Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/05575/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 12 October 2022	**On the 24 October 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

S V
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Boyle, instructed on behalf of the appellant
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Anonymity :
Rule 14: The Tribunal Procedure(Upper Tribunal) Rules 2008:
Anonymity is granted because the facts of the appeal involve a protection claim. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction:

1. The appellant, a citizen of Sri Lanka, appeals with permission against the decision of the First-tier Tribunal (hereinafter referred to as the "FtTJ") who dismissed his protection and human rights appeal in a decision promulgated on the 30 March 2020.

2. Permission to appeal was granted by FtTJ Keane on 8 June 2020.

Background:

3. The history of the appellant is set out in the decision of the FtTJ, the decision letter and the evidence contained in the bundle. The appellant is a national of Sri Lanka. He first came to the UK on 20 March 2003. He claimed asylum on arrival and the claim was refused. He appealed the decision, and it was heard by the adjudicator Mrs Omotosho. The basis of his claim was that he was detained and tortured by both the EPDP and the LTTE and that he left Sri Lanka after escaping from the LTTE where he was being forcibly held against his will. The adjudicator did not believe the appellant and in the factual findings set out in her decision dated 8 July 2003 stated as follows:

> "on review of all the evidence, I find the appellant not to be a credible witness " (at [27])
>
> "I conclude on the evidence the appellant was not forcibly conscripted in the EPDP, and although he might have had links to the organisation, I do not believe that this brought him to the adverse attention of anyone in Sri Lanka. I have already mentioned above that I do not believe his claim of arrest, detention or ill-treatment by the LTTE. I find that he is of no interest to the EPDP, the LTTE or anyone in Sri Lanka" (para 36).

4. Consequently his appeal was dismissed by the adjudicator. Thereafter the appellant sought but did not obtain permission to appeal that decision.

5. The appellant remained in the United Kingdom. The appellant's wife entered the United Kingdom in 2012. They have child born in 2015. The appellant filed 2 further sets of further submissions, both of which were refused without a right of appeal. Then on 27 March 2019, he filed the third set of further submissions providing further evidence relating to sur place activities in the UK and also relying on medical evidence (NHS letter dated 25/1/ 2019).

6. The respondent considered the claim and refused it in a decision taken on 29 May 2019. The material in support of the appellant's claim was listed at page 4 of the decision letter. The respondent set out the previous decision of the adjudicator with specific reliance upon the factual findings made applying the decision in Devaseelan and that the adjudicator had found appellant to have given inconsistent and incredible evidence and that she had not accepted that he was forcibly conscripted in the EPDP nor that he would come to the adverse attention of anyone in Sri Lanka.

7. The respondent considered his claim based on his sur place activities by reference to the CPIN Sri Lanka: Tamil separatism dated June 2017 and by reference to the country guidance decision in GJ and others.

8. As to his sur place activities, applying the decision of GJ it was noted that the attendance at some demonstrations was insufficient to create a degree of likelihood of adverse attraction from the authorities. Consideration being given to the caselaw of BA (demonstrators in Britain – risk on return) Iran CG [2011) UK duty 36 where the Upper Tribunal identified 5 factors to consider when assessing the risk of return to Iran having regard to sur place activities of the political nature. It was considered that those factors may be applied to other nationalities including Sri Lanka (see paragraph 9 of the decision letter). Having considered those particular factors, the respondent took into account the bundle of photographs with photocopies showing the appellant holding a Tamil solidarity sign. The attendance of such demonstrations did not establish that a person was a committed member of the political group, and it was noted that there was no further evidence to support his claim to establish that he was a fully committed member of the LTTE in the United Kingdom. It was further noted that he had not established that his activities at the demonstrations would come to the adverse attention of the authorities and in the photographs he appeared to be a regular member at a demonstration and not a leader or instigator. It was considered that mere attendance to demonstration alone were not enough to establish a high political profile.

9. Consideration was given to article 8 between paragraphs 11 – 14 of the decision.

10. As to article 3 based on his medical condition, the respondent had regard to the CPIN; Sri Lanka – medical: disability – mental health, psychiatrist 23 February 2018 and concluded that there were care facilities medication for treating PTSD, depression and anxiety in Sri Lanka. There were antidepressants, antipsychotics and also medication used for anxiety. The only treatment he was receiving in the UK was Dosulepin, and whilst that was not listed, alternative antidepressant medications would be available. It is therefore considered that whilst it was accepted he had to medical issues there were not life-threatening and primary care treatment was available in Sri Lanka. He could access appropriate medical treatment therefore article 3 was not breached. The respondent refused his claim.

11. The appellant appealed the decision to the FtTJ. In a decision promulgated on the 30 March 2020 the FtTJ dismissed the appeal. In the decision, the FtTJ set out his findings of fact and assessment of the evidence.

12. The FtTJ set out at his factual findings at paragraphs 17-23. The FtTJ noted that the claim was entirely predicated on the appellant's actions in the UK and that it was accepted by Counsel that there was nothing in the

material before him intended to undermine the adjudicator's previous findings of fact (see paragraphs 6 and 15).

13. The FtTJ set out the evidence relevant to the sur place claim including photographs (paragraph 7), a photocopy of what was said to be a newspaper published in Sri Lanka containing a small photograph of the group of people demonstrating outside the magistrates court. The appellant had encircled a person's face at the edge of the group and said it was his though the FtTJ observed that the photograph was so small and badly copied it was hard to know. However the judge accepted that he was present at that particular demonstration. The FtTJ set out the letter from the MP in Sri Lanka at paragraph 10).

14. Having undertaken an assessment of the evidence, the FtTJ considered the nature and extent of his activities and noted that the earliest photographic evidence of attendance at political activities dated July 2018. The judge found that there was no evidence of any political activity during the first 15 years of his stay in the UK which led him to question the appellant's commitment to the Tamil separatist cause (paragraph 17). At paragraph 18, the judge found that whilst he was plainly present at a number of demonstrations he did not appear to play any kind of leadership or organisational role. There was no evidence before the judge from any organisers or officials from diaspora organisations who might attest to the appellant's role. At paragraph 18, the judge referred to "the mainstay of the appellant's case" which was that he appeared in a photograph of a group of protesters outside the magistrates court and this photograph was published in a Sri Lankan newspaper. However the judge found there was no suggestion that he was named anywhere in the text of the newspaper; the photograph was small and have at least 20 people. The appellant was at the very edge of the photograph with his face partly obscured by a placard. The judge concluded "in my estimation it is highly unlikely that anyone who did not know that he was there would be able to identify him from this picture. "At paragraph 20, the judge gave his reasons for rejecting the letter from the MP.

