Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/05650/2018
PA/08381/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 March 2021	**On 11 February 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

GK
(ANONYMITY ORDER IN FORCE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Jegarajah, Counsel and Ms E Atas, Counsel instructed by Lova Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make this order because the appellant seeks international protection and so is entitled to privacy.

Introduction

2. These appeals arise from a decision of Upper Tribunal Judge Gleeson and Deputy Upper Tribunal Judge Haria on 8 December 2020 to set aside decisions of the First-tier Tribunal allowing the appeals of the appellant who is a citizen of Sri Lanka. As I have to re-determine the appeal I have decided to revert to the description "appellant" to identify the person seeking to remain in the United Kingdom and to call the Secretary of State the "respondent".

3. The decision in PA/08381/2017 was made on 13 August 2017 and is a decision to refuse the appellant leave to remain on human rights grounds because he did not need protection and a decision that he was excluded from international protection under the Refugee Convention and Humanitarian Protection by reason of his conduct. The decision on 27 July 2018 in EA/05650/2018 is a decision refusing him a residence card as the husband of an EEA national exercising treaty rights in the United Kingdom.

4. The appeals were allowed by the First-tier Tribunal but challenged by the Secretary of State and the Upper Tribunal ruled that the First-tier Tribunal had erred in law. I note here that an earlier decision of Upper Tribunal Judge Gleeson to set aside the decisions was itself set aside because notice had not been given. That is irrelevant to these proceedings but I mention it because it might be noticed and without explanation could cause confusion.

Outline of Decisions

5. Judge Gleeson's tribunal gave a summary of the decision of 13 August 2017. They said at paragraph 15 of the decision dated 8 December 2020:

> "15. On 18 February 2014, the [appellant] made a protection claim that was refused on 13 August 2017. That is the primary decision under appeal in these proceedings. The Secretary of State in her refusal letter certified his claims as excluded from refugee and humanitarian protection, pursuant to Article 1F of the Refugee Convention, Article 12 of the Qualification Directive, and Section 55 of the Immigration, Asylum and Nationality Act 2006. Any court or Tribunal considering the protection and human rights appeal must begin its task by considering whether the Section 55 certificate is lawful.

6. Section 55 of the 2006 Act brings Article 1(F) into United Kingdom Law.

7. Judge Gleeson explained why the First-tier Tribunal's decision was unsatisfactory but for present purposes it is sufficient to say that the fundamental problem was the judge did not engage with the Secretary of State's submissions on exclusion.

Outline of Appellant's Case

8. It is the appellant's case that he is a citizen of Sri Lanka and a Tamil and a former member of the Intelligence Corps of the LTTE. He had lived in the United Kingdom since 2009. He was ill-treated by the Sri Lankan authorities when he visited Sri Lanka in 2013 and he claimed asylum on 18 February 2014.

9. He chose not to give evidence in the appeal against each of the decisions and so his case has to be distilled from what he said in interview and statements he served.

Reasons for Secretary of State's Decisions

10. I begin by looking particularly at the Secretary of State's Reasons for Refusal of the protection claim which is dated 13 August 2017 and the addendum to that dated 7 June 2019. The addendum of 7 June 2019 makes it plain that the two are to be read together.

11. The letter of 13 June 2017 acknowledges there is a claim for recognition as a refugee, the appellant alleging a well-founded fear of persecution in Sri Lanka on the basis of his political opinion. The letter explained that the Secretary of State had additionally considered the possibility of the appellant requiring Humanitarian Protection but decided that the appellant fell to be excluded from protection under Article 1F(a) and the Secretary of State issued a certificate under Section 55 of the Immigration, Asylum and Nationality Act 2006 saying that the appellant was not entitled to protection under Article 33(1).

12. Reasons were given which I summarise below.

13. The Secretary of State acknowledged that it was the appellant's case that he feared serious ill-treatment or even death at the hands of the authorities and of the LTTE in the event of his return to Sri Lanka.

14. The Secretary of State noted that, in outline, the appellant said that he had been forced to join the LTTE in 2003 when he was aged 19. Essentially he was stopped at a checkpoint and after basic training he was one of five selected for "spy training" and he claimed to have been a member of the LTTE's intelligence wing between June 2003 and April 2009. Initially he did work checking vehicles, essentially to make sure that civilian vehicles were not vehicles run under the guidance of the Government of Sri Lanka and that they had permission to be in LTTE controlled areas. He explained that he had no authority to arrest anyone but he would make reports that could lead to people being detained by the LTTE. He did not see anyone mistreated. He believed that if people were to be mistreated they would be taken to a different place.

15. In December 2003 he was sent to Colombo to join the LTTE's external intelligence group and started work for them in 2004. He was introduced to a handler who he knew as "Ravi" and was given a mobile phone and a SIM card which Ravi would use to contact him. Ravi did telephone him once or twice a week and give him instructions. He had no way of contacting Ravi.

16. Ravi instructed him to enrol on educational courses to give him a legitimate reason for being in Colombo and as a result of that he signed up for a computing course.

17. The appellant denied receiving any payment from the LTTE. He said he worked for them because he was frightened of the consequences if he did not. Ravi had never threatened him but told him he was under

observation and that if he tried to tell the authorities he would be detected and that would make problems.

18. His first major project was to find details about Douglas Devananda. Mr Devananda has been a prominent figure in Sri Lankan politics for some time. For present purposes it is sufficient to say that he is a Tamil who gave support to the government of Sri Lanka and by so doing incurred the wrath of the LTTE.

19. The appellant said that under Ravi's direction he was required to observe and monitor the movements of Mr Devananda and particularly the vehicles in and out of Mr Devananda's house. He did that and passed on the information he had found.

20. I note that in his asylum interview the appellant described Mr Devananda as "one of our most target". This appears in answer to question 185 and whilst it may be a slightly incomplete record the sentiment is plain. The appellant knew that Mr Devananda was being targeted because he was a Tamil who was seen as a traitor. It is plain from the answer to question 202 that the appellant knew that there had been an assassination attempt, using a female suicide bomber, on Mr Devananda after the appellant had started to gather intelligence but he had no way of knowing if the information he gathered was actually relied upon.

21. He made it plain in answer to question 322 at his interview that he knew the information he was gathering might be used to develop a plan to kill Mr Devananda. He said that Ravi assured him he was doing a good job but he was frightened of both the authorities, who clearly would disapprove of his conduct, and, if he stopped doing what was required of him, of Ravi.

22. In 2005 on Ravi's instructions he started to work for Dialog Telekom as a customer service call centre staff member. He worked for Dialog Telekom between November 2005 and April 2009 with the intention of finding important information about government officers and VIPs. He said that he did not recognise the names of most of the people he was required to investigate but one of the targets (question 276) was "Colonel Karuna" but he found nothing about him. He did not know how the LTTE were using information gathered.

23. In a printout from the South Asian Terrorist Portal in the papers before me Vinayagamurthy Muralitharan, also known as "Colonel Karuna", is described as the leader of the LTTE breakaway faction. I do not consider this description controversial. The point for present purposes is that he is perceived as a known enemy of the LTTE.

24. The appellant said that in February 2009 he lost contact with Ravi sometime in February or March. No explained was given but contact just stopped. He assumed that Ravi had been arrested or killed.

25. He said that he did not have the option of leaving his work for the LTTE. Sri Lanka was a small country and he was frightened of being found if he stopped work.

26. Between September and October 2009 he worked for a bank.

27. The appellant entered the United Kingdom lawfully as a student with a student entry clearance visa in November 2009.

28. He was given leave to remain until July 2014 and claimed asylum in February 2014.

29. It is the appellant's case that he returned to Sri Lanka for a short visit lasting less than 10 days in 2011 to support his family on the occasion of his father's death. The appellant returned to the United Kingdom without incident. He went back to Sri Lanka in 2013 for a family visit and was ill-treated during that trip.

30. The appellant said that he was arrested on 20 July 2013 in Wellawatte in Sri Lanka because his name had been given to the police by someone in the LTTE intelligence wing. He was released on 28 July 2013 after his uncle paid a bribe but he said he was tortured by the police in Sri Lanka because he was in the LTTE.

31. The letter then considered the appellant's immigration history.

32. The Secretary of State accepted that the appellant was a national of Sri Lanka, mainly because he spoke Tamil.

33. The Secretary of State then considered the appellant's long term involvement with the LTTE. The refusal letter noted that the LTTE were a well organised and in many ways effective insurgent group and that their intelligence unit was seen as an essential part of its work. It had been involved in several high profile successful assassinations.

34. The ceasefire came into force in January 2002 but was often breached. However, under the terms of the ceasefire the LTTE were able to open offices in government controlled areas.

35. The letter also explained how Douglas Devananda was the head of the Eelam People's Democratic Party and explained in some detail how his political activities were offensive to the LTTE. There had been several attacks on Mr Devananda. Four people were killed in an attack on his home in 1995. There was a firearms attack on him in March 2004. A female suicide bomber killed herself and four police officers in July 2004. The bomber had tried to enter his office. In 2005 his car was subject of a bomb attack. In November 2007 one person was killed and two injured by a female suicide bomber who detonated her explosives in Mr Devananda's offices in Colombo. The letter then listed attacks on less prominent people in the EPDP. Many killings or attempted killings were outlined in the letter in which the intended victims were members of the EPDP.

36. The letter also outlined attacks by the LTTE in Colombo between January 2004 and February 2009. There were many such attacks listed.

37. The letter then set out reasons for concluding that the appellant is not entitled to protection under the refugee convention. These are rooted in Article 1F of the 1951 Convention Relating to the Status of Refugees and I set out below the terms of the article:

Article 1F

> 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

38. At paragraph 42 the letter dealt with the "Reasons for your Exclusion under Article 1F(a): exclusion from the Refugee Convention and Humanitarian Protection".

39. This letter set out the definition above and then outlined the UNHCR's position. According to the Secretary of State the UNHCR said that in order to satisfy the standard of proof under Article 1F there needed to be "clear and credible evidence" but no criminal conviction was necessary and neither was proof to the criminal standard. According to the letter:

> "In general, individual responsibility arises where the individual committed or made a substantial contribution to the act in question, in the knowledge that his or her act or omission would facilitate the criminal conduct".

40. It said the UNHCR required "reliable, credible and convincing evidence, going beyond mere suspicion" to support a finding that there are serious reasons for considering that such individual's responsibility exists.

41. Having outlined the law as it was understood by the Secretary of State, the letter set out the reasons for excluding the appellant under Article 1F(a).

42. Essentially it was said the appellant was a long term member of the LTTE who was active for some years before disavowing himself from the organisation. He described himself as an intelligence officer reporting to Ravi, gathering information on the movements of Mr Devananda and he had been told he was doing the job in a satisfactory way. On his own version of events he had gone to Colombo adopting the pretext of being a student to spy for the LTTE. He tried to get a job in Mr Devananda's office. He failed, then got a job later with Dialog Telekom.

