Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09402/2019**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 12 July 2022	**On the 22 August 2022**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

BM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Wass, Counsel instructed by David Benson Solicitors
For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

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 or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction

1. The appellant, a citizen of Sri Lanka, has appealed against the respondent's decision dated 11 September 2019 ('the 2019 SSHD decision') to refuse to grant him asylum / humanitarian protection or leave to remain on human rights grounds. The appeal against the 2019 SSHD decision was dismissed by the First-tier Tribunal ('FTT') in a decision dated 30 November 2020 ('the 2020 FTT decision'). In a decision sent on 28 May 2021, I found that the 2020 FTT decision contains an error of law and would be re-made by me at an adjourned hearing.

2. I now re-make the decision on the appellant's appeal against the 2019 SSHD decision.

3. It is undisputed that the appellant is vulnerable, and I have treated him as such throughout these proceedings in accordance with the relevant Practice Direction and Presidential Guidance Note No 2 of 2010, as set out and explained in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123. At the beginning of the hearing Ms Cunha did not dispute the evidence that the appellant's mental state is such that he is unfit to give evidence. Ms Cunha was entirely correct to do so, given the cogent medical evidence to that effect.

4. In a report dated 28 November 2021, Dr Dhumad, a consultant psychiatrist confirmed at [6.5] that the appellant remained unfit to attend court or give oral evidence. Dr Dhumad had already made that view clear in his two previous reports. Dr Dhumad's opinion is consistent with the memory failings set out in Dr Goldwyn's earlier report dated 24 January 2017, in which she said that the appellant "*was finding it difficult and distressing to recall what happened to him and when. He seemed to have no idea of the time of events.*" Dr Goldwyn also recorded the appellant as indicating that he had memory problems since his claimed ill-treatment in detention. Under the heading of 'cognition' Dr Goldwyn said this:

> "[the appellant's] memory seemed excessively poor and he often got confused. I tested his cognition with a well recognised test which is not language specific... he did not know the month or the year. He could not count backwards from 20 in his own language nor say the months of the year backwards. The interpreter herself was surprised. We tried to find a suitable address for him to remember for a short while. We gave him his own address in the end (which I already knew) but he even got that wrong. He scored 22 which indicates significant cognitive impairment."

5. I have made an anonymity order because this is an international protection case, wherein the importance of facilitating the discharge of the United Kingdom's obligations under the Refugee Convention and the ECHR outweighs the principle of open justice.

Background

6. The appellant arrived in the United Kingdom ('UK') as a student in September 2010 but did not claim asylum in December 2011. He asserted that he was separated from his family during the final stages of the Sri Lankan conflict in May 2009, and was detained and severely tortured, which resulted in scarring. He has explained that his interrogators wanted him to confess to being an LTTE member. He claims that he was only released from detention after his cousin paid a bribe. His cousin took him to Colombo airport and from there he travelled to the UK with the assistance of an agent.

7. The appellant's asylum claim was initially refused in January 2011 and his appeal against that decision was dismissed in a FTT decision dated 22 March 2012 ('the 2012 FTT decision'). The 2012 FTT decision (Judge Woodcraft) is a comprehensive and carefully drafted analysis of the appellant's asylum claim. Judge Woodcraft considered evidence from a consultant psychiatrist, Dr Balasubramaniam, that the appellant was suffering from PTSD, but did not accept his account of detention and ill-treatment in Sri Lanka to be credible, concluding the appellant "*to have been inconsistent on almost every aspect of his case*" and to have used the excuse of poor memory to justify those inconsistencies. Although Judge Woodcraft had the benefit of psychiatric evidence, there was no medical evidence of any of the physical injuries that the appellant claimed to have suffered whilst detained in Sri Lanka. The appellant became appeals-rights exhausted in April 2012.

8. The appellant made no further attempts to regularise his stay until he lodged fresh claim submissions in April 2017. These submissions relied upon, amongst other documents, a medical-legal report from Dr Goldwyn dated 24 January 2017 (referred to above) addressing the appellant's scars and mental state. These submissions also relied upon documents the appellant received from his aunt in Sri Lanka, in support of his claim that the Sri Lankan authorities continued to have an adverse interest in him and visited her home in 2017 looking for him.

9. This fresh evidence was comprehensively considered by the respondent in the (19-page) decision under appeal - the 2019 SSHD decision. The respondent properly noted that the 2012 FTT decision must be used as a starting point but concluded that little weight should be attached to the documents sent by the aunt The respondent noted Dr Goldwyn's report but did not accept the appellant's account of how the scars were caused to be credible. Having applied the relevant country guidance applicable at the time, GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC), the respondent did not accept that the Sri Lankan authorities were or would be adversely interested in the appellant

10. In a decision dated 2 July 2020 the Upper Tribunal ('UT') set aside a decision of the FTT dated 20 December 2019, dismissing the

appellant's appeal against the 2019 SSHD decision. I need say no more about these decisions because the UT remitted the matter for a de novo hearing before another FTT. That led to the 2020 FTT decision, which I have found to contain a material error of law. I adjourned the matter to be re-made in the UT on 4 May 2021. It should be noted that the appellant did not attend or give evidence at the FTT hearings in 2019 and 2020. The 2020 FTT decision specifically referred to Dr Dhumad's evidence and treated the appellant as a vulnerable witness.

