Neutral Citation Number: [2019] EWCA Civ 172

Case No: C9/2017/1746

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Kekic
DA/00135/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2019

Before:

LORD JUSTICE FLOYD
and
SIR STEPHEN RICHARDS

- -

Between:

KK (Sri Lanka)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Phil Haywood (instructed by **Jein Solicitors**) for the **Appellant**
Claire van Overdijk (instructed by **the Government Legal Service**) for the **Respondent**

Hearing date: 7 February 2019

- -

Approved Judgment

Sir Stephen Richards:

1. This is an appeal against a determination of the Upper Tribunal ("UT") setting aside a determination of the First-tier Tribunal ("FTT") which allowed the appellant's appeal on asylum and Article 3 ECHR grounds against a decision to make a deportation order against him in accordance with regulations 19 and 21 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The issue on the appeal is whether the UT Judge was right to find that the FTT Judge erred in law in her approach to evidence that post-dated the relevant country guidance. The issue is a narrow one, turning on the specifics of the individual case.

The factual history

2. The appellant is a Sri Lankan national of Tamil ethnicity. He entered the United Kingdom in December 2000, at the age of 26, and claimed asylum on the basis of risk arising from alleged activity within the LTTE. He said that he had joined the LTTE in 1989, that he had become involved in the political wing in 1990 and had become a full-time political worker, and that in 1995 he had been appointed leader of the political wing for the area of Kilinochi, continuing in that role until 2000. His claim to asylum was, however, refused and an appeal was dismissed in September 2002. The core finding in the determination dismissing the appeal was that his account was not credible. The Adjudicator did not believe that he held the position of authority in the LTTE which he alleged, and she found that the centrepiece of his evidence was largely fictitious or substantially embellished.

3. The appellant remained in the United Kingdom. In May 2007 he was granted a residence card on the basis of his marriage to an EEA national in June 2004. The residence card, originally valid from May 2007 to May 2012, was subsequently extended to September 2013. There were three children of the marriage.

4. In January 2014 the appellant was convicted of conspiring to do an act to facilitate the commission of breach of UK immigration law. He was sentenced to five years' imprisonment. The circumstances of the offence were that from 1 January 2012 to 23 May 2013 he was an important part of a criminal conspiracy to provide an illegal service to facilitate the movement of Sri Lankans into and out of the United Kingdom by various devices designed to defeat immigration controls. The conspiracy involved the smuggling of at least 20 individuals, using an extensive European network. The appellant admitted in evidence to the FTT that the individuals smuggled were Tamils. The judge's sentencing remarks made clear that the offence was committed for financial gain rather than for any altruistic motive as subsequently suggested by the appellant.

5. On 23 February 2016 the Secretary of State made a decision to make a deportation order against the appellant on grounds of public policy or public security in accordance with regulations 19 and 21 of the 2006 Regulations.

6. An appeal to the FTT against that decision was heard by FTT Judge Colvin. In a determination promulgated on 15 November 2016 she held that the appellant's deportation was justified on serious grounds of public policy or public security in accordance with the 2006 Regulations. She was satisfied that his deportation would not breach the right to respect for family life under Article 8 ECHR. As to asylum,

she found that apart from the issue of risk on return, which needed to be considered separately in view of the lapse of time, there was no new reliable evidence to displace or correct the findings made in the September 2002 determination. She considered the nature and extent of the appellant's *sur place* activities and the publicity given to his criminal conviction. She then dealt with the issue of risk on return, concluding that returning him to Sri Lanka at the present time would place him at real risk of persecution under the Refugee Convention and/or conduct amounting to breach of Article 3 ECHR. She therefore allowed the appeal on asylum grounds and under Article 3, whilst dismissing it on other grounds.

7. The Secretary of State was granted permission to appeal to the UT against Judge Colvin's determination. In a determination dated 20 February 2017, UT Judge Kekic held that her conclusions on asylum and Article 3 were based on a legally flawed approach and that her decision to allow the appeal on those grounds should be set aside. Judge Kekic ordered that the decision be remade. Following a further hearing, she went on to hold in a determination promulgated on 13 April 2017 that the appellant would not be at risk on return, and she dismissed the appeal on all grounds.