43. The Secretary of State noted that the appellant spoke English, Tamil and Sinhalese and appeared to have a good knowledge of Colombo where he said he had grown up. The information he gave about his methods of operation chimed with the Secretary of State's understanding and Mr Devananda was indeed a target. The Secretary of State took the view that the appellant's role made "a significant contribution to the LTTE's ability to carry out these crimes" and that was sufficient. The Secretary of State believed that the appellant as a resident of Colombo prior to 2003 would have had every reason to believe the LTTE was involved in assassination attempts on people such as Mr Devananda and similarly about the people who he researched when he was at Dialog Telekom.

44. At paragraph 84 the Secretary of State said:

> "Your role in gathering intelligence for the LTTE's intelligence wing, that contributed towards the planning for terrorist attacks and/or crimes against

humanity, for a period of five years, gives serious reasons for considering that you made a significant contribution to the LTTE's ability to commit crimes".

45. Further the Secretary of State noted that the appellant was a voluntary member of the LTTE. The Secretary of State noted the appellant's claim to have been forcibly recruited and to have worked out of fear and also noted the appellant said he had never been threatened directly by Ravi or anyone else so there was no imminent direct threat. The appellant worked in that role for six years between 2003 and 2009. He operated under areas of government control and did nothing to distance himself from his handler. The Secretary of State regarded him as a willing participant. In short, the Secretary of State regarded him as somebody who had willingly gathered information knowing that it could be used in an effort to kill someone and that according to the Secretary of State was sufficient to disqualify him from protection of the Convention.

46. The letter then dealt with the appellant's expressed risk on return.

47. The appellant said that he feared return to Sri Lanka because he would be arrested and tortured by the LTTE or the Sri Lankan authorities. The Secretary of State noted that the appellant remained in Sri Lanka after Ravi disappeared and obtained a job within the HSBC Bank in which he worked for a couple of months before getting a visa to study in the United Kingdom. He was there for eight months before travelling to the United Kingdom.

48. The appellant said he was arrested by the police in July 2013. He left the UK on 9 July 2013 to visit his immediate family because his grandmother's health was in a serious condition. He said he stayed at his family home in Moratuwa. He said he renewed his passport and, immediately afterwards, he was arrested at Manning Place market and detained on 21 July 2013. He said that his name had been given to the police by other intelligence officers.

49. He was then removed in custody to Pettah but he was released on 28 July after his uncle paid a bribe of 14 lakhs. The same uncle provided him with his passport and tickets for the return trip to the United Kingdom on 29 July 2013. He was assisted by an immigration officer at the airport and had no further problems.

50. When interviewed in May 2016 he said he travelled to Sri Lanka in 2011 to visit his family after his father's death. He had no issue on entry at Colombo and stayed in the family home for seven days without attracting attention. Nothing suggested that was on a "wanted list".

51. The Secretary of State did not believe that the appellant would have been released on a bribe if he really was of interest to the authorities for high profile LTTE activity.

52. The Secretary of State did not believe there was any risk from the LTTE. It was a spent force.

53. The Secretary of State did not accept that the appellant was at any risk from the authorities. The refusal letter considered the guidance given in

GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) which identified the categories of people who might be at risk. This included a person who was detained by the Sri Lankan security services. The present concern of the Sri Lankan security services was to identify people in the diaspora working for Tamil separatism and the appellant was not such a person.

54. The letter then dealt with the Article 8 claim which is not the subject of an appeal before me because it is a "new matter". The letter explained that the appellant did not risk ill-treatment and was not entitled to protection under the Refugee Convention.

55. I consider now the supplementary letter dated 7 June 2019. The letter explains that it is intended to give reasons for the appellant's exclusion under Article 1F(b) and Article 1F(c) of the 1951 Geneva Convention, to consider points raised in the expert report of Dr Chris Smith dated 8 February 2019 and for the Secretary of State to confirm the Secretary of State's position in relation to Article 3 of the European Convention on Human Rights on risk of return to Sri Lanka.

56. The letter asserts that Article 1F(b) applies where a person has committed serious non-political crimes outside the country of refuge and Article 1F(c) applies where a person is guilty of acts contrary to the purposes and principles of the United Nations. The letter acted as a certificate that the appellant was not entitled to protection under Article 33(1).

57. The letter noted that reasons had already been given for exclusion under Article 1F(a).

58. The "serious non-political crimes" identified by the Secretary of State were committed by the appellant when he gathered intelligence knowing that the information he passed on was wanted for the purpose of facilitating assassination.

59. The explanation for the Secretary of State relying on Article 1F(c) (acts contrary to the purposes of the United Nations) is also discursive. It refers to the purpose and principles of the United Nations and to international and United Kingdom definitions of terrorism before concluding:

> "There are serious reasons for believing that you were preparing to organise and prepare potential terrorists attacks on Douglas Devananda. It is therefore considered that your actions intelligence gathering meet the threshold of Article 1F(c)."

Evidence

60. The papers before me were in a very unsatisfactory state and I am grateful to Ms Jegarajah's pupil, Ms Atas, who took the lead in sorting them into something like a useful form and this enabled me to proceed with the hearing.

61. No evidence was called before me. The case was argued by submissions from the various skeleton arguments that had been lodged at different stages.

Dr Chris Smith

62. I have seen the opinion of Dr Chris Smith, Senior Research Fellow at the Institute of Commonwealth Studies in London. It is set out in a report dated 8 February 2019. Irritatingly page 18 was missing from my copy of the report but the appellant's representatives provide a complete copy promptly when the omission was drawn to their attention.

63. Dr Smith is known to the Tribunal for his work as Deputy Director at the International Policy Institute, King's College London and his research in international matters. He is clearly a man competent to give opinion evidence. He has written extensively on Sri Lanka. He has also done work reviewing the COIS Report on India for the UK Border Agency.

64. He was told that the appellant is a Sri Lankan Tamil from Jaffna who was forcibly recruited into the LTTE, that he was arrested by the police in July 2013 and detained for a week when he was tortured. He worked for the intelligence wing of the LTTE. He was sent to Colombo in 2003 and started to work for a telecom company. He lost contact with the LTTE in 2009. He opined that the appellant's involvement with the intelligence wing was "reasonably likely to be known to the Sri Lankan authorities". He said that the government authorities in Sri Lanka were a sophisticated intelligence system and he speculated that the appellant's activities were of sufficient importance to have come to their attention. He said that the appellant would be detained under the Prevention of Terrorism Act. He said that the Sri Lankan authorities remain vigilant and suggested that the effluxion of time makes it more likely that his activities would be discovered rather than less likely that the authorities would be interested. He also explained how a person who was arrested by the Sri Lankan authorities for suspected terrorist links would not necessarily be treated well.

65. He said at paragraph 9:

> "The LTTE were defeated in 2009 and ceased to be an insurgency group of any significance. The LTTE main area of control, the Vanni, was overrun by the Sri Lankan Army. The HQ in Kilinochchi was ransacked and all administrative material was secured. A number of former LTTE intelligence officers and former LTTE members have aligned themselves with the authorities and furthermore, the authorities are now believed to have access to the LTTE database, containing badge numbers and the actual names and nom de guerre names of LTTE members. It is reasonably likely that the appellant's identity and role is now known to the authorities".

66. He said the LTTE did run a state within a state and the LTTE were well organised. He notes the appellant's claim to have been arrested and detained for just over a week in July 2013. He said he was interrogated and tortured. Anything he said, Dr Smith speculated, would have been recorded and analysed carefully.

67. He said that the passenger inventories of all flights into Sri Lanka are checked so that anyone in whom the authorities were interested would be noticed. He had been advised informally that once a record is made it is never erased. Additionally as a returned asylum seeker he would be noted by the authorities and interrogated.

68. He confirmed that there are two lists used by the authorities in Sri Lanka. There is a "stop list" which ensures the detention of people on arrival, and the second is a "watch list" which alerts the authorities to the return of a person of interest and interest is taken. He said that a returned asylum seeker is likely to be arrested. At paragraph 28 he suggested that it is now reasonably likely that the appellant's name appears on a stop list and said:

> "the likelihood of him appearing on the stop list is heightened by his post-conflict arrest and that will note that the Appellant had been arrested post-conflict and appears to have left detention".

69. I am not sure that Dr Smith added much to established country guidance but I regard his evidence as useful a helpful but, informed as his opinion is, he is not definitive but his opinions are entitled to significant weight.

Dr Robin Lawrence

70. I have a report from Dr Robin Lawrence dated 23 September 2017. Dr Lawrence is a qualified medical practitioner and his higher qualifications include his membership of the Royal College of Physicians and the Royal College of Psychiatrists and his having worked as a consultant at St Thomas' Hospital in London. He is plainly competent to give expert evidence on the appellant's mental state. He prepared a report that contains appropriate expert directions.

71. The appellant gave an account of being arrested in July 2013 and taken to the Wallawetta police station before being transferred to the CID branch in Pettah. He was beaten with sticks and kicked with booted feet and told he would be killed if he did not co-operate. He was then beaten with heated rods burning his back and he said cigarettes stubbed out on his legs. However, he was released on the payment of a bribe.

72. The appellant said that when he returned to the United Kingdom he did not want to tell anyone what had happened and the report described this reluctance as "highly consistent with PTSD" (page 11) but the appellant then heard from his mother that the police had come to his house.

73. Dr Lawrence found that the appellant was depressed and had PTSD which had receded spontaneously, a change the Dr Lawrence found indicative of good progress. Dr Lawrence found that the appellant was at some risk of taking his own life but his wife (in the United Kingdom) was a protective factor and the risk would increase "greatly" if he returned or attempt was made to return him.

74. I have no reason to doubt Dr Lawrence's opinion and I accept what he told me.

Dr Andres Isquierdo-Martin

75. I have seen a scar report from Dr Andres Isquierdo-Martin. Dr Martin is a medical practitioner and his qualifications include his being a Fellow of the Royal College of Surgeons and a Fellow of the Royal College of Emergency Medicine. He prepared a report dated 27 September 2017. It includes photographs of the appellant's leg and back.

76. He said at paragraph 6.3:

> "The scars on the back are typical of the events described by the appellant of being intentionally burnt. The rest of the scars were less specific but did not show any inconsistencies with the description of events by the appellant. Following the recommendations in Chapter V, Section D, paragraph 188 of the Istanbul Protocol where it states that 'ultimately it is the overall evaluation of all lesions and not the consistency of each lesion with a particular for of torture but is important in assessing the torture story', overall in my expert opinion the scars are typical of injuries caused by torture as described by the appellant".

