Upper Tribunal
(Immigration and Asylum Chamber)

KK (Application of GJ) Sri Lanka [2013] UKUT 00512 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination sent**
On 12 August 2013	**On 30 September 2013**
Prepared on 13 September 2013	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

KK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mackenzie, Counsel, instructed by TRP Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

There is no merit in the argument that the country guidance given by this tribunal in GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) is not rational or that it is inconsistent with the evidence which had been accepted by the tribunal.

DETERMINATION AND REASONS

1. The appellant, who was born on 3 August 1985, is a national of Sri Lanka. He entered this country on a student visa on 24 June 2009. On 27 July 2011, he claimed asylum, but this was refused on 12 October 2011. The respondent also made a decision on the same date to remove the appellant as an illegal entrant.

2. The appellant appealed against this decision and his appeal was heard before Immigration Judge Lobo, sitting at Taylor House on 22 November 2011, but in a determination prepared on 25 November 2011 and promulgated shortly thereafter, Judge Lobo dismissed the appellant's appeal on all grounds.

3. The appellant appealed against this decision, and was granted permission by a Judge of the Upper Tribunal in February 2012. Subsequently, following a hearing at Field House on 8 June 2012, Upper Tribunal Judge Allen found that there had been an error of law in Judge Lobo's determination, in that he had failed to give adequate consideration to the guidance of this Tribunal in the country guidance case of *TK*, but Judge Allen then went on to dismiss the appeal on reconsideration. It is not necessary for the purposes of this appeal to set out Judge Allen's reasons.

4. The appellant appealed against Judge Allen's decision to the Court of Appeal, and was given permission to appeal by Moore-Bick LJ on 7 January 2013, who observed that it was "arguable the Upper Tribunal failed properly to consider whether the authorities in Sri Lanka were likely to have a record of the [appellant's] membership of the LTTE and, if so, what the record would be likely to contain". Moore-Bick LJ also considered that "it is also arguable that [the Upper Tribunal] failed properly to consider and explain why the authorities were not likely to have a record of his detention".

5. Subsequently, by consent, and without determining the merits of the appeal, it was ordered by the Court of Appeal that the appeal against the determination of the Upper Tribunal (that is Judge Allen's determination) dismissing the appellant's appeal was allowed and that determination set aside and that the case be remitted to the Upper Tribunal "for a re-determination on the basis set out at paragraph 5 of the accompanying statement of reasons".

6. The aforesaid paragraph 5 provides as follows:

> "The parties agree that the Upper Tribunal erred in law for the reasons given in the grounds of appeal. They accordingly agree that the matter should be remitted to the Upper Tribunal (Immigration and Asylum Chamber) for the Upper Tribunal to consider the applicability of the country guidance to the specific facts of this case. The findings of fact made by Immigration Judge Lobo remain undisturbed and should stand for the purposes of the Upper Tribunal's further decision."

7. It is on that basis that this appeal is now before me.

8. Following the hearing in the Court of Appeal, but before the hearing before me, this Tribunal promulgated its determination in *GJ & Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319, in which the Tribunal gave fresh country guidance in respect of Sri Lanka. I note in particular that at paragraph 356(1) of this determination (which is also set out at head note (1)), the Tribunal state in terms that "this determination replaces all existing country guidance on Sri Lanka". Accordingly, subject to the argument advanced on the appellant's behalf by Mr Mackenzie, to which I refer below, I must consider whether, on the findings of fact made by Judge Lobo (concerning which there is some debate, to which I also refer below) this appellant would be at risk in light of the current country guidance contained within *GJ*.

The Hearing

9. I heard submissions from Mr Mackenzie on behalf of the appellant and also submissions on behalf of the respondent from Mr Tarlow. In the course of his submissions, Mr Mackenzie relied upon the skeleton argument which he had submitted prior to the hearing. As I recorded the submissions contemporaneously, and these are contained within the Record of Proceedings, I shall not set out everything which was said during the course of the hearing. I have, however, had regard to all the submissions made, as well as to all the documents contained within the file, whether or not these are referred to specifically below.