11. The matter came before me on 2 December 2021 for a resumed hearing. It was again adjourned because the parties had been given insufficient notice of the hearing. At that hearing I gave directions for a consolidated bundle from the appellant and skeleton arguments from both parties, which have been complied with.

Resumed hearing before me

12. The appellant appeared at the hearing by way of video link. I noted Dr Dhumad's evidence and made it clear that his solicitor should sit next to him for support and that he was free to ask for a break or leave at any point.

13. Ms Cunha and Ms Wass appeared before me at Field House. I granted Ms Cunha additional time before the commencement of the hearing, as she had been allocated the case the day before and had only recently received key documents from the consolidated bundle.

14. Ms Cunha and Ms Wass agreed the following preliminary matters and issues in dispute:

(a) The hearing would proceed by way of submissions only because the appellant was unfit to give evidence. Ms Cunha confirmed that she did not dispute Dr Dhumad's evidence to this effect, albeit she would have preferred to have had the opportunity to ask the appellant written questions in advance of the hearing. However, Ms Cunha acknowledged that this had not been previously requested by the respondent. The respondent's skeleton argument also made no reference to this. Ms Cunha therefore made it clear that she believed it was too late to raise the issue at this stage and was content to proceed on the information available. I specifically asked Ms Cunha if she wished to apply for an adjournment in the light of the late receipt of instructions and the other concerns she identified, but she confirmed that she did not. Ms Cunha made it very clear that she was willing and able to proceed.

(b) The findings in the 2012 FTT decision must be a starting point in principle, but there is a wealth of materially different evidence post-dating that decision: a report analysing the appellant's scars and physical injuries; more detailed reports concerning the appellant's mental health; evidence from the appellant's aunt regarding the

authorities adverse interest in the appellant in Sri Lanka in 2017; updated country background evidence on Sri Lanka including two country guidance cases – GJ and KK and RS (*Sur place* activities: risk) Sri Lanka (CG) [2021] UKUT 130 (IAC). KK was unsuccessfully appealed to the Court of Appeal and remains the applicable country guidance – KK and RS (Sri Lanka) v SSHD [2022] EWCA Civ 119. In all the circumstances both parties agreed that: the evidence available to me is materially different to the evidence before the 2012 FTT; I could therefore depart from those findings; my findings should be made in the light of all the extensive evidence that is now available.

(c) It is undisputed that the appellant has been diagnosed with recurrent depression and PTSD, and that he has scars which are consistent with his account of torture. However, the respondent contends that the appellant's scarring and mental health are also consistent with other causes and disputes aspects of the appellant's account of events in Sri Lanka.

(d) The parties agreed that the central aspects of the appellant's account to be determined by me are:

(i) Was he detained and tortured in Sri Lanka because he was suspected of carrying out LTTE activities, as claimed?

(ii) Did his brothers and mother 'disappear' during the conflict and was his father detained until his release in 2019?

(iii) Was he released as a result of a bribe?

(iv) After his release did he leave Sri Lanka with the assistance of an agent?

(v) Have the Sri Lankan authorities visited his aunt in Sri Lanka seeking to arrest him?

(vi) Has he participated in protests / demonstrations in the UK linked to the Transitional Government of Tamil Eelam ('TGTE')?

(e) Ms Cunha accepted that if I determine (i)-(iv) in the appellant's favour, then the appeal must be allowed. This is because the country guidance supported the proposition that a person with that background would be at prospective risk of serious harm for a convention reason in Sri Lanka.

(f) Both parties accepted that (v) and (vi) remain relevant. If the documents relied upon at (v) were found to be manufactured, that would adversely impact credibility findings relevant to (i)-(iv). A positive resolution of (v) would bolster the appellant's claim to be at prospective risk.

(g) In relation to (vi), Ms Cunha expressly accepted that irrespective of my findings regarding (i)-(v), following KK, the appellant's appeal should be allowed *if* I find that he has taken part in TGTE activities, as

claimed, but that she would be inviting me not to accept the appellant's evidence in this regard absent supporting information.

(h) Although there have been wide-ranging and well-known developments in Sri Lanka in recent months, both representations confirmed that they were not inviting me to depart from KK, which updated the guidance in GJ.

