incentive for her to fabricate her account.*

> *67. I consider that she appeared to be someone who was trying to assist the Tribunal, and there was no indication that she was trying to mislead or exaggerate. She was clear that the appellant was a good father and, importantly, the appellant 'had very strong views' about politics and he was heavily involved in attending demonstrations, sometimes to the detriment of the marriage."*

36. Albeit the Secretary of State challenged the appellant's lack of knowledge in response to questions regarding the British Tamil Forum, the judge heard the appellant's oral evidence and accepted that he was articulate and genuine in his desire for the Tamil homeland and that his ex-wife, who had no reason to mislead or exaggerate, was clear that the appellant was heavily involved in attending demonstrations and was politically active.

37. Although the Secretary of State observed that Mr Yogalingam did not know the appellant well, there was nothing to *undermine* the appellant's evidence or the judge's assessment by the presence of Mr Yogalingam from the TGTE who confirmed that the appellant was involved in political activity on behalf of Tamil separatism; the judge was entitled to accept the evidence because it was given in a moderate and temperate way.

38. Overall the judge clearly accepted the appellant's genuineness as a political activist. The judge found at [73] that the appellant had been involved with the TGTE for a number of years stretching back to at least 2009 and in which he took part in a hunger strike which attracted media attention which would have been known to the authorities. The judge is clearly acknowledging that the Sri Lankan authorities would be alert to the appellant's association with the TGTE.

39. The judge referenced the photographs of the appellant assisting with security at demonstrations and accepted that his involvement had come from a genuine belief of a separate Tamil homeland. It was open to the judge to find there would be a "reasonable likelihood that they [the GOSL] will have obtained his details" [77]. The judge cogently reasoned that there was a real risk because the Sri Lankan authorities closely monitor TGTE events and activity. That was sound reasoning and in accordance with **RS and KK**.

40. I do not accept that the judge's reasoning in relation to the role of Ms Collum Hawcroft was speculative because the judge accepted the evidence that she regularly appeared at demonstrations and had the freedom to go in and out of the Sri Lankan High Commission [78], had taken photographs of the appellant [79], and made a number of public comments which were "hostile towards the appellant and portray him as being an active Tamil separatist who is a significant organising figure of TGTE activities in the United Kingdom".

41. The judge was balanced in his approach to this evidence not finding that she was an "agent" of the Sri Lankan government but clearly was "working

with the High Commission and feeding information back to the government" [81] and [82]. The judge was entitled on that evidence to make that deduction.

42. On these findings I find that the judge addressed **KK and RS** and was entitled to find that there was a reasonable likelihood that "*he will be seen by the Sri Lankan authorities as a committed Tamil separatist who is the organiser of protest events in the United Kingdom"* and that there was a reasonable likelihood he would be detained on return.

43. The country guidance in **KK and RS** confirmed in the headnote inter alia that:

> *(1) The current Government of Sri Lanka ("GoSL") is an authoritarian regime whose core focus is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam.*
>
> *…*
>
> *(3) Whilst there is limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of avowedly separatist or perceived separatist beliefs.*
>
> *…*
>
> *(5) Sur place activities on behalf of an organisation proscribed under the 2012 UN Regulations is a relatively significant risk factor in the assessment of an individual's profile, although its existence or absence is not determinative of risk. Proscription will entail a higher degree of adverse interest in an organisation and, by extension, in individuals known or perceived to be associated with it.*
>
> *(6) The Transnational Government of Tamil Eelam ("TGTE") is an avowedly separatist organisation which is currently proscribed. It is viewed by GoSL with a significant degree of hostility and is perceived as a "front" for the LTTE. Global Tamil Forum ("GTF") and British Tamil Forum ("BTF") are also currently proscribed and whilst only the former is perceived as a "front" for the LTTE, GoSL now views both with a significant degree of hostility.*
>
> *…*
>
> *(8) GoSL continues to operate an extensive intelligence-gathering regime in the United Kingdom which utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media. At the initial stage of monitoring and information gathering, it is reasonably likely that the Sri Lankan authorities will wish to gather more rather than less information on organisations in which there is an adverse interest and individuals connected thereto. Information gathering has, so far as possible, kept pace with developments in communication technology.*
>
> *(9) Interviews at the Sri Lankan High Commission in London ("SLHC") continue to take place for those requiring a Temporary Travel Document ("TTD").*

(10) Prior to the return of an individual traveling on a TTD, GoSL is reasonably likely to have obtained information on the following matters:

i. whether the individual is associated in any way with a particular diaspora organisation;

ii. whether they have attended meetings and/or demonstrations and if so, at least approximately how frequently this has occurred;

iii. the nature of involvement in these events, such as, for example, whether they played a prominent part or have been holding flags or banners displaying the LTTE emblem;

iv. any organisational and/or promotional roles (formal or otherwise) undertaken on behalf of a diaspora organisation;

v. attendance at commemorative events such as Heroes Day;

vi. meaningful fundraising on behalf of or the provision of such funding to an organisation;

vii. authorship of, or appearance in, articles, whether published in print or online;

viii. any presence on social media;

ix. any political lobbying on behalf of an organisation;

x. the signing of petitions perceived as being anti-government.