Judge Lobo's Findings of Fact

10. The first issue which arose concerned precisely what should be regarded as the findings of fact made by Judge Lobo, which, pursuant to paragraph 5 of the statement of reasons referred to in the order of the Court of Appeal must "remain undisturbed and…. stand for the purposes of the Upper Tribunal's further decision".

11. At paragraph 20, under the heading "Findings of Fact" Judge Lobo had made a number of findings, including:

> (a) the appellant was of Tamil ethnicity; (h) during 2008 the appellant was frequently stopped between his parents' home and university and accused of being an LTTE member but was always released; (i) the appellant had been detained in March 2008 for seven days, threatened with a gun but not beaten, and the COIS Report on Sri Lanka of June 2008 "describes these routine detentions of large numbers of people". The appellant had been released after payment of a bribe by an agent acting on behalf of a family member; (j) the appellant was further detained in April 2007 from the camp Ramanathan, was removed from the camp, ill-treated and suffered scars on his back. He was asked whether he was a member of the LTTE and about senior members of the LTTE but gave no information. Again he was released by the payment of a further bribe, arranged by his father through the same agent; (k) the appellant was released from both detentions, but never charged nor taken to court, nor officially "inducted" or required to do anything after release; (l) the appellant left Sri Lanka using his own passport and went through the airport at Colombo, where

although his passport was taken and considered by the CID, it was handed back to him and he was allowed to leave.

12. Judge Lobo also found at paragraph 20(f) that the appellant had become a member of the LTTE in 2000, when he was 15, but had left two years later when he was 17, and at 20(g) that during the period he lived at home between January 2003 and February 2008, he had encountered no problems from either the Sri Lanka army or the LTTE. Although at 20(m) Judge Lobo states (still as a finding of fact) that in cross-examination the appellant had mentioned for the first time that a photo album existed from which he could be identified, he does not appear to make any finding as to whether or not he has accepted this evidence.

13. Then, under the heading "Conclusions", Judge Lobo appears to make a number of further findings, from paragraphs 21 to 29. These include, at paragraph 24, that the judge does "not accept that the appellant was in the front line of the LTTE as claimed", and at paragraph 26(a) that although the appellant had been asked if he was a member of the LTTE, he had never admitted it and "there is no record that he is suspected or an actual member of the LTTE". He also finds at paragraph 26(b) that the appellant has no previous criminal record nor is there an arrest warrant in existence, at (c) that he has not jumped bail, at (d) that he has not signed a confession statement, at (e) that he has never suggested that he was asked to become a secret informer and at (f) that he did not depart Sri Lanka illegally but departed on his own passport and with a valid student visa to enter the United Kingdom "although it is noted that this was obtained by false representations".

14. Then, at paragraph 28, Judge Lobo records his conclusion that "the appellant would be returning to Colombo as a person with little or no national profile in Sri Lanka as an LTTE member".

15. Mr Mackenzie submits that the "findings of fact" referred to in paragraph 5 of the statement of reasons were essentially those findings contained within paragraph 20 of Judge Lobo's determination, and during the course of argument submitted that the other findings referred to above, other than the finding at paragraph 24 that the appellant had not been in the front line of the LTTE as claimed, and in particular the conclusion at paragraph 26(a) that there was no record that the appellant was a suspected or an actual member of the LTTE, were not really "findings of fact" as such but rather "an inference drawn from the evidence". When asked by the Tribunal how it could be said that this was not a finding of fact, Mr McKenzie accepted that it might have been better if the order had said in terms that the findings of fact were restricted to those made under paragraph 20, but that it could not have been intended that the conclusion at paragraph 26(a) should be retained, because this would make a nonsense of Moore-Bick LJ's reason for granting permission to appeal (that it was also arguable that the Upper Tribunal had failed properly to consider and explain why the authorities were not likely to have a record of his detention).

16. Unsurprisingly, on behalf of the respondent, Mr Tarlow submitted that the "conclusions" at paragraphs 26 and 28 were findings of fact, and that they should stand, in accordance with the terms of the order of the Court of Appeal.

Appellant's Submissions

17. Mr Mackenzie's submissions on behalf of the appellant, contained in his oral submissions to the Tribunal and in his skeleton argument, can be summarised as follows.