15. I then heard submissions from both representatives. Ms Cunha referred to a skeleton argument filed earlier in the year and the 2019 SSHD decision but was prepared to narrow the issues in dispute. Ms Cunha accepted that the evidence in Dr Goldwyn's report regarding the appellant's experience of 'falaka' was particularly strong and supported the appellant's claim to have been arrested and detained in the past. She nonetheless submitted that he could have been arrested for reasons other than those claimed by him. Ms Cunha submitted that although she accepted that the appellant may have been detained at some point in the past, that in itself did not explain the inconsistencies identified within the 2012 FTT decision. She invited me to reject the appellant's claim that his family members had disappeared, his father had been detained and he had to flee Sri Lanka after escaping from detention and in the premises asked me to dismiss the appeal.

16. Ms Wass relied upon her skeleton argument and submitted that the appellant's account should be accepted as broadly credible in the light of the detailed medical evidence and its plausibility in the light of the country background evidence. Ms Wass made brief Article 8 submissions in the alternative. I refer to the parties' respective submissions in more detail when making my findings below.

Evidence

17. The appellant relied upon two witness statements dated 25 November 2019 and 25 November 2021. These reiterate the central aspects of the appellant's account and provide an update on his and his family's circumstances in Sri Lanka. He claims that his father was released from detention in May 2019 and relied upon a hospital report dated 24 May 2019 confirming that he was treated for a leg fracture upon his release. The appellant said that his mother and brothers are still missing, from the time they were separated during the conflict in 2019. Following his departure from Sri Lanka, the appellant also claims that in 2017 Sri Lankan CID visited his aunt's property searching for him. The appellant also outlined his *sur place* involvement between 2015 and 2019.

Scarring report

18. Dr Goldwyn's 'medico-legal report' dated 20 March 2017 contains a comprehensive examination and analysis of the appellant's mental health and scars. Dr Goldwyn described the history as recounted by

the appellant. He said that he was suspected to be a Tamil Tiger and he was therefore blindfolded, his hands tied behind his back and arrested before being taken to the camp, where he was interrogated in a small, dark room, that at first he was allowed to keep his shirt and sarong but sometimes he was stripped and sexually abused, his penis was hit with iron rods and sometimes he was kicked in the crotch. The interrogators wanted him to confess to being a Tamil Tiger. They burnt him with the flame from a cigarette lighter and hit him with iron rods. They also beat him on the soles of his feet, known as 'falaka'. Dr Goldwyn also set out one particular occasion when the appellant claimed that the interrogator hit him very badly on his head and he fell unconscious. He recovered consciousness in the cell, but he did not know for how long he was unconscious. A prison orderly was trying to help him stem the bleeding and the appellant described there being a lot of blood on the cell floor. Dr Goldwyn described the appellant's significant memory / cognitive challenges and as finding it very difficult and distressing to recall his maltreatment.

19. Dr Goldwyn then set out a description of each of the eight scars she recorded by reference to photos. Dr Goldwyn made it plain that she assessed the scars in accordance with the Istanbul Protocol, before describing a more detailed assessment of each scar. Dr Goldwyn regarded scars 1, 2, 3, 4 and 7 to be *consistent* with the appellant's account. These included deliberately inflicted cigarette burns. Dr Goldwyn found scar 5 to be *diagnostic* of an injury caused by a sharp object such as a knife. As far as scar 8 was concerned, Dr Goldwyn regarded that as being a *typical* scar one would expect from a blow to the head i.e. from its position it is typical of another person hitting the appellant. Dr Goldwyn noted a distant possibility that it may have been due to a serious road or industrial accident as well as there being a mere possibility that it could have been caused by flying shrapnel. Dr Goldwyn went on to find that the pain in the soles of the appellant's feet was *typical* of 'falaka' and said this at [79]:

> "The soles of [the appellant's] feet were very tender and he felt pain when I bent his great toes upwards on both feet. In my opinion it is most unlikely that [the appellant] would know those tests and indeed he did not volunteer the information that he had been beaten on the soles of his feet but rather answered that he had as a result of my usual line of questioning. In my opinion the pain in [the appellant's] feet are typical of falaka. It is hard to imagine another cause although plantar fasciitis has some similarities."

20. Dr Goldwyn also considered that the appellant suffered from severe PTSD and severe depression, although she acknowledged that she was not a psychiatrist. In addition, Dr Goldwyn recorded that the appellant's memory seemed "*excessively poor and he often got confused*". She tested the appellant's cognition with a well-recognised non-language specific test and concluded that the results indicated that he had "*significant cogitative impairment*". This

included an inability to recall what month it was or to recall number sequences backwards in his own language.

21. Dr Goldwyn then reached the following conclusion at [90]:

> "The Istanbul Protocol requires that the examining doctor assess the overall picture of scarring and the mental effects of the alleged torture on a patient. In my professional opinion [the appellant's] scarring together with the PTSD and depression are typical of the type of torture that [the appellant] described."

