Neutral Citation Number: [2022] EWCA Civ 828

Case No: CA-2021-000098

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Upper Tribunal (Immigration and Asyum Chamber) Upper Tribunal Judge Grubb
PA/07445/2019 (V)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 June 2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE DINGEMANS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

SR (SRI LANKA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Abid Mahmood (instructed by **Fountain Solicitors**) for the **Claimant**
Ben Keith (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date : 28 April 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 11 o'clock on 24 June 2022.

Lady Justice Elisabeth Laing :

1. The Appellant ('A') appeals, with the permission of Nicola Davies LJ, from a determination of the Upper Tribunal (Immigration and Asylum) Chamber ('the UT'). The UT held that there was no material error of law in a determination of the First-tier Tribunal (Immigration and Asylum) Chamber ('the FtT') made in 2020 ('the 2020 determination'). In the 2020 determination, the FtT dismissed A's appeal from a decision of the Secretary of State dated 16 July 2019 to refuse his protection claim ('the Decision'). In outline, his claim was that he had helped the Liberation Tigers of Tamil Eelam ('the LTTE') between 2006 and 2009, during the civil war in Sri Lanka, that he had been detained and tortured by the authorities, had left Sri Lanka illegally, and would be at risk from the authorities if he returned there. That risk was increased, he alleged, by his activities in the United Kingdom on behalf of the Transnational Government of Tamil Eelam ('the TGTE').

2. On this appeal, A has been represented by Mr Abid Mahmood and the Secretary of State by Mr Ben Keith. I thank both counsel for their helpful written and oral submissions.

3. Unless I say otherwise, paragraph references are to the determinations of the FtT or of the UT, as the case may be.

4. The question on this appeal is whether the FtT, which heard the evidence and found the facts, erred in law or not. If there is no error of law in its approach, the precise route by which the UT reached its conclusion that the FtT did not err in law does not matter. The focus of this judgment will, therefore, be the 2020 determination. For the reasons I give below, I consider that the FtT did not err in law in dismissing A's appeal.

5. A has appealed twice to the FtT against decisions of the Secretary of State refusing his protection claim. In a determination promulgated on 29 March 2013 ('the 2013 determination') the FtT dismissed A's appeal. The FtT again dismissed an appeal by A in a determination promulgated on 16 October 2019 ('the 2019 determination'). In a determination promulgated on 14 March 2020, the UT overturned the 2019 determination and remitted A's appeal to the FtT. I say no more about either of those two determinations.

The 2013 determination

6. The 2013 determination was promulgated on 15 March 2013. A was represented at the 2013 hearing by counsel. The FtT recorded that A was born in 1954 and is a citizen of Sri Lanka. A entered the United Kingdom on 11 September 2012 and claimed asylum at port. The Secretary of State refused his claims in a decision dated 30 January 2013. The FtT explained that, at the hearing, A had renewed an earlier application for an adjournment, on two grounds. The FtT had already refused the application twice. One ground was that A needed time to get two different medical reports (about his mental health and about his scars). The FtT refused an adjournment, essentially on the grounds A had known for some time that he would need reports to support his claims and had done nothing to obtain them.

7. The FtT reminded itself that the burden of proof was on A. It made detailed findings of fact between paragraphs 28 and 60. It had to consider the question whether A had a

well-founded fear of persecution 'in the round in the light of all the relevant circumstances and judged against the situation as at the time of the hearing of the appeal' (paragraph 26). The standard of proof in asylum appeals in relation both to 'the likelihood of persecution and the establishment of past and future events, is a reasonable degree of likelihood which can also be expressed as "a reasonable chance" or "a serious possibility". In human rights appeals the burden is to the lower standard namely whether there is a 'real risk of a breach…' (paragraph 27).

8. The FtT bore in mind the time which had elapsed since some of the events to which A referred. The FtT referred to *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271. In that case, this Court said that in assessing future risk, decision makers may have to take into account 'a whole bundle of disparate pieces of evidence: (1) evidence they are certain about; (2) evidence they think is probably true; (3) evidence to which they are willing to attach some credence, even if they could not go so far as to say it is probably true; and (4) evidence to which they are not willing to attach any credence at all' (paragraph 28).

