



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00485/2015
PA/00487/2015
PA/00488/2015

THE IMMIGRATION ACTS

**Heard at Field House
On Friday 12 May 2017**

**Determination Promulgated
On Tuesday 23 May 2017**

**Before
UPPER TRIBUNAL JUDGE SMITH**

Between

**MR D K A
MRS K K M
MISS A T D
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Benfield, Counsel instructed by Theva solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. It is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the

Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

- 1.** The Appellants appeal against the Secretary of State's decision dated 18 June 2015 making a deportation order against the First Appellant under s32 UK Borders Act 2007 and refusing their protection and human rights claims. The appeals of the Second and Third Appellants are dependent on the outcome of the First Appellant's appeal.
- 2.** The Appellants' appeals were heard and dismissed by First-tier Tribunal Judge Aujla by a decision promulgated on 28 July 2016. The Judge held that deportation of the First Appellant and the consequent removal of the Second and Third Appellants would not breach the UK's obligations on asylum and human rights grounds and that the Appellants were not entitled to humanitarian protection.
- 3.** The Appellants sought permission to appeal to this Tribunal on protection grounds only. Permission to appeal was granted by First-tier Tribunal Judge Brunnen on 17 August 2016.
- 4.** By an error of law decision promulgated on 27 October 2016, I found an error of law in relation to one aspect of the Appellants' protection claim only. I therefore set aside one paragraph only of Judge Aujla's decision (paragraph [70]). The focus of the Appellants' protection claim before me is therefore very narrow indeed. I deal with that below under the heading of "The Appellants' Claim". My error of law decision is appended to this decision for ease of reference.
- 5.** Also appended to this decision is a further decision promulgated on 11 January 2017 made following a hearing on that day. By that decision, I adjourned the hearing of the appeal as a result of late service of further evidence by the Appellants on the Respondent. The Senior Home Office Presenting Officer who attended that hearing therefore had no prior notice of that evidence. He also asked for time to verify one of the further documents put forward. The Appellants did not object to that course but asked that the Respondent also consider verifying another document adduced earlier in the proceedings. That the Respondent agreed to do.
- 6.** The Respondent failed to file a document verification report in relation to those documents. Mr Duffy who appeared for the Respondent at this hearing indicated that no verification checks had been made for reasons which appear from an email which he read out at the hearing

and with which I deal below under the heading “The Respondent’s Case”.

7. At the hearing before me, the First Appellant gave oral evidence. The interpreter arrived late but the First Appellant indicated that he was content to give evidence in English and did so. He was not asked any questions by Mr Duffy. I asked one question by way of clarification. Otherwise, the hearing proceeded on the basis of oral submissions of both advocates which I have set out below under the respective headings.

Legal Framework

8. In order to be recognised as a refugee an appellant must show that he has a well-founded fear of persecution for one of five reasons set out in Article 1(A) of the 1951 Refugee Convention ie for reasons of race, religion, nationality, membership of a particular social group or political opinion. The 1951 Convention is interpreted in European law through Council Directive 2004/84/EC (“the Qualification Directive”). The Qualification Directive is incorporated in UK law through The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and the Immigration Rules.
9. Article 3 of the 1950 European Convention on Human Rights prohibits torture, inhuman or degrading treatment. It is an absolute right from which there can be no derogation. An appellant must show that there are substantial grounds for believing that there is a real risk that the consequence of removal would violate his rights under Article 3.
10. The burden of proof is on the Appellant to establish his claim and that there is a real risk that he will be subjected to persecution or serious harm. The assessment of risk must be considered at the date of the hearing before me.

The Appellants’ Claim

11. Since the only claim which remains before me is the protection claim which focusses on the position of the First Appellant, I refer below only to “the Appellant”. As indicated at [1] above, though, the Second and Third Appellants’ claims are dependent on the First Appellant’s claim and therefore stand or fall with his claim.
12. The Appellant is a national of Sri Lanka. He came to the UK as a student in 2004. His leave was extended first as a student and then as a Tier 1 migrant. The Appellant was the manager of a Money Exchange Bureau. The Appellant was arrested in 2009 alongside the owner of that business (“RT”) and the compliance officer (“TK”) for alleged money laundering. He was convicted on 25 March 2014 of converting criminal property and sentenced to two years’ imprisonment. He was served with notice that he was liable to be deported and then claimed asylum.

- 13.** The Respondent accepted that the Appellant returned to Sri Lanka on 22 November 2013 and returned to the UK on 14 December 2013. That is relevant since it formed the basis of the Appellant's primary protection claim.
- 14.** The basis of the Appellant's primary protection claim (hereafter "the primary claim") is that he had taken an interest in war crimes committed against Tamils during his return to Sri Lanka as a result of being shown certain photographs by friends there. He says he arranged to obtain a CD bearing the photographs to bring back to the UK to expose the abuse. As a result, he had been kidnapped and detained, he says by the Sri Lankan authorities. He says he was detained for three days during which he was beaten and verbally abused and accused of being a supporter of the LTTE. He was then released on payment of a bribe.
- 15.** His subsidiary claim (hereafter referred to as such) is that he is at risk by reason of his criminal conviction in the UK which attracted publicity in Sri Lanka. He would be of interest because it would be assumed that he has money and he fears kidnap for ransom.
- 16.** Judge Aujla did not believe the Appellant's claim for the reasons set out at [58] to [70] of the Decision. By my error of law decision, I found no error of law in relation to the Judge's findings about the primary claim. His decision that the primary claim is not credible therefore stands. The primary claim remains relevant however for the adverse credibility findings and the effect of those on the subsidiary claim. It was in relation to the subsidiary claim that I found an error of law and therefore set aside [70] of Judge Aujla's decision.
- 17.** The subsidiary claim as originally presented to me was that, as a result of the widespread reporting of the Appellant's conviction in the UK, which reporting also extended to Sri Lanka, the Appellant would be considered to be wealthy and would be at risk of kidnapping for ransom. As an aside, it was also noted that the Sri Lankan authorities would be aware of the Appellant's involvement in this crime.
- 18.** The Appellant has produced and relies on a number of reports of his conviction. Those include a press release from HM Revenue and Customs, a report on the internet in "The Africom" and on the website of "Asian Express" as well as reports which appeared in the press in the UK.
- 19.** Between the error of law hearing and the hearing initially fixed for the re-making of the decision, the Appellant produced further evidence. I gave permission for this to be adduced in accordance with the directions given in my error of law decision. That evidence consisted of the following:-

