



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: PA/04948/2019**

Appeal

THE IMMIGRATION ACTS

**Heard at: Field House
On the 23rd February 2022**

**Decision & Reasons Promulgated
On the 29 March 2022**

Before

**UPPER TRIBUNAL JUDGE BRUCE
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

**TS
(anonymity direction made)**

Appellant

And

The Secretary of State for the Home Department

Respondent

**For the Appellant: Ms Jegarajah, Counsel instructed by A&P
Solicitors**

For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The Appellant is a Tamil national of Sri Lanka born in 1975. He seeks protection in the United Kingdom.

Case History and Matters in Issue

2. By her letter dated the 10th May 2019 the Secretary of State accepted the Appellant's evidence that he had been a member of the

LTTE for many years, and that he had been a driver, and sometime security guard, for the family of Velupillai Prabhakaran, the leader of the LTTE. The Secretary of State however rejected the Appellant's claim on two grounds: despite his association with the LTTE he no longer has a well-founded fear of persecution, and because he is excluded from the protection of the Refugee Convention because there are serious reasons for considering that he has committed a war crime or crime against humanity. The Secretary of State relies on Article 1F(a) of the Convention:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

...

3. The substance of the allegation under Article 1F (a), as set out in the refusal letter, was that as the Sri Lankan Army closed in on LTTE positions in Mullivaikkal in the final stage of the war, the Appellant drove a truck containing weapons to the front line.
4. The Appellant appealed against that decision and on the 28th January 2021 the appeal came before Judge Hanbury. The parties were represented, as they are before us, respectively by Ms Jegarajah and Ms Cunha. In putting the Respondent's case to the First-tier Tribunal Ms Cunha submitted that in addition to driving weapons the Appellant was also culpable because he had, in his work as a security guard for the Prabhakaran family, handed suspect individuals over to LTTE security personnel whom he should have known may, in the normal course of events, subject those individuals to human rights abuses.
5. In his written decision of the 25th March 2021 Judge Hanbury dismissed the appeal. The Tribunal directed itself that the burden of proof lay on the Respondent and the standard of proof is the ordinary civil standard. It found that the Appellant had the necessary *mens rea* because at numerous points during his asylum interview "he disclosed that he supported the aims of the LTTE and was not opposed to killing of those who opposed it" [at FTT §25]. The Tribunal then said this:

"As far as the *actus reas* is concerned, the appellant belonged to an elite regiment known as the Radha Regiment, which was responsible, amongst other things, for the protection of the LTTE leader Prabhakaran. The appellant described himself as being part of the battle unit. Furthermore, he was part of that battle unit, albeit as a driver, at a crucial stage in the civil war (which ended in 2009). It is known, as a result of the UN report into the civil war in 2011, that a range of international war crimes were

committed by the LTTE at that time including using civilians as a buffer zone, killing civilians that attempted to flee the LTTE, using military equipment in close proximity to those civilians, forced recruitment of children and the killing of civilians through suicide attacks. Although the appellant probably did not support all of those activities, he may well have supported some and there is sufficient credible evidence as summarised in the respondent's skeleton argument of his involvement in providing weapons to the LTTE in the final stages of its battle with the army. Ms Cunha also asserts in that paragraph of her skeleton argument that the appellant provided those suspected of being "intruders" for interrogation, presumably to other members of the LTTE. These are, potentially, war crimes which the appellant admits"