18. Mr Mackenzie's first submission, as noted above, was that the "findings of fact" to be retained must be limited to those set out at paragraph 20, although he accepted he could not go behind a later finding that the appellant had not been in the front line of the LTTE. However, it could not be the case that this appeal had been remitted on the basis that a finding that there had been no record of his membership of the LTTE would stand, because in those circumstances the remittal would have been pointless.

19. Mr Mackenzie's position was that it was now for this Tribunal to make a finding as to whether or not there would be a record of his membership of the LTTE, on the basis of what Judge Lobo had found (presumably restricted to paragraph 20) and the current country guidance.

20. With regard to current country guidance, Mr Mackenzie accepted that if the head note of *GJ* was determinative of the situation in Sri Lanka, there were difficulties in the appellant's case. However, it was the appellant's case first that the head note was not a complete summary but more importantly, as the argument developed in the course of his submissions, that in any event this Tribunal should not follow the guidance given in *GJ*, for reasons which are discussed below.

21. In this case, there were certain findings which are not now disputed. The appellant was in the LTTE, as a child soldier, having been recruited at the age of 15. His case is that he was trained as a sniper; although Judge Lobo did not accept that he had been posted to the front line, he did accept that he was in the LTTE. He had been detained twice, in March 2008 when he was released on payment of a bribe and again in 2009, at the end of the civil war, when he had been detained in an internment camp. He had then been picked up and taken to another place and tortured. It was the appellant's case that he had been denounced. Although there was no finding by the judge as to whether or not he had, the judge accepted that he was questioned about his LTTE membership and tortured. He was again released on payment of a bribe.

22. It was on this factual basis that his case should be considered alongside country guidance.

23. Mr Mackenzie referred the Tribunal to paragraph 290 of *GJ*, where the Tribunal had referred to the UNHCR's position, as set out in its December 2012 guidelines. These are set out at paragraph 12 of the skeleton argument. Although the panel in *GJ* did not agree that the UNHCR guidelines were determinative, they were still quoted in some detail. These guidelines set out a number of categories of people who might be

at risk, including those whose "previous (real or perceived) links [to the LTTE]….. go beyond prior residency within an area controlled by the LTTE". These include "former LTTE combatants or "cadres", which, it was submitted, would include this appellant. The panel in *GJ* had criticised the respondent for not taking the UNHCR guidelines into account when preparing her guidance notes.

24. This Tribunal should take account of parts of the UNHCR guidelines which had not been quoted in *GJ*, in particular with regard to information which had been published documenting cases of mistreatment and torture of people in detention because of their or their family members' alleged former links with the LTTE. Also, that people who had such a profile, depending on the individual circumstances of their cases, were likely to be in need of international refugee protection on account of their (perceived) political opinion, usually linked to their ethnicity. The UNHCR guidelines also state that the same is likely to apply to family members and other dependants of individuals with those profiles.

25. With regard to the head note in *GJ*, the Tribunal does not say that LTTE membership is not a risk factor, nor does it say in terms that the UNHCR guidance should not be followed. However, in answer to a question from the Tribunal, Mr Mackenzie accepted that at head note (7) of *GJ* the Tribunal lists the current categories of person whom it is said are at real risk of persecution or serious harm on return to Sri Lanka and it is not said that the current categories "include" these persons. However, in *TK*, the Tribunal there had referred to "categories" and the difference between "categories" and "risk factors". As the Tribunal also accepted (it was submitted) the UNHCR approach, that a risk specific assessment was needed of people who did not fall within the risk category specified, with all respect to the Tribunal, it was not clear what was meant by the expression "fact-specific risk groups, some of which overlap with the general categories set out in the UNHCR guidelines generally". It was not clear whether this was supposed to be fact-specific to individual cases or not.

26. This sentence had a "slightly obscure meaning". The expression "fact-specific risk groups" was something which had not previously been known. This seemed to be a hybrid fact-specific risk assessment on the basis of risk factors and a non-fact-specific assessment based on risk categories. Going beyond the semantics one had to ask whether the Tribunal was either saying that it accepted what the UNHCR had put in the guidelines or that it did not, because the UNHCR had got it wrong. The Tribunal did not do so.

