Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12147/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 2 September 2022	**On the 25 October 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

NT (SRI LANKA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Ursula Miszkiel, Counsel instructed by KT Solicitors Ltd
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of Court proceedings.

Introduction

2. This appellant was the second appellant in the case of **GJ & Others (Sri Lanka) CG [2013] UKUT 00319**, and the second appellant in the Court of Appeal case of **MP and NT [2014] EWCA Civ 829**. This is his appeal against the decision of First-tier Tribunal Judge Khawar, promulgated on 11 March 2020, by which he dismissed the appellant's appeal against the respondent's refusal on 22 November 2019 to accept his fresh claim for asylum based on his asserted *sur place* activities in the UK, in particular his claim to be a long-standing activist for the TGTE, which has been proscribed by the Sri Lankan government ("GoSL").

Relevant Background

3. In **GJ**, at paragraph [432], having heard oral evidence from the appellant and submissions, the UT referred to the appellant as having not taken any part - still less a significant part - in Tamil separatist activity in the UK. The appellant also did not claim to have engaged in Tamil separatist activity in his second appeal to the Court of Appeal in 2014.

4. His case was remitted back to the UT for reconsideration because the UT was found by the Court of Appeal in **MP and NT** to have erred in law in holding that it appeared that the appellant was not of sufficient concern in 2009 to be one of the 11,000 active LTTE cadres who were considered to require re-education through the rehabilitation programme. At [43] of **MP and NT**, the Court said that the problem with this approach was that the appellant was released following payment of a huge bribe only three months after the commencement of his detention. The selection process for rehabilitation or prosecution was still taking place until mid-2010. It was plain that the authorities knew enough about the appellant to move him to Anuradhapura Camp within two days. It was also not without significance that his cousin was still in detention four years after the end of the civil war. The Court continued: "*The UT was entitled to attach significance to the fact that the appellant has not participated in Tamil separatist activity in the United Kingdom but that is not an absolute pre-requisite for protection under the Guidance.*"

The Decision of Upper Tribunal Judge Coker

5. On 29 April 2015, the appellant's appeal came before Upper Tribunal Judge Coker for reconsideration following the second remittal from the Court of Appeal. In a witness statement signed on 11 February 2015 that was filed for the hearing, the appellant claimed for the first time that he had been involved in diaspora activities since 2011.

6. In her decision dated 3 May 2015, UTJ Coker gave her reasons for dismissing the appellant's appeal on all grounds raised, including the new ground that he would be perceived to be a threat to the integrity of Sri Lanka as a single state because he had, or would be perceived to have, a

significant role in relation to post-conflict Tamil separatism within the diaspora.

7. At [14], UTJ Coker summarised the evidence which he gave about his diaspora activity. He said that, since he had given his mobile number to one of the organisers of an event, whenever there was an event, he received a text and he went to the event, and to meetings dealing with the event. He was given jobs such as marshalling, taking banners or water or leaflets. UTJ Coker said that there were numerous photographs of him at the demonstrations wearing a reflective jacket and/or with a loud hailer. The appellant confirmed in oral evidence that he was not involved with the actual planning of events, but was someone who regularly participated in them, and was regularly called upon to undertake various tasks associated with large-scale events.

