



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08308/2016

THE IMMIGRATION ACTS

Heard at Field House
on 17 July 2018

Decision & Reasons Promulgated
on 7 August 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

RN
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mackenzie, Counsel, instructed by A J Patterson Solicitor

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Although no Anonymity Order was made by the First-tier Tribunal, and no application was made by the appellant's representative for an anonymity order, given the issues involved and the state of the appellant's mental health, I consider it appropriate to make an Anonymity Order.
2. This is an appeal against the decision of Judge of the First-tier Tribunal Obhi (the judge), promulgated on 27 March 2017, in which she dismissed the appellant's

appeal against the respondent's decision dated 25 July 2016 refusing his protection claim and human rights claim.

Background

3. The appellant is a national of Sri Lanka, date of birth 2 July 1982. He entered the United Kingdom on 4 December 2008 and applied for asylum.
4. I briefly summarise the protection claim advanced by the appellant following his entry to the UK. Between 2000 and 2002, when the appellant was student, although not a member of the LTTE, he assisted the organisation by doing jobs such as selling papers, putting up notices, and assisting during Pongu Tamil events. The appellant claims these activities were known to the Sri Lankan authorities. The appellant's older brother was a teacher and, in 2001, was recruited by the LTTE to work as a teacher and interpreter. The older brother joined the Karuna group (a group that defected from the LTTE in 2004 and helped the Sri Lankan army fight the LTTE) but when the Karuna group split into factions the appellant's older brother returned home. In September 2008 police and members of the Karuna group surrounded the appellant's home and asked his older brother to re-join. The older brother refused and returned to the LTTE.
5. On 10 October 2008 police and members of the Karuna group came to the appellant's home and arrested him and his younger brother. The appellant was asked about the whereabouts of his older brother and told that he and his younger brother would be detained until their older brother surrendered. They were detained at a police station and, between 22 and 23 October 2008 and 26 and 27 October 2008, they were taken to a camp where the appellant and his younger brother were interrogated and tortured about any assistance they had given to the LTTE. On 28 October 2008 the appellant and his younger brother escaped from the police station with the assistance of 2 men the appellant knew from the time he helped the LTTE and who had joined the Karuna group. Whilst escaping the appellant heard shots and did not see his younger brother again. The appellant ran to the home of a friend where he hid until an agent arranged by his uncle took him to Colombo. The appellant then flew to Malaysia using a false passport before travelling to Russia and then on to the UK.
6. The respondent refused the appellant's asylum claim on 27 May 2010. An appeal to the First-tier Tribunal was dismissed on 8 July 2010 but the appellant was granted permission to appeal to the Upper Tribunal. In a decision promulgated on 2 September 2011 Upper Tribunal Judge Renton found material errors of law in the First-tier Tribunal decision and re-made the decision dismissing the asylum appeal. Judge Renton found that the appellant may have helped with certain LTTE activities but the judge did not believe that the Sri Lankan authorities displayed any awareness of his past activities. Judge Renton also found that at different times the appellant's brother may have worked for the LTTE and the Karuna group. The judge found the remainder of the appellant's account lacking

in credibility and was not satisfied that he or his younger brother were arrested and detained at the police station. Judge Renton supported his findings by reference to discrepancies in the appellant's evidence as to his knowledge of the whereabouts of the CID camp and the implausibility of the appellant's account of his escape. Judge Renton placed little weight on a scarring report prepared by Dr A I Martin because, *inter alia*, some of the doctor's opinions in respect of injuries caused by blunt instruments was contradictory. On the basis of his factual findings judge Renton concluded that the appellant would not be at real risk of persecution if returned. Applications for permission to appeal judge Renton's decision were refused and in March 2012 the appellant was appeal rights exhausted. I merely observe that, in refusing permission to appeal to the Court of Appeal, Upper Tribunal Judge Macleman found that the grounds of appeal (which contended that a diagram drawn by the appellant showed the Karuna camp rather than the CID camp, as understood by Judge Renton, and that the appellant had previously mentioned being beaten with a cane and Judge Renton was wrong to find to the contrary) were "realistically arguable in point of fact", but that they fell short of showing that the outcome was plainly wrong and did not pass the second-tier appeal test.

