Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00057/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons promulgated**
On 26 June 2017	**On 7 July 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

S C
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Capel instructed by Tamil Welfare Association (Romford Road)
For the Respondent: Ms J Isherwood Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Hussain ('the Judge') promulgated on 30 March 2017 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

Background

2. The appellant is a national of Sri Lanka born on 18 December 1989. The basis of the appellant's claim is set out at [2 – 6] of the decision under challenge. The core of the claim is that following a bomb blast on 26 May 2008 near his home in Colombo the appellant was rounded up by the police and detained for seven days during which he was interrogated and tortured. His mother secured his release on payment of a bribe and thereafter arranged for an agent for him to leave for the United Kingdom in September of that year. The appellant remained in the UK although in August 2014 returned to Sri Lanka having got his mother to check with a lawyer that it was safe for him to do so. The appellant claimed he was in Sri Lanka when, on 6 September 2014, he was arrested by the police whilst he was travelling in a car, detained for three days, but again with the assistance of a lawyer arranged by his mother, managed to secure his release on bail. On 10 September 2014, the appellant flew to the United Kingdom but did not apply for asylum until one day before his leave to remain in the UK, which he was granted as a student, was due to expire.
3. The Judge sets out findings of fact at [34 – 48] of the decision which may be summarised in the following terms:

   i. The Judge was required to have regard to the background evidence relating to country conditions which has been looked at, leading to a finding there was nothing in that evidence that is inconsistent with the appellant's claims [34].
   ii. The respondent did not accept the appellant's account of his association with the LTTE. The respondent relied upon adverse credibility challenges as well as the appellant's delay in seeking asylum which was said to damage his credibility pursuant to section 8 of the Asylum and Immigration (Treatments of Claimants, etc.) Act 2004.
   iii. At [37] the Judge writes:

> 37. My starting point in the assessment of the appellant's credibility is Section 8 of the 2004 Act. I find that the appellant has delayed his claim and the explanation which he offers for the delay is not reasonable. The appellant's explanation is that when he returned in September 2014 and thereafter, he had leave to remain as a Tier 4 student which meant that he could continue to remain here in that capacity. The need to make the asylum claim arose from the fact that the Home Office was unlikely to grant any further extensions as a Tier 4 student. That excuse, in my view, does not avail the appellant because by his own account after his departure in September 2014, the authorities visited his mother on no less than three occasions, namely November 2014, August 2015 and May 2016 (see Question 130 of his interview) I find therefore that the appellant's credibility is damaged. However, I am aware that a finding of deemed damaged credibility under Section 8 of the 2004 Act is not determinative of the issue. The Tribunal, as any other decision-maker, has to consider the totality of the evidence in order to reach a final position on the appellant's account.

iv. There was no need to make a finding regarding the appellant's involvement with the LTTE in 2006 because his claim is that he was arrested in May 2008 as a suspect in a bomb blast on the 26th of that month [38].

v. The fact there was a bomb blast is evidenced in the various news articles to be found in the appellant's bundle. However, there is "absolutely no evidence directly to support the claim that the appellant was the subject of an arrest and detention over a seven-day period". The Judge agrees with the Home Office's reasons for doubting that part of his account and noted that the account of detention over a seven-day period is at odds with his mother's written statement which suggested that he had only been detained for two days [38].

vi. The Judge did not accept the alleged arrest and detention on 6 December 2014 [39].

vii. The Judge noted that neither in his interview nor written statements that the appellant make is there any mention of his return visits to Sri Lanka in 2009 and 2012 which only came to light in his mother's statement [40].

viii. The appellant's explanation for not mentioning he had returned to Sri Lanka was not accepted especially as the appellant was represented and those representatives would have gone through his immigration history and realised the significance of these facts. The appellant admitted his solicitor was aware of these facts [40].