8. In her discussion of the evidence, UTJ Coker said as follows at [23]:

> "There is no doubt but that the appellant has been going on demonstrations on a fairly regular basis since his appeal to the First-tier Tribunal was dismissed and that he has been photographed with a loudspeaker. I accept that he was allocated tasks at some of the events such as handing out leaflets, taking banners to the demo or bringing water. These were tasks that were given to him by the organisers of the events. He was asked to do things and he did them. He did not, on his evidence, participate in the decision- making process either in terms of who should do what or whether an event should be held, how or where or why it should be held. He is no more than a willing volunteer who essentially did what he was asked to do. He did this for three separate organisations and gave no evidence whatsoever of his understanding of the different organisations' ideals or political ethos. He gave no indication whatsoever of whether he agreed with one or other or less than another. The only question he was asked about why he did these things was replied to in vague general terms that there are Tamils in Sri Lanka, he is a Tamil and he cannot give up his feelings for the Tamils. These are not the sentiments of a political activist committed to Tamil separatism or working towards the destabilisation of the unitary Sri Lankan State. Even if photographed by the Sri Lankan authorities (which it is reasonable to assume he has been) given the extent of Sri Lanka intelligence it is inconceivable that it would not be known to the authorities (assuming he is identifiable) that he was no more than a person who undertook minor tasks in relation to events, when asked to do so. It is inconceivable that the Sri Lanka authorities would consider him to be an activist working for Tamil separatism merely because of these activities. Ms Isherwood took issue with the late disclosure of his activities and that he had only started to take part in such activities after his appeal to the First-tier Tribunal had been dismissed. Whilst that is correct and his activities do smack of an attempt to bolster his claim, even at its highest, namely that he was asked to do the various jobs, those activities are not commensurate with the descriptive role submitted by Mr Spurling as working for Tamil separatism and (or indeed 'or') seeking to destabilise the State."

9. UTJ Coker went on to make findings on the other main thread of the appellant's asylum claim, which was that there was continuing adverse interest in him on account of his history, including him being allegedly listed as an escapee from Anuradhapura camp - and that this continuing adverse interest was manifested in the fact that the appellant's mother had been visited by security forces in 2011, 2013 and 2014. UTJ Coker said:

> "38. [307] and [308] of GS sets out the process of obtaining a Temporary Travel Document. Of critical importance is the underlying acceptance that an individual cannot be expected to lie in order to protect himself from the threat of persecution. TTDs are issued from Colombo; it is more likely than not that the Sri Lankan authorities can distinguish those waging an alternative war and those who are not involved with attempts to revive the LTTE in the diaspora (see [323] of GS. From the high level of intelligence the security services have of individuals both within Sri Lanka and in the diaspora, it can be assumed that the authorities are aware that the appellant was in the camps and is now in the UK; has attended demonstrations and handed around leaflets and shouted using a loudhailer etc. It can be assumed that the authorities know and have a record of his activities for the LTTE - including manning a checkpoint when the LTTE controlled the area and his forcible recruitment to dig bunkers and help with the wounded in the closing stages of the war; of his brother's disappearance and the incarceration of his cousin.
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> 39. It cannot be concluded that the applicant's activities in the UK are significant political activities that would attract the adverse attention of the GOSL as being intended to destabilise the State.
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> 40. Even though the applicant had been in the camps and not gone through the rehabilitation process, the concern of the GOSL now is not what happened then but what an individual might do in the future. As [351] of GS says, Tamils returning from the diaspora now who have not undergone rehabilitation are not for that reason at risk.
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> 41. The applicant would not have to lie or dissemble as to his activities both in the closing stages of the war, in terms of his sojourn in the UK or his attendance at meetings in the UK. He is, quite simply, not involved in activities at anything approaching a significant level designed to threaten the Sri Lanka State and the activities he undertook in 2009 are now of little interest to the GOSL.
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> 42. If, because he is known as a former LTTE cadre returning from the diaspora, he is placed on a watch list, that is not persecutory. There is no credible evidence that anything more than that would happen to him."

10. The appellant applied for permission to appeal to the Court of Appeal against the decision of UTJ Coker, but permission was refused on 13 August 2015, and the appellant became appeal rights-exhausted in respect of his asylum claim on 14 September 2015.

The Fresh Asylum Claim

11. On 22 September 2019, AASK Solicitors made further submissions in support of a fresh asylum claim. In the further submissions *pro forma*, they summarised the further submissions as being about, firstly, the applicant's sincere and long-time involvement with the UK Tamil diaspora called TGTE. The applicant had a significant role within the organisation. Secondly, the further submissions were about his severe psychiatric condition. They submitted that the appellant being a member of the TGTE meant that the Sri Lankan Government would easily prosecute and persecute him. Reliance was placed on the case of **UB {Sri Lanka)**, although it was not explained why this case was relevant.

12. In their covering letter dated 23 September 2019, AASK Solicitors characterised the old basis of claim as being that the applicant was forced to join the LTTE in 2008 and worked with them until May 2009; that he was arrested by the Army in 2009 after the end of the civil war, that he was detained in a camp until 30 August 2009 during which time he was tortured; that he was released by payment of a bribe to the PLOT made by his uncle; and that he had fled Sri Lanka with the assistance of an agent on 13 September 2009.