- A number of e mails passing between the Appellant and his brother who remains in Sri Lanka dating between January and October 2016 as well as mobile phone records which report threats made to the family. It is said that the family reported the threats to the police;
- A letter dated 9 January 2017 written by Mr Appathuray Vinayagamoorthy, LLB, Ex MP, a Sri Lankan Attorney-at-law, Notary Public and Commissioner for Oaths;
- Press and internet articles concerning abductions and “white van” disappearances for ransom and other articles concerning continued ill-treatment of Tamils by the Sri Lankan authorities.

20. The main focus of the Appellant’s subsidiary claim is now a fear of the Sri Lankan authorities as a result of his conviction in the UK. He says that the authorities perceive that the motivation for the offence was to fund the LTTE. This is exacerbated, he says, by the belief of the authorities that his former employer, RT, is a LTTE fundraiser although in oral evidence the Appellant confirmed that he has had no contact with RT or TK since leaving prison.

21. The Appellant relies in this regard not only on the reports of threats made to his brother but also on the letter from the Sri Lankan Attorney. Given the importance of that evidence to the Appellant’s case, I set it out in full below.

“I am an Attorney-at-Law of the Supreme Court of Sri Lanka with 31 years standing in the profession and was also a Member of Parliament representing Jaffna constituency in the Sri Lankan Parliament. In my legal practice, I have for many years regularly represented Tamils arrested and detained under the Prevention of Terrorism Act 1978 and the Emergency Regulations.

As per my records dated 14 October 2016, I can confirm that [AI] and [AA] sought my assistance. They were introduced me to [sic] by a former client, [C].

According to [AI] and [AA] from [place of residence] they have been receiving threats and abuses over the telephone. On one of the occasions, [A] was physically threatened and beaten by unknown of persons [sic]. They filed a complaint at [name of police station], the local police station, however, after filing the complaint the verbal abuses over telephone only increased. They fear the threats were made with the connivance of Criminal Investigation Department (CID). The main reference of the abuses meted out is regarding [D], [I’s] son, who is in the UK.

In my line of practise I have witnessed several occasions when the CID resort to local nationalist persons attached to the ruling power to harass and intimidate people of Tamil origin. The modus operandi in the case of [I] and her son [A] shows that the persons threatening them have all the information about [I] and [A], including the complaint they filed with the police, the contents of which outsiders are impossible to have access.

I spoke to an officer of [name of police station] on 20 October 2016 to gather information about the matter. The officer took my details and

informed me that they would get back to me after going through their records.

Two days later, I received a call from [name of police station]. We had a conversation in Sinhala. He submitted that there is a complaint lodged by [A] about the harassment and intimidation received by them. However, he accused that [DA] laundered money in the UK to revive the LTTE in Sri Lanka. The LTTE has links and has been involved in all notorious areas; human trafficking, weapons, transport heroin and money laundering. [D] is part of the organised crime cartel of the LTTE that engaged in money laundering for the LTTE. He further alleged that [D] was trying to bring disrepute to the Sri Lanka soldiers who successfully fought the war against terrorist organisation by giving untrue evidence about Sri Lankan soldiers.

I was shocked after hearing the allegations made against [D] and asked him how they could make such serious accusations against [D]. The officer refused to speak any further about the matter.

[D] was accused of supporting terrorism and concealed the wealth accumulated by criminal wrong doing. He will be apprehended soon after landing in Sri Lanka according to the police. According to the officer, [D] was intentionally working for the LTTE and was active participant in the money laundering wing of the LTTE.

I conveyed all that was said to me by the officer and asked [A] to seek assistance from any politician who has influence to speak to the Police to solve their problems, as there are no legal avenues to challenge their allegations or to prevent the covert actions taken against them. I expressed my inability to assist them further in the matter."

- 22.** In addition to the further evidence referred to above, Ms Benfield also produced at this hearing two letters dated 13 March 2017 and 3 May 2017 from Luton Mental Health and Wellbeing Service concerning the Appellant's mental health problems. These follow on from a report of Dr Osagie Ogbeide which was before Judge Aujla. That formed part of the Appellant's grounds at the error of law stage but I found that there was no error of law in the Judge's treatment of that report. Whilst the Judge accepted Dr Ogbeide's diagnosis of post-traumatic stress disorder, he did not accept the causation of that as being the Appellant's detention in Sri Lanka, particularly since the Appellant's mental health problems surfaced during his detention in the UK in consequence of his conviction.
- 23.** In relation to the more recent evidence, Ms Benfield explained that the purpose of this related to the impact of the Appellant's mental health problems on his oral evidence. Since the Appellant was not cross-examined at the hearing before me, that evidence had little bearing on the issues I have to decide. Ms Benfield submitted though that it continued to have relevance to the weight I should give to the earlier adverse credibility findings.
- 24.** Ms Benfield provided a very helpful speaking note setting out the consistency of the Appellant's subsidiary claim with the case law relating to Sri Lanka asylum claims. She also drew my attention to

recent background evidence, in particular the Home Office Country Information and Guidance concerning Tamil separatism dated March 2017. She submitted that it is plausible that the authorities would suspect his involvement in money laundering to be linked to LTTE fundraising. She submitted that this was not simply a risk which might eventuate but one which has arisen as confirmed by the letter from Mr Vinayagamoorthy. She submitted that the Appellant's name will appear on a "stop list" and the Appellant will be arrested and detained when he returns to Sri Lanka. She submitted that the conditions for Tamils suspected of continued LTTE involvement remain such that there is a real risk of ill-treatment in detention reaching the Article 3 ECHR threshold.

