



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: PA/01170/2019**

**THE IMMIGRATION ACTS**

**Heard at Manchester (via Teams)  
On the 15<sup>th</sup> July 2021**

**Decision & Reasons Promulgated  
On the 3<sup>rd</sup> August 2021**

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**FFHR  
(ANONYMITY DIRECTION MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr Jagadesham

For the Respondent: Mr Diwnycz, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Sri Lanka who was born in 1984. She appealed to the First-tier Tribunal against a decision of the Secretary of State made on 8 July 2019 refusing her claim for asylum. The First-tier Tribunal (Judge Kelly), in a decision promulgated on 15 October 2020, dismissed his appeal. The appellant now appeals, with permission, to the Upper Tribunal.
2. The respondent accepted that an order for the appellant's arrest for involvement with the LTTE was a genuine document [11]. The judge records that the Secretary of State also accepts that the appellant is at Article 3 ECHR risk if returned to Sri Lanka [12]. Accordingly, she has been granted restricted leave to remain for renewable periods of 6 months. The

appeal before the First-tier Tribunal turned on the respondent's decision to refuse to exclude the appellant from refugee protection by the operation of Article 1(f) of the Refugee Convention:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

3. There are two grounds of appeal. First, the appellant challenges the judge's decision on the ground that the judge acted unfairly by making credibility findings against the appellant having accepted that the appellant would not give oral evidence at the First-tier Tribunal hearing because the respondent agreed that her account of past events in Sri Lanka was accurate. At [24] Judge Kelly stated:

"24. As I have previously noted, the primary facts that I have endeavoured to summarise at paragraphs 2 to 11 (above) are not in dispute. Moreover, the appellant has provided a detailed statement explaining the extent of her knowledge of the wider activities of the LTTE, as well as her motivation and intention in undertaking work on its behalf. Following my initial introductions, I therefore granted her request to be excused from further attendance at the hearing so that she could attend to various pressing family matters. Mr Jagadeshm thereafter elaborated upon his skeleton argument (above), whilst Mr Mullarkey simply relied upon the explanatory letter of his colleague, Mr Spence, to which he said he had nothing to add."

4. At [2], Judge Kelly recorded that:

"2. It is inaccurate to suggest, as does Mr Jagadeshm at paragraph 47 of his Skeleton Argument, that the "the Appellant's credibility is not in dispute". On the contrary, the dispute concerning her motivation and intentions in carrying out her admitted actions, is what lies at the very heart of this appeal. What is not now in dispute, however, is the account that she has given of her actions and of the events that led to her seeking asylum in the UK. These may be conveniently summarised as follows."

The appellant submits that she would have given evidence had she been aware that the judge would make findings regarding the *mens rea* for her actions in Sri Lanka and that she has, in consequence, been denied a fair hearing of her appeal.

5. In my opinion, the judge has not erred in law. As Judge Kelly himself makes clear at [2], the appellant's 'motivation and intentions in carrying out her admitted actions, is what lies at the very heart of this appeal.' Indeed, counsel's own skeleton argument dated 14 August 2020 states at

[4] that one of only two issues in the appeal was the determination of what the appellant knew and intended by her actions and whether those actions 'would in fact further the commission of claimed war crimes/crimes against humanity.' It is, with respect, showing wisdom after the event now to complain that the appellant has been treated unfairly. I am satisfied that the appellant's *mens rea* had not been agreed by the parties prior to the hearing and remained a live issue, as Judge Kelly acknowledges in the opening paragraphs of his decision. Given that it was obvious from the outset that the judge would be making findings regarding the *mens rea* element of Article 1 (F), had the appellant wished to be heard on that aspect of the appeal she should have remained at the hearing and been cross examined. It was her choice that she did not do so and not any error on the part of the judge.

6. The Upper Tribunal also has the benefit of a transcript of the hearing before Judge Kelly. The transcripts reinforces my view that the judge has not fallen into legal error. At page 6, Judge Kelly tells the appellant:

'... your appeal is going to turn on very technical matters, all based on it being accepted about what you say **you did or did not do** in Sri Lanka...' [my emphasis]

Earlier, at page 4 the judge had told the appellant:

'It is now accepted, for the purpose of this hearing, **the account that you gave when you first claimed asylum. That is now accepted.**' [my emphasis]

The judge has made it clear that what had been agreed was the appellant's account of past events in Sri Lanka; he makes no mention of the appellant's intentions. In my opinion, the expression 'what you say you did or did not do' does not obviously include 'what you *intended* to do' and indicates that the question of the appellant's *mens rea* remained at large and for the judge to determine.