7. The appellant made further submissions to the respondent supported by, *inter alia*, further statements from himself, statements from his mother and someone described as his "uncle", a medical scarring report prepared by Dr Soon Lim, expert country reports prepared by Prof Anthony Good, 3 psychiatric reports prepared by Dr Mala Singh, a letter from the Transnational Government of Tamil Eelam (TGTE), a letter from the Tamil Welfare Association Leicester, a letter from the British Tamils Forum, photocopied photographs of the appellant's attendance at Tamil demonstrations and gatherings and webpage printouts depicting the appellant at demonstrations. In his further submissions the appellant maintained the basis of his initial asylum application but contended that he was also raped while in detention and was suffering from PTSD and Severe Depression with Psychotic Symptoms, that he is at risk of suicide if returned to Sri Lanka, and that he has engaged in 'sur place' activities that will expose him to a real risk of ill-treatment in Sri Lanka. Although the respondent considered that the further representations did amount to a fresh asylum and human rights claim, she refused both claims.

The decision of the First-tier Tribunal

8. On the basis of medical advice, detailed in the reports by Dr Singh, the appellant did not give oral evidence at his hearing. The judge heard oral evidence from Dr Singh and from Mr EM, with whom the appellant has been living since 2011. In her decision the judge set out the appellant's account of events in Sri Lanka and his claim to have been raped and sexually assaulted by soldiers, and his claim to have attempted suicide on several occasions. The judge additionally set out the appellant's claim that members of the Karuna group visited his parents in December 2012 because of his anti-government activities in the UK, details of the

appellant's participation in various protests against the Sri Lankan government, and his parent's assertion to have received about 15 visits from the Sri Lankan authorities, the last being in January 2015. The judge set out the legal framework for the appeal and correctly set out the relevant burden and standard of proof. The judge recorded the essential elements of Dr Singh's evidence and the evidence from EM. The judge also recorded in some detail the submissions from both representatives.

9. In the section of her decision dealing with her findings of fact the judge considered that her starting point was the decision of Judge Renton. The judge repeated in detail the written and oral evidence of Dr Singh. At [40] judge found that, although Dr Singh was able to give an opinion on the appellant's mental health, her reports 'strayed' from her remit and commented on findings already made by the court and inappropriately provided an opinion on why the appellant may have given certain evidence, including explanations as to why some of his evidence may not have been reliable in previous interviews and hearings. The judge stated that Dr Singh "*accepts at face value everything she is told by the appellant and those representing him*" and supported this assertion by reference to the 2015 psychiatric report which listed, amongst the documents considered, Internet photographs of the appellant which the doctor stated were seen by the Sri Lankan intelligence and passed to the police and the Karuna Group personnel in his home area. The judge noted that the psychiatrist could not possibly know that the police had seen these photographs. The judge was surprised that Dr Singh did not request consent from the appellant or his solicitors to make a written referral to his GP so that he may be referred to the local mental health services for treatment given that he was at very high risk of self-harm, and noted that the appellant had no specific counselling, and that Dr Singh did not specify whether the appellant is on antipsychotic medication. The judge then stated, "*subject to these concerns, I do place weight on Dr Singh's report.*"
10. The judge then noted that the appellant registered with his GP practice on 14 October 2009 when he complained of severe headaches for the past 5 years. The judge noted that there followed various entries relating to the appellant's low mood and his inability to sleep, and that an entry dated 29 May 2012 indicated there were no suicidal thoughts. The judge then stated that she did not understand why there was no entry in similar terms prior to April 2012. She stated that the account the appellant gave to judge Renton showed no signs of him having been mentally troubled, and that there was no such sign in the record of his evidence before the judge presiding at his very first appeal, or in his interview notes of the Home Office. At [42] the judge stated that she was nevertheless satisfied, despite noting the difficulties with the appellant's evidence, that he had mental health problems as referred to. The judge then indicated that she was not satisfied as to how or why he has these mental health problems. She stated, "*it is not uncommon for example, for individuals who have been refused asylum to threaten to kill themselves in the UK rather than return. According to the appellant's own evidence they have been many attempts on his life, but he has been remarkably lucky in that he has*

been thwarted in each of his attempts. His mental presentation could be a response to the frustration he feels in his claims not being accepted."