The Respondent's Case

- 25.** As I note at [5] above, I adjourned a previous hearing fixed for the re-making of the decision so that the Respondent could verify the letter from Mr Vinayagamoorthy as well as a document said to be a report to the police in January 2016 made by the Appellant's family in relation to the threats they have received. As I note at [6], the Respondent failed to file any document verification report.
- 26.** At the start of the hearing, Mr Duffy referred to an email received in relation to the request for document verification. That email was not physically admitted in evidence because Mr Duffy said that it was marked as confidential, no doubt because it contained the names of those who were to conduct the verification. However, I allowed Mr Duffy to read the email out and I treated that as sufficient evidence of the content of the email. Ms Benfield did not object to that course.
- 27.** The writer of the email indicated that no verification had been carried out of the Attorney's letter because letters from him had been verified in two other cases previously and were accepted as being genuine. It was accepted that Mr Vinayagamoorthy is registered with the Sri Lankan Bar Council. The letter is therefore accepted as being genuine.
- 28.** In relation to the report to the police station, the writer indicated that the report was genuine. However, the point was also made that the report only confirmed that a complaint had been made and did not substantiate the contents of the complaint. The Respondent therefore accepted that the threats were reported to the police but did not accept that this meant that threats had genuinely been made.
- 29.** In his submissions, Mr Duffy pointed out that Judge Aujla's decision stands in relation to the Appellant's primary claim. As such, the Appellant has been found not to be credible in relation to that claim. It is not accepted that he has previously been suspected by the authorities of LTTE involvement or detained by them. The Appellant's

wife was also found not to be credible. Mr Duffy submitted that the adverse credibility findings attach to the evidence of the police complaint and emails from the Appellant's brother since those had to be seen in the context of the previously fabricated claim. That evidence can be given little weight as it is self-serving.

- 30.** In relation to the subsidiary claim, Mr Duffy submitted that the risk arising at the hands of the authorities would require a perception by them that the Appellant has links to Tamil separatism notwithstanding that he has no prior LTTE involvement and has been found not to have been of interest to the authorities previously. As such, he submitted that the claim that the authorities would now be interested in him simply because of the criminal conviction was not plausible.
- 31.** Mr Duffy accepted that there have been cases where those committing fraud have been suspected by the authorities of fundraising for the LTTE. However, he said, the intelligence gathering by the security services in Sri Lanka has been found to be sophisticated. The reporting including the Judge's sentencing remarks do not make any link between the money laundering and LTTE fundraising. The crime was reported to be motivated by the lifestyles of those convicted and the proceeds were reported to have been used to buy properties, cars and fund private education for their children. The Judge's sentencing remarks also make clear that this Appellant was not one of the ringleaders and had come late to the criminal enterprise.
- 32.** In relation to the risk of kidnapping by those seeking to extort money by ransom demands, whilst the background evidence shows that such kidnappings does occur from time to time, the problem is not sufficiently systemic to give rise to a real risk.

Decision and Reasons

- 33.** I start by noting what is not in issue before me. First, there is no separate Article 8 claim, the Appellants' claim having been rejected by Judge Aujla and no challenge having been made in relation to that claim. Second, the certification of the Appellant's protection claim under section 72 Nationality, Immigration and Asylum Act 2002 was set aside by Judge Aujla. That is not challenged by the Respondent. Third, the Appellant's primary claim to be at real risk of persecution or ill-treatment on return as a result of events said to have occurred in November 2013 was not found credible. I reject Ms Benfield's submission that I should be sceptical about the Judge's previous credibility findings because of the Appellant's mental health problems. First, the Judge had a medical report setting out those mental health problems and was aware of those when he reached his findings. Second, as Ms Benfield herself accepted, the two documents produced at this hearing are not written by mental health experts; the writers do not profess any specialist knowledge of the Appellant's mental health

problems. It is also relevant to the Appellant's credibility that he was convicted of a crime involving dishonesty. The Appellant's wife was also found not to be credible by Judge Aujla. For those reasons, I take into account against the Appellant that both he and his wife have been found not to be credible in the past and that the Appellant has fabricated his primary claim.

- 34.** I start from the premise, therefore, in relation to the subsidiary claim that the Appellant is a Tamil who has not shown any prior interest in or been previously involved in the LTTE cause, has not participated in demonstrations or other activities in support of the LTTE in the UK and was able to return to Sri Lanka on a number of occasions including in November 2013 without exciting any interest by the Sri Lankan authorities. Those visits though pre-date the Appellant's criminal conviction.
- 35.** The only issue which remains for me to determine therefore is whether the Appellant is at risk as a result of his criminal conviction. I deal first with the claimed risk that others will kidnap him in order to obtain a ransom because of his perceived wealth. I accept it is plausible that this might occur based on background evidence. However, the reports which are in evidence show isolated incidents. That evidence does not demonstrate even to the lower standard that there is a real risk that this will occur. I therefore reject the Appellant's subsidiary claim insofar as it relates to a risk of kidnap by non-State agents.
- 36.** I turn then to the subsidiary claim that, as a result of the Appellant's criminal conviction, the authorities will perceive the Appellant as being a fundraiser for the LTTE because of the nature of the crime committed thereby placing the Appellant at risk of arrest and detention on return. The Respondent says that this is not plausible. The Appellant says that this is not simply plausible but the risk has been shown to have arisen by evidence, in particular the letter from Mr Vinayagamoorthy.
- 37.** I accept that reporting of the Appellant's criminal conviction is likely to have reached Sri Lanka by the publication of reports on the internet. Conversely, I do not accept as plausible that the UK conviction of a Tamil without any known LTTE background or involvement would in general give rise to a real risk. Much depends on the individual facts of the conviction and the perception that the reporting would generate.
- 38.** I accept that the reporting shows that the crime was committed for financial gain. There is no suggestion in either the press/internet reports or the Judge's sentencing remarks of money being laundered for any organisation. However, I also accept Ms Benfield's submission that it is not simply a matter whether the crime was committed to fund

the LTTE but whether the authorities will perceive that to be the motive. I pause to note that there is no suggestion that the Appellant has actually been involved in fundraising for the LTTE.