13. The new basis of claim was that the appellant was relying on his involvement in Tamil separatism. He was very much associated with the UK Tamils diaspora called TGTE, and he had been participating in demonstrations against the GoSL since 2013.

14. The solicitors went on to list the new evidence that was being provided to support the fresh claim. Item 1 was the applicant's TGTE ID card. Item 2 was confirmation from a TGTE MP of his activities - but that was going to follow.

15. In the RFRL, the respondent took an internally contradictory line on the issue of whether the appellant's claim to be an activist with the TGTE who had been participating in demonstrations against the GoSL since 2013 was a submission that had or had not previously been considered. The respondent initially contended in the RFRL that this submission had been fully considered by UTJ Coker in her decision of 2015 and authoritatively rejected by her. However, at paragraph 13 of the RFRL, the respondent said that the same submission had not (our emphasis) previously been considered; and at paragraph 14, she acknowledged that new evidence in support of the *sur place* claim had been provided in the form of a photocopy of a Tamil Eelam national ID card, which contained the appellant's name and photograph. The respondent observed that an application form to register for such a card was easily accessible via the internet, and therefore the card failed to demonstrate how he held "*such a significant profile*" and therefore it added little weight to his claim.

The Hearing before, and the Decision of, the First-tier Tribunal

16. On 21 January 2020, the appellant's appeal against the refusal of his fresh claim came before Judge Khawar sitting in the First-tier Tribunal at Taylor

House. Both parties were legally represented, with Ms Heybrook of Counsel appearing on behalf of the appellant. The appellant gave oral evidence through a Tamil Interpreter, and he was cross-examined.

17. In his subsequent decision giving reasons for dismissing the appeal, the Judge began by summarising the appellant's claim, and then at [11] he set out in full paragraphs [8] and [9] of the decision of UTJ Coker in which she had set out the findings of fact preserved by the Court of Appeal.

18. At [12], he said that, in support of the appellant's fresh claim/further submissions, it was maintained that the appellant had continued to take part in TGTE activities as an activist and he had been involved in "*organising*" activities on behalf of the TGTE, and as such the GoSL would view his activities as being significant and as being intended to destabilise the State.

19. The Judge set out his findings of fact at paragraphs [24] onwards. At [24] he said:

> "Plainly UT Judge Coker provided detailed analysis/consideration of the appellant's claims (following remittal from the Court of Appeal), at paragraphs 23-43 of her decision. Such conclusions represent the starting point for the present appeal. Having carefully considered the appellant's fresh/further oral and documentary evidence I conclude that Judge Coker's findings and conclusions are in accordance with the evidence and the law and unaffected by the appellant's fresh evidence. I do not propose to reiterate everything contained at paragraphs 23-43 of Judge Coker's decision but the entirety of the said paragraphs should be considered as being specifically traversed and incorporated into this decision."

20. The Judge then set out UTJ Coker's discussion of the evidence given by the appellant about his *sur place* activities, before providing at [26] his own discussion of the oral evidence given by the appellant before him on the same topic, by way of comparison. He said:

> "During his oral evidence in this appeal hearing, it soon became evident despite the appellant having continued his attendances at demonstrations/meetings of TGTE, there has been no real change to the level of his activities. Although he now claims ... that he is now involved in "organising" public events in the UK, during questions posed by the HOPO it clearly emerged that he does little more than as told/requested."

21. At [28], the Judge discussed a letter dated 16 January 2020 from Mr SY, who asserted that the appellant had joined as a volunteer, and was now given responsible roles such as organising events of the TGTE and fund raising. Mr SY further asserted that the appellant played a key role in organising. The Judge observed that the assertion of a key role being played by the appellant was extremely vague and unspecific because it was not particularised. No details were provided as to the key role the appellant played. The appellant's oral evidence simply amounted to attendance and various tasks such as decorating a hall where meetings

might take place, or putting up posters/pictures of deceased considered as heroes.