11. The judge then considered Dr Lim's scarring report and in particular, Dr Lim's reference to cigarette burns that were not mentioned by Dr Martin in his scarring report. The judge noted that Dr Lim pointed to a large number of such lesions and estimated that they were caused in 2008, although Dr Lim also said that it is possible they were not there when Dr Martin examined the appellant. The judge noted Dr Lim's observation that some of these lesions could be attributable to a skin infection, although the judge neglected to note that 3 of the lesions were said to be 'diagnostic' of cigarette burns. The judge noted that several of the other scars were considered by Dr Lim to be consistent or highly consistent with the appellant's explanation but that "*there are many other possible causes in relation to many of them.*"
12. The judge then turned to the assessment of the appellant's claim in light of the new evidence. The judge took the statements from the appellant's mother and "uncle" into account but placed less weight on them because they were not independent. At [46] the judge noted that EM was simply not present all the time to observe the appellant's behaviour. The judge believed that if EM feared the appellant may harm himself in a household with children then he would take additional precautions and that, while there was no suggestion that the appellant posed a direct risk to EM's children, the fear that he may harm himself by hanging or by overdosing was likely to be a cause of concern to any parent.
13. At [47] the judge found, having considered all the additional information as well as the previous evidence provided by the appellant, that the additional information added little to that which was before the Tribunal in the original appeals. The judge saw no reason to depart from the findings made by Judge Renton. The judge additionally noted that at the time of his alleged escape the appellant had been subject to severe physical and sexual torture and that despite his weakened state, he was able to run or walk to his friend's house rendering it even less credible that the appellant would have been able to escape.
14. At [48] the judge stated that the lesions that were claimed to be cigarette burns were not present when Dr Martin saw the appellant. The judge did not find it likely that an expert on scarring who saw the appellant within 2 years of the injuries would either not ask the appellant about the appearance of the lesions or would have simply missed them all together. The judge noted that dating of scars and burns becomes more difficult the longer the elapse of time and, whilst accepting the general findings of Dr Lim, stated that it was almost impossible for Dr Lim to say whether the lesions were there when the appellant saw Dr Martin or were inflicted afterwards.
15. At [49], whilst accepting that it is very difficult for an individual to admit to, let alone detail a sexual assault, the judge was troubled by the appellant's failure to

mention these assaults during his first asylum claim despite having legal representation and having had the benefit of seeing a scarring expert, and given that he had already allegedly attempted suicide on at least 3 occasions. The judge noted that the appellant gave a very detailed account of what happened to him to immigration officers and that there had been no evidence before either the First-tier Tribunal or the Upper Tribunal in relation to his very poor mental health.

16. At [50] the judge stated that the evidence that troubled her most was the psychiatric evidence of Dr Singh. *"In particular I am concerned that there is no independent evidence in relation to the appellant's claimed suicide incidents, such as would normally follow such events."* The judge noted that the medical records suggested the appellant was not suicidal and that they did not mention any of the symptoms which were detailed by Dr Singh in the years following the appellant's arrival in the UK up until April 2012. The judge additionally noted that, despite his fear of the Sri Lankan authorities, the appellant continued to participate in demonstrations and to put himself in situations that risked not only criticism of himself but attacks on his parents. The judge found it difficult to see how going to political demonstrations, where he will be reminded of his own painful experiences and which would place his parents at risk, would serve to distract him from his preoccupation and therefore help his mental health.
17. The judge was not satisfied by the new evidence that the appellant had previously been detained and tortured. Despite her concerns about the appellant's claims in relation to his mental health, she did place reliance on Dr Singh's evidence and accepted that she saw him presenting in the way he did, that he was troubled when he saw her and that he genuinely did not want to return to Sri Lanka. The judge accepted that the appellant was threatening to commit suicide if not allowed to stay but was not satisfied that he was arrested and detained as claimed or that he was tortured in detention. The judge found, in light of her findings, that the authorities were no longer interested in the appellant's brother given the belief that he died in 2009.
18. The judge then considered whether, in light of the appellant's sur place activities, he would be at risk of ill-treatment from the Sri Lankan authorities. The judge set out the risk categories detailed in GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). At [55] the judge concluded that the appellant did not fall within any of the risk categories. The judge found the appellant was only active in the Tamil diaspora *"... as someone who attends events organised by others."* There was no evidence that his name was on a stop list and he had not previously been of interest to the authorities, on his own account, other than as someone who could provide information relating to his brother, who was now probably dead. The judge then stated, *"... the appellant's involvement with the diaspora is at a low level, even if he is responsible for organising and encouraging others to attend demonstrations, he can hardly be described as an activist campaigning against the Sri Lankan government."* While acknowledging Mr Mackenzie's submission that the appellant was involved with the TGTE, a proscribed organisation, the judge did

not accept that the appellant was anything more than an attendee at demonstrations. It was clear to the judge from the evidence that the appellant attended the demonstrations as a “*form of distraction*” and that any more active role in them would be contrary to the evidence of his poor mental health. The judge concluded, “*the claim that he is an activist in the diaspora is not supported by the evidence before me.*”

19. The judge finally considered whether the appellant’s return to Sri Lanka would breach article 3 on the basis of his mental health. At [58] the judge reiterated her finding that Dr Singh’s reports relied wholly on the account given by the appellant, and that there was little evidence of the state of the appellant’s mental health prior to April 2012. The judge considered there to be inconsistencies in the appellant account, on the one hand, of being terrified by the thought of returning to Sri Lanka, and on the other hand, attending demonstrations that involves him in political thought. The judge noted the absence of any independent evidence of the appellant’s suicide attempts and the absence of any treatment following these attempts, and the fact that the appellant had not been referred for treatment or for admission to hospital. The judge stated, “*Whilst I accept the expert opinion of Dr Singh, this is not supported by treatment on the ground.*” For these reasons the judge was not satisfied the appellant proved that he reached the high threshold required by Art 3 in a medical case.