- 39.** There is a suggestion that the Appellant's employer, RT, was believed by the authorities to be a fundraiser for the LTTE and to have property in Sri Lanka which was used by the LTTE. However, that emerges only from evidence given by the Appellant orally in interview which itself is said to have arisen from questions asked of him by the authorities when he was detained in November 2013. Since I have not accepted, based on Judge Aujla's findings, that such detention and questioning occurred, it follows that I give that evidence little weight. There is no independent reporting that RT is believed to be a LTTE fundraiser. Further, and in any event, the Appellant is no longer in contact with RT and, given the sophisticated intelligence of the Sri Lankan authorities, they would no doubt be aware of that if that were the source of their interest.
- 40.** I also give little weight to the emails from the Appellant's brother and the complaint made to the police. I note that although the Appellant's brother said that he changed his mobile number as a result of threats, the Appellant's brother and mother remain living in Sri Lanka apparently in the same location. Neither is there any evidence that these threats come from the authorities. I accept that the Appellant's brother and mother reported threats to the police. However, even if I accept that they did so because they were genuinely receiving threats, the fact that they reported those threats to the police does not suggest to me that they believed that the authorities were the source of the threats.
- 41.** The letter from Mr Vinayagamoorthy though is in a quite different category. I have set out the content of that letter at [21] above. As is there shown, this is not simply a letter confirming what the Appellant's relatives have said. It is direct evidence from a lawyer that he received information from the police that they suspect the Appellant as being involved in fundraising by the LTTE because of the Appellant's criminal conviction. The Respondent has conceded that the letter is genuine. Although the Court of Appeal in PJ (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 1011 confirmed that there is no separate category of lawyer's letters creating any different evidential presumption, based on Mr Vinayagamoorthy's position and standing (both as a lawyer and former MP), I give weight to the content of that document as showing that the Appellant is of interest to the authorities because he is perceived as assisting in fundraising for the LTTE.
- 42.** I have also considered whether the Appellant's claim is plausible bearing in mind the complete absence of any prior involvement with or

interest in the LTTE and that he did not previously excite any interest by the authorities on that account.

43. The Appellant relies on the following categories in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) ("GJ") as relevant to his case:-

“(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;

.....

(d) A person whose name appears on a computerised “stop” list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a “stop” list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.”

44. I begin by observing that, although Ms Benfield relied in her submissions on risk category (d), there is no evidence before me that there is a Court order or arrest warrant in place against the Appellant. Although the Appellant said in interview that his name will be on a stop list, I give that evidence little weight due to general concerns about the Appellant’s credibility. Mr Vinayagamoorthy does not say that the Appellant’s name was on such a list and he does not assert that the police officer with whom he spoke said there was any arrest warrant or court order in existence. I do not accept therefore that the Appellant’s name would appear on a stop list.

45. However, the evidence in GJ is that intelligence gathering by the Sri Lankan authorities is very sophisticated (see [8] of the headnote). That this is so is confirmed by the Respondent’s own country information (referred to at [24] above) citing from GJ. The relevant passage reads as follows.

“[2.4.9] 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’ (paragraph 356 (8)).

[2.4.10] Unlike in the past, returnees who have a previous connection with the LTTE are able to return to their communities without suffering ill-treatment. Civil society groups on the ground did not report recent issues of ill-treatment. The police interest, if any, is not in any previous involvement with the LTTE, but on whether the person has committed any criminal act. This is because many had left the country using forged identities and the police were therefore seeking to establish the true

identity of the returning person and whether they are wanted for any criminal acts in addition to leaving the country with false documents”

46. Whilst there is no suggestion that there is any issue with the Appellant’s identity, that passage supports the Appellant’s claim that he would be questioned about his immigration and other history on arrival and that disclosure of his criminal conviction would emerge either via that questioning or possibly even before then during the returns process. I therefore accept as plausible that the intelligence services would be aware of the Appellant’s return to Sri Lanka even if his name does not appear on a stop list.

47. As is made clear in GJ and as emphasised by the Court of Appeal in MP and NT (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 829, interest by the Sri Lankan authorities is based not on a person’s past but on present and future support for the LTTE. This is encapsulated in the following passage (dealing with the Upper Tribunal’s decision in GJ):

“[50]The clear message of the Upper Tribunal’s guidance is that a record of past LTTE activism does not as such constitute a risk factor for Tamils returning to Sri Lanka, because the Government’s concern is now only with current or future threats to the integrity of Sri Lanka as a unitary state; and that that is so even if the returnee’s past links with the LTTE were of the kind characterised by UNHCR as ‘more elaborate’. I respectfully agree with the Vice-President that that is a conclusion which it was entitled to reach. It is also clear that the Tribunal believed that ‘diaspora activism’, actual or perceived, is the principal basis on which the Government of Sri Lanka is likely to treat returning Tamils as posing a current or future threat; and I agree that too was a conclusion which it was entitled to reach. But I do not read para. 356(7)(a) of its determination as prescribing that diaspora activism is the only basis on which a returning Tamil might be regarded as posing such a threat and thus of being at risk on return. Even apart from cases falling under heads (b)-(d) in para 356(7), there may, though untypically, be other cases (of which NT may be an example) where the evidence shows particular grounds for concluding that the Government might regard the applicant as posing a current threat to the integrity of Sri Lanka as a single state even in the absence of evidence that he or she has been involved in diaspora activism.”

48. Just as it may be the case, therefore, that an individual with fairly extensive past links with the LTTE is no longer of interest because that individual has shown no signs of continuing with that support, so I find it plausible that an individual such as the Appellant with no past profile as a supporter of the LTTE might nonetheless be perceived by the Sri Lankan authorities as a supporter because of current activities. More usually, the activities relied upon are involvement in demonstrations and the such like. The Appellant has not sought to exaggerate his claim by placing reliance on such matters. It is though plausible that a group of Tamil men convicted of an offence of money laundering would

raise the suspicions of the Sri Lankan authorities about their motivation. It is therefore plausible that the Appellant would become of interest to the authorities notwithstanding the lack of any prior interest (based on Judge Aujla's findings) and the lack of any prior involvement with or support for the LTTE.