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

(12) Whichever form of documentation is in place, it will be for the judge in any given case to determine what activities the individual has actually undertaken and make clear findings on what the authorities are reasonably likely to have become aware of prior to return.

(13) GoSL operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself. This database is accessible at the SLHC, BIA and anywhere else within Sri Lanka. Its contents will in general determine the immediate or short-term consequences for a returnee.

(14) A stop list and watch list are still in use. These are derived from the general electronic database.

(15) Those being returned on a TTD will be questioned on arrival at BIA. Additional questioning over and above the confirmation of identity is only reasonably likely to occur where the individual is already on either the stop list or the watch list.

(16) Those in possession of a valid passport will only be questioned on arrival if they appear on either the stop list or the watch list.

(17) Returnees who have no entry on the general database, or whose entry is not such as to have placed them on either the stop list or the watch list, will in general be able to pass through the airport unhindered and return to the home area without being subject to any further action by the authorities (subject to an application of the HJ (Iran) principle).

...

(19) Returnees who appear on the watch list will fall into one of two sub-categories: (i) those who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention once the individual has travelled back to their home area or some other place of resettlement; and (ii) those who are of interest, not at a level sufficient to justify detention at that point in time, but will be monitored by the authorities in their home area or wherever else they may be able to resettle.

(20) In respect of those falling within sub-category (i), the question of whether an individual has, or is perceived to have, undertaken a "significant role" in Tamil separatism remains the appropriate touchstone. In making this evaluative judgment, GoSL will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam.

(21) The term "significant role" does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been "high profile" or "prominent". The assessment of their profile will always be fact-specific, but will be informed by an indicator-based approach, taking into account the following non-exhaustive factors, none of which will in general be determinative:

i. the nature of any diaspora organisation on behalf of which an individual has been active. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it;

ii. the type of activities undertaken;

iii. the extent of any activities;

iv. the duration of any activities;

v. any relevant history in Sri Lanka;

vi. any relevant familial connections.

(22) The monitoring undertaken by the authorities in respect of returnees in sub-category (ii) in (19), above, will not, in general, amount to persecution or ill-treatment contrary to Article 3 ECHR.

> *…*
>
> *(27) There is a reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to persecutory treatment within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR.*

44. Although Ms Ahmed submitted that the judge had not engaged with the question of whether the appellant had a passport or not as Mr Paramjorthy pointed out the respondent should have known that the appellant had no passport, and he would have to go through the process of an interview at the Sri Lankan High Commission. In view of the appellant's entry in 2001 I accept that the appellant would indeed be classified as someone who would have to undertake an interview at the Sri Lankan High Commission.

45. In the light of the guidance given in **KK and RS** I find that the judge was entitled to make the findings he did in relation to the appellant and the risk on return to Sri Lanka. The appellant was found to have long standing activity for the TGTE in the United Kingdom at demonstrations and had been photographed and identified as such. His hunger strike in connection with the TGTE attracted media attention [73] and the appellant has attended demonstrations and rallies where he has been photographed as shown in the bundle of evidence [74]. These were factors identified by the judge at [77] in line with [10] of the headnote of **KK and RS.** The judge found the Sri Lankan authorities closely monitor TGTE events and were likely to have his details.

46. Quite separately, the judge found at [78]-[79] that the Ms Hawcroft worked with the Sri Lankan government albeit she was not an agent and she had effectively identified the appellant as an active Tamil separatist '*who is a significant organising figure of TGTE activities in the United Kingdom'* and was likely tasked with the monitoring the diaspora for the Sri Lankan authorities [82]. Although Ms Ahmed submitted that the judge failed to identify if the appellant would only be monitored, it was clear that on the findings of the judge the appellant would not fall within category 19(ii) but within 19(i). The appellant would not merely be monitored on return.

47. That the mother returned does not necessarily indicate that the appellant would not be at risk. I find this observation does not undermine the decision on Article 3 as a whole.

48. On a careful reading of the findings on Article 3, I find no error of law in the judge's approach to Article 3. There was proper reasoning and the approach to the Section 72 certificate does not undermine the findings on Article 3 with which the Secretary of State expressed mere disagreement.

49. The appeal was dismissed by the judge on Article 8 grounds and no challenge was made by the appellant to that decision.

50. On remaking the decision for the reasons given above, the appellant remains a danger to the community and cannot avail himself of asylum or humanitarian protection grounds and the appeal is dismissed on those grounds. However **the appeal remains allowed on Article 3 grounds**.

Notice of decision

The appeal is dismissed on refugee and humanitarian protection grounds.

The appeal is allowed on human rights grounds (article 3).

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

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

Signed Helen Rimington Date 30th November 2022

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal in part and on that basis and owing to the complexity I conclude there can be no fee award.

Signed Helen Rimington Date 30th November 2022

Upper Tribunal Judge Rimington