15. In undertaking his assessment of the sur place activities, he applied the guidance in GJ and others particularly taking into account paragraph 336 and 351. The judge concluded that the appellant had not provided any reliable evidence to suggest that he done any more for the Tamil cause and merely attend demonstrations. He only provided evidence of attending such demonstrations 15 years after his arrival. There was no evidence specific to the appellant from any diaspora organisation in the UK. His initial claim was based on a fear of Tamil organisations rather than the government and that in all of the circumstances even applying the low standard of proof, the judge did not find the appellant to be a committed activist seeking to promote Tamil separatism. He further concluded that the Sri Lankan authorities would not consider him to be such an activist and thus the activities undertaken would not place at a real risk of ill-treatment on return. At paragraph 23 the judge considered the points

raised as to his mental health but did not consider that would place the appellant at risk on return and that whilst he would be asked questions on arrival, in the light of the findings of fact made as to his level of involvement in diaspora activities, he would be able to answer this question strictly without facing a real risk of persecution. The FtTJ therefore dismissed the appeal.

16. The appellant appealed on two grounds and permission to appeal was granted by FtTJ Keane on 8 June 2020. The grant reads as follows:

> "The judge's finding that the appellant's passive presence at demonstrations organised against the Sri Lankan authorities in the United Kingdom would not bring into the adverse attention of the Sri Lankan authorities upon his return was open on the evidence. The judge remarked, a remark which counsel who appeared at the hearing and who prepared the grounds did not dispute, that the appellant, although present at a number of demonstrations did not appear to have undertaken any kind of leadership or organisational role (paragraph 18 of the decision). Although the judge accepted that the appellant appeared in a photograph depicting protesters outside the magistrates court the judge was entitled to place weight on the fact again not disputed by counsel) that he had not been named in the text of newspaper reporting the trial. However at paragraph 15 of the decision the judge arguably perpetrated a procedural irregularity which affected the outcome and fairness of the proceedings in attributing to counsel the concession that the appellant stated mental health could not meet article 3 of the Human Rights Convention. Counsel had advance such a proposition in written submissions which he prepared for use at the hearing but, according to the judge, withdrew such a contention during the hearing. At any hearing before the Upper Tribunal counsel's note of the evidence should be provided as should the judges record of proceedings. The aforementioned sources of evidence may enable the Upper Tribunal to determine whether the concession as to the appellant's stated mental health was made or not. To this extent and to this extent only the grounds disclose an audible error of law but for which the outcome of the appeal might have been different. The application for permission is allowed to this extent."

17. The grant of permission therefore only related to article 3 and whether the concession set out in the FtTJ's decision at paragraph 15 (that counsel accepted that the appellant's removal would not amount to a breach with article 3 rights on health grounds) had been made. The FtTJ refused permission to appeal on the 2nd ground which related to the consideration of the appellant's sur place activities.

18. In relation to the article 3 point and the procedural irregularity FtT Judge Keane set out the evidence that the appellant's solicitors would be required to produce including Counsel's note of the evidence and the judges record of proceedings.

19. Following the grant permission, Upper Tribunal Judge Mandalia gave directions on 27 January 2022. A direction was made for Counsel's note to be filed within 14 days and the respondent to file the presenting Officer's note and then to be listed for a hearing. The judge attached the record of proceedings to the directions.

20. The appeal was listed for hearing on 19 April 2022 before the Upper Tribunal. The appeal was adjourned on the basis that the appellant had applied for an adjournment to obtain representation. The appellant obtained further representation following the adjourned hearing.

21. The appeal was again listed on 3 August 2022, Mr Boyle appeared on behalf of the appellant. Counsel's note had not been provided as directed and he had not had access to the full papers of the appellant. The appeal was therefore adjourned, and the tribunal provided Mr Boyle with copies of the relevant material which he had been lacking and further directions were given for the hearing, including a Rule 24 response by the respondent and a skeleton argument from the appellant.

22. Prior to the hearing a letter had been sent to the tribunal dated 1 July 2022. The letter requested leave to appeal on all original grounds including that which related to the assessment of the sur place activity. It was stated that the grounds were prepared, and permission granted prior to the latest country guidance decision in KK and RS and that this decision "clarified the correct interpretation of the law at the time of the hearing". The letter stated that leave had been granted on one ground whether the appellant's stated mental health would infringe article 3 but it was asked that the tribunal should revisit the original grounds drafted before the decision in KK but applying that country guidance decision.

23. Mr Boyle, solicitor advocate appeared on behalf of the appellant and Mr Diwnycz, Senior Presenting Officer appeared on behalf of the respondent.

24. Mr Boyle relied upon the grounds and a skeleton argument (undated). There are two issues set out in the skeleton argument. The first concerns the issue of the appellant's sur place activities and the second relates to the appellant's medical condition and article 3 of the ECHR.

Challenge to the FtTJ's assessment of the sur place activities:

25. In relation to the ground which challenged the FtTJ's assessment of the sur place claim, the skeleton argument set out the following submissions:

(1) GJ [2013] UKUT 00319 was the binding CG before the First Tier Tribunal. It would be an error of law if it were misinterpreted or misapplied. Applying GJ requires the Tribunal to decide if an individual has a 'significant role' in Tamil separatism. It is submitted the Tribunal erred in law in interpreting 'significant role' too narrowly, in an arbitrary way, and in a way which to a risk of future persecution.

(2) The 2021 case of KK and RS [2021] CG UKUT 00130 specifically *clarifies* earlier CG rather than replaces it. It clarifies the correct application of GJ, and specifically the correct interpretation of

'significant role.' KK and RS suggests that often the ground asserted (that 'significant role' was interpreted too narrowly) did occur.

(3) It is clear from considering the determination the Tribunal considered the Appellant as falling outside the scope of the Country Guidance because he did not have a specific role in Tamil organisations. It is clear this was an incorrect interpretation of GJ. That it was, is and always was an incorrect interpretation has been highlighted by KK and RS. But importantly KK and RS *illustrates* the approach was incorrect. It does not *make* the approach incorrect.

(4) It is submitted the Tribunal placed inappropriate weight on the lack of evidence of a leadership role. It mis-interpreted headnote 7a of the 2013 CG. This common error has now been clarified by headnote 8 of the 2021 CG.

26. In his oral submissions, Mr Boyle submitted that the FtTJ fell into error by considering a material fact or putting weight on immaterial facts concerning whether the appellant had a significant role in the UK. He made reference to the decision in GJ and that it had been stated that someone who attended demonstrations was insufficient and therefore must have a significant role. The Upper Tribunal was wrong to interpret the law in that way as was shown in the later case of KK . He submitted that the country guidance decision of KK did not change the law but clarified the terms of significant profile and that the FtTJ was in error in his decision at paragraph 18 by considering the appellant's activities on the basis that he had no leadership role and there was no evidence from any UK organisation attesting to his role. To correctly assess the appellant whether he be at risk on return it would be necessary to go to the guidance in KK.