27. Mr Mackenzie also submitted that one needed to look at the Tribunal's assessment of the UNHCR guidelines in the context of other evidence which was considered, and accepted. In this regard, particular reliance was placed on the evidence of Dr Gunaratna. The Tribunal had expressly approved of Dr Gunaratna's evidence at paragraph 273.

28. In Appendix K to the determination in *GJ*, Professor Gunaratna's evidence is recorded. The appellant particularly relied on sub-paragraphs (v) and (vi), and in particular (vi) where it is stated that:

> "In his expert opinion, LTTE cadres deported from foreign countries are held in detention, investigated, and either prosecuted or rehabilitated. The criteria had changed: in 2009, the rehabilitation programme was used for those identified by membership of and degree of involvement in the LTTE; now, it was more nuanced and guided by concerns about the resurgence of the Tigers in the Tamil diaspora. The decision whether to detain would be made after a fact-specific assessment by the police, security and intelligence services".

29. Mr Mackenzie suggested that given what was known about the behaviour of the Sri Lankan security forces, a fact-specific assessment in Sri Lanka must involve the risk of ill-treatment.

30. What Dr Gunaratna was saying was that a decision as to whether someone needed to be rehabilitated would be taken after detention and investigation. This was not reflected in the guidance contained in the head note. That was one of the arguments which was advanced in the grounds which had been submitted in support of an application which had been made for permission to appeal against this decision.

31. It was the appellant's case that it followed from Dr Gunaratna's evidence that anyone known to be a former LTTE member, as this appellant was, would be detained soon after arrival until a decision was then made on whether to send them either to be rehabilitated or prosecuted. That initial detention and investigation would itself be accompanied by a risk of torture, as the Tribunal in *GJ* had accepted at paragraph 356(4) (this is in the head note at paragraph (4)).

32. It was accordingly the appellant's case that he would be at risk of persecutory treatment on return, if he was on record as having been a former member of the LTTE. To the extent that it was said in *GJ* that this was not the case unless a returnee had been involved in diaspora activities, this was hard to understand because this was what had been stated in evidence which they had accepted, in particular that of Dr Gunaratna and the UNHCR guidelines. To the extent that the Tribunal had not accepted the guidelines set out by the UNHCR, there should have been a clear indication of the reasons why these guidelines had not been accepted.

33. In answer to a question from the Tribunal, as to whether he was saying that as the Tribunal in *GJ* had accepted the evidence to which he had just referred, it had then reached conclusions which were contrary to that evidence, Mr Mackenzie replied that although this might be a stark way of putting his case, that nonetheless was his case.

34. Mr Mackenzie then suggested that this Tribunal's position was that although it would normally have to consider and apply a country guidance case unless there was a good reason not to, "a good reason" was not restricted to situations where the circumstances had changed since country guidance had been given. It was his case that because the guidance given in *GJ* was legally flawed, it should not be followed. In reliance on the submission that a Tribunal was not bound to follow a previous country guidance decision which was itself legally flawed, Mr Mackenzie relied on

the Court of Appeal decision in *KS (Burma) [2013]* EWCA Civ 67, especially at paragraph 19.

35. Again in answer to a question from the Tribunal, Mr Mackenzie agreed that essentially it was his case that the findings of the Tribunal in *GJ* were not supported by the evidence which that Tribunal had accepted, and to that extent the findings as set out in the head note were not rational. Although at paragraphs 12.2 and 12.4 of the Presidential Practice Direction,[1] a Tribunal was required to follow a clear and apparently applicable country guidance case, in this case, it was the appellant's position that this guidance was not "clear". This was because the guidance was not consistent with the evidence.

The Respondent's Submissions

36. On behalf of the respondent, as well as submitting that all of Judge Lobo's findings of fact should be retained, Mr Tarlow submitted that there was no proper basis upon which the Tribunal could refuse to follow the guidance given in *GJ.* In light of that guidance, on the basis of the findings of fact made by Judge Lobo, even if there had been a record of this appellant having previously been a member of the LTTE, he would still not be at risk on return. The Tribunal was reminded that at paragraph (8) of the head note, it was said that the Sri Lankan authorities' approach was now "based on sophisticated intelligence"; there was no reason in this case for the authorities to have any real interest in this appellant.