- 49.** For those reasons, I accept that the Appellant's claim is plausible judged against background evidence. Placing weight as I do on the letter from Mr Vinayagamoorthy, I also accept that the Appellant has demonstrated that there is a real risk in his case that the authorities perceive him as a person who is involved in fundraising for the LTTE and that he would be of interest on return for that reason. The Appellant therefore falls within the risk category (a) in GJ and there is a real risk that he will be arrested and detained on that account.
- 50.** The Respondent does not dispute that, if there is a real risk that a Tamil individual will be of interest to the authorities on return and will, as a result of that interest be arrested and detained, there is a real risk of ill-treatment contravening Article 3 ECHR.
- 51.** For those reasons, the Appellant has demonstrated that he has a well-founded fear of persecution or ill-treatment by reason of the political opinion which will be imputed to him by the Sri Lankan authorities. The Appellant's appeal is therefore allowed on protection grounds. Since the appeals of the Second and Third Appellants are dependent on the First Appellant's appeal, their appeals are also allowed.

DECISION

The Appellants' appeals are allowed on protection grounds.

Signed
Upper Tribunal Judge Smith



Dated: 16 May 2017

APPENDIX: ERROR OF LAW DECISION



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SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Murphy, Counsel instructed by S Satha & Co solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

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Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

ERROR OF LAW DECISION AND REASONS

Background

1. The Appellants appeal against a decision of First-Tier Tribunal Judge Aujla promulgated on 28 July 2016 (“the Decision”) dismissing the Appellants’ appeal against the Secretary of State’s decision dated 18 June 2015 making a deportation order against the First Appellant under s32 UK Borders Act 2007 and refusing their protection and human rights claims. The appeals of the Second and Third Appellants are dependent on the outcome of the First Appellant’s appeal in relation to the protection claim which is the only challenge to the Decision before this Tribunal. I therefore refer hereafter only to his case and I refer to him hereafter as “the Appellant”.
2. The Appellant is a national of Sri Lanka. He came to the UK as a student in 2004. His leave was extended first as a student and then as a Tier 1 migrant. The Appellant was arrested in 2009 for alleged money laundering. He was convicted on 25 March 2014 of converting criminal property and sentenced to two years’ imprisonment. He was served with notice that he was liable to be deported and then claimed asylum.
3. The Respondent accepted that the Appellant returned to Sri Lanka on 22 November 2013 and returned to the UK on 14 December 2013. That is relevant since it forms the basis of the Appellant’s primary protection claim as it is now pursued.
4. The basis of the Appellant’s primary protection claim (hereafter “the primary claim”) is that he had taken an interest in war crimes committed against Tamils during his return to Sri Lanka as a result of being shown certain photographs by friends there. He says he arranged to obtain a CD bearing the photographs to bring back to the UK to expose the abuse. As a result, he had been kidnapped and detained, he says by the Sri Lankan authorities. He says he was detained for three days during which he was beaten and verbally abused and accused of being a supporter of the LTTE. He was then released on payment of a bribe. His subsidiary claim (hereafter referred to as such) is that he is at risk by reason of his criminal conviction in the UK which attracted publicity in Sri Lanka. He would be of interest because it would be assumed that he has money and he fears kidnap for ransom.
5. Judge Aujla did not believe the Appellant’s claim for the reasons set out at [58] to [70] of the Decision. He took into account the guidance given in GJ and others (post-civil war returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). Permission to appeal was granted by First-tier Tribunal

Judge Brunnen on 17 August 2016 on all grounds. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

The grounds and submissions

6. Ground one focusses on the Judge's treatment of the medical evidence which was in the form of a psychiatric report of Dr Osagie Ogbeide. This was considered by the Judge at [72] of the Decision. The Appellant's complaint in this regard is that the evidence was not considered in the round with the other evidence when assessing the Appellant's credibility in relation to the primary claim. Instead, his credibility was rejected and the Judge then dismissed the medical evidence on the basis that it did not assist the Appellant's case in this regard.
7. The second ground challenges two of the reasons why the Judge found the Appellant's primary claim not to be credible. The first concerns the fact that the Appellant's solicitor's initial letter in relation to the asylum claim did not mention the Appellant's abduction and release. The Appellant says that this was because it was his wife who was in contact with the solicitors and not him (as he was in prison under criminal sentence at the relevant time). He said his wife did not know about the details of his claim. He also said that the solicitor had told him not to raise this element of his claim until he had proof of it. The complaint made about the Decision in this regard is that the Judge noted the explanation given but then failed to make any findings about whether that explanation was accepted or rejected.
8. This ground also challenges the Judge's finding that the Appellant's interest in the photographs during his visit to Sri Lanka did not sit comfortably with his profile. The Judge found that this amounted to a "sudden" interest in politics when the Appellant had no previous involvement whether in Sri Lanka or the UK. Mr Murphy argued that this insistence on the suddenness of the Appellant's interest misunderstood the Appellant's case. The Appellant is a Tamil who lived previously in Colombo and had many Sinhalese friends. As such, he had little exposure to the plight of the Tamils elsewhere in Sri Lanka and no interest in the situation. It was not until he came to the UK and met and befriended other Tamils that he became more aware of what had happened to the Tamils in Sri Lanka. He had also watched the news. When he had met his Sinhalese friends during his visit one had produced photographs of the events at the end of the conflict. He had seen some of the photographs before but had not seen two of the photographs and believed that the world should see them. Mr Murphy referred me to his notes of the evidence before Judge Aujla. The Appellant had said that he wanted to give the pictures to Channel 4 news.