9. The FtT also said that it had complied with section 8 of the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 ('the 2004 Act') when considering A's credibility. It reminded itself that it was possible to believe that a witness was not telling the truth about some aspects of his account, but that 'the centrepiece still stands' (paragraph 29).

10. In paragraph 37 the FtT described the documents on which A relied. He said that his sister had sent them to him two months before the hearing. A said he was still in contact with his sister in Sri Lanka. The documents concerned his treatment at a clinic in Colombo in 2006. A's evidence was that he had been treated for a brain tumour.

11. In paragraph 40 the FtT considered an inconsistency between answers A gave in his asylum interview and in his interview about when he stopped driving a lorry for the LTTE. The FtT recorded that when the inconsistency was put to A, he had qualified his evidence and said that between 2006 and 2009 he had accompanied the driver. The FtT found that A did not qualify his response until after he realised that his evidence did not fit with a previous statement. The FtT found that A 'changed his evidence because he realised that his response undermines his claim that he was driving a vehicle and aiding the LTTE in 2006 and onwards into 2009. I find that the inconsistency in the evidence damages A's credibility'.

12. A's account in his asylum interview of the length of time for which he was tortured was different from his account in oral evidence. His evidence was 'inconsistent on the day and inconsistent with his written statement and interview'. The FtT took into account that A was describing events in 2009, and that, if true, the events would have been 'extremely frightening'. His answers were inconsistent 'on an issue which goes to the core of his claim' (paragraph 44).

13. The FtT considered photographs of A's three small scars (to his hip, leg and foot) in paragraph 46. A was 59 and had worked since he was 12. He had produced no medical evidence, whether through his wealthy sister in Sri Lanka, M, or his friend Kuhan in

the United Kingdom. The FtT was satisfied that A had scars, but not that they were the result of torture. Given the time which A had had in which to produce medical evidence, and that he had failed to, the FtT did not accept that he suffered from mental health problems.

14. In the 2020 determination, the FtT recognised that the 2013 determination was its starting point, but did not treat its findings as 'determinative'. It made a decision based on its own assessment of the up-to-date evidence. It also summarised the 2013 determination in paragraphs 12-19 (see paragraphs 31-33, below). It is not, therefore, necessary for me to summarise the 2013 determination in any more detail, other than to draw attention to the summary, in the 2020 determination, of the conclusions of the 2013 determination (see paragraphs 32-33, below). In short, in the 2013 determination, the FtT did not accept A's account of his actions in Sri Lanka, or of the way in which he left Sri Lanka.

15. The FtT refused A's application for permission to appeal on 3 May 2013. A's appeal rights were exhausted on 17 May 2013.

A's further submissions

16. A lodged further submissions on 12 August 2013. In a decision dated 15 August 2015, the Secretary of State refused those submissions and decided that they did not amount to a 'fresh claim' within paragraph 353 of the Immigration Rules (HC 395 as amended) ('the Rules'). A again lodged further submissions in 2016 and in 2017, with the same result (decisions of 3 March and 26 May 2017, respectively). On 20 December 2018, A lodged yet more submissions.

17. The Secretary of State considered those submissions in a letter dated 16 July 2019. The Secretary of State refused the representations with an in-country right of appeal.

18. The claim considered by the Secretary of State was that A would face detention and torture in Sri Lanka because of his imputed political opinion, that he was at an increased risk of punishment because he had left Sri Lanka illegally, that he suffered from various medical conditions, and that he was a member of the TGTE. The Secretary of State quoted extensively from the 2013 determination. She noted that in her decision of 26 May 2017, she had referred to the absence of any evidence that A was wanted by the authorities, such as having his name on a stop or watch list, or a court order or outstanding arrest warrant.

19. The Secretary of State also considered A's claim that he had been involved in activities in the United Kingdom which would put him at risk on return. A had supplied 'undated and unreferenced' photographs which seemed to show him at a demonstration. That evidence was not enough to show that he would be at risk in Sri Lanka. The Secretary of State also considered a letter from the TGTE which said that A was a volunteer. The Secretary of State accepted that the TGTE was proscribed in Sri Lanka on 25 February 2014. The Secretary of State concluded that A was only 'a low level helper'. Objective evidence showed that while returnees might be questioned on their arrival in Sri Lanka, there had been no reports of any arrests for 'diaspora activities with any of the proscribed groups'. In the light of A's low-level involvement, the Secretary of State did not accept that A would be seen as having 'a "significant" role in relation to post-

conflict Tamil separatism, or that you would be at risk on return …on account of sur place political activity'.