The grant of permission to appeal to the Upper Tribunal

20. The grounds contend that the judge was not entitled to conclude that the new evidence added ‘little’ to the evidential position in 2011, and that the judge failed to undertake an assessment of the appellant’s credibility on the basis of the evidence as a whole.
21. The grounds further contend that the judge erred in law by stating that Dr Singh “*relied wholly on the account of his mental health give to her by [the appellant]*”, and that the judge was not lawfully entitled to substitute her own view of what may have caused the appellant’s mental condition. It was further submitted that the judge’s acceptance of Dr Singh’s opinion was irreconcilable with her rejection of parts of the medical evidence such as the causation of the illnesses and the risk of suicide. Nor was it clear how the issue of treatment was relevant to the judge’s conclusions, with particular reference to [58] where the judge accepted the expert opinion of Dr Singh but then said it was not supported by the treatment from the appellant’s GP and that there had been no reference to a psychiatrist or hospitalisation.
22. The grounds further contend that the judge overlooked an addendum report from Dr Lim, dated 21 February 2017, in which Dr Lim said it was clear, based on photographs taken by Dr Martin, that the appellant did at that time have the scars documented by Dr Lim but not documented by Dr Martin. It was also contended that the judge, whilst accepting that the statements from the appellant’s mother

and 'uncle' merited some weight, failed to explain how she factored them into her assessment of the appellant's credibility.

23. The grounds finally contend that the judge failed to reach sustainable views of the risk to the appellant on the basis of his sur place activities. It was submitted in particular that the judge made no findings on the letters from the TGTE or the Tamil Welfare Association, both of which stated that the appellant had been an organiser, and that the finding that the appellant's active role in political activities was 'contrary to the evidence of his poor mental health' was contradicted by the reports of Dr Singh which said that political campaigning was therapeutic for the appellant, helping him to express his emotions about his family and treatment. Furthermore, the judge's alternative finding that even if the appellant had been involved in organising and encouraging others to attend demonstrations he could not be described as an activist campaigning against the Sri Lankan government, was not sustainable on the evidence.
24. Both the First-tier Tribunal and the Upper Tribunal refused permission to appeal to the Upper Tribunal. The High Court however granted permission to judicially review the Upper Tribunal's decision and, without the need for a hearing, the Upper Tribunal's decision refusing permission was quashed. In a decision dated 12 December 2017 the Upper Tribunal granted permission in light of the decision of the High Court.
25. I heard detailed submissions from both Mr Mackenzie and Mr Clarke, both of whom took me to various passages in the judge's decision and the evidence before the judge. I am grateful for their considerable assistance. At the end of the hearing I indicated that I would reserve my decision.

Discussion

26. It is apparent from the judge's decision that she considered in some detail the evidence before her, and that she spent a significant amount of time and effort in reaching her conclusions. I am nevertheless persuaded, for the following reasons, that the decision is marred by material legal errors such as to render the judge's conclusions unsustainable.
27. I note at the outset that there has never been any rejection, either by the respondent or by the judge herself, of Dr Singh's diagnosis of PTSD and Severe Depression with Psychotic Symptoms. As Mr Mackenzie pointed out, a diagnosis of PTSD is based on the occurrence of a traumatic event or events. Whilst the respondent accepts the diagnosis, he has not suggested an alternative cause for the PTSD. It may, for example, be due to some event that occurred in the past that has not been disclosed by the appellant and which has nothing to do with any fear of ill-treatment from the Sri Lankan authorities. At [42] however the judge found that the appellant's "*mental presentation could be a response to the frustration he feels in his claims not being accepted.*" In so doing, I find that the judge has

impermissibly re-diagnosed the appellant's PTSD and that there was no medical basis for attributing his serious mental health condition to the appellant's sense of frustration. The psychiatric reports consistently described the appellant as being "*seriously mentally ill*", that his distress was "*severe*", that he was unable to function adequately due to psychological trauma and was unable to carry out the activities of daily living without getting support and prompting from the people with whom he lived. Dr Singh was of the opinion that the appellant was unlikely to have developed prominent PTSD symptoms had he not experienced real and major trauma of the nature he described. Once again, there has been no challenge to this diagnosis and the judge accepted the psychiatrist's diagnosis.