9. Mr Murphy submitted that this was not a case where the Appellant's interest in politics was "sudden". He had set out in his answers at interview and in his witness evidence that he was not politically involved before the incident in 2013 but he had watched the news and taken an interest in Sri Lankan matters.
10. The third ground concerns the subsidiary claim and the risk to the Appellant as someone who has been convicted of a crime involving a substantial amount of money which had become known in Sri Lanka. It was asserted that he would be at risk as someone known to have money and would be likely to be kidnapped for that reason. In the permission grant, Judge Brunnen noted that there was no indication that the Appellant had put his case to Judge Aujla on this basis. Mr Murphy pointed me to his skeleton argument for the hearing in the First-tier Tribunal and to the reference to the authorities' awareness of his involvement in a money laundering crime. It is also referred to at [38] of the Decision. The Judge noted at [36] of the Decision that a HMRC twitter had mentioned the criminal conviction and it was the Appellant's case that this would have come to the attention of the authorities.
11. In response, Mr Tarlow relied on the Respondent's rule 24 notice. In relation to the first ground, he submitted that the assertion that the Judge had "put the cart before the horse" in relation to the psychiatric evidence was based only on the positioning of the reference to that viz-a-viz the credibility findings. It did not mean that the Judge had considered it in the wrong order. In the rule 24 notice, the Respondent refers to what was said by the Court of Appeal in S v Secretary of State for the Home Department [2006] EWCA Civ 1153 (referring to HE (DRC Credibility and Psychiatric Reports) DRC CG [2004] UKAIT 0032). It is not for a doctor to assess credibility. A doctor can offer a view of consistency of symptoms with the patient's account but will generally, for good reason, accept that account at face value. As such, a report has more limited weight when it comes to judging credibility. Mr Tarlow submitted that it was open to the Judge to find that the report could not assist him in relation to the cause of the Appellant's mental state because the psychiatrist himself could not determine the cause.
12. Mr Tarlow accepted that the Judge had not apparently made a finding in relation to the subsidiary claim relying on the Appellant's wealth which is set out at [49] of the Decision. He submitted however that this was not a material failing bearing in mind the other reasons for doubting that the authorities had any interest in the Appellant. In that regard, he submitted that the findings challenged by the Appellant's ground two were open to the Judge on the evidence.
13. In reply, Mr Murphy submitted that, in light of Mr Tarlow's concession that there was no finding on the Appellant's case regarding the risk to him on account of his perceived wealth arising from the

criminal conviction, I could not be satisfied that this was not a material error because it could, on its own, give rise to a real risk.

14. Both representatives were agreed that, if I found a material error of law, I should remit the appeal to the First-tier Tribunal. The challenge is to the Judge's findings on credibility. As such, the Appellant should be entitled to a further hearing at first instance to consider the evidence properly. Both did agree however that if I were to find an error only in relation to ground three, I could retain the appeal in the Upper Tribunal since the evidence in relation to this risk was limited and the issue could be determined at a resumed hearing with further submissions.

Discussion and conclusions

15. I begin with consideration of the psychiatrist's report. Dr Ogbeide records the Appellant's history as recounted to him. Based on that, his observations of the Appellant and applying diagnostic criteria, he reaches the conclusion that the Appellant has "a moderate degree depressive disorder with somatic symptoms and post-traumatic stress disorder". His prognosis for the future is said to be good with appropriate intervention. He says at [10.1.3] that the psychological effects of trauma which the Appellant exhibits are typical for victims of trauma and gives an opinion that "there is a direct causal link between [the Appellant's] current mental health difficulties and traumatic experiences resulting from his abduction in Sri Lanka" [10.1.4]. He observes that the nature of the illness is what he would expect in terms of natural progression from the time of the trauma to the development of symptoms. I note that the psychiatrist records that the first mention of symptoms of depression was on 29 April 2014 when he was seen in HMP Wandsworth where he was detained in connection with his criminal matter. At [10.2.1] of the report Dr Ogbeide again opines that the Appellant's mental health difficulties began from his traumatic experiences in Sri Lanka. This appears to be based on the account given to him by the Appellant.

16. The Judge dealt with this element of the evidence at [72] of the Decision, having found at [68] that the Appellant was not credible. In relation to the report he says this:-

"I have also considered the psychiatric report. I note the opinion of the psychiatrist that the Appellant was suffering from PTSD. However, the report could not assist with identifying the real cause of the PTSD. I have found that the Appellant was not abducted or ill treated in Sri Lanka. I note that the Appellant was seen by mental health services whilst he was in prison and there is good reason to believe that any mental health problems he had developed whilst he was in prison. I have no reason to believe that any medication that the Appellant required would not be available in Sri Lanka. I therefore find that the psychiatric report did not assist me much."

[my emphasis]

17. I make it clear at the outset that my decision in relation to the error of law claimed in relation to the treatment of the report is not based on where the findings sit within the Decision. Ideally, the consideration of the report would precede the findings on credibility but that is not essential provided it can be shown that the report has been taken into account before reaching the findings on credibility. I also find unobjectionable the Judge's view that the report did not assist much in relation to credibility. Whilst Dr Ogbeide opines that the Appellant's symptoms are consistent with the trauma he claims to have suffered and that the progression from the trauma to symptoms is consistent in terms of timing, it is the case that the Appellant did not develop those symptoms until a few months after his return at a time when he was in custody for his criminal offence. However, I find there is an error of law highlighted in the passage cited above [72]. In that sentence, the Judge incorporates the credibility finding he reached previously at [68] of the Decision. That suggests that he had closed his mind at this point to the report providing any assistance in relation to credibility. He did not consider this evidence before reaching the credibility findings. Ultimately, however, consideration of this report in the context of the overall credibility findings might not lead to any different result if the other credibility findings on the primary claim cannot be impugned. I therefore turn to consider the second ground of challenge before reaching my decision whether the error of law in this regard is material.
18. The second ground concerns the Judge's finding that the Appellant's primary claim based on events in December 2013 is not credible for two reasons. The first is that the Appellant did not mention these events when he first made his claim for asylum and the second is that his account of taking an interest in war crimes is not consistent with his previous lack of interest in politics. As to the first of those reasons, Mr Murphy points to the reasons given by the Appellant for the failure to mention the events earlier; in essence because it was his wife who was liaising with the solicitors and he had not told his wife of the events. Mr Murphy submitted that there was no finding whether that was accepted. That is not the case. The Judge found at [63] that there was no "credible explanation" [my emphasis] for not raising this part of his case earlier and that this had been done simply to bolster his case [62]. Mr Murphy's submission in relation to the second part of this challenge is that the Appellant's account of how he had become involved with the Tamil cause was a perfectly plausible explanation. As someone who had not been exposed to the situation of Tamils before he came to the UK, he had developed an interest in their plight as a result of meeting Tamils in the UK to the extent that he wanted to gain publicity for their cause. Although his solicitors did not mention the events at the outset, the Appellant had given a good deal of information about his arrest and detention in his statement and in response to the questions at interview. Mr Murphy complains that the categorisation of the Appellant's political interest as "sudden" was not open to the Judge on the evidence.