20. The 2013 determination was the starting point (*Devaseelan*). Some of the claims in the current submissions had been decided in the 2013 determination and A had not provided any evidence to show that those findings should be changed. A's Tamil Eelam identity card and the letter from the TGTE had been considered in the decision dated 26 May 2017. In his statement dated 19 December 2018, A had said that he had carried goods for the LTTE in Sri Lanka. There was no reason to change the FtT's 'robust findings' about that. A had provided no information about the voluntary work he said he had done for the TGTE.

21. The Secretary of State considered a medical card dated 18 July 2012, which A said was sent to him by his sister. A claimed that this proved he had been treated for injuries after he was tortured by the authorities. A also relied on his scars. A had not explained why he had only just produced this card. He had not explained why a hospital would have released this document to his sister. The Secretary of State referred to A's witness statement dated 28 December 2012. The card was from a hospital 200 miles from Colombo. A had not explained why he had not gone to hospital as soon as he was released, or why he had gone to a hospital 200 miles from Colombo. The document was handwritten and A had not submitted it to a document expert. The Secretary of State considered that little weight could be given to it.

22. The Secretary of State also considered a letter dated 10 December 2009 from the Red Cross. A had not explained how he had got the letter, or why he had not produced it sooner. There was no evidence that A had approached the Red Cross more recently. The Secretary of State decided to give that letter little weight. For similar reasons the Secretary of State adopted the same approach to a letter dated 14 September 2017 which A said had been sent to him by his cousin. It was sent shortly after the Secretary of State had refused A's further submissions in May 2017. It was translated in the United Kingdom on 2 October 2017 but A had provided no information about the qualifications of the translator and had not explained his delay in submitting it.

23. The Secretary of State took into account in-country information about Tamil separatism. The issue was whether membership of any organisation was likely to be detected on return and/or whether a person's activities were likely to be seen as a threat to the integrity of the state. The Secretary of State did not consider that this information would change the findings of the 2013 determination.

24. The Secretary of State then considered whether A would fall into any of the risk categories described in *GJ (post-civil war: returnees to Sri Lanka) CG* [2013] UKUT 00319 (IAC) and the Country Policy and Information Note - Sri Lanka - Tamil Separatism - June 2017. The LTTE was a spent force in Sri Lanka. A person would be at risk if he was or was seen to be a threat to the integrity of Sri Lanka because he had or was seen to have a significant role in post-conflict Tamil separatism in the diaspora, and/or in a renewal of hostilities in Sri Lanka. The Secretary of State did not consider that A was in that category. He was not a journalist, either, and had not given evidence implicating the security forces, nor had he provided evidence that he was on a stop or watch list. The Secretary of State did not accept that A had a genuine fear of returning to Sri Lanka.

25. The Secretary of State considered whether A had any claim under the Rules and decided that he did not. The Secretary of State then asked whether there were any exceptional circumstances which would result in unjustifiably harsh consequences for A. A claimed to have problems with his sight and general mood, and to have received counselling. The Secretary of State considered that the material supplied by A did not show that his article 8 or article 3 rights would be breached by reason of his medical issues. A had provided sketchy information.

The 2020 determination

26. The FtT hearing was on 15 December 2020. A was represented by Ms Sepulveda, a solicitor. He gave evidence.

27. The FtT summarised A's immigration history in paragraph 1, and his claim in paragraphs 2-6. He could not be returned to Sri Lanka because he had helped the LTTE by delivering supplies for three or four years from 2006 in his own lorry. He had his own transport business. A brain tumour forced him to stop driving in 2006. He would accompany a driver whom he had hired on his doctor's advice. On 15 September 2009 he, his wife and younger son were detained by the authorities in a round-up of Tamils. He was taken to Joseph camp and detained until he escaped on 13 July 2012. The authorities beat him severely, believing that he was a member of the LTTE or a collaborator; so severely that he lost consciousness. He was taken to hospital, treated, and returned to the camp. He signed a confession without knowing what was in it.