28. It is trite law that it is inappropriate for a judge to make clinical judgements (R v SSHD, ex p Khaira [1998] INLR 731; SP Kosovo CG [2003] UKIAT 00017). This however is, in effect, what the judge did. The judge concluded that the appellant's serious presentation, which included vivid flashbacks and nightmares (a point corroborated to some extent by EM who frequently heard the appellant screaming in his room at night), could be a response to his claims being rejected by the Home Office. Given the serious nature of the appellant's mental health, and given that PTSD is a condition specifically caused by the after effects of severe trauma, I am not satisfied that the judge was reasonably entitled, for the reasons she gave, to conclude that the appellant's mental presentation could be response to the frustration he felt from his claims not being accepted. While the judge was not obliged to accept the appellant's account of events that gave rise to his PTSD, the judge was not entitled to conclude that the diagnosis could be explained by frustration in his claims being rejected alone.
29. Nor, in my judgement, was the judge entitled to conclude that Dr Singh "*accepts at face value everything she is told by the appellant and those representing him*". The judge supports her assertion by a single reference to the 2015 psychiatric report where Dr Singh listed amongst the documents she considered Internet photographs of the appellant that had "*been seen by Sri Lankan intelligence*" and passed to the police and the Karuna Group personnel in his home area. The judge was unarguably correct in stating that Dr Singh could not possibly know whether the photographs had been seen by the Sri Lankan police and that she did appear to state this as a fact and not a claim made by the appellant. This must however be considered in its specific context and in light of a holistic assessment of the psychiatric reports. Dr Singh's reference to the photographs was contained in the very first page of the addendum psychiatric report and appears in the context of a list of documents provided to her by the appellant's legal representatives. Throughout her 2013 and 2015 psychiatric reports Dr Singh cautions herself in respect of the likelihood that the appellant was ill-treated in Sri Lanka. In her 2013 report, at [4], she explained why the appellant's behaviour, his reaction to questioning and his presentation was consistent with his account, and at 1.7 of the 2015 report Dr Singh stated, "*the possibility of [the appellant] exaggerating his symptoms is unlikely as he does not have any knowledge of mental illness and in order to fabricate it there has to be knowledge of mental illness. In his case, I did not find any. I*

have observed his reaction and behaviour during my assessment over sessions and my impression is that his clinical presentation is highly compatible with the experience of extreme trauma. The rating scales which I have used twice have given consistent results and they confirm the diagnosis ... I conclude that he has not fabricated his symptoms." In her 2013 report Dr Singh stated that, in order to manufacture symptoms, there was a need for knowledge related to psychiatry in order to try to present a fabricated picture, whereas the appellant, in his sessions with Dr Singh, tended to understate his symptoms as he felt shamed and distressed when recalling his past traumatic experiences. Dr Singh explained that it was apparent from the appellant's manner that he found many of the questions distressing, and she was satisfied that his symptoms were genuine and he had not been exaggerating or manufacturing. Dr Singh's reports indicate that she properly exercised her professional judgement and there is little supportable evidence that she accepted the appellant's account uncritically. I once again remind myself that the judge was obliged to critically consider the evidence from Dr Singh and the judge did not have to accept the psychiatrist's findings as to the causation of the appellant's mental health problems. To the extent however that the judge rejected the psychiatric evidence as to causation because the psychiatrist "*accepts at face value everything she is told by the appellant...*", she misdirected herself on the evidence and took account of an irrelevant consideration.

30. The judge was clearly troubled by the absence of any written referral by Dr Singh to the appellant's GP, and the absence of any reference in the appellant's medical notes to his suicidal ideation, and the absence of any counselling or further psychiatric treatment following Dr Singh's medical reports.
31. At [46] the judge found it surprising that Dr Singh did not request consent from the appellant or his representatives to make a written referral to his GP so that he may be referred to the local mental health services for treatment. Having referred to the evidence in the psychiatric reports of the appellant's suicidal ideation, the judge stated, "*why then, I ask myself did [Dr Singh] not make an urgent written referral to his GP?*" The fact that the appellant had not been referred for specialist treatment was considered by Dr Singh in her 2015 report to be "*a matter of real regret*" and at [22] of her decision the judge records Dr Singh's evidence that she made a telephone referral in 2016. It is not, in any event, clear how this particular concern has impacted on the judge's assessment of the psychiatric evidence. One on view the judge appears to be suggesting that, if Dr Singh's concerns were legitimate, a written referral would have been made. As was accepted by Mr Clarke, there is no evidence that any referral had to be in writing. Moreover, the appellant's treatment is a clinical decision for his GP and not for Dr Singh. If the judge has accorded less weight to the psychiatric evidence because Dr Singh made no written referral, she had misdirected herself in law.
32. Nor is it clear what the judge meant at [58] when stating, "*Whilst I accept the expert opinion of Dr Singh, this is not supported by treatment on the ground.*" As the grounds contend, if this was intended to suggest that Dr Singh's expert opinion was

somehow undermined by the GP's actions, then the two parts of the sentence appear to contradict each other. If, however the judge was suggesting that the GP was somehow better placed to assess the appellant's mental health, then the judge fails to give clear reasons in support.