8. Longmore LJ subsequently granted the appellant permission to appeal against the first of Judge Kekic's determinations, by which the FTT's determination was set aside for error of law. He refused permission to appeal against Judge Kekic's second determination, by which the decision on the appeal was remade and the appeal was dismissed. The issue on the appeal to this court is therefore limited to the question whether the UT was right to set aside the FTT's determination for error of law.

<u>The material reasoning of the FTT</u>

9. As already mentioned, Judge Colvin found no basis for displacing the findings made in the September 2002 determination dismissing the asylum claim then advanced. In relation to the appellant's *sur place* activities, she accepted that he had had some involvement with the British Tamil Forum ("BTF") since about 2007/2008. But she found that his claim to have attended 30 to 40 demonstrations and to have helped organise them was most likely to be an exaggeration, particularly as he had only submitted photographs of being at demonstrations in Geneva and Brussels in 2008; and she did not find him to have played a prominent role in the organisation over the years, beyond attending some meetings and some demonstrations.

10. The judge had no doubt on the evidence before her that the appellant's name and photograph had been widely publicised, including in the Sri Lankan media, in relation to his criminal conviction. But she rejected his claim that the Sri Lankan authorities had visited his parents in 2007 with photographs of him attending demonstrations; nor did she accept that his parents had been visited by the Sri Lankan authorities following his criminal conviction.

11. The judge referred to the appellant's claim that the Sri Lankan authorities would connect him with his brother who was said to have been an LTTE member captured and presumed killed at the end of the war. She said that it was difficult to assess whether the brother came to the attention of the authorities and was killed, but she was willing to give the appellant the benefit of the doubt on the point.

12. In a section headed "Risk on return", the judge continued as follows:

> "67. I have now to assess whether the appellant faces a risk on return to Sri Lanka at the present time. This assessment includes the fact that it was found in the appellant's previous appeal that he had not come to the adverse attention of the Sri Lankan authorities before leaving the country in 2000. Then there are my own findings that the appellant has had some involvement in the BTF in the UK including attending some demonstrations but has not played a prominent or significant role in the organisation. He has a conviction and prison sentence for smuggling Tamils into the UK as part of a criminal gang that used an extensive European network. His name and photograph has been publicised internationally including in Sri Lanka. There is also a possibility that the appellant will be identified with his elder brother who was an LTTE member captured by the authorities at the end of the war.
>
> 68. The CG case of *GJ & Others (post-civil war: returnees) Sri Lanka* [2013] UKUT 319 sets out the guidance on risk of return to Sri Lanka. The relevant matters for this case are the following headnotes:
>
> > *"(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:*
> >
> > > *(a) individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.*
> > >
> > > ...
> >
> > *(8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.*
> >
> > *(9) The authorities maintain a computerised intelligence-led 'watch' list. A person whose name appears on a 'watch' list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a*

> *Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual."*

69. This CG case of *GJ* was decided on the basis of an amount of evidence of circumstances in 2012-2013. It is submitted that the situation in Sri Lanka has significantly changed since then and that this is reflected in the recent *Country Information and Guidance, Sri Lanka: Tamil Separatism* Version 3.0 August 2016. The relevant passages include the following:

- *"Returning Tamils from abroad continue to be arrested at the airport"* [para 6.5.1]. Being *"questioned on arrival by CID, SIS and TID"* about *"whether they have been involved with one of the Tamil Diaspora groups"* is, like the torture of detainees, *"routine"* [para 6.10.3]. They are *"particularly subject to screening"* [para 6.5.2].

- *"A security force insider testified that since the presidential election in 2015 that military intelligence officials from Joseph Camp were actively looking for any Tamils returning home from abroad in order to interrogate them. The witness said that the intention was to abduct, detain and torture them"* [para 6.5.2].

- The 2016 ITJP also reported: *"During interrogation by the security forces several victims were falsely accused of working to restart the LTTE or of bringing the country into disrepute"* [para 6.6.8].

- The 2016 ITJP reports on the profile of those tortured: *"Tamils with tenuous links to the LTTE or low-level cadres continue to be targeted, along with their families"* [para 6.6.3]. *"Tamils returning from abroad continue to be arrested under the PTA on suspicion of old LTTE involvement"* [para 6.5.5].

70. The question before me is whether this recent background information signifies such changes to the risk to returnees as to justify a departure from the CG case of *GJ*. It has been observed in other cases, that country guidance is not inflexible and it must be applied by reference to new evidence as it emerges. In *KS (Burma) 3012 EWCA Civ 67* it was held that in order to depart from a CG case there needs to be cogent and reliable evidence that the appellant would face risk.