28. He left Sri Lanka illegally with the help of an agent. Since then, the authorities had raided his home several times, looking for him. His cousin wrote a letter dated '14 September 2014' saying that the authorities had been harassing him and other members of the family, looking for A. It is overwhelmingly likely that the year, 2014, is a slip, as, elsewhere in the 2020 Determination, and in the Decision, the date given for a letter to this effect from A's cousin is 14 September 2017.

29. Paragraphs 8-11 are headed 'Burden and Standard of Proof'. In paragraph 8, the FtT said that as A was claiming international protection, he had to meet the requirements of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ('the Qualification Regulations') and the relevant provisions of the Rules, which implemented EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and others. On the appeal, A had the burden of proof. He had to show that on return to Sri Lanka he would face 'a real risk' of persecution for a Geneva Convention reason, such as his race or his imputed political opinion. The Rules dealt with Humanitarian Protection. A must show that there was a 'real risk' of serious harm if he were returned to Sri Lanka. The FtT listed the provisions which were relevant to a decision whether A was at a 'real risk' of serious harm. In his human rights appeal, A had to show that he faced a 'real risk' of a breach of article 2 or 3 on return to Sri Lanka. The FtT added that when considering A's credibility, it was required to have regard to section 8 of the 2004 Act. Section 8(1) of the 2004 Act provides that 'In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim…a deciding authority shall take into account, as damaging a claimant's credibility, of any behaviour to which this section applies'. Various types of behaviour are then listed, including making a late asylum claim, and making an asylum claim after travelling through a safe country.

30. In an obvious slip, to which Mr Mahmood rightly drew the Court's attention in the course of his oral submissions (see paragraph 86, below), the FtT noted, in paragraph 11, in what seems to be a boiler-plate paragraph, the relevance to any assessment of proportionality under article 8 of the best interests of A's minor children. A has no minor children. The likeliest explanation is that the judge used at least one standard paragraph in the determination and then did not proof-read the determination when she had finished writing it.

31. In paragraphs 12-19, the FtT summarised the 2013 determination. In paragraph 12 the FtT referred to paragraph 46 of the 2013 determination (see paragraph 12, above), and to its conclusions about A's scars. In paragraph 13, the FtT referred to paragraph 37 of the 2013 determination, which described the documents on which A had relied (see paragraph 10, above)

32. The FtT said that, in 2013, the FtT had found that A's evidence about driving a lorry for the LTTE between 2006 and 2009 was inconsistent. His explanation for the inconsistency about when he stopped driving and whether he had accompanied a driver was not considered credible. 'The tribunal found that [A] did not qualify his response until after he realised that his evidence did not fit with the previous statement and then changed his evidence' (paragraph 14). The FtT had not considered that A's evidence about the length of time for which he was tortured was consistent. His account of the length of the torture varied between 10 and 15 days and more than 15 days (paragraph 16). The FtT had not found A's account of being helped by a high-profile person to be credible (paragraph 16). The FtT had found his evidence about how he was freed and travelled through immigration checks to the United Kingdom unsatisfactory (paragraph 17).

33. The FtT had been satisfied that A was a Tamil and that he had three small scars but not that he had been involved in any activity with the LTTE or that he would be suspected of such activity. It had not been satisfied that he had been detained, or that he had signed a confession. There had been no evidence that he had left Sri Lanka on a false passport or of the date when he left Sri Lanka (paragraph 18). In the light of those findings, the FtT had not accepted that A would face any difficulties with the authorities in Sri Lanka (paragraph 19).

34. In paragraph 20, the FtT said that, in accordance with the principles in *Devaseelan v Secretary of State for the Home Department* [2003] Immigration AR 1, 'I treat this previous decision as the starting point for my own findings of fact always bearing in mind that I must make a holistic assessment of all of the evidence before me as it stands at the date of the hearing'.

35. The FtT listed, in paragraph 21, the documents which A had submitted with the further submissions which were the subject of the decision under appeal. The medical card from a divisional hospital in Sri Lanka recorded that A was treated there between 18 and 21 July 2012 for a headache, wounds to the right leg and hip and pain in his whole body after an assault by 'unknown people'. The other documents were his Tamil Eelam card, a letter from the Red Cross dated 10 December 2009, a letter from A's cousin dated 14 September 2017, and a letter dated 3 December 2020 from the TGTE.