ix. The significance of the appellant's ability to travel safely and return to the United Kingdom during the two periods mentioned is firstly that if he was the subject of adverse interest in 2008 the authorities would have kept a record of that and it was found highly unlikely that the appellant would not have been apprehended on return, particularly as 2009 and 2012 would have been much closer to the Civil War than 2014 [41].

x. The appellant claimed to have been detained for three days, interrogated, yet released on bail, but makes no mention of an appearance at court. He produced no paperwork to show this was police bail, if that was the applicable medium, and it was also found remarkable the appellant would have simply been asked to produce his national identity card despite having a passport with a Visa in it. The Judge concluded the authorities were more likely to have confiscated the passport. The appellant's evidence was that the authorities would have been aware he was out of the country until his return in August 2014 [42].

xi. The appellant sought to prove ongoing interest by the authorities per se by providing a letter purportedly from the Human Rights Commission of Sri Lanka dated 29 May 2016. The appellant's representatives wrote to the Tribunal to say enquiries with the organisation have revealed the letter was not issued by them. The Judge noted, however, that in his supplementary statement the appellant continued to rely on the letter as being genuinely issued by the Commission [43].

xii. The letter allegedly from the Commission is dated 29 May 2016 which is said by the Judge to be at odds with the appellant's own evidence which was that his mother made the report of the police visit on 28 May when she procured the letter. The letter refers to a police visit on 28 May whereas in the appellant's interview he claimed it was the 26th. The letter also simply states the appellant's mother went to their offices and told them there had been visits by the police who were looking for the appellant yet the report did not include the alleged visits in November 2014 and August 2015 [45].

xiii. On 2 February 2017, the appellant's current representatives wrote to the tribunal in a letter received 15th February 2017 attaching an email dated 3 February 2017 from the Human Rights Commission of Sri Lanka to the effect that the letter dated 29 May 2016 was not issued by them [46].

xiv. At [47] the Judge concludes:

> 47. Having looked at the totality of the evidence and for the reasons given above, I have come to the conclusion that the appellant has not demonstrated that there is a real degree of likelihood of being treated in a manner that may amount to persecution for the purpose of the Refugee Convention or otherwise incompatible with his rights under the Human Rights Convention. In any event, I agree with the Home Office position that the appellant is not a person of sufficient profile to fit the categories of those at risk as set out in **GJ and Other (post-civil war: returnees) Sri Lanka CG [2013] UKUT 000319 [IAC].**

xv. In relation to the appellant's human rights claim, it was found that for the reasons given by the Home Office the appellant is unable to satisfy the Immigration Rules and the circumstances are not sufficiently exceptional as to merit a grant of leave outside the Rules [48].

4. The appellant sought permission to appeal on three grounds, Ground 1 asserting an incorrect approach to the assessment of credibility by using Section 8 of the 2004 Act as a starting point, Ground 2 asserting an incorrect approach to the assessment of credibility by an unfair and improper reliance on the absence of documentation, and Ground 3 and improper assessment of credibility by failure to consider background country evidence.
5. Permission to appeal was granted by another judge of the First-tier Tribunal. The operative part of the grant reads "the fact that at paragraph 37 the Judge said that his starting point in the assessment of the Appellant's credibility was Section 8 may well have infected the whole of the Judges credibility findings in this matter. Thus, I find there is an arguable error of law in the decision."
6. There is no Rule 24 reply.