Other reports on mental health

22. The appellant relied upon four reports from Dr Dhumad - the first three: 27 November 2019, 3 November 2020, 28 November 2021 - were prepared after Dr Dhumad met with the appellant. The final report dated 26 January 2022 answered questions from the appellant's solicitors regarding the general explanations for the apparent weaknesses in the appellant's evidence, including inconsistencies.

23. In his initial report, Dr Dhumad diagnosed the appellant as suffering from PTSD and severe depressive episode and concluded that he could not be said to be feigning or exaggerating his mental health symptoms. Dr Dhumad expressly considered alternative causes of his PTSD such as exposure to war atrocities but said that his psychological symptoms are typical of exposure to traumatic experience, namely torture. He considered his risk of suicide to be moderate at the time but high if threatened with removal. Dr Dhumad did not consider that the appellant was fit to attend court to give oral evidence on the basis that he would not be able to follow the proceedings meaningfully and it was likely that his mental health would deteriorate further. He contrasted this with the appellant's ability to provide a statement to its solicitor which could be done over a number of visits within a less intimidating environment.

24. In his addendum reports Dr Dhumad repeated much of the content of his first report but updated the appellant's mental health history since that time. In the first addendum report, Dr Dhumad described the appellant's condition as having worsened since he last saw him. In his second addendum report dated 28 November 2021 Dr Dhumad was of the view that the appellant's mental health remained the same as the preceding year, albeit his PTSD symptoms seemed much worse due to the constant fear of deportation, and his overall mental health had not improved over the past three years. Dr Dhumad noted that the appellant had avoided consultation with his GP due to fear of immigration detention and deportation and that he remained unfit to give oral evidence. Dr Dhumad also said this at [7.7]:

> "I have seen him three times and, on all occasions, I have considered the possibility that he might be feigning or exaggerating his mental illness. My opinion remains the same, I have not taken his story at face

> value but carefully examined his symptomatology and his emotional reactions during interviews. I have also considered the evidence before me. It is my clinical opinion that his clinical presentation is consistent with a diagnosis of depression and post-traumatic stress disorder. In my experience it is extremely difficult to feign a full blown mental illness brackets (as opposed to individual symptoms). The Istanbul Protocol advises that, in formulating a clinical impression for the purpose of reporting physical and psychological evidence of torture, examining physicians should ask themselves whether the clinical picture suggests a false allegation of torture… my impression is that his clinical presentation is compatible with the experience of intense fear of expected threat to life."

25. It should be noted that the evidence concerning the appellant's mental health did not only emanate from Dr Dhumad over the period 2019 to 2022. I also have the benefit of reports from Dr Goldwyn in 2017 and Dr Balasubramaniam in 2012 together with correspondence from clinicians treating his mental health symptoms from 2011.

Evidence emanating from aunt

26. The documents sent by the appellant's aunt as set out in the consolidated bundle include: a letter from the aunt dated 28 November 2017 stating that men from the intelligence division of the army frequently came looking for the appellant and that she made a complaint to the Human Rights Commission of Sri Lanka, which was followed by a summons from the police; the aunt's identity card; police documentation dated 7 July 2017 stating they were unable to arrest the appellant and his aunt was to appear at the Criminal Investigation Department in Colombo; a letter from an attorney dated 27 November 2017 confirming that he had spoken to the police, who said the appellant was wanted "*for an inquiry in connection with the LTTE*" and the attorney's belief that the appellant is on a 'watch list'; the attorney's Bar Association membership card; the aunt's complaint dated 9 June 2017 to the Human Rights Commission and a letter of that same date confirming receipt of that complaint.

Country background evidence

27. I note the appellant has sought to rely upon a country expert report from Dr Smith dated 25 November 2019. The respondent has submitted her latest COIS report on Sri Lanka, but I was not taken to any particular section by Ms Cunha. Both representatives acknowledged that the most important country background information is contained in KK.

Legal framework

28. I first address the appellant's asylum claim. If the appellant is successful on asylum grounds, I need not deal with the alternative

submissions made on human rights grounds. Indeed, Ms Wass made it clear she was not making a discrete Article 3 health claim and therefore the Article 3 claim relied upon the same factual matrix as the asylum claim.

29. The applicable legal framework relevant to the determination of the appellant's asylum claim is governed by the Refugee Convention. The Nationality and Borders Act 2022 does not apply to this asylum claim, given the vintage of the decision under appeal. When making findings of fact and assessing risk on return, I do so by applying the lower standard of proof.

Findings

Approach to medical evidence

30. I first address the evidence concerning the nature and extent of the appellant's medical concerns. This is because these findings together with his related vulnerability inevitably impact the correct approach to a proper assessment of the appellant's evidence, particular where, as here he has not given oral evidence and the respondent has not had the opportunity to cross-examine him.