36. A's evidence was that his wife and younger son still lived in Sri Lanka. He had another son who lived in London and who came to the United Kingdom a year or so after A arrived here. His brother came to the United Kingdom over 30 years ago. His son had claimed asylum on the grounds that he had moved money for the LTTE. His case was still pending. The FtT asked A why neither his brother nor son had given evidence. A said he did not see it as important. The FtT did not find that that was a 'credible answer', as A's son had made a protection claim which was similar to A's, and given that A had been making protection claims and appealing for over eight years (paragraph 23).

37. A's evidence about the medical card was that his sister had sent it to him from Sri Lanka about two years ago. He had not provided it to the Secretary of State earlier because members of his family were having difficulties and could not move around as they wished. He could not explain, given that he had it for two years, why he had not sent it to the Secretary of State earlier. He thought he had given it to his solicitors earlier. Ms Sepulveda, who was not the caseworker, could give any information about this. A did not explain where he was in the six days between his escape and his hospital visit.

38. A was not asked questions about his Tamil Eelam card.

39. The Red Cross letter was over 11 years old. It recorded that A's mother had visited the Red Cross and reported that A, his wife and son had left their home area after the war ended. She had stayed at home and claimed to have had no contact with A, his wife or son after their departure. The Red Cross recorded their details in a register of missing persons. A's evidence was that his mother had reported his detention to the Red Cross, but the letter did not refer to that; only to the fact that she could not trace A and his family. He had difficulty, because of his depression, in remembering the date when he was detained. He did not say, at that point, that his mother did not know he was detained. The FtT said that that was what he said in his witness statement of 8 October 2019. I observe, however, that in paragraph 7 of that witness statement, A said that his mother asked the Red Cross for help in October 2009: 'She did not know where I was detained', which is different. The FtT added that A had said that his sister knew he was missing. She also knew his mother had gone to the Red Cross for help. She had not sent the letter to him sooner because it was in a cupboard where she kept her valuables and she had forgotten where it was. The FtT did not find this explanation for A's delay in providing the Red Cross letter to the FtT, the Secretary of State, or A's solicitor, 'to be credible'. A's sister, on A's evidence, had known that A's mother had been to the Red Cross for help tracing A. A's sister could have followed this up several years ago. The letter did not support A's claim, but was consistent with background evidence about the displacement of Tamils in 2009.

40. The letter from A's cousin said that the authorities had harassed the family, looking for A. The letter was dated 14 September 2017. A said that his cousin had sent the letter spontaneously. He had not asked his cousin for more information in order to protect him from trouble with the authorities. He denied that the letter had been produced to align with his further submissions in 2017.

41. The letter from the TGTE was produced at the hearing. A had got it from the TGTE's Wembley Office on the day it was written. That letter and a limited number of photographs sent in with the previous further submissions were the only evidence of A's sur place activities. The letter was signed by Mr Yogalingam Sockalingam, who is

a member of the TGTE. He described A as a volunteer at several public events for the TGTE in the United Kingdom. The events supported the creation of a free Tamil Eelam in Sri Lanka. The letter referred to events in 2016, 2017 and 2018. A was said to have sold tickets for a dinner to raise funds for the de-proscription of the LTTE. The FtT quoted the letter, which described A's activities in the United Kingdom. The letter opined that A was likely to be of interest to the Sri Lankan authorities. He continued to 'express his political aspiration publicly'. He was an ardent supporter of the independence of Tamils.

42. When asked how he had got the letter, A had said that he had worked for its author 'previously'. A had asked for the letter. He had asked for the letter from 'Mr Yogis, he is the main man there'. That is what they call Mr Yogalingam. A had collected the letter on 3 December but had only handed it to his representative the day before the hearing. He had asked for the letter three or four months previously but the office had been closed because of Covid. Its author lived in London but was not able to come to the hearing to give evidence. A had not asked him to. A had been involved in protection claims for seven years. The FtT found that A knew he should provide documents to his solicitor as soon as possible. He did not explain why he only did so the day before the hearing. He did not send a copy to his solicitor. R had no opportunity to inspect the document until the day before the hearing. The FtT questioned A's delay in asking for the letter, given the sequence of further submissions and that the last activity mentioned was in 2018.