77. Similarly, I have no reason to doubt Dr Martin's evidence and I accept what he told me.

Documents

78. The papers include a translation of a Ministry of Defence Public Security, Law and Order "Receipt on Arrest" relating to the appellant saying he was arrested at Manning Place Wellawatte on 20 July 2013 at 10 o'clock in the morning as a person suspected of terrorist activities.

79. There are also statements supplied to the hearing in March 2021.

80. There is a letter from the appellant's mother-in-law. She lives at an address in London SE2. She expresses her approval for the appellant's marriage to her son.

81. There is a letter from the appellant's wife who is a French national, confirming their relationship.

82. There are also divers country reports and similar background material that I have considered.

Secretary of State's submissions

83. Although Ms Jegarajah opened the case and, quite properly, reminded me of her right of reply, which she exercised, I find it more helpful to set out first the Secretary of State's submissions made after Ms Jegarajah addressed me.

84. Mr Clarke relied on his skeleton argument dated 27 June 2019 and 14 February 2020. Mr Clarke's skeleton argument dated 27 June 2019 helpfully set out the Secretary of State's case beginning at paragraph 3 and I reproduce the substance of it below.

85. It is the respondent's case that the appellant:

    (i) falls to be excluded from the Refugee Convention in the light of his involvement with terrorist acts during the Sri Lankan ceasefire in 2002;

    (ii) the appellant has not made out the defence of duress;

    (iii) the appellant does not have a well-founded fear of persecution on return on account of his former LTTE activities as he was not arrested and detained as alleged until 2013;

    (iv) the appellant's stand-alone claim on Article 3 grounds has not reached the required threshold;

(v) that the appellant's Article 8 claim cannot succeed in the light of the public interest in excluding him because of his terrorist activities;

(vi) the appellant is a present, genuine and sufficiently serious threat to the fundamental interests of society and it would be proportionate to refuse a residence card.

86. Mr Clarke confirmed that the burden of proof is on the Secretary of State to establish that the appellant is excluded. Further, in a case such as this where the appellant raises duress it is for the Secretary of State to prove the appellant was not acting under duress. For the avoidance of doubt I agree with Mr Clarke's submissions on these points and I have directed myself accordingly.

87. Mr Clarke referred to the decision in **Al-Sirri [2012] UKSC 54.**

88. If I may respectfully say so, I have found that opening paragraphs of the judgement in **Al-Sirri** particularly helpful in considering what is, for me, a line of argument that rarely rises and, although I repeat the text of article 1F, I set them out below:

> 1 These appeals are concerned with a little used provision in article 1F(c) of the Geneva Convention on the Status of Refugees ("the Refugee Convention"). This excludes from refugee status and protection "any person with respect to whom there are serious reasons for considering that . . . he has been guilty of acts contrary to the purposes and principles of the United Nations." For the time being at least, however, the Home Secretary accepts that these appellants cannot be returned to their home countries because they face a real risk of torture or inhuman or degrading treatment or punishment there. It is the grant of refugee status, rather than the right to stay in this country, which is in issue in these proceedings.
>
> 2 The issues in the two cases are different. In Al-Sirri, the question is whether all activities defined as terrorism by our domestic law are for that reason alone acts contrary to the purposes and principles of the United Nations, or whether such activities must constitute a threat to international peace and security or to the peaceful relations between nations. In DD, the question is whether armed insurrection is contrary to the purposes and principles of the United Nations if directed, not only against the incumbent government, but also against a United Nations-mandated force supporting that government, specifically the International Security Assistance Force ("ISAF") in Afghanistan. Although the issues are different, many of the relevant materials are the same, as must be the general approach to article 1F(c), and so we deal with them in one judgment to avoid unnecessary repetition. In all article 1F cases, there is also the issue of the standard of proof: what is meant by "serious reasons for considering" a person to be guilty of the acts in question?
>
> **(1) The general approach**
>
> Relevant treaty and legislative provisions
>
> (3) Article 1F of the Refugee Convention excludes three types of person from the definition of refugee:
>
> > "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."

It will be apparent that a particular act may fall within more than one of these categories. In particular, terrorism may be both a "serious non-political crime" and an act "contrary to the purposes and principles of the United Nations".

4 Member States of the European Union are, moreover, bound to observe the standards laid down in Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"). Its main objective is to ensure common standards in the identification of people genuinely in need of international protection and a minimum level of benefits for them in all Member States (recital 6). Recital 22 deals with article 1F(c):

> "Acts contrary to the purposes and principles of the United Nations are set out in the preamble and articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.'"

5 Article 12 of the Qualification Directive both reflects and expands slightly upon article 1F of the Refugee Convention (the changes and additions are italicised):

> "2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
>
> (a) he or she 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 or she has committed a serious non-political crime outside the country of refuge prior to his or her admission [to that country] as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
>
> (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and articles 1 and 2 of the Charter of the United Nations.
>
> 3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

6 The Qualification Directive is transposed into United Kingdom law by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525). Regulation 2 provides that "'refugee' means a person who falls within article 1(A) of the Geneva Convention and to whom regulation 7 does not apply". Regulation 7(1) states that "A person is not a refugee, if he falls within the scope of article 1D, 1E or 1F of the Geneva Convention". The Immigration Rules provide, in paragraph 334, that a person will be granted asylum, inter alia, if "(ii) he is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006".

7 However, section 54 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"), provides:

> "(1) In the construction and application of article 1F(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular –
>
> (a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and
>
> (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).
>
> (2) In this section –
>
> 'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, and
>
> 'terrorism' has the meaning given by section 1 of the Terrorism Act 2000."

8 There is no need to set out the definition of terrorism contained in section 1 of the 2000 Act. The essence is the use or threat of certain dangerous actions designed to influence this or any other government or intimidate the public for the purpose of advancing a political, religious, racial or philosophical cause. But if firearms or explosives are involved, the act or threat need not be designed to influence the government or intimidate the public. Terrorism designed solely to achieve political change within the United Kingdom, with no international repercussions, is clearly covered, as is terrorism committed here with a view to achieving internal political change in another country.

9 The Preamble to the Charter of the United Nations recites the determination of the peoples of the United Nations to save succeeding generations from the scourge of war; "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"; to maintain justice and respect for international law; and "to promote social progress and better standards of life in larger freedom"; and for these ends to live together in peace, unite to maintain international peace and security, ensure that armed force is used only in the common good, and employ international machinery for the economic and social advancement of all peoples.

10The purposes of the United Nations are set out in article 1 of the Charter. The first purpose is

> "1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."
>
> The second is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"; the third is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian nature", and in "promoting and encouraging respect for human rights and for fundamental freedoms for all"; and the fourth is to be a centre for harmonising the actions of nations in the attainment of these common ends
>
> 11Article 2 of the Charter requires the United Nations and its Member States to act in accordance with the seven Principles set out therein. These are: the sovereign equality of all Members; the duties of all Members to fulfil their obligations under the Charter in good faith; to settle their disputes by peaceful means; to refrain from the threat or use of force against the territorial integrity or political independence of any state; to give the United Nations every assistance in taking action in accordance with the Charter and to refrain from assisting any state against which it is taking action; the duty of the United Nations to ensure that non-member states act in accordance with these principles so far as may be necessary to maintain international peace and security; and, finally, that "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ..."

89. Following **Al-Sirri**, he argued that although it is for the respondent to prove her allegation that the appellant was disqualified from protection under the Refugee Convention it was sufficient to show that there were “serious reasons” for considering that the matters that led to exclusion,. and the “serious reasons” test is higher than a “reasonable grounds” test and the evidence must be clear and credible or strong, that “considering” is more than suspecting and in the view of the court is stronger than “believing” but it is not the criminal standard of being sure beyond all reasonable doubt but it is for the decision maker to apply the Convention.

90. He then outlined the law relating to a Section 55 certificate which requires there be “serious reasons for considering that the person concerned has committed a crime against peace or a war crime or a serious non-political crime or was guilty of conduct contrary to the purpose of the United Nations”.

91. Concerning criminal responsibility, he referred to Directive 2004/83 and Article 12 which provides that a person is excluded from being a refugee when there are “serious reasons for considering that he has committed a crime against peace or a war crime or a crime against humanity for a non-political crime”. Following **JS (Sri Lanka)** Article 1F disqualification applies to someone who has made “a substantial contribution to” a crime knowing that his own conduct would facilitate it and that the necessary mens rea that the person had personal knowledge of the aims and

intended to contribute to their commission. Following **Al-Sirri** he contended that a person who has done something such as making a significant contribution to the commission of the relevant act in the knowledge that the act done would facilitate the criminal act.

92. He then looked at provisions specific to 1F and said that the international instruments are the place to start. The Rome Statute at Article 7 outlines crimes against humanity and includes murder and persecution and that Article 1F(c) relating to acts contrary to the purpose of principles of the United Nations including committing, preparing or instigating terrorism or encouraging others. He drew attention to the decision of **Al-Sirri**, paragraphs 38 and 39, which said that Article 1F(c) is only triggered in "extreme circumstances by activity which attacks the very basis of the international community's coexistence" and indicated that the:

> "Essence of terrorism is the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose of intimidating a population or compelling a government or international organisation to act or not act in a particular way".

93. At paragraph 39 it was suggested that it was "very likely that inducing terror in the civilian population or putting such extreme pressures upon a government will also have the international repercussions referred to by the UNHCR".

94. He then drew attention to the decision in **AH [2015] EWCA Civ 1003** and perhaps particularly paragraph 46 which stated that it is wrong to presume mere membership of an organisation with terrorist aims is enough for Article 1F(b) to bite but it is also wrong to presume that any particular level of overt activity has to be shown.

95. Mr Clarke then directed attention specifically to the appellant's case.

96. It was the appellant's case that he had been stopped at a checkpoint and required to join the LTTE and eventually sent to Colombo for external intelligence work and was contacted by Ravi. It was his case that he found details about Douglas Devananda including his movements, where he could be found, what vehicle he used, how he could perhaps contact him by pretending to be a salesman or by applying for jobs at his office. He observed Mr Devananda between January 2004 and November 2005. The appellant admitted to matters that Mr Clarke submitted should lead to his exclusion. He said in his interview his initial fear was that he would be used as a suicide bomber because he knew that the LTTE did such things but he was not involved directly in any attempts on Mr Devananda.

97. He described himself as being part of a cell that attacked those who were targeting the LTTE state. He did not like Mr Devananda because he described him as a Tamil who sided with the government and was a prime target. People did not like Devananda in the Tamil community. He was also aware of an assassination attempt at Devananda's office by a female suicide bomber but he had no way of knowing that his own intelligence had been used to facilitate that end. He indicated he did not know how it would be used but seemed quite clear that he accepted that he knew it might have been used for killing him.

98. Mr Clarke drew attention to the appellant's work and to the surveillance for Dialog Telekom, he was particularly gathering information on Karuna but did not know how this was worked.