> 71. Again, after careful consideration of all the evidence including the recent CIG published in August 2016, I have reached the conclusion that there is sufficient cogent and reliable evidence that failed asylum seekers currently returning to Sri Lanka may be at real risk on *suspicion* of having actual or perceived LTTE connection or involvement in the past. This is different from the evidence that was before the Upper Tribunal in 2012-2013 in the CG case of *GJ*. And whilst the appellant may not have come within the risk categories of *GJ*, I have reached the conclusion that on the basis of this new background information that there is more likely than not a real risk to the appellant on return to Sri Lanka at the present time. This is based on the findings set out above which are cumulative: he will be returning as a Tamil from the North after 16 years absence and as a failed asylum seeker. He has been convicted for being involved in a criminal gang smuggling Sri Lankan Tamils into the UK through a network of contacts across Europe. He has had involvement with the diaspora in the UK including attending demonstrations that took place in two European capitals."

<u>The reasoning of the UT</u>

13. Judge Kekic's findings in respect of the FTT's determination are set out in two paragraphs of the UT's first determination:

> "10. The judge allowed this appeal because she considered that the appellant would be at risk on account of being a Tamil, a failed asylum seeker, absent for a long time, convicted of smuggling Tamils into the UK and involved in attending two demonstrations in European capitals. She based her conclusion on four citations from the respondent's August 2016 Information report on Sri Lanka. These essentially report on the continuing interrogation of Tamils at the airport and the targeting of their families. Contrary to Mr Paramjorthy's submission [Mr Paramjorthy appeared at that stage as counsel for the appellant], there is no mention in the judge's conclusion of the appellant's brother's involvement in the LTTE and this does not appear to have been included as a risk factor.
>
> 11. A judge is of course entitled to depart from country guidance on the basis of fresh evidence however where a departure is based on a single report, one would expect the judge to do more than rely on a limited portion of it. Mr Bramble [Senior Home Office Presenting Officer] is right to point out that overall the report does show many positive developments and the judge was obliged to consider those along with the sections singled out at paragraph 69 of her determination. I fully accept Mr Paramjorthy's submission that judges are not expected to go through every paragraph of a report and comment on it. That is not what the respondent is

> suggesting. Nor is this an issue of giving weight to the evidence, as suggested in Mr Paramjorthy's submissions. The respondent's complaint is that apart from the sections cited, the judge completely disregarded the rest of the report thereby providing an unbalanced picture of the situation in Sri Lanka. I wholly agree with that view. The judge should have summarised both the positive and negative aspects and then reached a conclusion. She failed to do so. That amounts to an error of law. As the asylum and article 3 conclusions were based on this flawed approach, I must set aside the decision to allow the appeals on those grounds."

The country guidance in *GJ*

14. Key passages from the headnote of the decision in *GJ* are set out in para 68 of the FTT's determination, quoted above. To place them in context, however, it is helpful to refer in addition to a few of the paragraphs that precede those passages:

> "(2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka is itself a spent force and there have been no terrorist incidents since the end of the war.
>
> (3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.
>
> (4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.
>
> …
>
> (6) There are no detention facilities at the airport. Only those whose names appear on a 'stop' list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days."

15. It is also relevant to mention a finding at para 351 of the decision in *GJ* (not included in the headnote summary):

> "… Attendance at one, or even several demonstrations in the diaspora is not of itself evidence that a person is a committed Tamil activist seeking to promote Tamil separatism within Sri

> Lanka. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual."

The Home Office's Country Information and Guidance ("CIG")

16. As its title indicates, the August 2016 version of the CIG which was in evidence before the FTT provided country information and guidance to decision-makers. The first part consisted of guidance. In a subsection on "Assessment of risk", it summarised the country guidance in *GJ* and continued:

> "2.3.6 Since the country guidance case of *GJ & Others* was handed down in 2013, a new government, led by President Maithripala Sirisena came to office in January 2015, following which there have been some positive developments in Sri Lanka, such as the element of fear has considerably diminished in Colombo and the South, and the restoration of the legitimacy and independence of Sri Lanka's Human Rights Commission. (See: Human Rights Issues).
>
> 2.3.7 The 'white van' abductions that operated outside all norms of law and order are now seldom reported. The number of torture complaints has reduced but new cases of Tamil victims continue to emerge and police reportedly often continue to resort to violence and excessive force. (See: Torture/ill-treatment).
>
> …
>
> 2.3.10 Despite the improvements made to date, there continue to be reports – albeit at much lower numbers – of abductions, torture complaints and police use of excessive force against Tamils perceived to support the LTTE. It is too early to assess whether the improved situation on the ground has been significant and durable to the extent that decision makers should depart from *GJ & Others*."