27. The first issue that requires consideration is the ambit of the appeal. As set out above the grant of permission was only on one ground which related to the procedural irregularity and whether the concession was properly understood as to whether article 3 on medical grounds was pursued on behalf of the appellant. Judge Keane gave reasons in his decision as to why there was no arguable error of law in the FtTJ's assessment of the appellant's sur place activities and that they did not demonstrate that he would be at risk on return for the reasons given by the FtTJ. Following the grant of permission, there had been no application to amend the grounds until the letter dated 1 July 2021. That letter plainly requested permission to rely upon the original grounds of challenge. Those grounds related to the FtTJ's assessment of the sur place activities in the context of GJ and others. The letter sought to argue that the more recent CG decision should be applied when undertaking the error of law hearing.

28. Whilst the respondent's rule 24 response dated 10 August 2022 referred to the later CG decision, the respondent stated that she did not object to the appellant's request to amend the grounds to include the original grounds on which permission was sought in respect of the

appellant sur place activities in the United Kingdom (see paragraph 8 of the rule 24 response). There is a real difference between considering the original grounds of challenge based on GJ and others and the basis upon which it is now sought to argue that the FtTJ erred in law by reference to a later country guidance decision which was not in force at the time the FtTJ heard the appeal.

29. The appeal before the FtTJ was heard on the 19 March 2020 and the decision was promulgated on 30 March 2020. The relevant country guidance decision extant at that time and one that the FtTJ was obliged to apply was GJ and others (post-civil war; returnees) Sri Lanka CG [2013] UKUT 00319 (hereinafter referred to" GJ").

30. In GJ the Tribunal identified a number of groups still at risk of harm in post-conflict Sri Lanka as follows:

> "*(1) This determination replaces all existing country guidance on Sri Lanka.*
>
> *(2) The focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009. The LTTE in Sri Lanka itself is a spent force and there have been no terrorist incidents since the end of the civil war.*
>
> *(3) The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.*
>
> *(4) If a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.*
>
> *(5) Internal relocation is not an option within Sri Lanka for a person at real risk from the Sri Lankan authorities, since the government now controls the whole of Sri Lanka and Tamils are required to return to a named address after passing through the airport.*
>
> *(6) There are no detention facilities at the airport. Only those whose names appear on a "stop" list will be detained from the airport. Any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days.*
>
> *(7) The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise, are:*
>
> > *(a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are or are perceived to have a significant role in relation to post conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.*

(b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.

(c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.

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

(8) The Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.

(9) The authorities maintain a computerised intelligence-led "watch" list. A person whose name appears on a "watch" list is not reasonably likely to be detained at the airport but will be monitored by the security services after his or her return. If that monitoring does not indicate that such a person is a Tamil activist working to destabilise the unitary Sri Lankan state or revive the internal armed conflict, the individual in question is not, in general, reasonably likely to be detained by the security forces. That will be a question of fact in each case, dependent on any diaspora activities carried out by such an individual."

31. The current country guidance in relation to Sri Lanka is contained in KK and RS (*Sur place* activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC), which states:

(1) The current Government of Sri Lanka ("GoSL") is an authoritarian regime whose core focus is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam.

(2) GoSL draws no material distinction between, on the one hand, the avowedly violent means of the LTTE in furtherance of Tamil Eelam, and non-violent political advocacy for that result on the other. It is the underlying aim which is crucial to GoSL's perception. To this extent, GoSL's interpretation of separatism is not limited to the pursuance thereof by violent means alone; it encompasses the political sphere as well.

(3) Whilst there is limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of avowedly separatist or perceived separatist beliefs.

(4) GoSL views the Tamil diaspora with a generally adverse mindset but does not regard the entire cohort as either holding separatist views or being politically active in any meaningful way.

(5) Sur place activities on behalf of an organisation proscribed under the 2012 UN Regulations is a relatively significant risk factor in the assessment of an individual's profile, although its existence or absence is not determinative of risk. Proscription will entail a higher degree of adverse interest in an organisation and, by extension, in individuals known or perceived to be associated with it. In respect of organisations which have never been proscribed and the organisation that remains de-proscribed, it is reasonably likely that there will, depending on whether the organisation in question has, or is perceived to have, a separatist agenda, be an adverse interest on the part of GoSL, albeit not at the level applicable to proscribed groups.

(6) The Transnational Government of Tamil Eelam ("TGTE") is an avowedly separatist organisation which is currently proscribed. It is viewed by GoSL with a significant degree of hostility and is perceived as a "front" for the LTTE. Global Tamil Forum ("GTF") and British Tamil Forum ("BTF") are also currently proscribed and whilst only the former is perceived as a "front" for the LTTE, GoSL now views both with a significant degree of hostility.

(7) Other non-proscribed diaspora organisations which pursue a separatist agenda, such as Tamil Solidarity ("TS"), are viewed with hostility, although they are not regarded as "fronts" for the LTTE.

(8) GoSL continues to operate an extensive intelligence-gathering regime in the United Kingdom which utilises information acquired through the infiltration of diaspora organisations, the photographing and videoing of demonstrations, and the monitoring of the Internet and unencrypted social media. At the initial stage of monitoring and information gathering, it is reasonably likely that the Sri Lankan authorities will wish to gather more rather than less information on organisations in which there is an adverse interest and individuals connected thereto. Information gathering has, so far as possible, kept pace with developments in communication technology.

(9) Interviews at the Sri Lankan High Commission in London ("SLHC") continue to take place for those requiring a Temporary Travel Document ("TTD").

(10) Prior to the return of an individual traveling on a TTD, GoSL is reasonably likely to have obtained information on the following matters:

i. whether the individual is associated in any way with a particular diaspora organisation;

ii. whether they have attended meetings and/or demonstrations and if so, at least approximately how frequently this has occurred;

iii. the nature of involvement in these events, such as, for example, whether they played a prominent part or have been holding flags or banners displaying the LTTE emblem;

iv. any organisational and/or promotional roles (formal or otherwise) undertaken on behalf of a diaspora organisation;

v. attendance at commemorative events such as Heroes Day;

vi. meaningful fundraising on behalf of or the provision of such funding to an organisation;

vii. authorship of, or appearance in, articles, whether published in print or online;

viii. any presence on social media;

ix. any political lobbying on behalf of an organisation;

x. the signing of petitions perceived as being anti-government.

(11) Those in possession of a valid passport are not interviewed at the SLHC. The absence of an interview at SLHC does not, however, discount the ability of GoSL to obtain information on the matters set out in (10), above, in respect of an individual with a valid passport using other methods employed as part of its intelligence-gathering regime, as described in (8). When considering the case of an individual in possession of a valid passport, a judge must assess the range of matters listed in (10), above, and the extent of the authorities' knowledge reasonably likely to exist in the context of a more restricted information-gathering apparatus. This may have a bearing on, for example, the question of whether it is reasonably likely that attendance at one or two demonstrations or minimal fundraising activities will have come to the attention of the authorities at all.