22. The Judge then moved on to address the other principal argument advanced on the appellant's behalf by Ms Heybrook, which was that the appellant would feature on a stop list because he was an escapee, following **RS (Sri Lanka) -v- SSHD [2019] EWCA Civ 1796**. The Judge said at [29]:

> "During her submissions - as also noted in skeleton argument on behalf of the Appellant - Ms. Heybrook submitted that the Appellant will feature on a "stop list" and upon return will be arrested at the airport and subjected to ill treatment because he is an "escapee" as concluded in RS (Sri Lanka v SSHD [2019] EWCA Civ 1796. In my judgment such assertion/submission is unfounded for the following reasons:
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> (i) The evidence as to whether the Appellant would be regarded as an "escapee" was considered in considerable detail by UTJ Coker and concluded against the Appellant (paragraphs 32 to 36 of her decision). Such evidence/considerations were not canvassed at any point during the oral evidence/appeal before me, other than by way of a simply assertion/submission by Ms. Heybrook; and
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> (ii) There appears to be a world of difference in the facts relating to RS compared to that of this appeal. RS had been detained for a very substantial period of eighteen months because he was a member of the LTTE and significantly involved in relation to LTTE activities. In contrast the Appellant was known to be a cadre who was forced to undertake menial duties towards the end of the civil war. In my judgment the presumptions in RS [do] not of necessity apply in the Appellant's case."

23. At [30] and [31], the Judge addressed the affidavit evidence of the appellant's mother, in which she asserted that the CID had attended the family home in September 2010, February 2014, and more recently in May 2019. On the latter occasion it was asserted that she had been threatened on the basis that the appellant had *"started regrouping the LTTE in the UK*."

24. The Judge held at [31] that he was not satisfied that the appellant's mother's affidavit contained reliable information. He noted that UTJ Coker was not satisfied even to the lower standard of proof that the appellant's mother was visited by the security forces in 2011, 2013 or 2014. He observed that the appellant's mother's affidavit made no reference to attendance by the security forces in 2011 or 2013; and that in oral evidence the appellant could not proffer any explanation for such an omission. The Judge continued at [32]:

> "Further and in any event, there was no rhyme or reason why the security forces would have delayed between 2014 to 2019, a period of 5 years, before attending at the appellant's mother's home - the appellant's diaspora activities have not materially changed during that period."

25. At [34], the Judge said that he had come to the same conclusions as Judge Coker which she had expressed at paragraphs [41] and [42] of her decision, which he went on to recite.

The Grounds of Appeal to the Upper Tribunal

26. The application for permission to appeal to the Upper Tribunal from the decision of Judge Khawar was settled by Ms Miszkiel.

27. Ground 1 was that the First-tier Tribunal Judge made an unreasonable assessment of the real risk of future persecution on the account of the appellant's TGTE diaspora activities by failing to consider at all the Court of Appeal's judgment in the case of **UB (Sri Lanka) -v- SSHD [2017 EWCA Civ 85**, to which the Judge was specifically referred at paragraph 7 of a previous Counsel's skeleton argument, and which post-dated UTJ Coker's determination.

28. Ground 2 was that the Judge erred by not finding that the appellant had already been perceived to be a threat to the integrity of Sri Lanka because he had been detained after the end of the war and there was continued interest in him, by analogy with the case of **ME (Sri Lanka) [2018] EWCA Civ 1486**. Accordingly, his finding at [29] was flawed.

29. Ground 3 was that the Judge failed to assess reasonably or with the most anxious scrutiny the most recent Country Evidence which post-dated **GJ** and which highlighted the future real risk of persecution.

30. Ground 4 was that by virtue of his flawed assessment of the real risk of future persecution, the Judge/s assessment of Articles 2, 3 and paragraph 276ADE at paragraphs [35]-[36] was fatally flawed.

The Reasons for the Grant of Permission to Appeal

31. On 20 April 2020, First-tier Tribunal Judge Haria granted permission to appeal on all grounds, but Judge Haria singled out Ground 1 as being particularly meritorious. Judge Haria said that it was arguable that, in the light of **UB (Sri Lanka) -v- SSHD [2017] EWCA Civ 85** (which the Judge had failed to consider), the Judge had erred in the assessment of the risk faced by the appellant [on return] on account of the appellant's involvement with the TGTE, a proscribed organisation.