19. I deal first with the Appellant's failure to mention the events in December 2013 when he first made his claim. The Judge had before him the reasons why the Appellant said that the solicitor's letter had not encompassed those events because his wife had been the one liaising with the solicitor and because his solicitor had advised him not to raise the primary claim until he had evidence of it. However, the Judge was entitled to find that explanation not to be credible. In relation to that latter aspect, there is no evidence from the solicitor concerned. I note that the Appellant continues to be represented by the same firm and it would be very surprising if they did not produce a statement to support the Appellant's position if that is what occurred. It is also difficult to see how they could continue to represent the Appellant in such circumstances. In relation to the former reason, the Judge was entitled to find that explanation also not to be credible. That is particularly so where the notice that the Respondent was considering deportation was sent to the Appellant himself (see letter of 11 July 2014 [AB1/58-60]). It follows that, in order for the solicitors to respond to that letter, the Appellant must himself have provided that letter and accompanying questionnaire to his solicitors. His explanation also lacks credence on the basis that the solicitor's letter refers in terms to their client's signed authority and the completed questionnaire which accompanied that letter [AB1/61-83]. The questionnaire is very clearly completed by the Appellant himself. His signature appears in two places (Q25 and at the end of the form). Answers are given in the first person such as at Q15 where the Appellant says that he owns his house. Where the Appellant is asked about the reasons why deportation would breach the ECHR or the Refugee Convention, he states "see solicitor's cover letter". It is also inconsistent with the Appellant's own statement - at [21] he says that his solicitor helped him to complete the deportation questionnaire and explained his circumstances and the reasons why he should not be sent back to Sri Lanka. In those circumstances, it was open on the evidence for the Judge to find that the explanation given for the omission was not credible.
20. Although the Appellant's explanation for why he had become involved in supporting the Tamil cause may be plausible, it remains the case as recorded at [58] that he had not shown any support for that cause while in the UK, for example by taking part in demonstrations or fundraising or other activities. Although the Appellant's own account might be better described as a developing rather than sudden interest, the Judge was entitled to take the view that it was in reality a sudden one and to categorise it as such when finding that his primary claim was inconsistent with someone of the Appellant's profile.
21. For those reasons, I find that there is no error in the Judge's findings concerning what the Appellant claimed had occurred in December 2013. He was entitled to find the Appellant's explanation both as to the timing of the primary claim and the substance of that claim not credible.

22. It follows from my finding in relation to this ground, that I do not find that the error in relation to ground one is material. I have noted at [17] above, that the Judge's finding that Dr Ogbeide's opinion could not assist much in relation to credibility is unobjectionable. He could give an opinion that the cause of the PTSD is consistent with the Appellant's account. However, given the Appellant's criminal conviction which occurred after the claimed events and before his symptoms began and the imprisonment in consequence, there is an equally plausible explanation for the Appellant's symptoms as the Judge found (and was entitled to find). In light of my finding that the Judge was entitled not to believe the Appellant's account upon which the psychiatrist's view is premised for other reasons, the Judge's finding that Dr Ogbeide's opinion could not assist in determining the cause of the PTSD is one to which he was entitled. Accordingly, the error based on the Judge's failure to take that opinion into account when forming his conclusion about credibility is not material.
23. I turn finally to ground three which relates to the Appellant's alternative, subsidiary claim that he will be at risk because the details of his conviction will be public knowledge in Sri Lanka and he will be at risk of kidnapping for monetary gain either by the authorities or, more probably, by non-State agents. When granting permission, Judge Brunnen indicated that it did not appear that the Appellant's case was put on this basis before the Judge. Mr Murphy directed my attention to [36] of the Decision where it is clear that the Respondent addressed the Appellant's case on this basis and it is also clear from the solicitor's letter of 5 August 2014 that the Appellant put forward a case on this basis.
24. Although the skeleton arguments before the Judge do not appear to focus on this subsidiary claim, the witness statements of the Appellant and his wife do contain some evidence in support of this claim. It is not dependent on the credibility of the Appellant's account in relation to the primary claim. Although the Judge does reach a finding at [70] of the Decision about the subsidiary claim, that does not include a consideration of or any findings on the evidence at [22] to [24] and [28] of the Appellant's statement and at [10] of the Appellant's wife's statement. This evidence is supported in vague terms by correspondence from the Appellant's family in Sri Lanka who say they have been visited by men who have made financial claims apparently in reliance on reports of the Appellant's conviction. Ultimately this may not affect the outcome of the appeal, since, insofar as it is asserted that the risk arises from non-State agents, the issue of sufficiency of protection may well arise in order to determine whether the risk is a real one. However, it is possible that, on the evidence, a real risk could be found based on this subsidiary claim. Accordingly, I find that the error of law in relation to ground three is material.
25. As noted above at [14], both representatives accepted that if I found that the material error was confined to ground three then the

appeal could be retained in the Upper Tribunal. Since I have so found, I have given directions below for a resumed hearing before this Tribunal.