(12) Whichever form of documentation is in place; it will be for the judge in any given case to determine what activities the individual has actually undertaken and make clear findings on what the authorities are reasonably likely to have become aware of prior to return.

(13) GoSL operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself. This database is accessible at the SLHC, BIA and anywhere else within Sri Lanka. Its contents will in general determine the immediate or short-term consequences for a returnee.

(14) A stop list and watch list are still in use. These are derived from the general electronic database.

(15) Those being returned on a TTD will be questioned on arrival at BIA. Additional questioning over and above the confirmation of identity is only reasonably likely to occur where the individual is already on either the stop list or the watch list.

(16) Those in possession of a valid passport will only be questioned on arrival if they appear on either the stop list or the watch list.

(17) Returnees who have no entry on the general database, or whose entry is not such as to have placed them on either the stop list or the watch list, will in general be able to pass through the airport unhindered and return to the home area without being subject to any further action by the authorities (subject to an application of the HJ (Iran) principle).

(18) Only those against whom there is an extant arrest warrant and/or a court order will appear on the stop list. Returnees falling within this category will be detained at the airport.

(19) Returnees who appear on the watch list will fall into one of two sub-categories: (i) those who, because of their existing profile, are deemed to be of sufficiently strong adverse interest to warrant detention once the individual has travelled back to their home area or some other place of resettlement;

and (ii) those who are of interest, not at a level sufficient to justify detention at that point in time, but will be monitored by the authorities in their home area or wherever else they may be able to resettle.

(20) In respect of those falling within sub-category (i), the question of whether an individual has, or is perceived to have, undertaken a "significant role" in Tamil separatism remains the appropriate touchstone. In making this evaluative judgment, GoSL will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam.

(21) The term "significant role" does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been "high profile" or "prominent". The assessment of their profile will always be fact-specific, but will be informed by an indicator-based approach, taking into account the following non-exhaustive factors, none of which will in general be determinative:

i. the nature of any diaspora organisation on behalf of which an individual has been active. That an organisation has been proscribed under the 2012 UN Regulations will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it;

ii. the type of activities undertaken;

iii. the extent of any activities;

iv. the duration of any activities;

v. any relevant history in Sri Lanka;

vi. any relevant familial connections.

(22) The monitoring undertaken by the authorities in respect of returnees in sub-category (ii) in (19), above, will not, in general, amount to persecution or ill-treatment contrary to Article 3 ECHR.

(23) It is not reasonably likely that a returnee subject to monitoring will be sent for "rehabilitation".

(24) In general, it is not reasonably likely that a returnee subject to monitoring will be recruited as an informant or prosecuted for a refusal to undertake such a role.

(25) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or are associated with publications critical of the government, face a reasonable likelihood of being detained after return, whether or not they continue with their activities.

(26) Individuals who have given evidence to the LLRC implicating the Sri Lankan security forces, armed forces, or the Sri Lankan authorities in alleged war crimes, also face a reasonable likelihood of being detained after their return. It is for the individual concerned to establish that GoSL will be aware of the provision of such evidence.

(27) There is a reasonable likelihood that those detained by the Sri Lankan authorities will be subjected to persecutory treatment within the meaning of the Refugee Convention and ill-treatment contrary to Article 3 ECHR.

(28) Internal relocation is not an option within Sri Lanka for a person at risk from the authorities.

(29) In appropriate cases, consideration must be given to whether the exclusion clauses under Article 1F of the Refugee Convention are applicable.

APPLICATION OF THE PRINCIPLE IN HJ (IRAN)

It is essential, where appropriate, that a tribunal does not end its considerations with an application of the facts to the country guidance, but proceeds to engage with the principle established by HJ (Iran) [2010] UKSC 31; [2010] 1 AC 596 , albeit that such an analysis will involve interaction with that guidance.

When applying the step-by step approach set out in paragraph 82 of HJ (Iran), careful findings of fact must be made on the genuineness of a belief in Tamil separatism; the future conduct of an individual on return in relation to the expression of genuinely held separatist beliefs; the consequences of such expression; and, if the beliefs would be concealed, why this is the case.

32. In assessing whether the appellant's sur place activities might place him at risk on return, the FtTJ applied the guidance in GJ (see paragraph 21) to his findings of fact. Mr Boyle sought to argue that the FtTJ erred in law in his assessment by reference to the decision in KK and RS to support his argument that the FtTJ had wrongly assessed the appellant's sur place activities and his profile giving rise to risk on return.

33. The difficulty with Mr Boyle's submission that a failure to take into account the country guidance decision not existing at the date of the FtTJ's decision could not be an error of law, since it is not a legal precedent to which the declaratory theory applies (see Adam (rule 45: authoritative decisions) [2017] UKUT 370 at paragraph 3. The FtTJ undertook as analysis of the risk on return of the appellant on the background material before him and the country guidance decision that was in force and reached a reasoned conclusion on that material. The fact that he might have arrived at a different result with the benefit of KK and RS is irrelevant to the question of whether his decision involved the making of an error on a point of law. That has been reaffirmed by the Court of Appeal in the decision of MA (Iraq) v The Secretary of State for the Home Department [2021] EWCA Civ 1467 at paragraph 79, 97 and 98, and also reaffirmed in SR (Sri Lanka)v SSHD [2022] EWCA Civ 828 at paragraph 101.

34. The grounds of challenge to the decision of the FtTJ on this issue should be seen in the light of the country guidance decision that was in force at the time the judge made his decision namely GJ. Factual matters arising after that point in time (including the issuance of a Country Guidance decision) can always be raised with the Secretary of State through further submissions, which will be considered under paragraph 353 of the Immigration Rules.

35. The original grounds of challenge referred to the Sri Lankan authorities' perception of the appellant as determinative of risk and that fact that he was not an organiser of the demonstrations could not

undermine the evidence of his photographs being in the public domain. It was further submitted that the judge materially erred in law by failing to adequately engage with the risk on return in light of the activity and attendance outside the magistrates court. These points were also made by Mr Boyle in his oral submissions, but in the context of the decision in KK and RS.

36. It was further asserted that the FtTJ did not consider the questions he would be asked on return as to what it been doing in the UK, and he could not be expected to lie about that activity (reference being made to appendix C of GJ and questions to be asked of returnees).

37. When undertaking an assessment of the FtTJ's findings of fact, they are entirely consistent with the guidance given in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC). The following propositions are set out (a) the GOSL's concern now is not the past membership or sympathy, but whether a person is a destabilising threat in post-conflict Sri Lanka (paragraph 311); (b) it is not established that previous LTTE connections or sympathies (whether direct or familial) are perceived by the GOSL as indicating now that an individual poses a destabilising threat in post-conflict Sri Lanka (paragraph 325); and (c) an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state which lacks in Government (paragraph 356).