17. A further section, headed "Policy Summary", did not add materially to the guidance in *GJ*.

18. The second part of the CIG consisted of country information compiled from a wide variety of external sources. The main section (section 6) was headed "Human Rights situation for persons perceived to support the LTTE or to be involved in Tamil separatism". A subsection on "Treatment of Tamil returnees" included the following passages which were quoted in part in para 69 of the FTT's determination:

> "6.5.1 … Written statement submitted by the Society for Threatened Peoples, a non-governmental organization in special consultative status to the UN Human rights council, Ongoing oppression of minorities in Sri Lanka, 4 September 2015, stated that: 'Returning Tamils from abroad continue

being arrested at the airport. The surveillance of the civil society in the North and East is remaining high'.

6.5.2 The Immigration and Refugee Board of Canada reported in February 2015 that: 'Sources report that individuals returning from abroad are particularly subject to screening'. A July 2015 International Truth & Justice Project (ITJP) Sri Lanka report on Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015 stated that: 'A security force insider testified since the presidential election in 2015 that military intelligence officials from Joseph Camp were actively looking for any Tamils home from abroad in order to interrogate them. The witness stated that the intention was to abduct, detain and torture them'.

…

6.5.5 The International Crisis Group noted in an August 2015 report that: 'Tamils returning from abroad continue to be arrested under the PTA [Prevention of Terrorism Act] on suspicion of old LTTE involvement. According to some reports, after police detention, many are sent to the military-run rehabilitation program. Tamil politicians and activists allege that secret detention centres established by the old government continue, though officials deny this."

19. Para 69 of the FTT's determination also quoted in part the following passages from the subsection on "Torture/ill-treatment":

"6.6.3 The International Truth and Justice (ITJP) report, Silenced: survivors of torture and sexual violence in 2015, published in January 2016, stated:

'The Sirisena government in Sri Lanka was elected one year ago, on 8 January 2015, on a promise of change. In September 2015 at the Human Rights Council in Geneva the Government of Sri Lanka sketched out a plan to deliver post-war accountability …. On paper the plan looks impressive but the reality on the ground in the former conflict areas tells a very different story. Human rights violations by the security forces continue with impunity and a predatory climate against Tamils prevails. Tamils with tenuous links to the LTTE or low-level cadres continue to be targeted, along with their families. Victims and witnesses rightfully fear that coming forward will endanger their lives and those of their families.

…

6.6.7 The ITJP also stated in the report that they had taken 'sworn statements' from 20 victims, who, all but one were subjected to abduction in a 'white van', unauthorised detention,

> repeated torture and sexual violence. Five of the abductions took place after the August 2015 parliamentary elections; fifteen were after the January 2015 presidential elections ….
>
> 6.6.8 Looking at the profile of those who were abducted, the ITJP report, added:
>
> 'During interrogation by the Sri Lanka security forces several victims were falsely accused of working to restart the LTTE or bringing the country into disrepute by talking about what happened in the war and its aftermath …
>
> 'In some cases the interrogators showed the victims print outs of photographs of themselves or people close to them attending recent Tamil diaspora commemorative events abroad ….

20. Finally, a subsection on "Freedom of movement" included a paragraph on the proscription of certain Tamil diaspora organisations by a UN Security Council resolution on counter-terrorism: though the text does not say this, the BTF was one of the organisations originally proscribed but it was de-proscribed in or before November 2015. The paragraph quoted a letter dated 25 July 2014 from the British High Commission in Colombo which in turn cited various sources as stating that no returnees had been arrested on arrival because of association with one of the proscribed organisations. The citation from the letter ended, however, with the following passage which again was quoted in part in para 69 of the FTT's determination:

> "6.10.3 … The spokesperson from the DIE [Department of Immigration and Emigration] stated that returnees may be questioned on arrival by immigration, CID, SIS and TID. They may be questioned about what they have been doing whilst out of Sri Lanka, including whether they have 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 rival submissions