The Subsequent Procedural History

32. In a decision promulgated on 19 October 2020, Upper Tribunal Judge Jackson dismissed the appeal without a hearing under Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The appellant sought permission to appeal to the Court of Appeal against that decision on 27 October 2020 on various grounds, the first two of which focused on two procedural fairness points. On 31 March 2022, UTJ Jackson promulgated a decision giving reasons for setting aside her earlier decision. At [4] she said:

> "On the specific facts of this case, there was one point raised by the appellant in relation to paragraphs 24 to 27 of the decision as to whether there should have been an opportunity for clarification by the parties of whether the appellant had claimed to have been a member of the TGTE in 2015, at a time of his previous appeal hearing before UTJ Coker. Whilst on the decision, read as a whole, it is far from clear that this would have made any material difference to the outcome, it is accepted on the particular facts of this case that this amounts to procedural irregularity or unfairness which is sufficient to set aside the decision promulgated on 19 October 2020."

33. As recorded in directions made by Upper Tribunal Judge Gill on 23 June 2022: (1) On 13 April 2022 the appellant applied to rely upon amended grounds of appeal, and ‚permission was granted on 23 June 2022 for the appellant to rely on the amended grounds which were to stand in place of the original Grounds; (2) On 20 May 2022 the appellant served a bundle of documents, which included a copy of his witness statement of February 2015 that was submitted in the appeal before UTJ Coker; (3) Mr Whitwell, Senior Presenting Officer, raised no objection to the amended Grounds and filed on the respondent's behalf a response to the appellant's amended Grounds and a skeleton argument in a document dated 30 May 2022 that was entitled "Respondent's Written Submissions".

34. In the first amendment to Ground 1 Ms Miskziel addressed the lacuna in the evidence about the case that was advanced in 2015. She pleaded that in his witness statement for the hearing before UTJ Coker in 2015, the appellant had stated that he had been involved with the British Tamil Forum (BTF), the Tamil Youth Organisation (TYO), and the TGTE. The respondent's Tamil separatism COIG dated 28 August 2014 confirmed that the BTF, TYO and TGTE were on the proscribed list on 1 April 2014. The BTF and the TYO were de-proscribed in November 2015, but the TGTE continued to remain on the proscribed list.

35. Ms Miskziel's second and very extensive amendment to Ground 1 related to the Country Guidance case of **KK and RS (Sur place activities) Sri Lanka CG [2021] UKUT 130 (IAC)** that had been promulgated after she had drafted the original grounds of appeal to the UT. She pleaded that in this country guidance case the UT had considered how the Sri Lankan authorities would view proscribed organisations, particularly the TGTE. The decision highlighted that the GoSL regarded the TGTE with a significant degree of hostility and as a front for the LTGE: "*These findings highlight that the FTTJ materially erred in failing to consider that the appellant had been involved in activities on behalf of a proscribed organisation.*"

The Hearing in the Upper Tribunal

36. At the hearing before us to determine whether an error of law was made out, Ms Miszkiel expressed surprise not to see UTJ Gill, as an error of law hearing before UTJ Gill had been adjourned part-heard on 28 April 2022. We informed the parties that we were ready to consider afresh the

question of whether an error of law was made out, as we were now seized of the matter.

37. Ms Miszkiel clarified that in her amended grounds of appeal she was only relying on the extensive section on the Country Guidance case of **KK and RS** for "*materiality*" and not for the anterior purpose of establishing an error of law in the first place.

38. Ms Lecointe informed us that she had only recently received the documents referred to in UTJ Gill's directions, and that she would need around 40 minutes to read the amended grounds of appeal. Accordingly, we adjourned the hearing until 11am to give her the opportunity to complete this exercise, and also to provide us with a copy of Mr Whitwell's submissions which had not yet reached us.