38. The decision in GJ reviewed the risk factors as set out, particularly in paragraph 356 of GJ. It was noted in that judgement that the focus of the Sri Lankan Government's concern has changed since the civil war ended in May 2009, the subject now being to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the Sri Lankan state.

39. Thus, those persons potentially at risk are those perceived to be a threat to the integrity of Sri Lanka as a single state or perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora, which may include journalists or human rights activists or individuals who have given evidence, and indeed a person whose name appears on a computerised stop list.

40. It is to be noted that the Sri Lankan authorities approach is based on sophisticated intelligence, both as to the activities within Sri Lanka and the diaspora. The authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and that everyone in the Northern Province had some level of involvement with the LTTE during the civil war post-conflict. An individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unity of the Sri Lankan state or Sri Lankan Government.

41. In terms of this appellant's history, the previous factual findings remain in place where the adjudicator found that at the time he left Sri

Lanka he was of no adverse interest to either the Sri Lankan authorities or the LTTE. As the respondent set out in the Rule 24 response (paragraph 11) the appellant accepted the findings of the previous decision that he had not at any point previously come to the attention of the authorities in Sri Lanka prior to him coming to the United Kingdom and did not seek to challenge those findings of fact before Judge Bonavero (see paragraph 15).

42. Similarly, in terms of political activities in the diaspora, it was not considered by the Upper Tribunal in GJ as indicated in paragraph 336 of the determination that the attendance of demonstrations in the diaspora alone would be sufficient to create a real risk or reasonable degree of likelihood that a person would attract attention on return. An attendance at one or even several demonstrations is not by itself evidence that a person is a committed Tamil activist seeking to promote Tamil separatism within Sri Lanka.

43. The FtTJ considered the material provided to demonstrate his claim, which consisted of photographs of his attendance at 4 political events ranging in date from 23 July 2018 to May 2019. The FtTJ 's assessment of the photographs with that in all of them he was part of a crowd sometimes holding a placard (see paragraph 7). The appellant also provided a photocopy of what was said to be a newspaper publishing Sri Lanka which contained a small photograph of the group of people demonstrating outside Westminster magistrates court. In respect of this the judge found that the appellant had circled a person's face at the edge of the group which he said was his own although the photograph was so small badly copy that was hard to know. The judge accepted that he was present at that demonstration and at the others.

44. The FtTJ's factual findings were set out paragraph 17 – 22. The FtTJ considered the nature and extent of the activities noting that the 1st earliest photographic evidence of attendance at political activities dates from July 2018 in the context of the fact that the appellant had lived in the UK since 2003. There was no evidence of any political activity during the 1st 15 years of the appellant stay in the UK. This led the judge to question the appellant's commitment to the Tamil separatist cause (see paragraph 17).

45. Whilst the judge accepted he was present at a number of demonstrations, the FtTJ found that he did not appear to play any kind of leadership or organisational role. Pausing at that point, the FtTJ was not simply stating that he had no role in the TGTE or any other organisation but was making that point on the basis of his activity as shown. The FtTJ found that there was no evidence before him from any of the diaspora organisations who might attest to the appellant's role and thus if he was involved in any capacity, the FtTJ considered that such evidence would likely to have been provided.

46. The FtTJ also considered the photographic evidence of the appellant outside Westminster Magistrates court (see paragraph 19). Mr Boyle

submits that this was a significant event and the appellant had attended demonstrations which were high profile and highly visible and would likely be seen as inflammatory outside court. However the FtTJ undertook a proper assessment of that evidence at paragraph 19. The claim made on behalf of the appellant was that the photograph was published in a Sri Lankan newspaper in 2019. However the FtTJ found that there was no suggestion that the appellant was named anywhere in the text of the newspaper, that the photograph was the small and at least 20 people and that he was at the very edge of the photograph with his face partly obscured by a placard. Therefore whilst Mr Boyle submits that the authorities in Sri Lanka have methods of surveillance and that this was a significant and high profile event, the FtTJ gave adequate and sustainable evidence-based reasons for reaching the conclusion at paragraph 19 that it was highly unlikely that anyone who did not know that he was there would be able to identify him from the picture.

47. In respect of the demonstrations the FtTJ applied paragraph 336 of GJ by reference to paragraph 351, and it was open to the FtTJ to conclude that he had failed to provide any reliable evidence to suggest that he done any more for the Tamil cause other than to attend some demonstrations. He had only attended such demonstrations 15 years after his arrival in the UK and there was no evidence specific to the appellant from any diaspora organisations in the UK. It was further open to the judge to consider the basis of the initial asylum claim which was based on a fear of Tamil organisations rather than the Sri Lankan government. I reject the submission made by Mr Boyle that the judge failed to make any factual finding that the appellant was not committed to the Tamil cause. It is plain from reading the decision that the FtTJ did not find that the appellant was committed to the Tamil cause. This was based on his length of residence in the United Kingdom and that he had only attended demonstrations 15 years after his arrival. There was no evidence specific to the appellant from any diaspora organisation and also that the initial claim that he had made was that he was in fear of Tamil organisations. At paragraph 22 the FtTJ concluded “in all the circumstances I conclude, even applying the lower standard of proof, that the appellant is not a committed activist seeking to promote Tamil separatism. I further conclude that the Sri Lankan authorities would not consider him to be such an activist.” Thus the point made by the FtTJ, and highly relevant to risk was that he would not be seen as a committed activist seeking to promote Tamil separatism either by his activities or by the Sri Lankan authorities as they would not consider him to be such an activist (see paragraph 22). However the FtTJ did not reject his sur place claim simply on the basis that his commitment was not genuine but because the evidence was limited consisting of photographs of attending protests and that he was not likely to be identified from the nature of the photographs provided.

48. Mr Boyle submitted that the appellant would be at risk on return because it was accepted that as the appellant did not have a passport he would be interviewed both in the United Kingdom and in Sri Lanka. Thus if he were so interviewed, he would be required to answer questions about

his activities. The FtTJ considered this issue at paragraph 23. The FtTJ properly accepted that he would be asked questions by the authorities on return, but it was open to him to conclude that in the light of his findings of fact as to his history it would not be on any stop list and also taking into account his level of involvement and his lack of any genuine support for the Tamil cause, he would be able to answer those questions truthfully without facing the risk of persecution. Whilst Mr Boyle submits that the appellant's medical condition may lead him to be at risk, the appellant's general presentation in such circumstances is not explained in the medical documentation and which is limited in its contents.

49. Drawing together those matters, the FtTJ undertook an assessment that was consistent with the principles set out in GJ and others, properly identifying the nature of the sur place activities relied upon but gave adequate and sustainable reasons for reaching the overall conclusion that the attendance at those demonstrations was such that they would not place them at risk of return that he would not be of adverse interest to the authorities.