99. Mr Clarke submitted that the appellant had gathered intelligence covertly in Colombo between 2003 and 2009 and that he had researched specifically Mr Devananda from January 2004 to November 2005 who had been victims of assassination attempts. He knew that the LTTE were involved in attacks on civilians and that he was gathering information to help with those targets. He knew that his information could be used to kill Mr Devananda.

100. Mr Clarke submitted there was no need to show that the appellant had any precise awareness of what was happening. What he had admitted was enough. Mr Clarke submitted that the refusal letter referred to a background of terrorism and assassinations by the LTTE suicide bombings and intelligence use and despite there being a ceasefire in 2002 there were numerous breaches until hostilities resumed in 2006 and he continued to work during the ceasefire including the time between 2002 and 2004 when 46 Tamil politicians were assassinated by the LTTE and by 2006 there were 3,500 ceasefire violations. Mr Devananda was a minister at the material time but he was involved in the agricultural, marketing and cooperative department, Hindu affairs and social services and welfare. It was argued he was not part of the Tamil conflict.

101. The LTTE targeted EPDP members and journalists. The appellant had referred to a suicide bomb in Devananda's office (interview question 202) and a bomb under his car and someone else was injured. Four police officers were injured in one of the suicide attempts on Devananda and there were many other events. Clearly the LTTE were gathering intelligence between 2004 and 2009 and 24 incidents are set out.

102. In the appellant's supplementary background evidence bundle reference to the recurring nightmare taken from a Human Rights Watch Report that the LTTE was not required to disarm in the 2002 ceasefire but the EPDP leadership was required to disarm and it did in large measure co-operate with the process and suffered intensification of attacks during that time.

103. Mr Clarke then directed my attention to the Statute of Rome, particularly Article 31, dealing with duress.

104. I set out below:

> **Grounds for excluding criminal responsibility**
>
> In addition to other grounds for excluding criminal responsibility provided by this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
>
> (a)… (b)… (c)…
>
> (d) The conduct which is alleged to constitute a crime with the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person necessarily and reasonably to avoid this

> threat, provided that the person does not intend to cause greater harm that the one sought to be avoided. …

105. He said that such circumstances clearly do not exist here.

106. Mr Clarke then dealt with the asylum claim.

107. It is the appellant's case that he had no profile. He had worked for an organisation described as "crushed and spent force". There was no sur place claim beyond attending Heroes Day and nothing to suggest that he would be of interest on return now.

108. Further, the appellant had gone back to Sri Lanka in 2011 and again in 2013. In 2011 there was no difficulty at all on his own account. This he submitted was inconsistent with someone who needed protection.

109. The appellant claimed to have been arrested in July 2013, eleven days after returning to Sri Lanka, he was arrested when he tried to change his passport, but was made clear in the country guidance given as CG such an individual who came to the attention of the authorities who was on a stop list or watch list would be monitored. Only if he was doing things that led to the suspicion he was trying to undermine the unitary state might there be consequences adverse to the appellant.

110. Although the appellant claims that he was suspected of terrorist activity there is no suggestion his home or his relatives' home was searched, he was not charged with any offence, he claimed he was released and left easily on his own passport.

111. Mr Clarke submitted that it was just not conceivable that there was any serious interest in him if he was allowed to get out as easily as happened.

112. Documents suggesting the contrary were unreliable.

113. Mr Clarke then looked at the report by Dr Martin. Clearly there are scars but Dr Martin cannot date anything particular and it is noted the appellant was entitled to medical care in the UK but failed to have his torture injuries looked at when he might have been expected to have done. He did refer to shoulder pain on examination in December 2013 but no other kind of injuries which is extraordinary in the case of someone who had been tortured if that was the case. Mr Clarke contended that the findings of post-traumatic stress disorder and the causation are unreliable. It was noted on the appellant's account he was not paid for anything, he was motivated because of fear and it is not clear the expert appreciated the time in which the appellant had been working. On the appellant's account he would have been suffering from PTSD when he was working for intelligence and this does not seem to fit the picture that has emerged.

114. The appellant says that his mother and sister had had problems with the authorities since he returned in 2013 to the United Kingdom but there is no confirmation of that. He was critical of the expert report of Dr Smith because it did not consider the fact that the appellant returned once without difficulty and does not provide appropriate examples to justify his conclusions. There was no reason the people identified are in any way

similar. Again, he returned unhindered in 2011 and this was just not explained.

115. He looked at the evidence of Dr Lawrence and it is not a case of a severe risk of suicide and there was someone to help him in Sri Lanka.

116. Under EU matter he has no claim to a permanent right of residence because he had not established one. Mr Clarke then looked at the law relating to exclusion and recognised that the principles set out in Regulation 27 must be considered. What he had done was a threat to the fundamental interests of society. At paragraph 56 he says:

> "It is submitted that in light of the gravity of terrorism, [the] appellant's lack of remorse, a failure to accept responsibility, continued opposition to Devananda and support for the LTTE cause demonstrates 'a persistence in him of a disposition hostile to a fundamental value enshrined in Article 2 and 3 TEU, capable of disturbing the peace of individuals and the physical security of the population'" (**HF and K** at 66).

117. He submitted the decision was proportionate, the appellant was then 35 years old, had a history of depression and post-traumatic stress disorder, with family in the UK and in the United Kingdom, not contributing economically but apparently living off his cousin, entered the United Kingdom as a family member of an EEA national only since 2017, most of his contacts were in Sri Lanka.

118. Finally he looked at the prospects of rehabilitation and looked at the decision in **Dumliauskus [2015] EWCA Civ 145** and noted that people who had not become qualified persons can be removed when they are not exercising free movement rights regardless of the public good. He said: "If their presence during this time makes them a present threat to public policy it would be inconsistent with the purposes of the Directive to weigh in the balance against deportation their future prospects of rehabilitation".

119. It indicated that substantial weight should not be given to rehabilitation in the case of a person without permanent residence.

120. Mr Clarke's submissions dated 14 February 2020 were made in response to Upper Tribunal Judge Gleeson's directions of 24 January 2020 and I consider them below. They are directed particularly to the application of Article 1F and also whether or not an oral hearing was required.

121. Concerning Article 1F(a) the respondent maintained that it was the appellant's case that Mr Douglas Devananda was not a protected person in International Humanitarian Law and that it was not necessary to say that the LTTE had a state but that it exercised state-like control.

122. Mr Clarke relied on Article 4 of the Fourth Geneva Convention relative to the protection of civilian persons in a time of war. The appellant maintains that Mr Devananda was not a civilian. The United Kingdom co-sponsored the March 2014 UNHCR Resolution that the Secretary of State is presumed to be aware that the LTTE targets for themselves war criminals and the appellant relied on "leaked diplomatic cables" published in The Guardian and extracts from **AS (s.55 "exclusion" certificate – process) Sri**

Lanka [2013] UKUT 571 (IAC) but, according to Mr Clarke, there was no evidence that Mr Devananda was a war criminal.

123. However, the appellant conceded that the appellant was part of a cell that attacked those who were targeting LTTE state and Tamil people and Douglas Devananda and other paramilitaries were war criminals who perpetrated crimes against humanity and not the appellant who was simply assisting in the legitimate defence of the Tamil state.

124. It is the appellant's case that it was permissible under International Humanitarian Law to pursue military objects against targets who were attacking the state and its people.

125. Mr Clarke argued that this contention is based on the fact that the LTTE was engaged in state building in areas they controlled during the ceasefire and therefore the state was defending itself lawfully.

126. Mr Clarke emphasised that the early submissions of 27 June 2019 were relied upon. He repeated his contention that the appellant falls to be excluded from the Refugee Convention by reference to international instruments under Article 7(1)(a) which excludes those involved in murder and Article 2(e)(i) which excludes those "intentionally directing attacks upon civilian population as such who are individual civilians not taking part in hostilities". It was the Secretary of State's case that the appellant admitted doing precisely those things. It was also her case the appellant bears personal responsibility for the acts though not directly involved in of course, following **JS (Sri Lanka)** which adopted **Al-Sirri**:

> "As a general proposition, individual responsibility arises where the individual committed an act within the scope of Article 1F(c), or participated in its commission in a manner that gives rise to individual responsibility, for example through planning, instigating or ordering the act in question, or by making a significant contribution to the commission of the relevant act, in the knowledge that his act or omission would facilitate the act".

127. It is argued that the fact his offending, if that is what it was, was inchoate does not exclude him from criminal responsibility (I regard this as uncontroversial). It was the appellant's case that he was involved with and had knowledge of acts the Secretary of State regarded as terrorist acts committed in Colombo between 2002 and 2006.

128. He then addressed the appellant's contention that what he did was lawful. His answer was simple; Mr Clarke said that there was no war. There was a ceasefire but in any event intimidation and terrorism were prohibited so even if there was a state of war notwithstanding the ceasefire attacks involving Mr Devananda were attacks against a protected person. It is also important he said to look at the chronology. Diplomatic cables relied on show, if they are reliable, that Mr Devananda was a war criminal but they are dated 2007 and outside the time when the appellant was active. The appellant has made assertions about Mr Devananda that are not evidenced. He was a government minister in as far as terrorist activities are concerned irrelevant and innocuous roles.

129. He also contended that terrorist acts cannot be justified as acts of self-defence but that terrorism is always disproportionate. The Statute of Rome at Article 31 states expressly that the fact a person was involved in the defensive operation does not of itself exclude criminal responsibility. He submitted it was clear that the appellant had knowledge of how the LTTE operated. He repeated the appellant's own claim that he thought he was going to be used as a suicide bomber so the appellant clearly knew suicide bombers operated, the background evidence indicated that there was a suicide bomb attack in which there was indiscriminate killing of four police officers and the appellant knew about this. Suicide bombing is not a proportionate response to any imminent threat.

130. He then related the submissions specifically to the appellant's own case. He argued that the conduct was not a political crime for the purposes of Article 1F(b). He relied on the decision in **T v Immigration Officer [1996] UKHL 8** which gave a two-pronged test. First, the act complained of have to be committed for a political purpose and, second, there had to be a sufficiently close and direct link between the crime and the alleged political purpose. The appellant accepted that he committed serious crimes but maintained that they are political crimes for a political purpose and the link was sufficiently close. The Secretary of State said they were not. In any event, the 1996 House of Lords decision in **T** predates Article 12 and so clearly it was not presumed to interpret it. Article 12 of the Directive 2004/83 says that a third country national or stateless person can be excluded from being a refugee. Various reasons are given including committing a serious non-political crime and that "particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes".

131. He argued that suicide bombers only discriminate civilian casualties such as took place in the attacks on Mr Devananda were particularly cruel.