39. On the resumption of the hearing at 11am, we informed Ms Miszkiel that in our view the key issue in the appeal remained what it had always been, which was whether the Judge had erred in law in failing to refer in his decision to the fact that the TGTE is a proscribed organisation and/or to engage with the case of **UB (Sri Lanka)**. We invited Ms Miszkiel to focus her submissions on this aspect of the appellant's case. Ms Miszkiel proceeded to do so. She also developed other themes in her amended grounds of appeal. In reply, Ms Lecointe said that she had nothing to add to the comprehensive written submissions made by her colleague, Mr Whitwell.

40. In answer to a question from us as to future disposal if an error law was made out, both representatives agreed that if an error of law was made out, the appeal should be remitted to the First-tier Tribunal for a fresh hearing, given the extent of the further fact-finding that would need to be made. We reserved our decision.

Discussion

41. On analysis, the amended grounds of appeal do not constitute a change of case on the part of the appellant. Rather, the intended purpose of the amendments is to reinforce the original pleaded case.

Ground 1

42. As we indicated during oral argument, we are not assisted by the exercise of looking at the decision of Judge Khawar through the lens of the Country Guidance case of **KK and RS**. While there are obvious shortcomings in the decision of Judge Khawar when assessed against this latest Country Guidance, it was not an error of law for the Judge not to follow Country Guidance that had not yet come into existence. The necessary focus must be on the Country Guidance that was current at the time, and on the evidence and arguments that the Judge was asked to address.

43. The first amendment to Ground 1 relates to the specific evidence about the TGTE which was deployed before UTJ Coker or which was in existence

at the time. Although the witness statement referred to in the first amendment is unsigned and undated (except that it is apparent that it was expected to be signed on a day in February 2015), we accept that the signed statement that was seen by UTJ Coker is likely to have been identical, and accordingly that UTJ Coker would have read paragraph 20 which provides as follows: "*I would describe myself as an activist: my involvement in diaspora activities is greater than mere attendance. I have carried out marshalling duties, helped set up demonstrations, handed out placards and leaflets, and called out slogans through loudhailers. The events I have attended have been arranged by the British Tamil Forum (BTF), the Tamil Youth Organisation (TYO) and the Transnational Government of Tamil Elum (TGTE), all of which are banned in Sri Lanka. My connections are with all these organisations, but mostly the BTF and the TYO.*"

44. We accept Mr Whitwell's submission that, on a fair reading of this witness statement, the appellant was not claiming to be a member of the BTF, the TYO or the TGTE. However, as he was claiming to be an activist for all three organisations, we do not consider that his failure to assert membership of the TGTE before UTJ Coker means that the appellant's argument on **UB (Sri Lanka)** now falls away.

45. In **UB**, the appellant made an asylum claim based on his previous involvement with the LTTE whilst in Sri Lanka, his participation in pro-LTTE demonstrations in the UK, and his claimed membership of the TGTE. His appeal to the Court of Appeal turned on a single ground. This was what was described as Policy Guidance issued by the Home Office on 28 August 2014, which was not brought to the attention of either the First-tier Tribunal or the Upper Tribunal. The appellant sought permission to adduce the material in the Court of Appeal, submitting that since the material was issued by the respondent, it was the responsibility of the respondent to ensure that it was drawn to the attention of the Tribunals concerned. He submitted that the guidance was material to the decision, and that its non-disclosure gave rise to procedural unfairness.

46. The only reasoned judgment was given by Irwin LJ. At [2], he said that, critically, the appellant had provided evidence to the Tribunal that he had involvement with the TGTE.

47. As detailed by Irwin LJ at [12] and [13] of his judgment, annexed to the Home Office Policy Guidance dated 28 August 2014 were two letters from the British High Commission in Sri Lanka. Irwin LJ said that the material was authoritative and clearly intended to be read with the Guidance. The first letter, dated 16 April 2014, said that on 1 April 2014 the GoSL had proscribed 16 Tamil diaspora organisations, among which were the TGTE: "*When making the announcement on 1 April, Brigadier Ruwan Wanigasooriya said that individuals belonging to those organisations would face arrest under anti-terrorism laws … [T]o date, there have been no known arrests based on membership of one of the newly proscribed groups.*"