6. The First-tier Tribunal thereby upheld the Respondent's decision to exclude the Appellant from protection under Article 1F(a) and dismissed the appeal on the grounds that the Appellant no longer faced a real risk of harm in Sri Lanka today. The reasoning here was that since he had been, in the eyes of the Sri Lankan government, "rehabilitated" after the war, there was no reason for them to be interested in him today. The Tribunal acknowledged that the Appellant claims to have continued his support for Tamil independence in the diaspora, but concluded: "none of those activities amount to very significant anti-government demonstrations nor is there any evidence that the appellant's identity would have been picked up".
7. The Appellant appealed to the Upper Tribunal. On the 22nd September 2021 the matter came before Upper Tribunal Judge Bruce sitting at Field House. Permission had been granted on 11 grounds of appeal but there was no need for the Upper Tribunal to consider all of these, since on the day Ms Cunha conceded that the decision of Judge Hanbury could not stand. The passage we have set out above was the core of the First-tier Tribunal's reasoning and, she agreed, it revealed that the Tribunal had apparently misunderstood the task before it. The issue is not whether the Appellant ideologically supported the LTTE. It was not sufficient to find that the Appellant's work meant that he "*may well* have supported some" of the alleged war crimes perpetrated by other members of the LTTE, or that in his work as a driver he contributed to actions that were "*potentially*" war crimes. Article 1F must be applied restrictively and with caution. The injunction to find "serious grounds for considering" should not be read as an invitation to deny protection on the grounds of mere suspicion. Cogent evidence is required and although the Tribunal decision contains a list of acts by the LTTE certainly able of engaging the exclusion provision, it does not go on to find any nexus between the Appellant's participation as a driver and security guard and the commission of those offences. On the contrary, the language used by

the Tribunal is distinctly equivocal. Judge Bruce therefore accepted Ms Cunha's concession that the Tribunal's reasoning on Article 1F(a) must be set aside to be remade.

8. There remained the issue of materiality. At its §28 and §29 the First-tier Tribunal had gone on to dismiss the appeal 'in the alternative' on the grounds that the Appellant would no longer be at risk in Sri Lanka. The grounds were silent on that matter, but in the hiatus between the application for permission to appeal and the case being listed, the Upper Tribunal had handed down the decision in KK and RS (sur place activities: risk) Sri Lanka CG [2021] UKUT 00130 (IAC). The findings in this, the now extant country guidance, squarely contradict Judge Hanbury's conclusions that there is no reason to suppose that the Appellant would have been identified as having attended protests against the Sri Lankan government since his arrival in the UK. See in particular headnote 8:

(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. In light of the findings in KK and RS Ms Jegarajah applied to amend her grounds, an application granted with the consent of Ms Cunha. The reasoning of the First-tier Tribunal was inconsistent with the country guidance and so was set aside. Ms Cunha also very fairly pointed out that in its assessment of risk 'post-rehabilitation' (at FTT §28) the Tribunal appears to have omitted to consider pertinent evidence, namely that the Appellant had been re-arrested after his supposed rehabilitation took place: in fact it was those arrests, and attendant ill-treatment, which had caused him to flee Sri Lanka.
10. The decision of the First-tier Tribunal was therefore set aside in its entirety. The matter was then adjourned to be listed for a final hearing so that the decision could be re-made. The Principal Resident Judge signed a Transfer Order to enable the matter to be heard by the present panel.
11. At the outset of the hearing before us Ms Cunha accepted on behalf of the Secretary of State that applying the agreed facts in this case to

the guidance in KK and RS, the Appellant had made out a real risk of serious harm contrary to Article 3 ECHR should he be returned to Sri Lanka. The appeal must therefore be allowed on human rights grounds. The matter remaining in issue is whether it should also be allowed on protection (refugee) grounds, and that requires us to assess the Secretary of State's decision to exclude the Appellant with reference to Article 1F(a).

Article 1F(a): The Legal Framework

12. There is no dispute between the parties about the applicable legal framework. Article 1F [the material part of which is set out at our §2 above] is mirrored in Article 12 of the Qualification Directive. The burden of proof lies on the Secretary of State to show that there are "serious grounds for considering" that an individual is guilty of one or more of the acts described at subsection (a)-(c).
13. The acts themselves are defined with reference to international law, the relevant instrument being the 'ICC Statute', ie the Rome Statute of the International Criminal Court. For the purpose of this appeal the relevant Articles are 25, 30 and 31:

Article 25 Individual Criminal Responsibility

...