132. It is recognised in **T** that a crime that was not a political crime was almost bound to involve indiscriminate killings because that is how suicide bombing works and it was too remote to be described as political. He further argued that the Supreme Court had recognised terrorist acts as non-political acts and relied on paragraph 33 of **Al-Sirri** which referred to **Bundesrepublik Deutschland v B and D (Joined Cases C-57/09 and C-101/09) [2011] Imm AR 190** where the "Grand Chamber confirmed that terrorist acts, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes (para 81)".

133. He then moved on to Article 1F(c). It was the appellant's case that Article 1F(c) was triggered only in extreme circumstances by activity that attacked the very basis of the international community's co-existence but maintained it was the Secretary of State's case that terrorist acts committed during the ceasefire had exactly that quality.

134. He relied on **Al-Sirri** in the Supreme Court at paragraph 39:

> "The essence of terrorism is the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose of intimidating a population or compelling a government or international

> organisation to act or not to act in a particular way (see, for example, the definition of Article 2 of the draft comprehensive Convention), as Sedley LJ put it in the Court of Appeal, 'the use for political ends of fear induced by violence' (para 31). It is, it seems to us, very likely that inducing terror in the civilian population or putting such extreme pressures upon a government will also have the international repercussions referred to by the UNHCR".

135. At paragraph 33 Mr Clarke contended that the LTTE's terrorist campaign was indeed a "serious and sustained violation of Human Rights". He said that the resumption of the Sri Lankan civil war following the breakdown of the ceasefire, something to which the appellant contributed, led to international intervention and created refugees. He invited me to uphold the certificate.

136. Having relied on his arguments he started to address me concerning the appellant's criminality Ms Jegarajah, helpfully, interrupted to emphasise that she had always accepted that the appellant had made a significant contribution to acts during the ceasefire. There was no argument to be made there. The argument lay in the legal significance of that.

137. He then argued that self-defence and duress are not synonymous but that it was the Secretary of State's case that the appellant knew there was a ceasefire between 2002 and 2006 when the appellant was supporting acts of terrorism and he was a knowing accomplice. The appellant was not defending anyone; he was attacking enemies. It was not a question of whether Mr Devananda was a popular man but he was a target and not a legitimate target for the present purposes.

138. Mr Clarke said that the decision letter made clear that Mr Devananda had been a supporter and actively involved in the EPDP but had then taken a different position. He was never a legitimate target.

139. Mr Devananda said that nearly nothing supported the contention that there was any duress except the repeated claim that the appellant was frightened which was wholly unsubstantiated. There was no indication he had made any effort to get away. He had made clear that in training people were difficult, there was a range of punishments but nothing that justified a conclusion that he would be killed.

140. He also drew my attention to certain answers in the interview. At paragraph 319 of the interview he was asked "Did you ever try to leave at any point?" He replied:

> "Leave means I don't have anybody so I need no talk to someone like I'm going through a problem. How am I leaving to be frank I failed the A levels just for the CNF so that result is not enough and I don't have any qualifications by the time I am good at computing I know myself but I don't have qualifications so I can't even apply for the job or anything so that's why I waited and he gave me an option to study as well. He helped me to get the visas here and after that how its work. I was only thinking how can I get out from here but I don't have option and I don't want to talk to them because my dad and mum will do something different so that's why I went to uncle".

141. This, he submitted, is simply not the answer of a person who was acting under duress but rather of someone working for the LTTE until something better came along.

142. Mr Clarke then repeated his contention that the people attacked were not excluded from protection under International Human Rights Law. The appellant was part of a cell that attacked other people and that is sufficient for him to be excluded. It was not a time of war and the special conditions that apply in a time of war just did not occur because there was not one. Neither was any evidence of immediate risk. He repeated that the diplomatic cables were outside the material time.

143. It was the appellant's own case that he knew about the possibility of suicide bombers. This is a terrorist act and he knew it and he is excluded. He did not have to take part.

144. Neither did he accept that the appellant would be at risk in the event of his return.

145. He then addressed me on the "EU claim". He said that there clearly does not have to be repeat offending or a conviction. The decision is a matter of judgment. The crimes in which the appellant has been involved are very serious but he submitted the burden on the Secretary of State had been discharged.

Appellant's Submissions

146. By way of introduction only it was Ms Jegarajah's case that the appellant should not be excluded from protection and was at risk. He should not be excluded from protection because he was not acting voluntarily but under duress.

147. Ms Jegarajah invited me to look at the appellant's interview records with care. There was a screening interview on 14 January 2014, an Asylum Interview Record on 12 May 2014 and then a further Asylum Interview Record on 11 May 2016 almost two years later.

148. She drew attention to the account of the arrest given in the first interview from questions 39 through to 47. The appellant said he was arrested on 20 July 2013 in Manning Place in Wallawatte at about 10 o'clock in the morning. Two people who identified themselves as CID officers said they wanted to question him about suspected involvement with the LTTE. They took him to the Wellawetta police station and then to the CID branch office in Pettah. He was at the police station from 20 July till 28 July in the early morning.

149. He said he was released when two people came and said to him they were going to transfer him to another camp and to get dressed. He was blindfolded and driven in a van. He later understood that his uncle had paid for his release. That was the only time he had been arrested in Sri Lanka.

150. He gave his account of being burned with hot rods in answer to question 52. He said that he had just returned from the United Kingdom and he told the officers he thought they had mistaken him for someone.

151. In answer to question 67 he explained he worked for the intelligence department with the LTTE. He was arrested after he had changed his passport and he was told by the officers that he had been named by people in the intelligence department and that is why he agreed with them that he had worked with the LTTE in the intelligence branch. The officer noted at question 98 the appellant had claimed to work for the intelligence wing and asked for details about it. At that point he was concerned with vehicles crossing the border. However, he had talked in that interview about spying on Mr Devananda and spying whilst working for Dialog Telekome.

152. He was interviewed again by a specialist officer on 11 May 2016. It was a substantial interview running to 424 questions from 10.22 until 13.37 which I make to be three hours fifteen minutes. Ms Jegarajah did not suggest there was anything improper about an interview of this duration but did make the point that it must have been something of an ordeal for someone to have to concentrate so hard for so long about so something important. It is not absolutely clear to me how much of the interview was conducted in Tamil and how much in English but certainly some was conducted in English because there is reference to the appellant being reminded that a Tamil interpreter is available. Again Ms Jegarajah did not suggest that this was improper but did make the point that the demands of the interview were increased by reason of using a second language.

153. The appellant made it plain that his family were not involved with the LTTE but their sympathies were very much with a political organisation that stood up for the Tamil people. He confirmed his earlier claim to have been forced to join the LTTE. He described in detail his experience of basic training and his realisation that the LTTE were a disciplined force which imposed a tough training regime.

154. In answer to question 84 he made plain he had no idea why he was thought to be particularly suited for spy training. People were not expected to ask the LTTE to explain their decisions. He explained how after his training he was eventually introduced to Ravi who encouraged him to find a reason to go to Colombo.

155. In answer to question 57 he explained his distress at his conscription into the LTTE. He gave a detailed account of his training intensifying as it became selective. He talked about his training for spy work and confirmed that initially his intelligence work involved reporting on roadblocks.

156. Ms Jegarajah argued that it was quite plain from reading the interview that the appellant had not chosen to work for the LTTE but was required to work for the LTTE and remained because he was frightened of the consequences of not remaining. In short, he was a forced recruit.

157. She said that whilst the Secretary of State might assert correctly that there was no direct evidence of Ravi threatening the appellant he was frightened of Ravi for the same reason that he was frightened of everyone else in the LTTE. It was a strong organisation that made demands and was not forgiving.

158. She emphasised that from around 2009 the LTTE could be thought of as an emerging state and it was wrong to dismiss them simply as terrorists.

159. Ms Jegarajah further submitted that the appellant was not in a sufficiently important role to be disqualified from protection. He said that he had no knowledge at all of the organisation of the intelligence network beyond his dealings with Ravi. This is underlined by the fact that according to the appellant when Ravi disappeared he just did not know what to do. There was no further contact from the LTTE.

160. Ms Jegarajah drew my attention to Article 25 of the Statute of Rome and said that the appellant was not of sufficient importance to be disqualified. The full text of that statute is before me. Article 25 is headed "Individual criminal responsibility" and determines the jurisdiction of the International Criminal Court. Where it is necessary I refer to the full terms of the Article in its English translation but it makes plain the court has jurisdiction where a person commits a crime or orders or solicits a crime or facilitates a crime within the jurisdiction of the court including genocide. An attempt is sufficient to establish guilt. The mental element requires "intent and knowledge" and this is explained in Article 30 to include the intention to cause or an awareness that the conduct will cause the crime complained of.

161. Ms Jegarajah also drew my attention to a report in the Colombo Telegraph at page 25 of the appellant's supplementary bundle referring to "WikiLeaks" showing how Karuna and local criminal gangs were doing something rather like exercising a protection racket or extortion ring.

162. I looked at **K and HF [2018] WLR (D) 272** in the European Court of Justice dealing with citizenship of the European Union. Of particular importance is paragraph 65 which states, in summary:

> "The fact that a Union citizen or a third country national family member of such a citizen, who applies for a right of residence in the territory of a Member State, has been the subject, in the past, of a decision excluding him from refugee status under Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95 does not enable the competent authorities of that Member State to consider automatically that the mere presence of that person in its territory constitutes, whether or not there is any risk of reoffending, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, capable of justifying the adoption of measures taken on grounds of public policy or public security".

163. Paragraph 66 goes on:

> "That overall assessment must also take account of the time that has elapsed since the date when the crimes or acts were allegedly committed and the subsequent conduct of that individual, particularly in relation to whether that conduct reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, capable of disturbing the peace of mind and physical security of the population. The mere fact that the past conduct of that individual took place in a specific historical and social context in his country of origin, which is not liable to recur in the host Member State, does not preclude such a finding".

164. Ms Jegarajah argued that the appellant was involved in two kinds of training and until he went to Colombo his conduct was of very general kind. She repeated what was said at question 92 where the appellant said that he had no idea why he was moved. He was doing as he was told. At question 137 asked about his role in the "internal area". He said there is less risk, for example, faced by firefighters. A person had to be careful and work conscientiously so, for example, carelessness about a vehicle registration number was a serious matter. At question 146 he made it clear he did not know why he was sent to work in Colombo, just that he was. He was given a telephone and a SIM card and told Ravi would call him, a claim he repeated in answer to question 153. He gave very detailed answers at question 158 about working under the intelligence department. He knew the name of someone he understood to be in charge, Maaran, but was unsure about exactly what Maaran did. His only direct contact was with Ravi and he knew not to ask questions because people who asked questions tended to be beaten. However, Ravi seemed to know a lot about him including his whereabouts and that "made me keep quiet". He did not know when Ravi would call, just that he would and make arrangements to meet him. He could not contact Ravi.