48. The second letter, dated 25 July 2014, quoted a spokesperson from the DIE who stated that returnees might be questioned on arrival by Immigration, CID, SIS and TID. They might be questioned about what they had been doing whilst out of Sri Lanka, including whether they had been involved with one of the Tamil diaspora groups. He said that it was normal practice for returnees to be asked about their activities in the country they were returning from. The letter continued: "*The spokesperson from the SIS said that people being "deported" will always be questioned about their overseas activities, including whether they have been involved with one of the proscribed organisations. He said that members of those organisations are not banned from returning to Sri Lanka, they are allowed to return, but will be questioned on arrival and may be detained."*

49. Irwin LJ went on to hold at [19] and [20] that the policy guidance was clearly material and clearly should have been served in advance by the respondent. It was plain from the respondent's decision letter that the appellant had claimed membership of the TGTE. The refusal decision took the stance that the appellant had not shown that he was a member of the TGTE. However, *"the possible implications of membership, as affected by the letters annexed to the policy guidance, meant this material clearly should have been served."*

50. Irwin LJ noted that UB's case for saying that he would be at real risk on return to Sri Lanka did not turn merely on him showing that he was actually a member of the TGTE, but also that his membership would be detected on arrival in Sri Lanka. In this regard, he also noted that the findings of the First-tier Tribunal were that the appellant's sur place activities, even if observed or recorded, were of a low-level nature and not likely to carry risk. Nor would these activities demonstrate membership of the TGTE. Nevertheless, Irwin LJ concluded at [25]:

> "I cannot quite preclude the possibility that these letters might affect the outcome, and thus that they are material to the decision in that sense."

51. In her skeleton argument for the hearing before Judge Khawar, Ms Heybroek acknowledged that the ratio in **Devaseelan** applied in respect of the Panel's findings in **GJ & Others** relating to the appellant. She also accepted that the Country Guidance case of **GJ & Others** was still applicable. However, the appellant equally relied on the respondent's own guidance in the CPIN of June 2017, as well as the plethora of objective evidence which, she submitted, demonstrated the GoSL's increased interest in any person deemed to have been associated with the LTTE and/or diaspora activity with the TGTE.

52. At paragraph 7, she went on to say that the appellant sought to rely on **UB (Sri Lanka)** in relation to the relevance of his *sur place* activities and his membership of the TGTE. At paragraph 19, she submitted that the appellant's case was stronger on the facts than that of the appellant in **UB,** as NT was able to show that he was a member of the TGTE and that

the Sri Lankan authorities would be aware of his involvement with the TGTE.

53. In **BH (Policy/Information: Secretary of State's Duties) Iraq [2020] UKUT 00189 (IAC)**, a UT Panel chaired by the President conducted an extensive examination of **UB (Sri Lanka)** and said at [55]:

> "The fact that this information came from the British High Commission was plainly regarded by the Court of Appeal as significant. The information clearly and specifically related to the TGTE. It suggested on its face that someone who had been a member of the TGTE could, as such, face serious problems on return to Sri Lanka."

54. Judge Khawar did not have the benefit of the Upper Tribunal's elucidation of the full significance of the two letters from the British High Commission in Sri Lanka which were considered by the Court of Appeal in **UB (Sri Lanka)**. The Judge also did not know that the appellant had relied in his witness statement evidence before UTJ Coker on the fact that he had been involved in demonstrations organised by the TGTE, a proscribed organisation, so as arguably to trigger an obligation on the part of the respondent to disclose the Policy Guidance dated 28 August 2014 with the two letters about the TGTE annexed to it, in order to avoid misleading UTJ Coker.

55. However, the Judge knew that the appellant's case before him was that he had been involved in *sur place* activities for the TGTE since 2013; and he knew that the decision of UTJ Coker was silent on the potential significance of the appellant's *sur place* activities being conducted on behalf of the TGTE, whereas (as indicated by the reasoning of the Court of Appeal in **UB),** the Policy Guidance dated 28 April 2014 pointed to the fact that even low-level activism for the TGTE might place the appellant at risk on return.