31. It is clear that the appellant has found it difficult and distressing to recall what happened to him during his claimed detention in Sri Lanka and has been unable to provide a consistent detailed account. The significant discrepancies and inconsistencies in his account have been particularised within the 2012 FTT decision and the respondent has placed firm reliance upon those findings. I have given careful attention to the individual concerns highlighted within the 2012 FTT decision, as well as the overall conclusion reached. As set out above, these are the starting point for my analysis of the evidence. However, the medical evidence available to me is significantly different to that before the 2012 FTT both in its nature and its extent. This evidence fills many of the holes identified by the 2012 FTT in the medical evidence before it, which: did not include a scarring report; did not have any clear evidence that the appellant was unfit to give evidence; noted that Dr Balasubramaniam did not refer to the respondent's decision, when Dr Dhumad has expressly done so; was concerned about the absence of a formal memory test, when Dr Goldwyn clearly performed one. I now turn to consider the medical evidence before me in more detail.

32. In my judgment Dr Goldwyn's report is fair and balanced. It complies with the Istanbul Protocol, as set out in KV (Sri Lanka) v SSHD [2019] UKSC 10. This states as follows:

> "[187] For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:

(a) Not consistent: the lesion could not have been caused by the trauma described;

(b) consistent with: the lesion could have been caused by the trauma described but it is non-specific and there are many other possible causes;

(c) highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;

(d) typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;

(e) diagnostic of: this appearance could not have been caused in any other way than that described.

[188] Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story …"

33. In KV (Sri Lanka) the court also drew attention to [105] of the Istanbul Protocol, which recommends that in formulating a clinical impression for the purpose of reporting evidence of torture, experts should ask themselves six questions, including whether their findings are consistent with the alleged report of torture and whether the clinical picture suggests a false allegation of torture.

34. Dr Goldwyn has appropriately categorised each scar, quite properly considered alternative explanations for the causes of the scarring and has importantly conducted a holistic evaluation. Dr Goldwyn regarded many of the scars (1-4 and 7) to be *consistent* with the appellant's account of torture. Dr Goldwyn also concluded scar 5 to be *diagnostic* of a sharp object injury and scar 8 to be *typical* of a blow to the head. This evidence supports the appellant's account, particularly the evidence in relations to scars 5 and 8. Nonetheless it does not follow that they were necessarily caused by the Sri Lankan authorities or for the reasons claimed by the appellant. As Ms Cunha submitted, the appellant may have been arrested but he was living 'in a war zone' at the time of the infliction of those injuries. However, Dr Dhumad expressly addressed this issue and in my judgment his opinion, which has been formed over the course of three annual meetings, should be given significant weight.

35. I note that the appellant did not seek treatment for or further investigation of the injury that was said to have led to scar 8, and this is of some concern. However, in my judgment, Dr Goldwyn's report is particularly significant and supportive of the appellant being tortured by the Sri Lankan authorities in detention for two reasons. First, as Ms Cunha conceded, Dr Goldwyn's opinion that the pain on the appellant's feet were *typical* of 'falaka' and that information came to light in a way that the appellant would not have known about, is particularly cogent evidence. Second, Dr Goldwyn's holistic

conclusion that the scarring and mental health presentation were *typical* of the type of torture described.

36. I also accept Dr Dhumad's first three reports to be fair, balanced and cogent. Dr Dhumad was very clear in his diagnoses, which have the benefit of having seen the appellant on three separate occasions from 2019. Ms Cunha submitted that I should approach these reports with caution because Dr Dhumad did not have GP records and based his report upon what was said by the appellant, who was found to be thoroughly unreliable by the 2012 FTT. Dr Dhumad was clearly alive to the fact that there were no GP records, having recorded that the appellant was not under the care of a GP in all three reports (made after seeing the appellant). Dr Dhumad was provided and clearly took into account all the relevant evidence, including the 2012 FTT decision. Whilst Dr Dhumad clearly based some of his views upon the appellant's self-reporting, over the course of three meetings, he expressly considered and ruled out the possibility that the appellant might be feigning or exaggerating his mental illness with ample clinical justification provided. Further, he made it clear that he had not taken the appellant's "*story at face value but carefully examined his symptomology and his emotional reaction during interviews... [and] also considered the evidence before [him]*" ([7.7] of report dated 28 November 2021).

37. The concerns identified by Dr Goldwyn and Dr Dhumad are not recent concerns. At the end of the screening interview on 13 December 2011 the appellant said, "*I have memory loss so if you ask me some questions again I might say something differently*". The articulation of these concerns was repeated by the appellant when he was substantively interviewed on 3 January 2012 and again in his witness statement signed at the 2012 FTT hearing. At the substantive interview the appellant made many references to his memory difficulties and the pain he was in when he tried to remember details. He was clearly trying to answer questions but repeatedly referred to difficulties in doing so – see by way of example the additional information box (p272) when he states that he got headaches and severe pain when he tried to remember and his responses to Qs 4, 26, 65-66, 73-74, 90, 150. In his witness statement before the 2012 FTT the appellant complained of severe memory loss, headaches with his head freezing and he could not think consistently – see [33] of the 2012 FTT decision.