165. I set out in its entirety the answer to question 158. It is fair to the appellant that I do. He is asked to help explain how the intelligence department operated and particularly any distinction between the "internal" and "external" factions. The appellant replied:

> "It's under the intelligence department I think, yes, but I don't have idea of what the time like I was working under Maaran. Maaran is the one who was in charge. He is the one who giving ideas but they might have a context between their big leaders, who's to do what they decide. Also you know that your team leader would be disguised good in this and that. I'm not saying you going to work under intelligence; you're going to get this kind of promotion. Once you don't this you will get this. They didn't say anything they don't tell you any part or of they're like other places. They only said to me you go and meet Ravi and I'm a person I'd never ask questions from them I know what happened there are a few people who are beaten I saw that in front of me, you can't ask that question and this. I just planning somehow I want to get out of there because if someone notice me my parents will get problems and then after that only I found out Ravi knows everything where I am and everything so that this also made me to keep quiet. Then when he connection get out only I was feared. I don't know anything about Ravi. Ravi he will call and tell me, meet me here, there and then I don't know where he stayed even I don't know his number and he call me and tell me but he knows where I'm staying, what I'm doing what course doing and what kind of job I'm doing everything he knows. And then suddenly when he was gone I thought because at that time Sri Lankan Army was getting strong against LTTE so if he found anything that Ravi was telling about me then my connection was also problem so many issues my family will also get into trouble so then I tried somehow to speak to my uncle this is the problem I'm going through he's also not contacted and no one from LTTE after that then he was the one who gave me an idea no option he was blame me a lot because he didn't say anything to anyone till that time. Only I speak to uncle even I didn't tell my dad. So then he told me we'll find agency soon to send you any country. First throw this phone and burn the

> phone don't use the phone anymore. Then only I will try to find the places I find the place to Australia agency and he tricked me so many money from me. I tried getting money from my uncle and my dad but he's another cheat as well he's done everything but he is the only one who told me to do ELTS so I did the ELTS on time and then I was feared to still working in Dialog when Ravi asked me work".

166. The point is the appellant asserted that Ravi knew what he did and he was frightened of Ravi's powers.

167. At question 154 he indicated that he had been told "so don't try to do anything foolish".

168. He insisted that he was given no payment for the work he had done. He was asked at question 178 what incentive he was given to do the work, he replied: "it's only under the fear".

169. In answer to question 179 he had said emphatically that:

> "Ravi never threatened me but he told me, he told me in a nice way but he said even if I am giving him these jobs you are under the observation of so many people so not only me here that know about you there are many other people around here so don't try to make any foolish decision by telling the police or army or that will make more problem to you as well as from us".

170. He said more on the same theme in answer to the same question 179.

171. Ms Jegarajah then drew my attention to the decision letter of 13 August 2017.

172. Ms Jegarajah submitted that the Secretary of State must have believed the appellant's claim of working for the LTTE. The decision is premised on there being "serious reasons for considering that you were responsible for committing a crime against peace, a war crime, or a crime against humanity …". The only contenders for such a description were the things the appellant admitted that he had done. But she submitted that the appellant's behaviour in support of the LTTE was targeted and was not a danger to the world at large.

173. She drew my attention to a decision of this Tribunal or its predecessor of the United Kingdom Asylum and Immigration Tribunal in **PS (LTTE – internal flight – sufficiency of protection) Sri Lanka CG [2004] UKIAT 00297**. This was a decision written by Mr Barnes and a panel comprising Mr J Barnes and Mr K Drabu, Vice Presidents of the Tribunal and Professor D B Casson. Ms Jegarajah particularly relied on paragraph 19 of that decision which summarised the Secretary of State's position as argued by Counsel Miss J Richards instructed by the Treasury solicitor. There, it was the Secretary of State's contention that there were a number of murders of LTTE activists particularly of people associated with Colonel Karuna and comprised people who the LTTE would consider "renegades and traitors" (paragraph 20).

174. She said the evidence did not show that the LTTE were engaged in unfocused, widescale human rights abuses but they were fighting an enemy and the appellant's support of that cause did not disqualify him from protection. There were examples of a substantial number of deaths

caused by LTTE supporting or instructed suicide bombers in the Colombo area but that is not what the appellant was supporting by his actions.

175. She also submitted it made no sense for the Secretary of State not to accept the appellant's account of being forcibly recruited when nothing else seemed to be doubted.

176. She then referred me to the references to the report of Professor Good that was considered extensively in **PS**. As the full name of the case implies in **PS** the Tribunal was seeking to give guidance on the risks facing Tamils in the event of return to Sri Lanka. The Tribunal looked through a considerable body of evidence with the help of Counsel for the Secretary of State whose efforts were particularly appreciated. The Tribunal said at paragraph 59:

> "What the careful analysis made by Miss Richards clearly demonstrates is that those who are reasonably likely to be targeted have a high profile which makes them particularly likely to be the object of LTTE reprisals. The analysis demonstrates that prominent present or past supporters of Tamil political parties which have aligned themselves with the government activities of the LTTE, LTTE defectors (particularly those who have aligned themselves with the Sri Lankan military intelligence units) and, more recently, those closely associated with the internal LTTE schism as supporters of Colonel Karuna, are at potential risk of being targeted".

177. This, Ms Jegarajah contended, supported her contention that the appellant whatever he was doing was not involved in crimes against humanity. Timing was crucial. Ms Jegarajah accepted, or it is unarguable, that the Statute of Rome protects civilians from attacks at time of war. Ms Jegarajah contended that at the time that the appellant was active there was a ceasefire but not a settlement and, disturbing as it may be, violent attacks were permissible in international law.

178. Ms Jegarajah argued that the Secretary of State's case was too straightforward. It was not nuanced to have regard to the people who were at risk from the activities of the LTTE and therefore had rather missed the point. She said that Mr Devananda and Mr Karuna were legitimate targets. She argued that it was plain because it was set out in the Home Office Guidance entitled "Exclusion (Article 1F) and Article 33(2) of the Refugee Convention" that the policy behind exclusion was to deny the benefits of refugee protection to those who through their own actions do not deserve protection as well as to protect the public from them. The appellant was not such a person, he had not been involved in indiscriminate acts.

179. It is trite law that mere membership of an organisation which uses violence or threats does not make a person outside the scope of protection under the Convention. This was confirmed by the Supreme Court in **JS (Sri Lanka) v SSHD [2010] UKSC 15** where it was said "more than mere membership of an organisation is necessary to bring an individual within the Article's disqualifying provisions".

180. It was also her case that the appellant was acting under duress.

181. She drew attention to the skeleton argument of Mr N Paramjorthy dated 2 October 2017 for an earlier hearing in which he contended that the conduct of the appellant was not sufficient to take him outside the scope of protection. He was a low level activist doing small things.

182. Ms Jegarajah drew attention to a decision of this Tribunal in **AS (s.55 "exclusion" certificate – process) Sri Lanka [2013] UKUT 517 (IAC)**. The headnote of that case makes clear that it is sensible though probably not legally necessary to determine at the outset of a hearing where issues of disqualification are raised. The effect of Section 55 of the Immigration, Asylum and Nationality Act 2006 as it relates to the facts of the case. Again relying on Mr Paramjorthy's skeleton argument Ms Jegarajah argued that in International Humanitarian Law (IHL) it is intended to limit the effects of armed conflict and protect people who are not or are no longer participating in hostilities. She said that I had to decide whether the people identified by the appellant especially Douglas Devananda and Colonel Karuna were protected under International Humanitarian Law and whether the LTTE's administration known as "Vanni" was a state and whether the actions of the appellant constituted a legitimate act of self-defence under International Humanitarian Law. Her point was that essentially the case was that whatever the appellant may have done it was not a war crime or a crime against humanity.

183. Ms Jegarajah took me to the judgment of the Court of Appeal in **R (on the application of JS) (Sri Lanka) v SSHD [2010] UKSC 15**. She submitted that particularly as far as exclusion by reason of Article 1F(c) (has been guilty of acts contrary to purposes of the United Nations) the test was nuanced rather than straightforward. She referred to parts of the judgments of the Supreme Court Judges endorsing the idea that the higher up an organisation is the more likely the person is to be regarded as someone promoting terrorism and also suggesting according to Ms Jegarajah that a foot soldier is not participating in acts contrary to the purposes of the United Nations. She pointed out that the Secretary of State had referred to an old judgment of the House of Lords in the case of **T** and she contended that it had to show nexus between what the appellant has done and the political aims of the organisation. It is suggested by way of example that a person who set off an explosion in a mosque whilst no doubt guilty of a serious crime would not be guilty of a political crime. She submitted that the appellant had not committed a crime against peace or a war crime or a crime against humanity. His actual behaviour did not have the serious qualities required. In any event, he had not committed a non-political crime. He had not committed any crime at all, he was acting under duress because he was frightened.

184. Ms Jegarajah's second skeleton argument dated 28 June 2019 refers to the case of **T v Immigration Officer [1996] UKHL 8**. This was a decision of the House of Lords. Ms Jegarajah relied on the headnote which she took from the All England Report of the case. There, Lord Lloyd of Berwick (with whom Lord Keith and Lord Browne-Wilkinson agreed) set out to formulate the appropriate test for determining if a crime was a political crime for the purposes of Article 1F. Persons who commit political crimes are not for

that reason excluded from protection under the Refugee Convention. This emphasised the need for the crime and the effect on the government to be "sufficiently close" to be political. In order to be a political crime it must have been committed for a political purpose which was defined as committed with the "Object of overthrowing or subverting or changing the government of a state or inducing it to change its policy, and it must have a sufficiently close link between the crime and the alleged political purpose. Determining if such a link exists the decision maker must bear in mind the means used to achieve the political end and whether the target was military or governmental or civilian".

185. She submitted that on the facts the conduct that can be traced to the appellant was never involvement in a non-political crime. All that he was doing was gathering information to help the LTTE pursue its political aims, albeit possibly by non-peaceful means.

186. Turning to another point she submitted that the appellant was acting under duress. She referred to a decision of this Upper Tribunal in **AS (s.55 "exclusion" certificate – process) Sri Lanka [2013] UKUT 00571**. This is a case that encouraged, as a matter of "common sense" that exclusion under Section 55 should be determined first. Nevertheless, it was made plain at paragraph 27 that the assessment should be made on the evidence as a whole. She further contended that following **JS** and looking whether a war crime was committed under the Statute of Rome the question of individual responsibility has to be accepted. Ms Jegarajah drew to my attention the observations of the Supreme Court in **JS (Sri Lanka)** concerning individual responsibility. The court looked at the work of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and particularly a decision of **Prosecutor v Tadic, 15 July 1999, (1999) 9 IHRR 1051**. Having considered that case Lord Brown in his judgment reformulated the test saying at paragraph 16:

> "I would hold an accused disqualified under Article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose in committing war crimes, aware that his assistance will in fact further that purpose".