DECISION

I am satisfied that the Decision contains a material error of law on ground three for the reasons given at [24] above. The finding at [70] of the decision of Judge Aujla promulgated on 28 July 2016 is set aside. I make the following directions for the resumed hearing on this issue before the Upper Tribunal:-

- 1. The Appellant shall file with the Tribunal and serve on the Respondent no later than 28 days from the date when this decision is promulgated any further evidence on which he relies in support of his case on the subsidiary claim. He shall also by the same date file and serve a skeleton argument dealing with the evidence on this issue.**
- 2. The Respondent shall file with the Tribunal and serve on the Appellant no later than 28 days from the date of service of the evidence and skeleton argument at [1] above a skeleton argument in reply to the Appellant's skeleton argument.**
- 3. The resumed hearing of this appeal to deal with the subsidiary claim shall be listed on the first available date after 56 days from the date when this decision is promulgated.**

Signed



Dated: 27 October 2016

Upper Tribunal Judge Smith

APPENDIX: ADJOURNMENT DECISION



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00485/2015

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On Wednesday 11 January 2017

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**Before
UPPER TRIBUNAL JUDGE SMITH**

Between

**MR D K A
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Benfield, Counsel, instructed by Theva & Co solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

ADJOURNMENT DECISION AND DIRECTIONS

1. This appeal was listed before me following my error of law decision promulgated on 27 October 2016 ("the Decision") setting aside one paragraph of the First-tier Tribunal decision of Judge Aujla promulgated on 28 July 2016. The setting aside of that paragraph had the effect of leaving one element of the Appellant's protection claim remaining for redetermination, namely the risk to him on return to Sri

Lanka as a result of his criminal conviction for money laundering in the UK.

2. In the Decision, I gave directions for the filing and service of further evidence by the Appellant relating to this issue within twenty-eight days from the promulgation of the Decision. Although that evidence was filed with the Tribunal within time, it was not sent to the Respondent. I accept that Mr Tarlow had not therefore seen that evidence prior to the hearing date. The bundle served also included the skeleton argument which I directed be served at the same time. The timing of the Respondent's skeleton argument was linked to service of the Appellant's skeleton argument. Whilst I accept Ms Benfield's submission that the Respondent could have checked with the Tribunal or the Appellant's solicitor whether the direction had been complied with rather than not submitting a skeleton argument at all, the onus is on the Appellant's representatives to serve the documents on the Respondent. Their failure to do so amounts to a failure to comply with directions.
3. That is in any event not the reason why an adjournment is sought. It appears that the Appellant, having become dissatisfied with his previous representatives, changed solicitors on or about 20 December 2016. There is a notice of that date indicating the change.
4. The new solicitors wrote to the Tribunal on 4 January 2017 indicating that they wished to submit additional documents for the hearing. Those were not enclosed with the letter. Indeed, the principal document which the Appellant seeks to adduce is dated some five days later (9 January 2017) and is a letter from an Attorney in Sri Lanka. Ms Benfield applied for permission to admit the further documents (sent to the Tribunal under cover of a letter dated 10 January 2017 although received only in copy by me from Ms Benfield on the morning of the hearing and at the same time by Mr Tarlow).
5. As indicated above, the principal document is a letter from an Attorney in Sri Lanka. He says that he has been instructed by the Appellant's family since October 2016 and made enquiries of the local police in that month which leads to a statement of risk on the further basis that it is said that the Appellant is suspected by the Sri Lankan authorities of fund raising for the LTTE as a result of his criminal conviction. Ms Benfield submits, and I accept, that the document does therefore have some potential significance to the issue which remains for me to decide. Ms Benfield indicated that she did not know why the document was not produced earlier since the Appellant had asked for it earlier. However, she thought it likely that this was due to failure of the previous firm to follow it up and it was only as a result of chasing by the new solicitors that the document was sent (two days before the hearing). It had therefore been produced as soon as possible following receipt.

6. Mr Tarlow did not object to the admission of the document but indicated that if I was prepared to admit it, he applied for an adjournment. The basis for the application is that the Respondent wishes to have the document verified. Ms Benfield quite properly did not oppose that application. She also asked though that if the Respondent were having that document verified, she should at the same time have verified another document which the Appellant had produced namely a record of complaint made to the police by the Appellant's family on 9 January 2016. Mr Tarlow indicated that he saw no difficulty with that request.
7. Having accepted that the letter from the Attorney is of potential significance to the issue which remains for me to decide, I indicated that I would give permission to admit the documents sent under cover of the letter of 10 January 2017 notwithstanding their late submission. I also indicated that I would grant the adjournment sought to enable that document to be verified and for further evidence to be produced on both sides together with updated skeleton arguments. I have given directions to that effect below.
8. I therefore grant permission to the Appellant to admit the documents sent under cover of the letter dated 10 January 2017. I grant the adjournment sought of the resumed hearing with the following directions:-
 - (1) By no later than 4pm on Friday 10 March 2017, the Respondent is to file with the Tribunal and serve on the Appellant's solicitors (Theva & Co) the verification report(s) in relation to the letter from the Attorney-at-law in Sri Lanka dated 9 January 2017 and the document from the police station in Sri Lanka dated 9 January 2016 recording the complaint made to the police. She is also to file and serve any further evidence on which she relies arising out of those documents and/or relating to the protection claim as now made by the Appellant.
 - (2) By no later than 4pm on Friday 7 April 2017, the Appellant's solicitors shall file with the Tribunal and serve on the Respondent any further evidence on which they rely in response to the evidence produced by the Respondent and/or in relation to the protection claim now made. By the same date, they shall file and serve a skeleton argument setting out their legal arguments in relation to the risk to the Appellant arising from his criminal conviction in the UK on the basis that this is now put.
 - (3) By no later than 4 pm on Friday 21 April 2017, the Respondent is to file with the Tribunal and serve on the Appellant a skeleton argument in response to the Appellant's skeleton argument at (2) above.
 - (4) The resumed hearing is to be relisted on the first available date after Monday 1 May 2017 with a time estimate of three hours.

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Signed

Date

11 January 2017

Upper Tribunal Judge Smith