38. The appellant was also in receipt of psychiatric assistance relatively shortly after his arrival. In a letter dated 3 May 2011 Dr Pothiraj refers to the appellant's claims that intrusive, avoidant and hyper arousal symptoms (including being fearful and overly worried he might be attacked by people in uniform) began upon his release from prison but became more prominent since he arrived in the UK. Dr Pothiraj diagnosed PTSD, prescribed Olanzapine and referred the appellant in order to receive specialist psychological and psychiatric

support. This was followed up and as set out in a letter dated 30 August 2011, the appellant received a diagnosis of PTSD from Dr Dimic, an associate specialist in psychiatry. Dr Dimic's letter of 30 November 2011 refers to the appellant having begun psychotherapy with the Institute of Psychotrauma and improvements in his mental health, albeit he continued to take Olanzapine and Zopiclone. In a letter dated 16 January 2012 Dr Robjant, a clinical psychologist, described the appellant's PTSD symptoms as severe. She noted that the appellant was trying to block out memories, but these were triggered very easily, and he should access individual trauma focussed therapy. In his independent psychiatric report dated 24 February 2012 (three days before the 2012 FTT hearing) Dr Balasubramaniam agreed with the diagnosis of PTSD and noted that the appellant was being treated with an antipsychotic and hypnotics, as well as receiving psychological treatment.

39. For the sake of completeness, I mention Dr Iervolino's report dated 28 December 2011. Both parties acknowledged that the report could not be found and was not before me. It has been referred to within the 2012 FTT decision and I have taken its contents into account, as summarised therein.

Findings of fact

40. I accept that the clear adverse findings of fact made by the 2012 FTT must form my starting point. I have taken into account the inconsistencies in the appellant's evidence before the 2012 FTT. These are comprehensively addressed at [52] to [63] of the 2012 FTT decision. The nature and extent of the inconsistencies are prima facie very concerning. The 2012 FTT made it plain that the appellant's indication that he could not remember what happened or what he said to whom did not stop him from giving substantial details of his case including quite long answers to different persons including the tribunal. These inconsistencies were wide-ranging (as conceded by his own Counsel at the 2012 FTT hearing at [53]) and include: his educational background [52]; when he last spoke to a relative in Sri Lanka [54(i) and (ii)]; details of who paid the bribe and what this cost [54(ii)]; who he was staying with and being supported by [54(iii)]; who was told about the scarring, and when [59]; arrangements for leaving detention and Sri Lanka [60]; circumstances upon arrival in the UK [61]. However, whilst those inconsistencies are significant, they form only part of the sea of evidence available to me. Having considered the evidence as a whole, I am satisfied that many of these inconsistencies can be explained by the appellant's long standing significant mental health concerns. I have had the benefit of over a decade of cogent and consistent specialist evidence relevant to this appellant's mental health symptoms. His severe PTSD symptoms have been recorded from 2011 to 2022 by a variety of clinicians, including treating clinicians in the early stages. The symptoms have been broadly consistent over time, as have the diagnoses made. I

entirely accept the evidence before me from Dr Dhumad and Dr Goldwyn.

41. The appellant's symptoms have clearly included memory loss and a lack of concentration. The appellant himself was straightforward about these matters in his interviews with the respondent. With the benefit of hindsight and much more detailed medical evidence than that available to the 2012 FTT, I am satisfied that the appellant tried to answer questions to the best of his ability but became confused when trying to recall many matters. The appellant has clearly given different answers to different people, but this can be explained as a feature of his mental illness – see Dr Dhumad's fourth report, in particular his answers to [I, VII-X].

42. Apart from inconsistencies, I have also noted there are other matters that undermine the appellant's credibility. The appellant's substantial delay of over a year in claiming asylum clearly detracts from his overall credibility. His explanation for the delay is difficult to follow but there is ample cogent evidence to suggest that he was mentally unwell during that period. Indeed, he was so unwell that he was prescribed Olanzapine and referred for specialist psychiatric and psychological treatment before he claimed asylum (and without the benefit of legal representation).

43. I also note that from as far back as March 2017 Dr Goldwyn made it clear that she believed the appellant had a significant cognitive impairment that may be connected with a heavy blow to the head in the past and advised an MRI scan and a specialist neuro psychiatric report. These have not been undertaken. This makes the assessment of the cause of the appellant's cognitive difficulties challenging. In addition, the appellant's failure to pursue this type of investigation adversely impacts his credibility. Although the appellant appears to have disengaged from his GP and struggles with daily life, he has been able to attend other medical appointments and demonstrations, albeit there is some evidence to support his claim these events can sometimes help to channel his anger.