187. In **JS (Sri Lanka)** Lord Brown approved Toulson LJ's ruling that Article 28 of the Rome Statute of the International Criminal Court should be the starting point in considering whether an applicant is disqualified from asylum by virtue of Article 1F(a). Lord Brown pointed out that the statute considers the idea of individual criminal responsibility under Article 25 particularly Article 25(3). Article 25 is headed "Individual criminal responsibility" and article 25(3) identifies such people. Article (3)(c) extends responsibility to those who, "For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in the commission or its attempted commission, including providing the means for its commission" and Article 25(3)(d) includes someone who: "In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. …".

188. Ms Jegarajah took me to Article 31 of the Statute of Rome. It is headed "Grounds for excluding criminal responsibility". The statute makes plain

that it does not set out an exhaustive list. This provides for a defence against exclusion based on self-defence. Ms Jegarajah argued that this appellant was acting under duress. I noted particularly her phrase that "there was not a gun at his head 24 hours a day but there may as well have been".

189. She then drew my attention to Article 30 which deals with the mental element. The appellant must mean to engage in the conduct and, consequentially, the conduct must be intended or the person "is aware that it will occur in the ordinary course of events".

190. She submitted this appellant believed he was defending himself and that is sufficient to protect him from exclusion.

191. Article 31(1)(d) provided that the conduct complained of was caused by duress "Resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person ... and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided".

192. It then explains how the threat can be made. She said that such a state of affairs existed in the case of this appellant.

193. She then made submissions on the EA case. The appellant had applied for a residence card on the basis of being married to a qualified EEA person in the United Kingdom. The application was refused on grounds of public policy. Refusal on public policy grounds is permissible under Regulation 24(1) of the 2016 Regulations. The Secretary of State said that the appellant had not demonstrated he had acquired a permanent right of residence. She directed herself in accordance with Regulation 27(5). The Secretary of State recognised the appellant had not been convicted of any crime but had admitted to working as an intelligence officer for the LTTE. At paragraph 15 the Secretary of State said:

> "It is deemed that your actions and your training and your success as an operative for the LTTE, you have demonstrated that you are a genuine, present and sufficiently serious threat and that the potential extremity of your threat should you reoffend would make it appropriate to also take this decision on preventative grounds which are specific to you. Moreover, it is considered that this decision complies with the principle of proportionality for the reasons outlined in this letter".

194. The Secretary of State noted on the appellant's account he had had weapons and explosive training. He had lived for five years undetected in Sri Lanka supporting the LTTE. At paragraph 47 the Secretary of State said:

> "It is positive that this demonstrates your clear threat by evidencing your ability to conceal and/or disguise your intentions to the official bodies who control or police security in an area which you are resident".

195. The Secretary of State noted the appellant had suffered no adverse consequences for his activities and saw no basis for regarding him as rehabilitated.

196. Ms Jegarajah acknowledged all the matters that had to be considered under Regulation 27 and the guidance given in Schedule 1 but maintained there is nothing about this appellant's past which makes him any risk to the United Kingdom in any of the manifestations. She asked, rhetorically, if the decision was made on preventative grounds why was he walking around.

197. Ms Jegarajah pointed out that the fundamental interests of society that can lead to an application being refused under 27(5) are explained in some detail in Schedule 1 paragraph 7 that include under (l) "countering terrorism and extremism and protecting shared values". It does not specifically refer to war crimes.

198. The refusal letter goes through the alleged bad behaviour but it does not, she submitted, make out a case for exclusion from EEA rights. The refusal letter at paragraph 19 referred to the judgment of the Court of Justice of the European Union in **K and Others, C-331/16 and C-366/16**. The Secretary of State maintained, correctly, that the case confirmed that a person engaging in activity contrary to the Convention which constitutes a war crime does not have to be convicted for a public policy decision to be taken against him but Ms Jegarajah submitted that was an understanding which rather missed the thrust of the case which was rather that exclusion on the Refugee Convention does not necessarily mean exclusion under EU law but each case needed to be looked at. She submitted that on the appellant's own account at most serious he was targeting enemies of the LTTE and simply did not present a risk to the world at large.

199. At the end of her submissions Ms Jegarajah accepted my summary of her case which was that the appellant was a refugee and was not properly excludable, but in any event returning him would be contrary to his rights under Article 3 because he would be at risk from people in Sri Lanka because he had helped the LTTE and he wins on his EEA application because he does not present a present threat. She confirmed that he had not been active in the Tamil community and was not basing his case on conduct in the United Kingdom.

200. In reply to Mr Clarke's submissions Ms Jegarajah drew my attention to the Home Office Sri Lanka COIS Report for March 2012. Paragraph 8.55 makes clear that according to the Amnesty International Report for 2011: "Armed Tamil groups aligned with the government continued to operate in Sri Lanka and commit abuses and violations, including attacks on critics, abductions for ransom, enforced disappearances and killings".

201. She said that the Secretary of State had made much of the appellant being involved in terrorist activities but had not defined the term.

202. She submitted there was no easy way of deciding the case simply by drawing analogies with other cases and their own facts. Rather, there had to be proper analysis as was made plain by Lord Brown in **JS**. She emphasised that in order to establish joint enterprise liability as well as conduct furthering making a significant contribution to the crimes' commission there had to be a common design and participation with the intention of furthering it. She said that the significant contribution

although necessary was not determinative of the matter. There needed to be proper consideration of his intentions.

203. Ms Jegarajah persisted in her case that the appellant was not acting voluntarily and was frightened for his own safety. She submitted I had to look very clearly at his intentions and his intentions were to keep himself out of trouble. There was a "serious grounds for believing test" and cautioned me against falling into what she said would be the error of not deciding properly that there were serious grounds for believing. She said the acts were part of Tamil people asserting themselves and their independence. They were essentially political acts. There was no conventional war brought to an end or temporary halt by conventional ceasefire. Disarming had not taken place as it should, as indicated in the COIS Report. She accepted the appellant had made no efforts to move but his evidence was that it was because he saw no point, he regarded himself as having to obey.

204. She said after the ceasefire started many things opened up, there was a lot of visiting between the north and the south as families reunited easily. She maintained that the COIS Report was particularly important insofar as it related to pro-government human rights non-state paramilitary groups. They were put in a position of power by the government of Sri Lanka. They were the enemy and were involved in bad things. The war had not ended because the acts of government and the supporting Tamil groups. She also pointed out that the LTTE were known, for example, to recruit children. The appellant did not want to cross them.

Findings

205. I find that the appellant has, substantially, told the truth.

206. In particular I find that he did act as a spy. A further find that his admitted conduct, take on its own, was not particularly serious. It amounted to reporting observations made in the public domain and, perhaps, dishonesty in seeking employment and (I guess) breach of data protection provisions in Sri Lanka. However he did these things knowing that they would be used in an attempt to assassinate someone.

207. Ms Jegarajah confirmed her written submission dated 28 June 2019 that "The Appellant admitted that he had committed serious crimes." The same submission made clear that it was the appellant's case that they were political crimes but that is a different point.

208. For the purposes of this appeal, I find that this appellant was knowingly helping the LTTE gather information with a view to killing people. Ms Jegarajah's submission was considered, written and repeated expressly orally by interrupting Mr Clarke at one point to confirm it. It is supported by answers in interview and Ms Jegarajah can be taken to have instructions about their meaning. It must not be assumed that I would have reached this conclusion on the undisputed facts without the concession that was made. My decision on this point should not be read as a ruling that the conduct admitted by the appellant in interview establishes knowing involvement in assisting murder but rather a

recognition on my part that it might and because experienced counsel clearly accepted that it did, I have seen no reason to behind the concession. I consider below duress and self-defence below.

Analysis

209. I must decide first if the appellant is disqualified from protection because, broadly, Section 55 of the Immigration, Asylum and Nationality Act 2006 requires that I do.

Duress

210. I consider first the blanket assertion that the appellant is not excluded because he acted under duress.

211. I reject the contention that the appellant acted under duress. I accept that he has consistently maintained that he had to work for the LTTE and was frightened of the consequences of disobeying and that he was frightened of defying the LTTE but duress requires rather more than that. There was no immediate threat to the appellant. The general assertion that he was being "watched" was never substantiated. There is no suggestion that the appellant made any effort to be reassigned to different work within the LTTE or did anything to disassociate from their activities except to stop working for them when Ravi stopped contacting him which, apparently, he was able to do without difficulty. Far from indicating duress, the appellant's evidence indicates a resigned willingness to work for the LTTE and shows nothing of the fear of an immediate real threat to his safety or indication that that is necessary for him rely on duress.

Legitimate target

212. A particular concern I have with the contention that Devananda and Karuna were both legitimate targets is that they are not the scope of the appellant's activities but are well known examples of the targets that he was required to consider. He was not just helping target them but was gathering information generally, particularly when he worked for Dialog Telekom.

213. Dealing directly with the attacks of Devananda and Karuna I reject the premiss of Ms Jegarajah's argument that such attacks by the LTTE were somehow legitimate. Whilst they definitely wanted to create one, the LTTE were not a state and not entitled to the privileges of being a state. Further, there was a cease fire. Conduct that might be permissible in international human rights law at a time of international conflict is not permissible by a non-state organisation that is not a war.

214. I appreciate that there is evidence before me suggesting that Mr Devananda and "Colonel Karuna" might themselves have been involved in unacceptable activities but I am not in a position to determine those allegations, nor do I need to. Even if well found, they do not give the appellant, the LTTE or anyone else a general right to kill them.

215. Neither does it matter if the appellant thought that he had such a right. It is not for him to determine what behaviour is acceptable in international law any more than it is for a thief to determine the meaning of dishonesty.

216. I appreciate that Ms Jegarajah criticises the respondent for lack of nuance but I find that, on this point, the respondent is right. Neither Mr Devananda, nor Colonel Karuna, nor the unknown or forgotten other people that the appellant researched are legitimate targets for non-state organisations during a cease fire.

Specific Grounds for Exclusion

217. I consider now the specific grounds for exclusion.

218. Has the appellant 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?

219. I find that I must answer this in the affirmative. He had admitted to assisting in plots against Mr Devananda and Colonel Karuna. I have rejected the contention that his conduct was justified and I accept Mr Clarke's submissions that the likely method of attack, that is suicide bombing, has about it the indiscriminate elements of terror that elevate the conduct into a crime against peace.