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime; . . .”

Article 30
Mental Element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) (b)

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control".'

14. As to what 'serious grounds for considering' might mean, the authorities caution against putting any gloss on those words. In JS (Sri Lanka) v SSHD [2010] UKSC 15 Lord Brown states [at §39]:

'It would not, I think, be helpful to expatiate upon article 1F's reference to there being "serious reasons for considering" the asylum-seeker to have committed a war crime. Clearly the Tribunal in Gurung (at the end of para 109) was right to highlight "the lower standard of proof applicable in exclusion clause cases" - lower than that applicable in actual war crimes trials. That said, "serious reasons for considering" obviously imports a higher test for exclusion than would, say, an expression like "reasonable grounds for suspecting". "Considering" approximates rather to "believing" than to "suspecting". I am inclined to agree with what Sedley LJ said in Yasser Al-Sirri v Secretary of State for the Home Department [2009] EWCA Civ 222, para 33: "[the phrase used] sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.'

15. When Al-Sirri reached the Supreme Court (Al-Sirri v SSHD [2012] UKSC 54) the Court nonetheless offered the following five principles by way of clarification [at §75]:

'We are, it is clear, attempting to discern the autonomous meaning of the words "serious reasons for considering". We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:

- (1) "Serious reasons" is stronger than "reasonable grounds".
- (2) The evidence from which those reasons are derived must be "clear and credible" or "strong".
- (3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decisionmaker.
- (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.
- (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the

applicant has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision maker is to apply the words of the Convention (and the Directive) in the particular case.'

16. That last sentence has led the Court of Appeal to subsequently hold that the effect of Al-Sirri is that it is for the Secretary of State to prove on a balance of probabilities that an individual should be excluded: see AA-R (Iran) v SSHD [2013] EWCA Civ 835 [at §7]. See Tribunal authority to the same effect: AH (Article 1F(b) - 'serious') [2013] UKUT 382 [at §82]. In light of the judgment in Al-Sirri itself we read both these authorities as indicating that *at the very least* the Secretary of State must prove her case to the civil standard, for if she does not it is unlikely that Article 1F will be engaged.
17. The Courts have held that the burden requires the Secretary of State to show that the person concerned has individual responsibility for the acts in question; this requires an individual consideration of the facts, including an assessment of the extent of involvement, his mental state and any grounds for excluding responsibility: see for instance Al-Sirri [at §15-16], JS (Sri Lanka) [at §15]. As Lord Hope puts it in JS [at §45]: "the critical question [is] whether the evidence provides serious reasons for considering the applicant to have committed the *actus reus* of an international crime with the requisite *mens rea*".

Core Facts

18. The facts are set out in the refusal letter, and in a schedule prepared by Ms Jegarajah and accepted by Ms Cunha. In the absence of a challenge to any aspect of the Appellant's evidence as set out in his various asylum interviews, we proceed on the basis that this evidence is all agreed. Although Ms Cunha did suggest, in her closing submissions, that there may be other matters of which we have not been made aware – for instance a greater proximity to the 'decision makers' at the head of the LTTE – we are not prepared to make such a finding. The case for the Secretary of State, as originally put, was that the Appellant had "aided and abetted" the commission of a crime contrary to Article 25(3)(c) of the Rome Statute. Ms Cunha's submission amounted to an attempt, very late in the day, to introduce the possibility that he had also acted with "common purpose" contrary to Article 25(3)(d). We reject this submission not only on grounds of fairness, but because there is absolutely no

evidence at all to support it. Any finding to that effect would amount to impermissible speculation.