21. For the appellant, Mr Haywood submitted that there was no error of law in the FTT's determination and that Judge Kekic failed to identify an adequate basis for setting aside the determination on asylum and Article 3 grounds. The FTT judge set out the relevant evidence at length and came to detailed findings on all the issues in the appeal. She made her assessment on the basis of her findings of fact and directing herself as to the requirement to consider the guidance set out in *GJ*. She referred to the Home Office's more recent CIG, stating that relevant passages *included* those quoted in the determination, and there is no indication that her assessment of the country evidence was limited to those passages. The passages quoted were the most directly relevant to the issue in the appeal (the consequences of enforced return, and evidence of what had happened at the airport). They did not constitute cherry-picking but were a fair reflection of the general tenor of the recent evidence, with its repeated suggestion of returnees running into difficulties. The judge then directed herself

about the essential issue, namely whether the country evidence justified a departure from the guidance in *GJ*. She concluded, after careful consideration of all the evidence including the CIG, that a departure from the guidance in *GJ* was justified and that there was a real risk to the appellant on return to Sri Lanka.

22. For the Secretary of State, Ms van Overdijk submitted that Judge Kekic correctly identified an error of law in the FTT's determination and in doing so identified adequate and valid reasons for setting aside the determination on asylum and Article 3 grounds. Judge Kekic was correct to say that where a departure from country guidance was based on a single report one would expect the judge to do more than rely on just a limited portion of it; and she was correct to conclude that Judge Colvin's assessment and analysis of the CIG was unbalanced and failed to have proper regard to the report as a whole.

23. Ms van Overdijk made detailed criticisms of the lack of balance in the particular quotations selected by the FTT Judge. She referred to other sections of the CIG (including those set out or referred to at paras 16-17 above) to which, in her submission, the judge failed to have regard and which were said to confirm that the overall picture was not one of deterioration in the country conditions; that a person who evidenced past membership of, or connection to, the LTTE would not warrant international protection unless they had or were perceived to have a significant role in relation to post-conflict Tamil separatism or appeared on a 'stop' list at the airport; and that participating in diaspora activities such as attending demonstrations was not in itself evidence that a person would attract adverse attention on return to Sri Lanka.

24. It was further submitted that the FTT judge failed to balance the evidence before her to justify departing from the guidance in *GJ* and that the departure was not justified on the evidence. She failed to have regard to her own finding that the appellant had no previous profile in Sri Lanka, so that there would be no question of suspicion of past involvement with Tamil groups. There was no evidence to support the conclusion that his criminal activities in the United Kingdom were connected to the LTTE, and there is no reason why the authorities should suspect that he was a Tamil separatist or was diverting the funds he made through his criminal activities to Tamil separatism. His *sur place* activities were not in themselves evidence that he would attract adverse attention on return to Sri Lanka. Thus, none of the individual factors relied on by the judge was a good reason for finding a risk on return; and there was no basis for finding that their cumulative effect was to give rise to such a risk.

Discussion

25. Ms van Overdijk's submissions were very well made and came close to persuading me that the appeal should be dismissed. In the end, however, I have come to the conclusion that Mr Haywood's submissions are well founded and should prevail.

26. The overall approach of the FTT judge was unobjectionable. Having made relevant findings of fact, she took as the starting point for her assessment the country guidance in *GJ*, quoting key passages from the headnote of that decision. She directed herself correctly that in order to depart from such guidance there needed to be cogent and reliable evidence that the appellant would be at risk on return. She referred in that connection to *KS (Burma) v Secretary of State for the Home Department* [2013] EWCA Civ 67, where the central issue was in fact whether the relevant part of the

country guidance was itself legally flawed; but her point is in line with the observations of Stanley Burnton LJ in *R (SG (Iraq)) v Secretary of State for the Home Department* [2012] EWCA Civ 940, [2013] 1 WLR 41, at para 47, that "decision-makers and judges are required to take country guidance determinations into account, and to follow them unless very strong grounds, supported by cogent evidence, are adduced justifying their not doing so". Having so directed herself, the FTT judge reached the conclusion, "after careful consideration of all the evidence including the recent CIG", that whilst the appellant may not have come within the risk categories of *GJ*, on the basis of the new background evidence there was a real risk to him on return to Sri Lanka.