220. It follows that, on my findings, the appellant is disqualified from protection under the Refugee Convention.

221. Has the appellant committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee?

222. Again I answer this question in the affirmative. Clearly assassinations are serious acts and, usually and in these circumstances, are criminal. I am also satisfied that they are would non-political crimes. I appreciate that the motivation for the crime is political. It is not the result of a personal grudge but of the victim's perceived role in opposing the LTTE. I appreciate too that both the LTTE and the Sri Lanka authorities would make political capital out of an assassination or attempted assassination but the fact that a crime has a political overlay, maybe even a substantial one, does not mean that it should be classified as a "political crime" for the purposes of interpreting the Refugee Convention. This I understand was underlying point in **Re T** and I see no reason why it should not stand.

223. Has the appellant been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and articles 1 and 2 of the Charter of the United Nations?

224. This I answer in the negative. Clearly there is some conduct that might easily satisfy two or even all three of the reasons for exclusion but 1F(c) must require an elevated threshold and/or have a distinct meaning or it would add nothing to 1F(a) and (b).

225. I remind myself of paragraph 38 of the Judgement in Al-Sirri where the Court said:

> "In those circumstances, it is our view that the appropriately cautious and restrictive approach would be to adopt para 17 of the UNHCR Guidelines: "Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting

> international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category."

226. Criminal acts, however reprehensible, are not themselves contrary to the purposes of the United Nations which, for present purposes, I summarise as building understanding between nations. The crimes complained of here were internal matters involving Sri Lanka and, without, I trust, implying that the United Nations would in any way condone or approve of them, they were not contrary to its purposes in the sense required by article 1F(c).

227. Having decided that the appellant is not a refugee I now decide if he needs protection.

228. For the avoidance of doubt I reject any suggestion that he is too poorly to return. If he can be returned safely then any mental health issues can be addressed in Sri Lanka where the appellant could expect support from his family including his wife who could travel with him.

229. I similarly reject any contention that he has a well-founded fear of the LTTE. It is the appellant's case that he worked satisfactorily for them and that they have not contacted him since Ravi stopped contacting him. There is no evidence that they have shown any interest in him since he stopped working for them or that now have any reason to be dissatisfied with him. Further, and importantly, there is little evidence that the LTTE, or what is left of it, has the means to settles scores with the appellant even if that is what they wanted to do for some unexplained reason.

230. However I am persuaded that there is a real risk to his safety in the event of his return.

231. I mean him no disrespect when I say his is in some ways a very familiar story. He is a Tamil and a citizen of Sri Lanka who fled to the United Kingdom. He says that he returned to the United Kingdom in July 2013 with some kind of leave valid until July 2014 and that he claimed asylum on February 2014. He says that he worked for the LTTE (I consider this in more detail below). He also said that he had returned to Sri Lanka without incurring problems in 2011 but on his last visit to Sri Lanka he was detained for a time and badly beaten so his body was scarred.

232. There is medical evidence to show that his body is indeed scarred. As well as other scarring that could be the result of cigarette burns acquired in some circumstances, there are "tiger stripes" on his back which he attributes to being hit with hot iron bars. This is a form of ill-treatment in my experience rarely seen if ever outside Tamil cases but is a technique which, at least according to a large number of Tamil asylum seekers, is used by members of the Sri Lankan security services.

233. The appellant claimed asylum on 18 February 2014 and his "scar report" is dated 27 September 2017. He claims that he was burned with hot rods during his detention in July 2013 and he return to the United Kingdom on 29 July 2014. If he is telling the truth he may well have improved his case significantly if he had has reported to his general medical practitioner

shortly after his return when the injuries were recent it was possible to indicate when they were inflicted. It is also surprising that the appellant did not seek treatment for injuries which I would have expected to have been still painful. I acknowledge these difficulties and I cannot resolve them. However I note too Dr Lawrence's finding that reluctance to disclose details is "highly consistent with PTSD". As indicated above, Dr Lawrence is clearly qualified to give such evidence and I have reason to go behind it.

234. There are obvious features about his claim which are difficult to reconcile. He says he is in trouble for things that he did at the time of the ceasefire. He entered the United Kingdom and lived there for some time then returned for a family visit. It is very difficult to think he would have done that if he had any anticipation of being in any kind of trouble and it is his case that he had no difficulty during the visit and he returned to the United Kingdom. He then returned again for a family reason and during the course of that visit, he says, was arrested and ill-treated but then released. Were it not for the injuries on his body it might be relatively straightforward to dismiss that evidence as the work of a busy imagination but one way or another he has scars on his back. He says they are there as a result of being beaten with a hot iron and the medical evidence strongly supports that claim. He clearly has been beaten with hot iron rods and if that was not done in the circumstances that he alleges, then I am left to wonder how they did get there. It must be possible that they were inflicted as a result of a voluntary act but that is a shocking claim to make for which there is absolutely no evidential basis whatsoever or any reason to believe it except that it would fit in the respondent's case. I do not know of any innocent activity that produces scars such as these.

235. The medical evidence does not prove they were done at a particular time. Neither does it prove that the depression and post-traumatic stress disorder from which suffers are attributable to the causes that he gives. This is an asylum appeal where the standard of proof is low and applying that low standard properly with regard to the evidence before me I find that the appellant was tortured in Sri Lanka by the authorities. Why should anyone else do it?

236. This finding goes some way to establishing the appellant's case for international protection.

237. I am very aware that the appellant enjoyed a safe visit to Sri Lanka. I cannot know on the material before me how this happened. A possible explanation is that the authorities did not know he had been involved in terrorist activities of any kind in 2011 but had found out by the time he made his return visit. If that is the case it is not surprising that the appellant cannot explain why they are now interested in him beyond what the authorities chose to tell him and that might not be reliable.

238. The document supporting his arrest is of minimal value. Certainly it appears to be a genuine document but I have no expert assistance about what documents are available, how easy it is to obtain copies or what documents ought to have been prepared. The difficulty appellants face is that if they do not produce such documents adverse comments can be

made and if they do they are told they are of little value. The fact is, without unusual circumstances pointing towards their authenticity both as the document that they purport to be and also being good evidence of the arrest indicated, such documents are unlikely to be of much assistance. Overall it helps rather than hinders the appellant's case but really not by very much. As I have indicated the scars are a different matter. He was ill-treated.

239. I would like to get to the bottom of the reasons for his being ill-treated. This would illuminate the risk on return but I cannot. I have to content myself with my finding that he was illtreated on his last visit as he has explained.

240. He says that he was detained when he introduced himself to the authorities by renewing his passport. This suggests that he was on some kind of stop list. His claim to have been released after a short time, albeit on payment of a bribe, and the ease with which he left the country could arise because the authorities have no immediate further interest in him and so he has nothing to fear but it could be because they have no reason to detain him further presently but would want to interrogate him further if he ever returned to Sri Lanka.

241. The appellant is not someone who has committed himself to the Tamil cause in the United Kingdom. That would be a very obvious route for someone with an interest in improving his case and with little regard to the truth and his failure to take that course adds slightly to the overall credibility of his claim.

242. I note Dr Smith's report. It makes sense to me that the Sri Lankan authorities remain alert to information that would help them work out what had happened in the past. It makes sense that more information comes to light with the passage of time and I find it believable that the appellant was not known to the authorities in 2011 which is why he had not had any difficulties and was known to them by 2013 which is why on his account, supported by clear evidence of physical injury, that he returned to Sri Lanka and found they had discovered things about him.

Findings

243. I accept that the appellant has given a truthful account of his experience of dealing with the LTTE. The story is detailed, told consistently, broadly credible and, where it was tested by the interviewing officer, it stood up to scrutiny.

244. It follows that I find that appellant was an LTTE intelligence officer and was, effectively, conscripted to do that work.

245. I accept too that he was ill treated by the Sri Lanka authorities at the end of his most recent visit there. I have indicated above reservations about this finding but I have applied to low standard of proof and I believe him.

246. I have found it extraordinarily difficult to determine if he is excluded from the protection of the Refugee Convention. The appellant was a spy. There is no evidence that he ever actually hurt anyone or that he was willing to

hurt anyone if that was expedient. Although he speculated that he might be required to work as a suicide bomber no such demands were made.

247. However he knew perfectly well that he was gathering information about people who were of interest to the LTTE. Much is made in the evidence about his spying on Devananda and Karuna but it must be remembered that they are mentioned because they are well known names. His activities were not limited to reporting on them. He also must have known that the LTTE wanted information about people to harm them. No doubt the LTTE had use for general intelligence as they considered the actions of their enemies but the LTTE had no interest in doing them good.

248. I appreciate that no known crime or terrorist act can be linked to anything that the appellant did. The strongest evidence against him is that he said that his handler was satisfied with his work. It seems inherently likely that the appellant was one of many similar operatives who contributed pieces to a massive jig saw managed by their handlers, or the handler's handler.

249. Points of the kind taken here about exclusion are quite rare but for all the reason indicated above, I find that appellant is excluded from the protection offered by the Refugee Convention.

250. For the reasons explained above, I allow the appeal on article 3 grounds.

251. I turn now to EA 05650 2018. The appellant is married to an EEA national exercising treaty rights. Theirs is a genuine marriage and, subject to important exceptions, she is entitled to have her husband live with her.

252. The sole reason for refusing the application was that the appellant's personal conduct which, according to the regulations, "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society taking into account past conduct of the person and that the threat does need to be imminent".

253. I am quite satisfied that the appellant DOES NOT present such a genuine, present and sufficiently serious threat.

254. It seems to me that there is an unattractive tension between the respondent's assertion that even if the appellant is telling the truth he would be of no interest now to the authorities in Sri Lanka but his conduct does represent a present threat to the fundamental interests of the United Kingdom.

255. I appreciate that there are serious reasons to suspect that the appellant has been involved in facilitating serious crime but he is not a convicted criminal.

256. His actual conduct put him at the outer fringes of a possible terrorist act. Although I reject the argument that he acted under duress I accept that he had no enthusiasm for the project and made no money from the work but that he did for the LTTE. He acted as he did because he was brought up a Tamil and knew not to argue with the LTTE. If he was a threat to anyone he was a threat to the establish government of Sri Lanka. The fact that I have rejected his claim to have been acting under duress is not inconsistent with my finding that he was a half-hearted, low level operator who did

elementary spying work, which was not necessarily criminal of itself, because he was concerned for his safety if he did not.

257. His spying activities were carried out many years ago.

258. I accept that the appellant's past conduct indicates perhaps a lack of moral fibre that made him disinclined to resist the demands of the LTTE but I cannot move from there to conclude that appellant really is a threat of any kind to the United Kingdom today.

259. The sole grounds for refusing his application required him to be a "present threat" and he clearly is not.

Notice of Decision

260. I allow the appeal against the refusal of a residence card.

261. I dismiss the appeal against refusal of refugee status.

262. The appeal against refusing him leave on human rights grounds is Allowed with regard to article 3 because of the risk of his being ill treated on return and not because of his poor mental health.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 11 February 2022