19. These then are the basic facts:

- The Appellant was born in Polikandy, Jaffna in 1975
- He left school at 13, unable to continue with his studies because of the conflict
- In 1995 he and his wife moved to LTTE controlled Vanni
- On the 3rd November 1995 the Appellant voluntarily joined the LTTE. He explained at interview that he did so because he had seen the Sri Lankan Army indiscriminately killing civilians, and he believed the LTTE administration to be “sincere and honest in their fight to protect the Tamil people”. We accept Ms Cunha’s submission that it can be properly inferred that he also supported the aim of a separate Tamil state in the north of Sri Lanka
- After receiving basic training he was assigned to the Radha Battle Wing as a driver
- In 2000 the Appellant was assigned to the protection team around LTTE leader Prabhakaran and his family. Because of this role the Appellant was not allowed to take part in active fighting in case he were to be captured and give up information about the family’s whereabouts
- This unit consisted of about 1000 individuals, with the Appellant being part of the 150-strong “inner circle”
- His daily work continued to primarily be driving essential supplies, such as delivering food to camps. He also regularly drove for Prabhakaran’s wife and children, taking the latter to and from school and to private tuition. On two occasions he drove Prabhakaran himself
- The Appellant was also tasked with acting as a sentry around the family home. This was a task performed by 3 LTTE cadres at a time, on rotating shifts of 2-3 hours. If anyone came to the gate of the compound that the Appellant did not know, part of his job was to send this person to his superior who in turn may refer the individual over to the Radha Battle Wing espionage wing

- In May 2009 the Appellant followed instructions to transport weapons including AK47s to Mullivaikkal, where the Battle Wing were fighting the Sri Lankan Army. On the return trip he brought injured civilians and combatants back to a hospital and safer areas
- He surrendered to the Sri Lankan Army on the 16th May 2009 whilst still in uniform. He was taken by bus from the frontline to Olanthai where he was detained and questioned by the Sri Lankan security services. He was fingerprinted and treated as a 'surrendered'. He was later transferred to Pusa Camp
- On the 22nd November 2011, after 2 ½ years in detention, the Appellant was taken to court where he consented to "rehabilitation". He was detained for a further year, being "rehabilitated" in Marythamadu, Vavuniya
- The Appellant was released on the 30th December 2012
- A week after his release the Appellant was arrested by the CID because they had discovered that he had worked as a driver/guard for the Prabhakaran family and he had failed to disclose this matter in his 'rehabilitation' interrogations. A further two such arrests followed. On the last occasion, the 10th December 2013, the Appellant was held for 6 days during which time he was tortured by being beaten and badly burned with lit cigarettes
- Following his release on the 16th December 2013 the Appellant fled to Colombo, obtained a false passport and left Sri Lanka
- Since he left the country the Sri Lankan security services have investigated his disappearance, visiting the family home on three occasions. CID officers informed his wife that he should have informed them that he would be leaving the country and that upon his return he would be punished
- The Appellant has, since his arrival in the UK, attended a number of protests including a demonstration against Brigadier Fernando in front of the Sri Lankan High Commission in February 2018

Discussion and Findings

20. In her submissions Ms Cunha identified two - possibly three - areas of the evidence which, she submitted, justified exclusion in this case.

21. We deal first with the work which the Appellant undertook for the Prabhakaran family. As we note above, this aspect of the Article 1F case did not feature in the original refusal letter, but Ms Cunha introduced it at the First-tier Tribunal, and Ms Jegarajah was happy to deal with it.
22. Ms Cunha's first concern is that in his role as a sentry the Appellant may have been complicit in having "intruders" dealt with by fellow members of the Radha Battle group in a manner which contravened their human rights. We note that the term "intruders" featured in the reasoning of the First-tier Tribunal but it is not one that the Appellant himself uses. His description of his duties whilst working as a sentry is far more pedestrian.
23. In an interview conducted on the 18th December 2018 the Appellant was asked to give a description of a typical working day during his time with the LTTE. He said that he would get up, begin the day by swearing the LTTE oath, and do some jobs like cleaning, tidying up the camp etc. Then he would do the school run, taking Prabhakaran's sons to school. Sometimes he would take his daughter to her private tutor. He might after that cook some breakfast for himself and other LTTE members, and if asked, would drive Prabhakaran's wife wherever she wanted to go. Then he would collect the kids from school and maybe prepare some light snacks for the evening. Then there would usually be a meeting in the evening, then dinner and then sentry duty. That was a "nightmare" because you didn't get to sleep through the night if you had to wake up and take your turn - it would be about 3 hours at a time. Asked for more detail about this he explained that 3 men from the "inner circle" of the Radha protection group would be assigned at any one time to guard the family house and its outer perimeter. One would be on the doorstep and the other two on the gate of the compound. In between was the garden area with banana plants etc. They were trained to be alert to any little noise coming from outside, but the property was never attacked at the time that he worked there.
24. The section of the Appellant's evidence that was the focus of Ms Cunha's submissions was as follows:

Q141: And what would you have done if you had come across somebody or somebody had been trying to break in?

A141: As such there is a big gate outside of the house so nobody can break in but having said that if someone comes outside the gate for some reason maybe a stranger maybe whoever they are, then I cannot go myself to enquire, to ask anything with this person whoever the stranger so normally there should be another person with me who I send him to enquire about this

stranger if at all if there is any stranger attending or coming up to the gate

Q142: If you weren't wearing uniform at this point how would you identify strangers from anyone else on the camp?

A142: As such these type of strangers were assigned to my supervisor who used to investigate who they are and what they have come there for and there is an espionage wing as well working within the LTTE and it's their job to ascertain who these strangers are and why they have come there on the spot on that day so it's their job to do that my job is only to hand them over to my supervisors.

Q143: So is the espionage department - were they within the Radha battle wing?

A143: Yes, yes they did have an espionage wing

Q144: And was there ever an occasion where you had to hand over anyone to your supervisor to then be passed on to the espionage wing?

A144: As far as I'm concerned all I did, actually I did find a few strangers before and I had informed my supervisors so and so has come such and such a person has come to this place and I don't know what happens with this person after that because it's their job to take him over and hand him over to the espionage wing and whatever they do I don't know.

25. The way that this evidence appears to have been portrayed to the First-tier Tribunal was that the Appellant was a security guard apprehending "intruders" and handing them over to security personnel for interrogation, or worse. In fact the interview reveals that the "strangers" were actually people coming to Prabhakaran's gate, in a compound in the middle of a large LTTE camp, and asking to be let in. The Appellant was one of the three guards on duty at any one time, tasked with not letting people in if he didn't know who they were or why they were there. If the individual at the gate was not known to the Appellant and his colleagues, he or she would be referred to someone in the "espionage wing" to have their credentials, and presumably the reason for the visit, checked out. Considering this evidence in context, we find it to be highly likely that the people who were seeking entry to the house were doing so because they had some business with Prabhakaran. That makes it highly unlikely, in our view, that they would in the ordinary course of events be subjected to any human rights abuses while the reason for their visit was being verified. In the context of the evidence overall these visitors were almost certainly other members of the LTTE.

There is in our view no evidence at all that in doing this work as a sentry the Appellant was facilitating the commission of a crime, aiding or abetting a crime, or otherwise contributing to a crime.