Discussion

37. For the purposes of this determination, I will consider the submissions on the basis that neither Judge Lobo's finding at paragraph 26(a) that there is no record that the appellant is a suspected or actual member of the LTTE nor his finding at paragraph 28 that the appellant will be returning to Colombo as a person with little or no national profile in Sri Lanka as an LTTE member is retained. However, when I consider the other findings which Judge Lobo made, in particular that he was allowed to leave Sri Lanka using his own passport even after his passport was taken by the CID, who looked at it before then handing it back to him and allowing him to leave, were it necessary for me to decide whether or not there was any record of the

[1] 12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-

(a) relates to the country guidance issue in question; and
(b) depends upon the same or similar evidence.

…

12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law.

appellant's membership of the LTTE between the ages of 15 and 17, I would not be satisfied on the basis of the findings of fact which have been made that there was. I must take into account the finding that the appellant was never charged nor taken to court, nor officially indicted nor required to do anything after release, and that at no stage has he been found to have given any information regarding either his membership of the LTTE or that of any other members. Further, Judge Lobo's findings include an acceptance of what is stated in the COI Report dated June 2008 that detentions such as the appellant's first detention were "routine".

38. When I take account also of the guidance given in *GJ* that the Sri Lankan authorities' approach is based on sophisticated intelligence, I do not consider there is a sufficient basis upon which I could be satisfied that there is a real likelihood that there is any record of the appellant's very brief membership of the LTTE.

39. However, because it is likely that the arguments advanced by Mr Mackenzie, challenging the guidance given in *GJ*, are likely to be advanced in other cases, I deal with these arguments on their merits.

40. It is not suggested that this appellant falls within any of the categories set out within the guidance given at paragraph 356 of *GJ*. Accordingly, his appeal must fail unless there is a good reason why this guidance should not be followed.

41. It is important to recognise that the head note itself sets out the Tribunal's findings, contained within the body of the determination at paragraph 356,[2] following

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[2] 356. Having considered and reviewed all the evidence, including the latest UNHCR guidance, we consider that the change in the GOSL's approach is so significant that it is preferable to reframe the risk analysis for the present political situation in Sri Lanka. We give the following country guidance:

(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

consideration of all the evidence which had been put before it, in the round. The UNHCR Guidelines and Dr Gunaratna's evidence were but a small part of that

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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.

(10) Consideration must always be given to whether, in the light of an individual's activities and responsibilities during the civil war, the exclusion clauses are engaged (Article 1F of the Refugee Convention and Article 12(2) of the Qualification Directive). Regard should be had to the categories for exclusion set out in the "Eligibility Guidelines For Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", published by UNHCR on 21 December 2012.

evidence. The "current categories of persons at real risk of persecution or serious harm on return to Sri Lankan, whether in detention or otherwise" are stated to be as follows:

> "(a) Individuals who are, or who 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) Individuals (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 crime 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'."

42. It is important to note that this is, and is intended to be, a definitive list of those persons who 'are' at risk on return; the Tribunal did not find that those persons at risk 'included' people who fell within one of the categories."

43. With regard to Professor Gunaratna's evidence, which Mr Mackenzie claims was "approved" by the Tribunal at paragraph 273 of *GJ*, it is important to contrast what Mr Mackenzie says at paragraph 15 of his skeleton argument was approved by the Tribunal in GJ with what the Tribunal actually said there. At paragraph 15 of his skeleton argument, Mr Mackenzie submits as follows:

> "... at [paragraph] 273 the Tribunal [in *GJ*] approved evidence from Professor Gunaratna that (Appendix K, [paragraph] 4(vi)):
>
> LTTE cadres deported from foreign countries are held in detention, investigated, and either prosecution or rehabilitated. The criteria had changed: in 2009, the rehabilitation programme was used for those identified by membership of and degree of involvement in the LTTE; now, it was more nuanced and guided by concerns about the resurgence of the Tigers in the Tamil diaspora. The decision to detain will be made after a fact-specific assessment by the police, security and intelligence services."