50. Even if Mr Boyle were correct in his submission that the tribunal should apply the CG decision in KK and RS because it clarified GJ and taking into account the submissions made, it is not shown that the FtTJ erred in law in his assessment as to risk on return.

51. Mr Boyle submits that he would be at risk on return due to being on a watchlist (paragraph 19(1) "of a significantly strong adverse interest") and secondly that within the reasoning of HJ Iran his return would interfere with his convention right to political opinion. As a previously there was no dispute that the appellant did not seek to challenge the previous findings of the adjudicator (see paragraph 15). Consequently there was nothing known of the appellant when he left Sri Lanka, and he was of no interest to the authorities. Given that there was no past detention or persecution in Sri Lanka he would not appear on any stop list for detention on return. At paragraph 20, the FtTJ set out his reasons for rejecting the appellant's account that the authorities had been asking the appellant's father-in-law about his activities in the United Kingdom. That finding has not been challenged in the grounds or in the submissions.

52. In terms of the appellant's profile and sur place activities, paragraphs 10 and 21 of the headnote apply as to whether the Sri Lankan's authorities likely knowledge of the appellant and as to whether he would be considered to have a significant role in a diaspora organisation. Reference is made to "significant role" does not require an individual to show they have held any formal position or are a member or that their activities have been "high-profile" or "prominent". The assessment is fact specific but take into account a number of factors (which are non-exhaustive) set out at paragraph 21. The FtTJ set out the evidence factual findings made in relation to the demonstrations. The type of activities undertaken were limited and consisted of attendance at 4 political demonstrations from July 2018 to May 2019. Mr Boyle submits he attended a fifth protest this was

not photographed. The duration of the activities was therefore short (paragraph iv). Whilst Mr Boyle submitted that he had attended high profile events organised by the LTTE including attending one at the magistrates court which had been published in national newspaper, the FtTJ found that the appellant was not named anywhere in the text of the newspaper. The photograph was small, and he is one of at least 20 people, with his face partly obscured by a placard and at the very edge of the photograph. There was no evidence before the FTT as to the circulation of the newspaper, but in any event was not likely to be identified from that. The appellant did not claim to have any social media presence in which his name was identified or posted any views in relation to political views, and his name had not been placed in the newspaper as the judge had found.

53. Mr Boyle submits that he would be questioned in the UK to obtain a TTD headnote 9 and 10) and also be questioned on arrival in Sri Lanka (headnote 15). Thus it is submitted that the authorities would likely to have information which would lead to him being on a watchlist under category (i) headnote 19.

54. The appellant does not have a passport would need to be interviewed. If the authorities gather information about the appellant they would be in line with the findings made by the FtTJ that there was little or no evidence to identify the appellant. In the light of the factual findings made by the FtTJ he would not be on the stop list for detention at the airport as he has no prior relevant history and Sri Lanka as he was not detained or released from detention by payment of a bribe and there is no arrest warrant for him. As to whether he would likely to appear on a watchlist and would be subject to further questioning on arrival, returnees who appear on a watchlist will be either (i) those who, because of their existing profile and deemed to be of sufficiently strong adverse interest to warrant attention or (ii) those were of interest, not at a level sufficient to justify detention at that point in time but will be monitored by authorities in their home area of place of resettlement. Included in the 1st category depends on whether the individual has always perceived have undertaken a “significant role” in Tamil separatism, with the consideration of the factors set out in paragraph 21 of the headnote.

55. The judge made factual findings which were open to him on the evidence. He did not find that the appellant would be considered by the Sri Lankan authorities to have any significant role in diaspora activities to be considered a person of sufficiently strong adverse interest to warrant attention on return to Sri Lanka, either at arrival or on return to his home area. Even if it was likely that he had been photographed by the authorities attending some events, the number of demonstrations were small and over a short period as noted by the FtTJ given the length of time the appellant had been in the United Kingdom or outside of Sri Lanka with his 1st sur place activity taking place 15 years after he claimed to have left. He had no organisational role, not been involved in any relevant social media presence, neither he or his family have any adverse history, he has not been named.

56. Even if it could be said that the appellant would be monitored on return, in the light of the FtTJ factual findings that he did not have any genuine political opinion, he would not undertake any activities on return which would otherwise place him at risk.

57. Thus it has not been demonstrated that the FtTJ's decision involved the making of an error on a point of law when considering the appellant's sur place activities.

58. Dealing now with the 2nd point raised in the original grounds of challenge and in the grant of permission where it was stated that the judge attributed to counsel a concession that the appellant's mental health could not reach article 3 of the ECHR, it is accepted on behalf of the respondent that the record of proceedings of the presenting officer show that counsel submitted that articles 2 and 3 were to stand or fall with the protection claim, with the exception of the appellant's mental health. Thus the FtTJ's misunderstood Counsel's submission that there was no freestanding article 3 claim. However the respondent did not accept that the error was material in the light of the evidence that was before the FtT. Mr Boyle in his skeleton argument set out at paragraph 1 that "It is contested whether the error in relation to the medical grounds was material" and that was the issue to be decided at this hearing.

59. It is the respondent's position set out in the rule 24 response (dated 10 August 2022) that the appellant had provided no reliable medical evidence to demonstrate a prima facie case that his health conditions would breach article 3 on return to Sri Lanka. Furthermore, Mr Diwnycz relied upon the CPIN relevant at the date of the hearing that set out the availability of medical treatment in Sri Lanka for mental health conditions at 8.9.1 and 8.9.2, and whilst it was not known what medication the appellant was currently taking, there was medication available in respect of mental health problems.

60. The submissions made by Mr Boyle are set out in his skeleton argument as follows.

61. The 17 July 2019 NHS report (p7 of the 2019 supplementary bundle) detailed suicidal ideation, hearing voices and seeing people in the room (psychosis). It noted the presence of PTSD with psychotic presentation.

62. It is submitted the medical evidence shows the mental health of the Appellant is fragile such as potentially to cause a crisis if he were returned to Sri Lanka. The 2019 NHS report indicated at that time it was somewhat unclear whether the Appellant could safely live with his family in the United Kingdom. This showed intense difficulty even when in the UK.

63. It is not argued that the Appellant is currently requiring either intense support or monitoring. He has an outstanding appeal, is legally represented, is living with family, is supported, and will be advised on further submissions (asylum and article 8) if his current appeal is

dismissed. Most importantly, he does not consider he is in immediate physical danger.

64. It is however submitted that if returned to Sri Lanka he would perceive risks such as those he perceived in 2019. Unlike HIV or dialysis cases for example, mental health is fickle. The test is whether there are substantial grounds to believe he may be at risk. A reading of his past mental health records indicates that there are indeed strong and substantial grounds to be concerned regarding his future mental health in such a scenario. It is further argued that deterioration of his mental health can rightly be considered to involve 'intense suffering'. If it were not, NHS clinicians would not have been considering in 2019 whether the family needed to be separated on safety grounds.