Error of law

7. A short preliminary discussion arose in relation to the grounds on which the appellant had been granted permission to appeal which was accepted by both advocates and the Tribunal would be all three of the pleaded grounds.
8. Ground 1 refers to section 8 of the 2004 Act and criticises the Judge for deciding at the outset that the appellants delay in the asylum claim was fatal to his credibility. This is a misrepresentation of the actual findings made by the Judge which are set out at [3 (iii)] above where [37] of the decision is set out in full. The Judge found that the appellant had delayed in his claim for asylum and that the explanation provided was not reasonable. The Judge found the appellant's credibility was damaged as a result of this fact. What the Judge does not do is state that such damage is fatal to the appeal without doing more. It can be seen at the end of [37] that the Judge finds "*However, I am aware that a finding of deemed damaged credibility under Section 8 of the 2004 Act is not determinative of the issue. The tribunal, as any other decision-maker, has to consider the totality of the evidence in order to reach a final position on the appellant's account*".
9. Not only does the Judge not find the appellant's delay in relation to Section 8 fatal or determinative, the Judge goes on to consider the merits of the appeal by reference to other matters. The Judge clearly sets out the correct self-direction that it is important to consider the totality of the evidence in order to reach a final position.
10. The appellant, in his grounds, relied upon *SM (2005) UKIAT 00116* in which the Tribunal said section 8 should not be the starting point for the assessment of credibility. The behaviour identified in that section is a factor to be taken into account in the overall assessment of credibility and its importance will vary from case to case. Although section 8 required the deciding authority to treat certain aspects of the evidence in a particular way it was not intended to and did not otherwise affect the general process of deriving facts from evidence.
11. In the more recent case of *JT (Cameroon) v SSHD 2008 EWCA Civ 878* the Court of Appeal said that section 8 factors should be taken into account in assessing credibility and were capable of damaging it but the section did not dictate that the relevant damage to section 8 inevitably results. It was possible to read the adverb "potentially" into section 8(1) before the word "damaging". In this case the Court concluded that there was a real risk that section 8 matters were given a statement and compartment of their own and were not taken into account as part of a global assessment of credibility. Accordingly, the appeal was remitted.
12. Ms Capel referred to this decision in support of her argument that even though the Judge made a finding at the end of [37] that "however, I am aware that a finding of deemed damaged the credibility under Section 8 of the 2004 act is not determinative of the issue, the Tribunal, as any other decision-maker, has to consider the totality of the evidence in order to reach final position on the appellant's account" the Judge erred. At [16] of *JT* the court found:

> 16. In fairness to the Tribunal, I note that, when considering section 8, the Tribunal stated, at paragraph 27, that it was not "a determinative factor on credibility, but as one of the matters that I should take into account when weighing the evidence that is placed before me". There was substantial conduct within the categories specified in section 8, including the use of a false travel document to enter the United Kingdom, a long delay in applying for asylum and the use of two identities in the United Kingdom. Moreover, the Tribunal conducted a very detailed assessment of matters relevant to credibility, other than section 8 matters, and the Tribunal did state, at paragraph 52, that it was "looking at the evidence in the round". I do not regard the positioning of the section 8 reference in the determination as necessarily fatal. I do, however, agree with the parties that there is a real risk that section 8 matters were given a status and a compartment of their own rather than taken into account, as they shall have been, as part of a global assessment of credibility.

13. In terms of the purpose of Section 8 the Court of Appeal stated at [21 – 22]:

> 21. Section 8 can thus be construed as not offending against constitutional principles. It is no more than a reminder to fact-finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility. If there was a tendency for tribunals simply to ignore these matters when assessing credibility, they were in error. It is necessary to take account of them. However, at one end of the spectrum, there may, unusually, be cases in which conduct of the kind identified in section 8 is held to carry no weight at all in the overall assessment of credibility on the particular facts. I do not consider the section prevents that finding in an appropriate case. Subject to that, I respectfully agree with Baroness Scotland's assessment, when introducing the Bill, of the effect of section 8. Where section 8 matters are held to be entitled to some weight, the weight to be given to them is entirely a matter for the fact-finder.
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> 22. Issues may arise as to precisely what conduct is capable of coming within section 8, and as to the relevance of that conduct to assessment of credibility in a particular case, but it is not, in my view, necessary to go into further detail to determine this appeal. Safeguards are incorporated within the wording of the sub-sections.

14. In *JT (Cameroon)* the section of the decision of the First-tier Tribunal which gave rise to concern was in paragraph 52 of the impugned decision where it is written:

> "In all the circumstances, and looking at the evidence in the round, I must apply the appropriate low standard of proof to the Appellant's account. Set out above, I am satisfied that very serious damage has been sustained to [the appellants) credibility by virtue of the operation of Section 8."