44. I bear in mind that Ms Cunha conceded that the medical evidence is such that the appellant may have been arrested and detained, particularly given the cogent evidence of 'falaka'. Having considered the evidence as a whole, including past inconsistencies, I accept there is a reasonable likelihood that the appellant's scars were caused in the manner claimed by him, having applied the principles relevant to the causation of scarring recommended by the Istanbul Protocol as contained in KV. I accept that this has led to the appellant's poor mental health over an extended period of time. I accept the diagnoses made by Dr Dhumad. Both Dr Goldwyn and Dr Dhumad probed the appellant's evidence and did not merely accept that which he said but gave opinions as to his clinical presentation after interviews. I acknowledge that the constant threat of deportation

probably also played an important role, but the pivotal factor has been the appellant's fear that what happened to him in the past will be repeated if he is deported.

45. I regard it as important that the central planks of the appellant's asylum claim have remained broadly consistent over time: one period of detention during the conflict, at which time his immediate family members 'disappeared'; torture during that detention because he was believed to be involved in the LTTE; release through payment of a bribe; hatred and fear of the Sri Lankan authorities since that time. These are all entirely plausible in the light of the well-known country background evidence relevant to Tamils residing in the north of Sri Lanka in 2009/10.

46. Ms Cunha expressly withdrew the submission at [38] of the 2019 SSHD decision and accepted that GJ made it clear the appellant could leave Sri Lanka on his own passport even if he continued to be of adverse interest.

47. Having considered all the evidence cumulatively I am prepared to accept that the core aspects of the appellant's account of what happened to him in Sri Lanka are reasonably likely, notwithstanding the clearly articulated concerns in the 2012 FTT decision and the 2019 SSHD decision. It follows that, I accept that: (i) the appellant was detained and tortured in Sri Lanka because he was suspected of carrying out LTTE activities, as claimed; (ii) his brothers and mother 'disappeared' during the conflict and his father was detained until his release in 2019; (iii) the appellant was released from detention as a result of a bribe; (iv) after his release, he left Sri Lanka with the assistance of an agent. I address each of these in more detail below.

48. Ms Cunha accepted there was a reasonable degree of likelihood that the appellant was arrested and detained prior to his departure from Sri Lanka. Although Sri Lanka was experiencing a very volatile period, I am satisfied to the lower standard of proof that the appellant was arrested and detained because of suspected LTTE links. The timing and circumstances of his arrest and detention are plausible in the light of the well-known country background evidence. Further, notwithstanding many difficulties in recollecting events accurately or consistently, the appellant has consistently maintained over an extended period of time (from before his 2011 asylum application and unsuccessful appeal in 2012 to the present) that he was detained and tortured for this reason, and it is that experience that gave rise to PTSD symptoms.

49. I also accept it is reasonably likely that the appellant's brothers and mother 'disappeared' during the conflict and his father was detained. The documentary evidence recording a leg fracture in respect of the father does not add very much – it does not establish that he was detained prior to that. However, again this is an aspect of the

appellant's account in which he has been broadly consistent – he maintained that he did not know where his family were since separated from them in 2009, from the time he was interviewed (responses to Q10-24). That account of family members being separated, arrested or disappeared is again plausible in the light of the country background evidence regarding that time (May 2009) and place (Puthumathalan in the north of Sri Lanka).

50. The appellant is reasonably likely to have been very confused during the process that led to him leaving detention and then Sri Lanka, given his experience of torture during detention. In these circumstances the lack of clarity and certainty, and the presence of inconsistencies do not detract from his account at the interview that he was released through bribery and left Sri Lanka with the assistance of an agent.

51. I now turn to note the concerns the respondent has expressed regarding the appellant's evidence that the authorities demonstrated a continued adverse interest in him in 2017 – see [15] to [26] of the 2019 SSHD decision. I prefer Ms Wass's submissions on these matters.

52. The respondent's contention that the aunt's letter is not corroborated does not bear scrutiny – the aunt also provided a police report, a letter from the lawyer and her Human Rights Commission complaint. The lawyer's letter is not drafted carefully but I accept from the information provided that he is who he says he is - a member of the Bar Association of Sri Lanka, and that he made the relevant inquiries he said he did. The lawyer's letter is broadly consistent with the terms of the police document. The Human Rights Commission complaint supports the aunt's claim as to what happened in 2017.

53. The respondent has contended that it is implausible that the authorities would wait until 2017 to show any adverse interest in the appellant. I note that he attended three TGTE demonstrations in the UK in 2016 and two others in February 2017. There may well be a link between these activities in the UK and the Sri Lankan authorities renewed adverse interest, as demonstrated toward the appellant's aunt in July 2017, in the light of the country guidance – see in particular headnotes (5), (6), (8) and (10) of KK.