26. Ms Cunha's second, and related, point arising from the Appellant's role at the Prabhakaran house was that the Appellant's proximity to the leader and his family, and indeed his dedication to the LTTE overall, is relevant to our consideration of his *mens rea* at the time that he took the weapons to the frontline at the closing stages of the war, a matter to which we now turn.
27. The accepted evidence of the Appellant is as follows. Despite having been given basic combat training the Appellant never in fact saw any action, because in his capacity as a member of the unit charged with protecting Prabhakaran's family it was considered too risky to station him near any frontlines, in case he should be captured and give up information about the family's whereabouts. This was common practice within the organisation – for security reasons one unit would not know the tasks carried out by another etc. The only time he came close to an actual battle was in May 2009 when he was ordered to transport weapons to the frontline to supply the soldiers from the Radha Battle Wing engaged in fighting with the Sri Lankan Army. Having delivered the weapons to the frontline he then transported wounded civilians back the other way, picking them up where he found them and taking them to hospitals or another place of relative safety. The Appellant explains that during these trips he always felt like he was going to die because the Sri Lankan Army were so close, but he had no choice. Those were his orders.
28. It was Ms Jegarajah's case that without more, the act of following orders to transport weapons in a conventional battle between two opposing armies is not in itself an excludable act. We did not understand Ms Cunha to disagree with that proposition, and we accept it: see for instance [§§38-40] of Stanley Burnton LJ's judgment in KJ (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 292 and [§27] of JS (Sri Lanka) per Lord Brown. Although the LTTE undoubtedly did commit acts of terrorism, that was not its sole, nor even predominant, methodology. It also operated a conventional army and as the "*de facto* government" in the part of Sri Lanka where the Appellant found himself: see the UNHCR assessment accepted by the Tribunal at §290 of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC).
29. Accepting that in those circumstances the act of transporting the weapons is not itself enough, the Respondent's case instead rests on this. First that the Appellant, unlike the vast majority of LTTE members, knew Prabhakaran, and presumably his inner circle, personally. Second that he had been a member of the organisation a long time and must therefore have been aware of the members'

resilience, means and dedication to their own cause, including knowledge of terrorist operations such as those mounted by The Black Tigers. Third, we know from reports such as the *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka* (31st March 2011) that war crimes were indeed committed by LTTE commanders during the Sri Lankan Army's assault on Mullivaikkal, including the use of civilians as 'human shields', killing civilians trying to leave the area, and the use of military equipment in the proximity of civilians.

30. Ms Cunha submits that taking those three factors into account we could properly reach the conclusion that the Appellant willingly and knowingly transported those weapons so that others could use them against civilians at the frontline, with the purpose of allowing the leadership of the LTTE to survive and fight another day. He knew first hand the determination of Prabhakaran; he knew that crimes had been committed during the Tigers' struggle, and he knew that there were many thousands of civilians trapped in the area.
31. We have given careful consideration to the evidence presented, and to the case put for the Secretary of State. We acknowledge that the Appellant's case is somewhat unusual in that it reveals a proximity to the LTTE leadership not enjoyed by most cadres. The Appellant was clearly trusted and valued by the Prabhakaran family. We are not however satisfied that this proximity gave him any particular insight into Prabhakaran as a leader, his strategy or emergency tactics. The evidence given by the Appellant has been accepted by the Secretary of State after two detailed interviews, the latter one specifically arranged to probe his connection to the family; the account he gives was further accepted by the First-tier Tribunal. There is nothing in the written material before us which has given us cause to doubt that the evidence is anything other than a straightforward recital of the truth. The Appellant was not an advisor, or a military commander. He was a driver, and a man who took it in turns with others to stand on the verandah and open the gate to guests at the Prabhakaran residence. We are not satisfied that this role gave him any particular insight into military plans.
32. We accept that Appellant must have been aware of units such as The Black Tigers and their suicide - or "martyrdom"- operations against the Sri Lankan state. He must have known that the Tigers were generally a feared and efficient fighting force and that they could be ruthless in pursuit of their aim of establishing an independent Tamil Eelam. This is however a long way from establishing that he knew, believed or even suspected that every operation carried out by the LTTE would necessarily involve crimes against humanity or war crimes. As we have noted above [see §28] it has long been recognised by international actors and our domestic courts that the LTTE was not simply a terrorist organisation. It was

also a conventional army, and a *de facto* government, raising taxes and providing services to a largely supportive population. It was against this background that the Appellant gave his support to the organisation. His belief in their mission is a matter repeatedly revisited in his interviews. When asked why he had joined the LTTE the Appellant explained that their fight was “sincere and honest for the protection of the Tamil people. I have seen with my own eyes the army killing people indiscriminately. It was quite disheartening”. As far as he was concerned the LTTE worked for the “downtrodden people” of Sri Lanka. If there were other people saying they were LTTE and they were actually terrorists, he did not know about that. As far as the Appellant is concerned they were there to defend the Tamil people and uplift them. It was in this context that the Appellant gave his support to the Tamil ‘state’ created by the LTTE.