7. Ground 2 complains that the judge failed to refer (i) to expert evidence which indicated that the appellant had been a 'lone operator' and 'extremely low-level member of the LLTE'; (ii) the appellant's own evidence as to how she had been recruited; (iii) the length of the appellant's service with the LTTE and any opportunities she had to leave the organisation. Consequently, he did not take account of evidence of those important factors in determining whether the appellant had contributed 'substantially' to war crimes/crimes against humanity.
8. In his thorough and careful analysis at [25] *et seq*, Judge Kelly notes that only circumstantial (as opposed to direct) evidence is before the Tribunal as regards the consequences of the appellant's admitted actions in Sri Lanka. He finds that one of the three elements of the appellant's *actus reus* (selling unregistered SIM cards) did not substantially contribute to Article 1 F crimes but that the remaining elements (surveillance on behalf of the LTTE and storing and distributing weapons) did contribute

substantially. The judge explicitly stated at [23] that he had ‘taken all the documents and statements [in the bundle of documents of the parties] into account in reaching my conclusions’. He was not required, in respect of each and every finding, to specify the evidence which he had considered. Moreover, the grounds fail to show how the elements of the appellant’s evidence, including the expert report, which it is asserted the judge ignored might compel a different outcome to the his analysis. Evidence that the appellant may have seen the LTTE as freedom fighters does not mean that her actions could not have amounted to Article 1 F crimes whilst the ‘low level, lone operator’ nature of her LTTE activities plainly did not prevent her from engaging directly and effectively with other LTTE members by giving details of the movements of those whom the organisation wished to target for assassination and by storing weapons for terrorist fighters.

9. Ground 2 also asserts that the judge also failed to consider that the LTTE was engaged in legitimate military, non-terrorist activities. As he had no evidence as to which category of activity the acts in which the appellant had participated fell, it was not open to the judge to find that Article 1 F was engaged.
10. That part of Ground 2 is without merit. It does not appear that the argument that the appellant had been involved only or predominantly in legitimate military activity was ever advanced to the First-tier Tribunal; the skeleton argument of 14 August 2020 makes no reference to the argument and, at [39-41] of the skeleton, the case is put summarised on the basis only that the appellant’s contribution had not been ‘substantial’ rather than that the activities had been non-criminal in the context of Article 1 F.
11. The challenge to the judge’s findings at [30] has, on first reading, more merit. The judge refers here to a letter written by Presenting Officer, Mr Spence, and dated 19 November 2019:

“30. I am therefore satisfied that the appellant’s intelligence-gathering made a substantial contribution to the catalogue of LTTE’s Article 1F crimes that are listed non-exhaustively at paragraphs 13, 14, and 27 of Mr Spence’s letter, and that the appellant knew and intended that it would do so.”

The appellant claimed to have become involved with the LTTE from August 2006; several of the ‘crimes that are listed non-exhaustively’ in the letter occurred before the appellant claims to have joined the organisation. The argument that the judge has attributed to the appellant crimes which she could not, given the chronology, have committed appears to have some force. However, a more careful examination indicates that the judge is not saying that the appellant contributed to all the crimes listed. The point which the judge is making is that intelligence-gathering of the kind in which the appellant engaged had led to LTTE crimes and that the appellant knew that it did so. In other words, when she began gathering intelligence, the appellant knew the use to which it would be put because

she was aware of past crimes which had been enabled by that very activity. That she went ahead in that knowledge proves that she possessed the *mens rea* which is the judge's conclusion at [30].

12. The remaining grounds amount to nothing more than a disagreement with findings available to the judge on the evidence. It was open to the judge to find that the appellant's contribution to war crimes/crimes against humanity had been 'substantial'. The appellant does not agree with that conclusion, but has failed to show that the judge's approach, application of the relevant law and consideration of the relevant evidence is wrong in law. Accordingly, I dismiss the appeal.

**Notice of Decision**

The appeal is dismissed

Signed  
2021  
Upper Tribunal Judge Lane

Date 26 July

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

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.