27. The focus of the present appeal is of course the particular use that the FTT judge made of the CIG as justifying a departure from the country guidance in *GJ*. The reasoning of the UT judge in finding an error of law in the FTT's determination can be summarised as follows. She said that "where a departure is based on a single report, one would expect the judge to do more than rely just on a limited portion of it". She went on to accept the submission for the Secretary of State that "apart from the sections cited, the judge completely disregarded the rest of the report thereby providing an unbalanced picture of the situation in Sri Lanka". In her view the judge "should have summarised both the positive and negative aspects and then reached a conclusion"; and her failure to do so amounted to an error of law.

28. In my view, however, the fact that the FTT judge set out only limited extracts from the CIG cannot sustain the inference that she disregarded the rest of the report. On the contrary, I see no proper basis for rejecting her statement that she had carefully considered "all the evidence including the recent CIG", or her statement that the relevant passages in the CIG "include[d]" those set out by her. Her approach was plainly to quote those passages from the CIG which she considered to be of particular significance in the context of her findings of fact. The passages in question were spread across 15 pages out of the 37 pages of the main body of the CIG. In order to identify and select them, she must have considered the whole report. She was not required to go through each section of the report in her determination or to set out a list of positive and negative factors from the report. What she was required to do was to set out her reasoning so that the parties could understand how her conclusion had been reached. In citing the passages she did from the report and explaining the conclusion she had reached in the light of the evidence as a whole, she did exactly that.

29. Ms van Overdijk contended that the passages quoted in the first bullet point of para 69 of the FTT's determination were fragmented and did not refer to parts of the same sections that contradicted those quoted, in particular the earlier part of paragraph 6.10.3 of the CIG, referring to sources stating that no returnees had been arrested on arrival because of association with one of the proscribed organisations. I do not attach any significance to the point about fragmentation. Nor do I accept that the evidence as to absence of arrests of returnees for membership of a proscribed organisation *contradicted* the evidence quoted by the judge about questioning of returnees as to whether they had been involved with one of the Tamil diaspora groups, or that the judge's reference to the latter point without also referring to the former resulted in a significant lack of balance. (Mr Haywood sought to rely on a further passage in the letter from the British High Commission quoted in paragraph 6.10.3 of

the CIG. The additional passage would have been helpful to him but was not in the material before the FTT and cannot therefore be taken into account.)

30. Ms van Overdijk also pointed out that the passage quoted in the third bullet point of para 69 related to "white van" abductions, which is a different point from questioning at the airport, and that no reference was made to the evidence in paragraph 2.3.7 of the report that "white van" abductions were now seldom reported. I accept that it would have been better if the judge had entered those qualifications in relation to the passage quoted; but the point about "white van" abductions was still potentially relevant to the appellant, even though the primary focus was on questioning on arrival at the airport.

31. Overall, I am not persuaded that there was a significant lack of balance in the FTT judge's approach to the CIG or that she was cherry-picking, relying only on a limited portion of the report to the exclusion of consideration of the rest of the report.

32. As to the assessment made by the FTT judge in the light of the material before her, Ms van Overdijk advanced a beguiling argument that none of the individual factors relied on by the judge was sufficient in itself to create a risk on return and that in the circumstances their cumulative effect could not give rise to such a risk. One cannot, however, dismiss so readily the cumulative effect of individual factors, in particular the possibility that a returning failed asylum-seeker Tamil who has not only participated in demonstrations as a member of a then proscribed organisation but has subsequently participated in a serious conspiracy to smuggle Tamils into the United Kingdom might be viewed differently from, and be subject to more intensive interrogation than, a returnee to whom only one of those factors applied. But in any event this trespasses into an area of assessment that is not before us on the present appeal. It may be that the appellant was fortunate to succeed as he did in the FTT. The UT judge's assessment of risk when remaking the decision differed materially from that of the FTT judge and led to the opposite conclusion. The issue before us, however, is not whether the conclusion reached by the FTT Judge was correct, or even whether it was a conclusion reasonably open to her on the evidence as a whole. The issue is whether she erred in law in the manner identified by the UT judge. For the reasons I have given, I am satisfied that she did not.

Conclusion

33. I would allow the appeal and set aside the UT's determination, thereby reinstating the FTT's determination.

Lord Justice Floyd:

34. I agree.