65. In his oral submissions he confirmed that he did not rely on the psychiatric report that had been obtained for the previous hearing save that he relied upon where it was stated that it was a doctor's opinion that he should not attend demonstrations and recommended that he stop. When asked what the relevance of this was, Mr Boyle stated it was relevant whether he was an active supporter. However, Mr Boyle confirmed that it was not being stated that he stopped attending events because he was given advice. However there is no updated evidence from the appellant, nor was that dealt with in any written evidence before the FTT.

66. He further confirmed that he did not rely on any updated evidence in relation to the appellant and was not seeking an adjournment for any updated medical evidence to be provided. In his submissions, Mr Boyle stated that at present he was receiving currently a very low amount of support, no outreach work and had an annual check and the situation was stable.

67. Mr Boyle stated that he relied upon the crisis assessment dated 17th of July 2019 which was before the FtTJ. He submitted that the mental health of the appellant was that such a position that he was on the verge of being sectioned. He submitted that the reason why removal to Sri Lanka would breach article 3 was that the environment there would be a traumatic place for him, and he would lose the security that he has which would create stress upon him and cause a significant decline. Mr Boyle submitted that even if there was no objective risk, there was a subjective risk.

68. Therefore applying the decision in AM (Zimbabwe), the appellant must produce evidence of a real risk on account of the access to treatment. He submitted there was no evidence as to the availability of antipsychotic medication, but the concern was that on return to Sri Lanka and passing through the airport there would be adverse treatment which would worsen his condition. The 2019 report explained that even in the UK his health was declining and therefore would cause intense suffering.

Discussion:

69. In AM (Zimbabwe) (Appellant) v SSHD (Respondent) [2020] UKSC 17 the Supreme Court considered and endorsed the judgment of the Grand Chamber of the European Court of Human Rights (the ECtHR) in Paposhvili v Belgium [2017] Imm AR 867 which gave an expanded interpretation of Article 3 ECHR in the context of medical treatment cases.

70. The appellant in AM (Zimbabwe) was settled in the UK when a deportation order was made against him because of very serious criminal offences. He was also HIV+ and claimed that he would be unable to access the appropriate antiretroviral therapy in Zimbabwe which would cause him to become prey to opportunistic infections and which, if untreated, would lead to his death.

71. The Supreme Court, having analysed Paposhvili and several other judgments, concluded that the Grand Chamber's pronouncement about the procedural requirements of Article 3 ECHR were not merely clarificatory and that the Grand Chamber had modified the earlier approach in N v United Kingdom [2008] 47 EHRR 39.

72. In Paposhvili, at [183], the ECrtHR found that an issue under Article 3 ECHR may arise in "... situations involving the removal of a seriously ill in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy."

73. At [23] the Supreme Court stated:

> "Its new focus on the existence and accessibility of appropriate treatment in the receiving state led the Grand Chamber in the *Paposhvili* case to make significant pronouncements about the procedural requirements of article 3 in that regard. It held
>
> (a) in para 186 that it was for applicants to adduce before the returning state evidence "capable of demonstrating that there are substantial grounds for believing" that, if removed, they would be exposed to a real risk of subjection to treatment contrary to article 3;
>
> (b) in para 187 that, where such evidence was adduced in support of an application under article 3, it was for the returning state to "dispel any doubts raised by it"; to subject the alleged risk to close scrutiny; and to address reports of reputable organisations about treatment in the receiving state;
>
> (c) in para 189 that the returning state had to "verify on a case-by-case basis" whether the care generally available in the receiving state was in practice sufficient to prevent the applicant's exposure to treatment contrary to article 3;

(d) in para 190 that the returning state also had to consider the accessibility of the treatment to the particular applicant, including by reference to its cost if any, to the existence of a family network and to its geographical location; and

(e) in para 191 that if, following examination of the relevant information, serious doubts continued to surround the impact of removal, the returning state had to obtain an individual assurance from the receiving state that appropriate treatment would be available and accessible to the applicant."

74. Recently in Savran v Denmark (Application No 57467/15) the Grand Chamber of the ECrtHR affirmed that Paposhvili provided a "*comprehensive standard*" in terms of mental illness as well, taking due account of all considerations relevant for the purposes of Article 3, and that it was for applicants to provide evidence capable of demonstrating that there are substantial grounds for believing that they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (at [130] to [139]). It is only after this threshold has been met that the returning state's obligation to dispel any doubts which have been raised, and if necessary, seek assurances, comes in to play.

75. This culminated in a recent distillation of the test by the Upper Tribunal in *AM (Art 3; health cases) Zimbabwe* [2022] UKUT 131 (IAC). The Upper Tribunal found that the initial threshold test involves two questions:

(1) Has the person discharged the burden of establishing that he or she is 'a seriously ill person'?

(2) Has the person adduced evidence 'capable of demonstrating' that 'substantial grounds have been shown for believing' that as 'a seriously ill person', he or she 'would face a real risk':

(i) 'on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,

(ii) of being exposed to:

(a) a serious, rapid, and irreversible decline in his or her state of health resulting in intense suffering, or

(b) a significant reduction in life expectancy?

76. The first question will generally require clear and cogent medical evidence from treating physicians in the UK. In HA (expert evidence; mental health (Sri Lanka) [2022] UKUT 111 the Upper Tribunal recently gave the following guidance on the preparation of psychiatric and psychological reports in immigration cases:

'(1) Where an expert report concerns the mental health of an individual, the Tribunal will be particularly reliant upon the author fully complying with their obligations as an expert, as well as upon their adherence to the standards and principles of the expert's professional regulator. When doctors are acting as witnesses in legal proceedings they should adhere to the relevant GMC Guidance.

(2) Although the duties of an expert giving evidence about an individual's mental health will be the same as those of an expert giving evidence about any other matter, the former must at all times be aware of the particular position they hold, in giving evidence about a condition which cannot be seen by the naked eye, X-rayed, scanned or measured in a test tube; and which therefore relies particularly heavily on the individual clinician's opinion.

(3) It is trite that a psychiatrist possesses expertise that a general practitioner may not have. A psychiatrist may well be in a position to diagnose a variety of mental illnesses, including PTSD, following face-to-face consultation with the individual concerned. In the case of human rights and protection appeals, however, it would be naive to discount the possibility that an individual facing removal from the United Kingdom might wish to fabricate or exaggerate symptoms of mental illness, in order to defeat the respondent's attempts at removal. A meeting between a psychiatrist, who is to be an expert witness, and the individual who is appealing an adverse decision of the respondent in the immigration field will necessarily be directly concerned with the individual's attempt to remain in the United Kingdom on human rights grounds.

(4) Notwithstanding their limitations, the GP records concerning the individual detail a specific record of presentation and may paint a broader picture of his or her mental health than is available to the expert psychiatrist, particularly where the individual and the GP (and any associated health care professionals) have interacted over a significant period of time, during some of which the individual may not have perceived themselves as being at risk of removal.