33. The judge additionally states that Dr Singh 'strayed' from her remit by commenting on why the appellant may have been unreliable in interviews and the earlier asylum appeal hearings. A psychiatrist is however legitimately entitled to express an opinion on evidence previously given based on the psychiatrist's later assessment of the appellant's mental health. The nature and severity of a person's mental state may be relevant in determining whether they were likely to be suffering from an un-diagnosed mental health condition when they gave their earlier evidence, although clearly such conclusions must be approached with the requisite degree of caution. In her 2015 psychiatric report Dr Singh makes clear that her comments are on the appellant's "likely" mental state at the time of his asylum interviews and the earlier appeal hearings (e.g. 5.8 to 5.11 and 5.15). Dr Singh stated that she could "only comment guardedly on the matter of [the appellant's] likely degree of mental fitness for interview on those important occasions during his original asylum procedure as I did not examine him at the time." She explains however that, in view of his mental state on the four occasions when she did examine him between 2012 and 2015, the appellant was unlikely to have been in a properly fit mental state at the date of either interview. In making her comments the psychiatrist did not stray from her remit and the judge misdirected herself in holding otherwise. While the judge would have been fully entitled to attach less weight to the psychiatrist's opinion that the appellant may have suffered undiagnosed PTSD in the past, given that such an opinion is, by its nature, speculative, the judge was not entitled to discount the evidence altogether.
34. Nor has the judge made any clear factual findings in relation to EM's evidence. The judge does not expressly find EM to be an incredible witness but notes that his evidence relating to the appellant's suicide attempts whilst living in EM's house when not observed by EM directly but by his wife and his children. The judge also notes the absence of any official follow-up to these suicide attempts such as referral to the GP or admission to hospital. The judge has not however identified any reason why the descriptions given to EM by his wife and children would not have been reliable, and the judge has not considered EM's evidence that he informed and sought advice from the pastor of his church after the perceived suicide attempts, and that the pastor visited the house on several occasions after each attempt. This material evidence was not considered by the judge. Nor does the judge engage in any depth with the detailed statement provided by EM in which does describe the appellant's behaviour over a number of years, including hearing the appellant screaming in his room at night and hitting his head against the wall, and the precautions taken by the family to move things such as bleach and pills out of the appellant's sight.

35. For entirely separate reasons, I find the judge has materially erred in law in her approach to the scarring reports from Dr Lim. Dr Lim prepared two medico-legal scarring reports, the first date 18 July 2012, the second dated 21 February 2017. The 2nd scarring report was contained in the appellant's supplementary bundle. Throughout her decision the judge only refers to a single report produced by Dr Lim (see, for example, [43] and [48]). It is not apparent from the decision that the judge considered the 2nd report by Dr Lim, or that the judge was ever aware of the 2nd report.
36. At [48] the judge states that the scars on the appellant's body claimed by him to be cigarette burns were not present when Dr A Martin saw the appellant in preparation for his July 2010 scarring report. The judge did not find it reasonably likely that Dr Martin would not have asked the appellant about the lesions or would have missed them altogether. Noting the difficulty in dating scars, the judge concluded that it was "*almost impossible*" for Dr Lim to say whether the lesions were present when the appellant saw Dr Martin or whether they were inflicted later.
37. The difficulty with the judge's assessment is that, in preparing his 2nd scarring report, Dr Lim was shown photographs taken by Dr Martin in 2010 that, in Dr Lim's professional opinion, did show that there were scars present on the appellant's back at the time of Dr Martin's examination that were not described in his report. Dr Lim incorporated copies of the photograph of the appellant's back taken by Dr Martin in 2010, and a copy of a photograph of the appellant's back taken by Dr Lim in 2012 but not included in his original report. Dr Lim stated that, *inter alia*, scars 23, 24, 25, 31, 32, 33, 34 and 35 were seen on the photograph taken by Dr Martin. In his original scarring report Dr Lim found that scars 33 and 34 were '*diagnostic of* third degree cigarette burns. Under the Istanbul Protocol a classification of a scar being '*diagnostic of*' means that the appearance could not have been caused in any way other than that described. Scars 23 to 25, 31, 32 and 35 was '*highly consistent*' with the appellant's description of the cause of the scar, although they could also have been caused by any inflammatory skin disease, but there were few other possible causes.
38. The evidence in Dr Lim's 2017 report is cogent and is clearly capable of undermining the judge's assertion that the relevant scars were not present when Dr Martin saw the appellant. While the judge was entitled to her concerns as to whether Dr Martin would have neglected to ask the appellant about the scars or simply missed them, the evidence in Dr Lim's 2nd report strongly suggests that the relevant scars were not inflicted after Dr Martin's report. Had the judge properly considered this evidence in a holistic manner it may have altered her overall assessment of the appellant's credibility and his account in general. The failure by the judge to consider this relevant evidence constitutes a material error of law.