56. Accordingly, while it was open to Judge Khawar to treat the decision of UTJ Coker as being authoritative on the question of the nature and extent of the activities in which the appellant was engaged as of 2015, and to find that as of 2020 there had been no change in his level of responsibility, it was not open to him to treat her decision as being authoritative on the issue as to whether there was an elevated risk to him flowing merely from the fact that the TGTE was a proscribed organisation. The significance of **UB (Sri Lanka)** in the present context was that it showed that in 2015 there was extant policy guidance about the GoSL's hostility towards the TGTE and other proscribed organisations which had not been drawn to UTJ Coker's attention, and so she had not taken it into account when assessing the risk on return posed by the appellant's *sur place* activities.

57. In summary, we find that Judge Khawar materially erred in law in not engaging at all with the case put forward by Ms Heybroek in her skeleton argument as to the significance of the TGTE being a proscribed organisation, and by failing to resolve the important issue that was raised by the appellant's citation of **UB (Sri Lanka)**.

Ground 2

58. There is a clear distinction between how the Judge addressed the case advanced by reference to **UB (Sri Lanka)** and how the Judge addressed the other principal line of argument. Whereas the Judge ignored the fact that the TGTE is a proscribed organisation and ignored the case put forward as to the significance of this, the Judge directly engaged with Ms Heybrook's submission that the appellant would be treated by the GoSL as an escapee, following **RS (Sri Lanka) -v- SSHD [2019] EWCA Civ 1796**. We consider that Judge Khawar gave adequate reasons for rejecting Ms Heybrook's submission on this issue, and that Ground 2 is no more than an expression of disagreement with a finding that was reasonably open to the Judge on the evidence before him and for the reasons which he gave.

59. It is also pleaded that the Judge wrongly failed to follow **ME (Sri Lanka)**, a copy of which was apparently included in the bundle that was placed before the Judge. However, this authority was not cited in Ms Heybrook's skeleton argument, and there is no evidence that Ms Heybrook relied upon this authority in her oral submissions. The mere fact that the authority was included in the papers before the Judge did not engender an obligation on the Judge to comment on it. We accept Mr Whitwell's submission that both cases are distinguishable on the facts from the present case, but the main reason why the Judge has not erred in law in failing to follow **ME (Sri Lanka)** is that it is not shown that this authority was specifically relied on.

Ground 3

60. Although Ms Heybrook relied on the 2017 CPIN, we do not consider that her discussion of its contents in her skeleton argument at paragraph 10 added anything of substance to the case that she was advancing. Firstly, one of the findings of fact made by UTJ Coker (to which Ms Heybroek alluded elsewhere in her skeleton argument) was that the GoSL would know about the appellant's activities in the UK, and so it did not add anything to his claim to postulate that the degree of surveillance by the GoSL had increased since 2015. Secondly, in stark contrast to the Policy Guidance of 2014 which is the subject matter of **UB (Sri Lanka),** it was not suggested by Ms Heybroek that the 2017 CPIN contained an equivalent policy concession as to the implications of mere membership of the TGTE. So, we are not persuaded that the failure by the Judge to refer to the 2017 CPIN discloses a material error of law.

Conclusion

61. Although Grounds 2 or 3 are not made out, the Judge materially erred in law in failing to address the question whether the risk that the appellant faced on return was elevated to a persecutory level by the appellant's membership of the TGTE and/or by his activities for the TGTE, a proscribed organisation, and his error in this regard is of such materiality as to require

the decision of the First-tier Tribunal to be set aside in its entirety and re-made.

Future Disposal

62. Given the extent of the fact-finding that will be required on re-making, and in particular the requirement to look at the appellant's activities for the TGTE through the lens of the Country Guidance case of **KK and RS**, we consider that this is an appropriate case for remittal to the First-tier Tribunal, with none of Judge Khawar's findings of fact being preserved. For the avoidance of doubt, and insofar as it is material, the preserved findings of fact from the Court of Appeal will continue to stand, and the **Devasaleen** guidelines will continue to apply to the decision of UTJ Coker in 2015, subject to the qualification contained in paragraph [56] above.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law such that the decision must be set aside and remade. This appeal is remitted to the First-tier Tribunal at Taylor House for a *de novo* hearing before any Judge apart from Judge Buchanan or Judge Khawar.

Signed Andrew Monson Date 21 September 2022

Deputy Upper Tribunal Judge Monson