44. What the Tribunal actually said at paragraph 273 is as follows:

> "Professor Gunaratna is an insider in relation to the GOSL and his views are interesting as a reflection of its mindset. He helped to design and assess the rehabilitation programme, although his evidence lacks specifics as to its operation. We accept his evidence that the government's concerns are now with the diaspora and that the LTTE within Sri Lanka is a spent force at present. We also accept his evidence that the GOSL is more selective now as to who requires rehabilitation in the present climate."

45. The Tribunal did not say in paragraph 273 that it accepted all of Dr Gunaratna's evidence, nor did it specifically approve the evidence set out in Appendix K at paragraph 4(vi) as Mr Mackenzie appears to suggest. The acceptance of Professor Gunaratna's evidence was far more limited.

46. What the Tribunal in *GJ* did was to consider Professor Gunaratna's evidence in the round but in the context of all the other evidence which it also considered. So for example, at paragraph 136, Professor Gunaratna's evidence was summarised as follows:

> "He explained the differences between how selection for rehabilitation was made in 2009 and now, but did not give details of the rehabilitation programme itself. Whereas all identified LTTE cadres had been rehabilitated in the 2009 tranche, the GOSL's approach in 2013 was to send to rehabilitation those who it believed could benefit from it. The selection was nuanced, and guided by concerns about the resurgence of the LTTE in the diaspora. The decision whether to detain and rehabilitate was made after a fact-specific assessment by the police, the security and intelligence services working together. ..."

47. This evidence, together with that part of Dr Gunaratna's evidence which was specifically accepted by the Tribunal, is then reflected in the Tribunal's ultimate findings. These include (implicitly) that other than for persons falling within the categories set out at paragraph 356(7), returnees will not be at real risk of persecution or serious harm on return. Although Mr Mackenzie submits that "a fact-specific assessment" must include interrogation, which gives rise to real risk of persecution, that is not what the Tribunal in *GJ* found. Its finding was that it was only persons who came within the risk categories identified at paragraph 356(7) who would be at risk, and it was specifically Dr Gunaratna's evidence that the government's concerns were now with the diaspora, and that the GSOL is more selective now as to who requires rehabilitation, which was accepted. There is no acceptance within *GJ* of any evidence to the effect that a "fact-specific assessment by the police, the security and the interline services working together" requires any detention or interrogation. Indeed, the Tribunal specifically found that it was only those people contained within the categories set out who would be at risk of such detention or interrogation; this is apparent from its finding at paragraph 356(4) that if a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.

48. The Tribunal in *GJ* reached its findings following consideration of a very large amount of evidence indeed, and submissions lasting several days. Its determination, excluding appendices, runs to 457 paragraphs and 107 pages. Amongst the evidence

considered by the Tribunal, but not accepted as a definitive statement of the risk on return, was the UNHCR Guidelines. It is not the function of this Tribunal, when giving country guidance, merely to accept UNHCR Guidelines without scrutiny; if it was, then there would seem to be little purpose in giving country guidance. One could just look at these guidelines. What the Tribunal's function is in these cases is to consider all the evidence in the round in order to give fact-based guidance which can then be relied on by other Tribunals until the situation in any particular country has changed. In my judgment, in *GJ*, this is precisely what the Tribunal has done, after conspicuous consideration and analysis of the vast body of evidence put before it. There is, in my judgment, absolutely no proper reason why this or any other Tribunal should not follow the guidance given in *GJ* until such time as good evidence is put before a Tribunal to suggest that circumstances in Sri Lanka have changed.

49. In summary therefore I find as follows:

    1) There is no merit in the argument that the country guidance given by this Tribunal in *GJ* is not rational or that it is inconsistent with the evidence which had been accepted by the tribunal.

    2) The country guidance given in *GJ* is authoritative and in accordance with the President's Practice Direction should continue to be followed unless and until there is material evidence put before a tribunal that the situation in Sri Lanka has changed.

50. It follows that this appellant's appeal must be dismissed, and I so find.

Decision

51. The appellant's appeal is dismissed.

Signed: Date: 25 September 2013

Upper Tribunal Judge Craig