39. I additionally have serious concerns with the judge's approach to the appellant's claimed engagement in sur place activities capable of bringing him to the attention of the Sri Lankan authorities. At [55] the judge accepted that the appellant has been attending demonstrations in the UK, but rejected his claimed involvement in organising them or having anything else to do with them. In reaching this conclusion the judge fails to make any findings in respect of the letter, dated 18 March 2015, from Mr Sockalingam Yogalingam, a TGTE MP, issued on behalf of the TGTE, or the letter from the Tamil Welfare Association Leicester, which was dated 10 June 2015. Although the respondent considered these letters to be vague in their description of the appellant's activities, no issue was taken with their authenticity. The letter from the Coordinator of the Tamil Welfare Association cannot, on any reasonable view, be considered vague. The coordinator stated that the appellant had been known by and worked for the Association for many years as a 'front-line worker'. Since 2011 the appellant had been helping the Association organise Tamils living in Leicester to attend political events in London campaigning against the Sri Lankan government. The Coordinator confirmed from personal knowledge that the appellant had undertaken door-to-door visits to Tamils in Leicester to persuade them to attend political meetings in London such as the Martyrs' Day event. The letter stated that as much as a third of the Tamil people attending these events did so because of the appellant's efforts. The Association was indebted to the appellant for his 'high profile' role as an organiser, including marshalling Tamil people from Leicester as a steward for some of these events. The letter from the TGTE confirmed that the appellant joined as a volunteer and volunteered in public events since 2013, and that he attended meetings, events and public demonstrations. The appellant was said to have played 'a leading role' in recruiting people to join the organisation, organising through the Tamil Welfare Association for people to come to political events and stewarding at these events. The letters were supported by several photographs of the appellant attending political demonstrations, and in some cases holding up placards, and one photograph showed him at a demonstration with a clipboard relating to a petition to refer Sri Lanka to the International Criminal Court. The letters were clearly relevant to the full extent of the appellant's sur place activities and it was incumbent on the judge to have engaged with them and to have made material findings in respect of them. The judge's failure to do so amounts to a legal error.
40. The judge found however, presumably in the alternative, that even if the appellant had low level involvement in the Tamil diaspora and was responsible for organising and encouraging others to attend demonstrations, he could "*hardly be described as an activist campaigning against the Sri Lankan government.*" I am grateful to Mr Clarke for his acceptance during the 'error of law' hearing that, if the appellant was responsible for organising and encouraging others to attend demonstrations, he may be considered as a campaigner or activist and would have a profile that may put him at risk. If the appellant's activities were accepted, he was someone who was actively involved in activities criticising the Sri Lankan

government and would run the risk of being perceived as an activist campaigning against the Sri Lankan government.

41. Nor is it apparent that the judge fully appreciated the significance of the appellant's involvement with the TGTE, a proscribed organisation in Sri Lanka. In UB (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 85 the Court of Appeal found that the failure by the Secretary of State to bring her guidance on separatist groups in Sri Lanka to the attention of a judge was unlawful as it may have led to a different assessment by a judge who had dismissed the appeal. The guidance indicated that returnees to Sri Lanka may be questioned on arrival by a number of different departments, including security departments, and that they may be asked about their activities outside Sri Lanka, including whether they have been involved with one of the Tamil Diaspora groups. I appreciate that UB (Sri Lanka) was only handed down two days before the appeal hearing, but the judge's decision was signed on 20 March 2017 and promulgated on 27 March 2017. Although the appellant was not a member of the TGTE, the letter confirmed the appellant's involvement with the organisation for some two years and that he had a 'leading role' in recruiting and organizing people to come to political meetings, a point corroborated by the Tamil Welfare Association letter. Had the judge been fully aware of the respondent's guidance in respect of questioning of returnees at the airport, the judge may have reached a different conclusion in respect of the relevance of the appellant's sur place activities to the issue of risk on return.
42. For the aforementioned reasons, considered singularly as well as cumulatively, I find the First-tier Tribunal judge's decision contains material legal errors and I set it aside.
43. I canvassed with both parties the possible options in the event that I found a material legal error in the decision. Although Mr Makenzie invited me to hear further evidence from Dr Singh, there was no objection from either party to the Tribunal assessing the issue of a risk on return arising from the appellant's sur place activities on the basis of the evidence contained in his bundle of documents. Having considered the representations from both parties, I am satisfied I can proceed to remake the decision without the need for further evidence.
44. If the appellant is at real risk of ill-treatment on his return as a result of his sur place activities then that will be determinative of his asylum appeal. I must therefore consider whether the appellant would be regarded as a threat to the integrity of the single Sri Lankan state because he is perceived to have a significant role in post-conflict Tamil separatism (applying GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)). In assessing whether such a threat exists I have once again carefully considered the letter, dated 18 March 2015, from Mr Sockalingam Yogalingam, a TGTE MP, the letter from the Tamil Welfare Association Leicester, dated 10 June 2015, and the photographs of the appellant's participation at various demonstrations. I will not repeat the content of the two