33. This is borne out by the specific evidence about his role in the final battle. At Q177 of his second interview the Appellant is asked what he thought the guns that he transported would be used for. He replied “As far as I know the LTTE has been using these weapons against the Sri Lankan army and that is what they are using it for”. The interview continued:

Q180: OK so I just want to ask you some more questions about this final battle
in May 2009. So what did you know of what was going on at the time?

A180: I was aware that the Sri Lankan army was nearing our positions LTTE
positions, and as the time goes by they came very close to us and there
was shelling everywhere and they were dropping bombs and many
civilians had died and we knew that those are big battle going on at the
time that the army was nearing

Q181: So what can you tell me about the civilians that were caught up in the
Conflict?

A181: The army surrounded the area the whole Tamil area from all four sides
including from the seaside and they were shelling and bombarding
every minute so uncountable people had died because of this because
the civilian population didn't have any other choice other than just

four getting caught up and dying because the army gathered all positions and bombarded all day they didn't have choice to go anywhere they didn't have any escape route

Q182: Was it just a Sri Lankan army that were allowing civilians to get caught up in the conflict or did the LTTE do the same?

A182: There was a complete utter confusion during this time because the Sri Lankan army surrounded all four directions and were bombing day in and day out and the people not only the civilians were dying the LTTE members they were dying too so it was complete utter confusion because it was just bombs and bombs day in, day out

Q183: And were you aware of this when you agreed to take the weapons to the various camps?

Q183: Yes

34. Reading that, in the context of his evidence overall, it appears to us that rather than willingly aiding and abetting the cynical use of civilians (for instance as human shields) the Appellant was motivated to *prevent* what he saw as crimes against humanity being perpetrated by the Sri Lankan army. We are unable to accept that he could have known, or had reasonable cause to suspect, that LTTE commanders on the ground would employ such tactics. This was a conventional army that he believed to be acting in the best interest of the Tamil population. Having regard to the evidence overall we do not accept that the Appellant was being disingenuous in his evidence on this matter.

35. Finally we have had regard to the fact that war crimes were in fact committed in Mullivaikkal by LTTE fighters, as detailed in the UN report highlighted in the refusal letter. We have carefully assessed the Appellant's evidence about his own role against the background evidence. He describes the situation as desperate and chaotic and this is certainly consonant with the accounts we have read. The remaining LTTE members, along with many thousands of civilians, were trapped in an ever decreasing enclave and faced shelling on all sides. The Appellant describes driving through gunfire and shelling, and believing that he was bound to die in the process. He would stop only to pick up the wounded or to unload his cargo. We think it unlikely that during any of those stressful and frenetic journeys back and forth to the frontline that he would have stayed long enough to

witness any specific acts: as he says, it was “complete utter confusion”. His motivation was to help the wounded, and to keep his comrades at the front line, in a conventional confrontation between two armies, supplied. We do not accept that this comes close to engaging Article 1F.

Anonymity Order

36. The Appellant is a refugee. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2022 No 2: *Anonymity Orders and Hearings in Private* we consider it appropriate to make an order in the following terms:

“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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decision and Directions

37. The decision of the First-tier Tribunal is set aside.
38. The appeal is allowed on human rights grounds by consent.
39. We substitute the decision on protection grounds by allowing the Appellant’s appeal.
40. There is an order for anonymity.



Upper Tribunal Judge Bruce
09th March 2022