15. Ms Capel submitted that the Judge erred in the decision under challenge in this appeal in that the section 8 matters were given a statement and compartment of their own and were not taken into account as part of a global assessment of credibility.

16. I do not agree. It is important that the decision is read as a whole and the correct self-direction by the Judge in relation to the need to assess all the evidence before reaching a final position shows the Judge retained an open mind to the potential outcome, notwithstanding the finding clearly open to the Judge that the appellant's conduct

warranted the finding that his credibility had been damaged pursuant to section 8. The weight the Judge gave to this element was clearly one of a number of issues to be considered and to be weighed in the balance before arriving at the final position.

17. Within each pleaded heading for the three grounds are a number of subparagraphs. In relation to Ground 1, which appears on the face of it to relate solely to Section 8 in its heading, it is further asserted that the Judge erred in failing to determine a real issue relating to the appellant's previous involvement with and support for the LTTE. It is stated the Sri Lankan authorities suspected the appellant of having connections with the LTTE and that his previous links to the organisation was central to the appeal and relevant to the proper understanding of the circumstances leading to the authorities' interest in the appellant.

18. The Judge was aware of the appellants claim in relation to membership of the LTTE and specifically refers to this at [3] and [4] of the decision under challenge. The Judge also notes at [38] it was unnecessary to make a finding as to whether the appellant was involved with the LTTE in 2006 as his claim was that he was arrested in May 2008 as a suspect in a bomb blast on the 26th of that month. The nature of the appellant's claim is to have supported the LTTE and to have attended border training camps, none of which it has been established would have placed him at risk on return to Sri Lanka in 2014 in light of the relevant country guidance caselaw. It was also not the appellants claim before the Judge that he faced a real risk as a result of such support of the LTTE although had the assertion been that the appellant had a higher profile, one that would place him at risk, it is arguable that the Judge would have been required to deal with this aspect of the matter.

19. Ms Capel asserted that the information is relevant as it is known the Sri Lankan authorities have an intelligence led system and that had the appellant been involved with the LTTE as he claims, this may have indicated the detention in 2014 May have had some relation to his previous activities.

20. It is necessary to consider the decision as a whole which reveals that the Judge did undertake a cumulative assessment of risk and, in light of the evidence available, cannot be said to have materially erred in law in treating the aspect of low-level involvement in 2006 (if credible) in the manner set out in [38] of the decision.

21. Ground 2 asserts an unfair and improper reliance on the absence of documents by reference to [38] of the decision under challenge. It is asserted the Judge found there was no evidence directly to support the claim the appellant was the subject of an arrest and detention over a seven-day period which is claimed to be entirely inconsistent with what was said by the Judge in [34], in which it is recorded that the Judge had looked at the background country evidence and found nothing that was inconsistent with the appellants claims.

22. The Judge is not seeking corroboration in [38] but making a factual statement that there was no evidence to support the claim the appellant was the subject of an arrest and detention over a seven-day period, which is factually correct.

23. The finding in [34] refers to the need to have regard to the background evidence relating to the country concerned which the Judge found did not disclose anything inconsistent with the appellants claim relating to this aspect. That is a finding in relation to the country conditions not the specific claim made by the appellant in relation to his own experiences. For example, the Judge found that the country material supported the fact there had been an explosion on 26 May 2008 which is stated to be evidenced in various news articles to be found in the appellant's bundle [38].
24. The fact the Judge found the evidence of country conditions consistent with that element of the appeal did not prevent the Judge from seeking further evidence to support the subjective aspects of the appellants claim, namely that he was the subject of an arrest warrant and detained over a seven-day period. It was not "unfair or unreasonable" as alleged for the Judge to find a lack of evidence having regard to even the lower standard of proof. The fact there had been an explosion in Colombo was not proof of the fact the appellant was person responsible or a person who had been arrested and detained in connection with this event. The country material refers to the troubled history in Sri Lanka where a number of explosions and similar activities occurred throughout the country by the LTTE and others.
25. It is not disputed that release from detention by payment of a bribe was entirely consistent with the country guidance case of GJ and indeed earlier country guidance cases, but the issue was not whether the appellant had been released on the payment of a bribe but whether he had even been detained in the first place, which was not accepted. No arguable legal error is made out in relation to the Judges treatment of this aspect of the evidence.
26. Ground 3 refers to an alleged improper assessment of credibility and failure to consider the background evidence challenging the conclusion at [41] that it was highly unlikely that the appellant would not have been apprehended on return to Sri Lanka in 2009 in 2012. The appellant refers to [392] of GJ where the Upper Tribunal found:

> "We do not consider that the authorities failure to arrest the appellant between 2010 and 2011 indicates that they did not arrest and detain him in May 2011. It is entirely possible that their information improved during that period to the extent that they became interested in him, alternatively, that some other matter of interest had arisen in which they considered he might have information."

27. It is submitted the Judge failed to engage with an identical submission made on behalf of the appellant that it was entirely possible that the information or intelligence upon the appellant improved after his return visits to Sri Lanka to the extent the authorities then became interested in him or that some other matter arose in which the Sri Lankan authorities considered the appellant might have information leading to his second arrest in September 2014.
28. The Judge was entitled to note the failure of the appellant in both his interview and written evidence to make any reference of the return visits that only came to light in his mother's witness statements. The

Judge was clearly suspicious as to why the appellant would choose to omit such information.

29. The assertion evidence may have subsequently come to light that warranted the appellants detention in 2014 is speculative as there is no evidence to support the same. There was no evidence to show that anything specific had arisen that would lead to an increased risk as per GJ or heightened risk on the evidence.

30. It is also important to consider the situation that existed at the date the appellant claimed he returned to Sri Lanka and not following the defeat of the LTTE and the issue of residual risk which is that contemplated in GJ.

31. In the earlier country guidance case of LP (LTTE area - Tamils – Colombo – risk?) Sri Lanka [2007] UKAIT 00076 the Tribunal had set out twelve risk factors, which may increase the risk. These were:(i) Tamil ethnicity; (ii) Previous record as a suspected or actual LTTE member; (iii) Previous criminal record and/or outstanding arrest warrant; (iv) Bail jumping and/or escaping from custody; (v) Having signed a confession or similar document; (vi) Having been asked by the security forces to become an informer; (vii) The presence of scarring; (viii)Return from London or other centre of LTTE fundraising; (ix) Illegal departure from Sri Lanka; (x) Lack of an ID card or other documentation; (xi) Having made an asylum claim abroad; (xii) Having relatives in the LTTE.

32. As the appellant was able to enter and leave Sri Lanka on two occasions without experiencing difficulties it is safe to assume that no factors were known to the Sri Lankan authorities, including those relating to any previous involvement with the LTTE, that warranted the appellants detention or created a real risk for him on return, within Sri Lanka, or on departing through the airport to return to the United Kingdom.

33. In TK (Tamils – LP updated) Sri Lanka [2009] UKAIT 00049, also a former country guidance case, the Tribunal found that the records the Sri Lanka authorities keep on persons with some history of arrest and detention have become increasingly sophisticated; their greater accuracy is likely to reduce substantially the risk that a person of no real interest to the authorities would be arrested or detained.

34. In AN & SS (Tamils – Colombo – risk?) Sri Lanka [2008] UKAIT 00063, a former country guidance case, the Tribunal held there is no good evidence that the LTTE maintain a computerized database of their opponents, such that new arrivals in Colombo can be checked against it. Checks are, on the other hand, run on a computerized database by immigration officers when passengers arrive at Bandaranaike International Airport, or by members of the security forces when people are detained, but there is no good evidence to show that everyone who has in the past been detained and questioned about possible involvement with the LTTE is on that database. On the contrary, it is likely to contain the names only of those who are of serious interest to the authorities.