letters, which are set out in paragraph 39 above. For the reasons already given I reject the assertion in the Reasons For Refusal Letter that the letters are vague. The content of the letters was not challenged by the respondent's representatives in either the First-tier Tribunal or the Upper Tribunal. The letter from the Tamil Welfare Association in particular provides details of the appellant's 'front-line' involvement in organising political gatherings critical of the Sri Lankan government.

45. The Tribunal in GJ found that the Sri Lankan authorities' approach to identifying those threatening the unitary nature of the Sri Lankan state is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. Headnote 9 states, "*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.*" At [306] the Tribunal found that the government of Sri Lanka "...has available to it sophisticated, high quality intelligence, enabling it to evaluate and assess the risk posed by particular individuals both within and without Sri Lanka." And at [351] the Tribunal held, "*Attendance at one, or even several demonstrations in the diaspora is not of itself evidence that a person is a committed Tamil activist seeking to promote Tamil separatism within Sri Lanka. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual.*"
46. Although the appellant is not a member of the TGTE, he has been involved with the group since 2013 and had played 'a leading role' in recruiting people to join the group and organising people to come to political events. This claim is supported by the letter from the Tamil Welfare Association which gives further details of the appellant's activities including door to door visits, marshalling, stewarding and organising. The numerous photographs of the appellant at various demonstrations and indoor meetings further confirms his involvement. Although he may not hold a high-ranking position within either organisation, his role as an activist is prominent. I find that his interaction with a large number of Tamils and his role in attempting to recruit and persuade them to get involved with Tamil organisations and attend political events, including those of the TGTE, a prescribed organisation in Sri Lanka, creates a real risk that he may have come to the attention of Sri Lankan intelligence organisations operating in the UK and monitoring Tamil political activity. I remind myself that any risk to the appellant may arise based on a perception that he has a significant role in post-conflict Tamil separatism.
47. The respondent's guidance identified in UB (Sri Lanka) indicates that returnees to Sri Lanka may be questioned on arrival by the security services, and that returnees may be asked about their activities outside Sri Lanka, including whether they have been involved with one of the Tamil Diaspora groups. Even if the appellant chose to lie about his involvement, I find there is a real risk that

inquiries may disclose his involvement and thereby expose his to a real risk of serious ill-treatment.

48. Any questioning to which the appellant is likely to be subjected must also be considered in the context of his mental health. I once again remind myself that the respondent has accepted that the appellant is suffering from PTSD and a Sever Depressive Disorder. The 2017 psychiatric report indicates that the appellant suffers from "poor concentration", and the psychiatrist concluded that, on return to Sri Lanka, the appellant's PTSD symptoms will worsen considerably and he would be overwhelmed by worsening symptoms [3.1] and distressed with anxiety and fear. At [5] the reported noted that the appellant showed marked agitation in the relatively informal clinical setting, and he had prominent difficulties in expressing himself to the psychiatrist. In Dr Singh's opinion the appellant was likely to become more agitated in a formal and potentially adverse setting. He was not considered fit to give oral evidence and his stress would impeded his ability to give a logical or coherent account of himself.
49. Approaching the appellant's evidence on the lower standard of proof, I find there is a real risk that, on being questioned on his return to Sri Lanka, and in light of his relative prominence as an activist in the UK for Tamil separatism, that he will be identified as a threat to the integrity of Sri Lanka as a single state and subjected to serious ill-treatment. I therefore allow the appeal.

Notice of Decision

The First-tier Tribunal decision is vitiated by material errors of law and is set aside. I remake the decision allowing the appeal on asylum grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed
Upper Tribunal Judge Blum

3 August 2018
Date