(5) Accordingly, as a general matter, GP records are likely to be regarded by the Tribunal as directly relevant to the assessment of the individual's mental health and should be engaged with by the expert in their report. Where the expert's opinion differs from (or might appear, to a layperson, to differ from) the GP records, the expert will be expected to say so in the report, as part of their obligations as an expert witness. The Tribunal is unlikely to be satisfied by a report which merely attempts to brush aside the GP records.

(6) In all cases in which expert evidence is adduced, the Tribunal should be scrupulous in ensuring that the expert has not merely recited their obligations, at the beginning or end of their report, but has actually complied with them in substance. Where there has been significant non-compliance, the Tribunal should say so in terms, in its decision. Furthermore, those giving expert evidence should be aware that the Tribunal is likely to pursue the matter with the relevant regulatory body, in the absence of a satisfactory explanation for the failure.

(7) Leaving aside the possibility of the parties jointly instructing an expert witness, the filing of an expert report by the appellant in good time before a hearing means that the Secretary of State will be expected to decide, in each case, whether the contents of the report are agreed. This will require the respondent to examine the report in detail, making any investigation that she may think necessary concerning the author of the report, such as by interrogating the GMC's website for matters pertaining to registration.

77. The second question is multi-layered and will depend on the facts of each case. It is insufficient for a person to show that their condition would worsen upon removal. They must show that there will be 'intense suffering'.

78. Medical experts based in the UK may be able to assist in this assessment, but many cases are likely to turn on the availability of and access to treatment in the receiving state. Such evidence is more likely to be found in reports by reputable organisations, clinicians, and country experts with contemporary knowledge or expertise in medical treatment and country conditions in the receiving state.

79. It is only after the threshold test has been met and Article 3 is engaged that the returning state's obligations, outlined in *Savran* ([130]and [135]) might become relevant.

80. The medical evidence relied upon by Mr Boyle is contained in 2 documents, the care assessment summary dated 17 July 2019 and a letter dated 18 September 2019. There are no GPs records providing the outline of the appellant's medical history or the basis upon which any diagnosis has been made. Mr Boyle stated that he did not rely upon the psychiatric report provided for the hearing before the FtT.

81. Dealing with the letter dated 17 July 2019, it relates to the appellant's wife contacting the crisis team on 16 July to express concerns about her husband's presentation. Reference has been made to an increase in auditory hallucinations and his response to them and reduction in his day-to-day functioning. It was noted that he continued to take antipsychotic medication and that it was unclear if there are any stressors other than his upcoming appeal. An assessment took place at the home address but what was evident was that he would drink daily to try and self-medicate against the level of distress he had from voice hearing. It was noted that the appellant was taking medication. Reference was made to the appellant with what appears to be a "relapse of PTSD symptoms with current psychotic presentation." The risks identified were further deterioration, physical ill-health and lack of sleep, vulnerable due to psychiatric symptoms, limited capacity. The protective factors were wife and child, no active suicidal thoughts, no thoughts to act on the voices or harm others, has been taking the prescribed medication given by his wife, agree to home-based treatment. Exacerbating factors were listed as undertreated psychotic condition, poor sleep and appetite difficult to engage via an interpreter. The care plan was a review of medication and daily home-based treatment with a carer review.

82. On 18 September 2019 there is a letter written to assist the request for a relocation of address with a diagnosis showing mental and behavioural disorders due to the use of alcohol and post-traumatic stress disorder. There is a list of the medication. It states that the appellant was currently being supported by mental services, but extra stressors are

having significant impact on the families daily functioning. The request to relocate would reduce current stressors and aid recovery for the family.

83. The evidence before the FtT was limited. There are no GPs records providing the outline of the appellant's medical history or the basis upon which any diagnosis has been made as to PTSD or why the medication was being prescribed. The cause of any deterioration in his mental health was not stated and is entirely unclear from the documents relied upon by Mr Boyle. There is reference to alcohol (18 September 2019) and in the July 2019 assessment an identified stressor was an upcoming appeal. In the light of the findings made by the adjudicator, which were not challenged before the FtTJ, there was no finding any previous detention or ill-treatment in Sri Lanka and thus no past traumatic events had been identified that might underlie the reports of auditory hallucinations or the reference to PTSD. In the light of that limited material, it is not possible to undertake any further assessment as to the causes.

84. Whilst Mr Boyle referred to the circumstances in July 2019 and that he was on the verge of an order being made under the mental health act, that is not supported by the material. In fact, the crisis team relied upon the evidence of his wife, and they felt it was appropriate for her to remain there, but a medical review would be undertaken. The protective factors were identified as his wife and child with no active suicidal thoughts or thoughts to act on voices or harm others. Contrary to the submissions made by Mr Boyle, there was no evidence as to the effect upon the appellant's mental health in terms of return. The position before the FtTJ was that the appellant's wife's asylum appeal had been dismissed by the decision of the FtT on 9 March 2015 (see respondent's bundle) and therefore he would have the assistance of his close family members.

85. The test at paragraph [31] of AM (Zimbabwe) requires evidence capable of showing that there are substantial grounds for believing that the appellant would face a real risk, on account of the absence of appropriate treatment in Sri Lanka or lack of access to such treatment, "of being exposed to a serious, rapid and irreversible decline in ... her state of health resulting in intense suffering or to a significant reduction in life expectancy." When applying the appropriate test, and on the basis of the limited material it is demonstrated that the appellant had some mental health problems for which he was being prescribed medication. Mr Boyle did not seek to submit that the medication was unavailable in Sri Lanka in light of the evidence set out in the decision letter and the CPIN relevant at the date of the hearing. Therefore it has not been demonstrated on that evidence that it has been established that there are substantial grounds for believing that he would face a real risk of being exposed to either a serious, rapid and irreversible decline in the state of his mental health resulting in intense suffering or the significant reduction in life expectancy as a result of either the absence of treatment or lack of access to such treatment.

86. It is therefore for those reasons that although it is accepted on behalf the respondent that th FtTJ misunderstood Counsel's position concerning article 3 as a freestanding part of his claim, based on the evidence before the FtTJ, it has not been demonstrated that the judge's failure to deal with that evidence was material to the outcome.

87. Consequently for the reasons given, the decision of the FtTJ did not involve the making of a material error of law and the decision to dismiss the appeal stands.

88. Mr Boyle referred to factual matters arising after the decision of the FtT in the context of any additional sur place activities and the circumstances of his family members. Those can always be raised with the Secretary of State through further submissions, which will be considered under paragraph 353 of the Immigration Rules.

89. I appreciate that the decision may cause the appellant distress and have therefore asked that the decision is promulgated to the appellant's legal representatives so that they may explain the decision to him with protective factors.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtT shall stand.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds

Dated 17 October 2022