54. It follows that I accept the Sri Lankan authorities visited his aunt looking for him in 2017.

55. I now turn to this appellant's sur place activities. The appellant has complained about his difficulties in going out for fear of re-traumatisation and / or triggering of PTSD symptoms. At first blush the appellant's attendance at demonstrations sits uneasily with his mental health concerns, which I have accepted. The appellant has sought to explain that he attended demonstrations to try to take his

mind off of his problems and to bolster his mood by being proactive and vocal about the regime responsible for torturing him. This has been explored by Dr Dhumad at [7.9] of his report dated 28 November 2021. Dr Dhumad described these types of activities as community support wherein there is a feeling of unity between victims, and that this appellant's attendance must be viewed in that context, albeit he admitted to these activities sometimes triggering nightmares and flashbacks. I accept Dr Dhumad's opinion that the appellant's attendance at demonstrations is not inconsistent with his clinical presentation.

56. As submitted by Ms Cunha, the appellant has relied upon no documentary or other supporting evidence to support his claim to have taken part in demonstrations against the Sri Lankan government. The appellant has friends who support him, and I agree that it is difficult to see why they could not provide a supporting statement regarding his attendance at demonstrations. However, in my judgment that does not mean that the appellant's evidence is incredible. It is necessary to carefully scrutinise the evidence that has been submitted whilst bearing in mind the absence of supporting evidence.

57. The appellant's evidence is that he attended demonstrations between 2015 and 2019. He explained that he stopped attending demonstrations in 2019 because he believed that his family in Sri Lanka were at increased risk of retribution at that time. In my judgment the appellant's *perception* of increased risk in 2019 is understandable. Mr Rajapakse, the former Defence Secretary during the later stages of the war, became President of Sri Lanka in November 2019. Further, the appellant's father was released from detention in 2019 and the appellant did not want to place him in any further danger. If the appellant was not genuinely fearful of the Sri Lankan authorities and wished to prioritise bolstering his asylum claim, there would be no reason to stop attending demonstrations. Notwithstanding the lack of supporting evidence, I am prepared to accept that the appellant attended demonstrations linked to and organised by the TGTE.

Conclusions on risk on return

58. This appellant has attended a few demonstrations but that has now stopped. He did not play a prominent role in the demonstrations, but he would have been visible. He has not played any role beyond attendance at demonstrations. Notwithstanding the appellant's apparent low level of TGTE involvement, Ms Cunha was correct to concede that KK supported the conclusion that he faces a real risk of serious harm upon return because of his imputed political opinion. Given this concession I can record my conclusions on prospective risk succinctly.

59. Applying the country guidance in GJ and KK to my findings of fact leads to the following conclusions. The appellant's low-level activities with TGTE, a proscribed organisation, is a 'significant risk factor' because the organisation is viewed by the authorities as avowedly separatist and a front for the LTTE. The appellant is likely to be on the stop or watch list. Given the extensive use of records in order to support intelligence gathering which are logged on a permanent basis, a person who was detained and tortured because of suspected LTTE links and then obtained his release by bribery, would either be recorded as a consequence of this as a person of no further interest or an escapee. The accepted circumstances relevant to this particular appellant supports the submission that he would have been recorded as an escapee (with an associated arrest warrant issued) rather than a person of no interest.

60. Firstly, the appellant was severely tortured before being released. The respondent's own fact-finding report on Sri Lanka dated 11-23 July 2016, makes it clear at 8.1.14 that after torture the detainee is normally made to sign a 'confession' that they have been associated with the LTTE. I also note that the Tribunal accepted in GJ that a bribe can be paid to secure release even where the person remains of ongoing interest. Second, it has been accepted that there was continued interest in the appellant in 2017. Although there is not up to date evidence beyond 2017 of the authorities enquiring into his whereabouts, these matters do not necessarily obviate a reasonable likelihood that after his escape, an arrest warrant was drawn up. Third, he left Sri Lanka at the height of the war and has participated in pro separatist demonstrations in the UK. Fourth, his family members have been linked to the LTTE.

61. The appellant will be questioned upon return, and it is reasonably likely to appear on the stop list due to an extant arrest warrant. Although many years have passed and the situation in Sri Lanka has changed (and is changing), it remains the case that the appellant is reasonably likely to have become the subject of an arrest warrant in all the circumstances of his case, in particular for reasons relating to the information held by the authorities against him together with his release from detention and the continued adverse interest shown after his release.

62. Alternatively, the appellant is reasonably likely to be on the watch list on the basis of a perceived 'significant role' in Tamil separatism, bearing in mind his low-level links to the TGTE, his history of arrest and detention and his family connections.

Final points

63. I need not turn to Ms Wass's alternative Article 8 submissions because on my findings the appellant is reasonably likely to face serious harm for a Refugee Convention reason.

Decision

64. I allow the appeal on Refugee Convention, humanitarian protection and human rights grounds.

Signed: UTJ Melanie Plimmer Date: 20 July 2022
Upper Tribunal Judge Plimmer