35. These cases again support the view that the appellant was of no adverse interest to the authorities in Sri Lanka on either of the occasions he was able to visit and leave that country, which again

supports the concern by the Judge in relation to the appellant's motives for failing to disclose this information.

36. At the conclusion of her intended submissions Miss Capel was asked to address an issue which by that point she had avoided, which was the reliance by the appellant upon a forged document in support of his claim for international protection.

37. Miss Capel accepted that the appellant had relied on the letter from the Human Rights Commission of Sri Lanka but asserted there had been no finding by the Judge that he had relied upon a forged document. It was claimed the appellant had received the letter from his mother and that the fact the letter was forged was only one matter relevant to assessing the credibility of the appellant in the round. It was submitted that even if the appellant had sought to bolster his claim by reliance upon a false document it did not mean that all his claim was unreliable as this was only one piece of evidence which should not be treated as determinative of the entire decision.

38. The assertion the appellant could somehow distance himself from the false document was shown to have no arguable merit in the response by Miss Isherwood who referred to the fact the appellant had been asked about the letter in cross examination. At [24] of the decision under challenge the Judge records:

> 24. In cross examination, the appellant was asked when he became aware that the letter from the Human Rights Commission existed. He said that after two or three days of getting the letter, she told him about it. He confirmed that he had been interviewed by the Home Office on 9 December 2016. However, he asked for the letter in September to be sent to him. He does not know why it was not sent to the Home Office before the appeal. What he told the interviewing officer was that he will submit a letter from Human Rights and that two people dressed as police officers visited his mother. He does not remember when he received the letter in the United Kingdom. He recalls receiving it in September. He admitted that the letter was in his possession before the interview. He does not know why he did not send it to the Home Office. The reason he asked for it in September was because he had applied for asylum and thought that he will need it.

39. The appellant therefore sought the letter, received it, failed to mention it in his interview or disclose the document, and sought to rely on it at the hearing. The letter is clearly a false and fraudulent document. Even though the appellant in his witness statement claimed that his mother had said the letter was genuine, either his mother or the appellant has lied as clearly the letter is not genuine. Submitting a false document is damaging to an individual's credibility or the credibility of the overall claim.

40. Whilst it is accepted that some parts of the case may not be believed but this does not mean that other parts of the claim cannot be believed, all matters which must be considered in the overall assessment in accordance with the self-direction by the Judge.

41. In relation to the section 8 point, Miss Isherwood also referred to the fact that section 8 only appears in [37] whereas the findings of fact commence from [34]. It is also the case that the Judge undertook the holistic assessment of all aspects of the decision.

42. Miss Capel has failed to establish that the finding by the Judge that there is insufficient evidence to support the claim that the appellant had been arrested and detained over a seven-day period is infected by arguable legal error. The Judge gives adequate reasons for why this aspect of the claim could not be believed.
43. In relation to the appellant visiting Sri Lanka in 2009 and 2012, it was not part of the appellant's case that he had paid an agent to get him into Sri Lanka indicating must have passed through the airport and the standard immigration and security checks in place at that time.
44. I find that the Judge not only considered the evidence with the required degree of anxious scrutiny but has also given adequate reasons to support the findings made. The core finding is that the appellant is not a credible witness, that his claim to have been detained over a seven-day period is not true (especially in light of the fact that it was found to be at odds with his mother's written evidence which suggested a two-day period of detention [38]), that the appellant's profile does not create a real risk on return, and that a key document relied upon by the appellant (which is stated to be at odds with the appellant's own evidence [45]) is also a false/fraudulent document.
45. The overall conclusion that the appellant had not established an entitlement to a grant of international protection or leave to remain on human rights grounds has not been shown to be affected by legal error material to the decision to dismiss the appeal

Decision

46. There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.

Anonymity

47. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 6 July 2017