43. A was asked why, apart from the letter from his cousin in 2017, there was no other evidence about the problems his family were having in Sri Lanka. He did not really answer the question. He said that, from time to time, the authorities had besieged his place in Sri Lanka looking for him and 'That's it.' When asked again he said his family were afraid. The FtT observed that that was inconsistent with A's receipt of further documents from his sister in Sri Lanka. A was in contact with his family in Sri Lanka.

44. It was suggested to A that the documents he relied on were from some time ago. His reply was 'Yes, when I was working with them, since then I have had an eye operation and it's difficult to travel. I had an injury when working on the road – a stone hit my eye – I have had five operations'. The FtT observed that the letter did not mention this.

45. When asked why he had not yet produced his travel documents, A said that he did not know where they were and had lost them because his family had moved from place to place. He had asked his family to look for them and they said that they were lost. The FtT noted that, in his October 2019 witness statement, A had said the agent had taken from him his original passport and the false passport which he had used to leave Sri Lanka. That was inconsistent with the evidence that the original documents were with his family, who later lost them. The FtT asked rhetorically, 'Why not say the agent had returned them to his family if that was indeed the case? If the original passport was returned to his family then why was it not sent to him in the UK immediately?'

46. The FtT also noted that in his October 2019 witness statement, A had said that he had driven lorries for the LTTE. He had not mentioned having a driver or having travelled with a driver. Paragraph 12 of his witness statement of 19 December 2018 was to similar effect.

47. In paragraphs 29-34, the FtT considered the background evidence and the country guidance. The FtT referred to the UK Fact-finding Mission report dated 20 January 2020. The FtT noted that the TGTE was a proscribed organisation 'and that known involvement can cause difficulties depending on what the nature and level of that known involvement is'. Scarring can lead to questioning but the risk is affected by whether the person is of known to be of interest to the authorities. The FtT followed *GJ (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC), referring to paragraphs 347 and 351, and *MP (Sri Lanka)* 2014 EWCA Civ 829. Only those whose name was on a stop list would be held at the airport. The Sri Lankan authorities had sophisticated intelligence. They could identify people in the diaspora who were trying to revive and fund the separatist movement with a view to destabilising the state. Going to one or more demonstrations in the diaspora does not, by itself, mean that a person is committed Tamil separatist with those aims. It would be a question of fact in each case and would depend on what the diaspora activities were. The objective of the authorities in Sri Lanka was to identify Tamil activists in the diaspora who were working for separatism and to destabilise the state, so as to prevent the revival of the LTTE and of the civil war in Sri Lanka.

48. Internal re-location is not an option for people who are of interest to the authorities. People who are at risk on return include those identified by the authorities as Tamil separatists who have, or who are thought to have, a significant role in post-conflict separatism in the diaspora, or in relation to a renewal of hostilities in Sri Lanka. There is a computerised stop list, which is accessible at the airport. People whose names are on that, because they are the subjects of a current court order or an arrest warrant, are also at risk. The authorities know that many Sri Lankan Tamils left as economic migrants and that everyone in the Northern Province was in some way involved with the LTTE during the civil war. After the end of the civil war, a person's past is only relevant to the extent that it is seen by the authorities as showing a present risk to the Sri Lankan state or to the government.

49. The Secretary of State's case was that A had not shown that his name was on a stop list. The FtT was not aware of any way in which A could have done that. While A bore the burden of proof, the FtT took into account the likelihood of A or of anyone else being able to get such information. The FtT did not 'regard [A's] failure to produce such information as damaging to his credibility' (paragraph 34).

50. The FtT's findings of fact about the protection claim are in paragraphs 35-50 of the determination. The FtT observed that, in his most recent submissions, A had tried to add to the evidence which the Secretary of State, and then the FtT, had considered, in order to get a different outcome for his protection claim. The evidence showed that A had been treated for injuries in a hospital in July 2012, three years after the war ended. A said he had been tortured and forced to sign a confession when he was detained and had then, with the help of an influential friend, secured his release. He had been in detention for three years by then. 'If he knew someone of influence I find it incredible that he would have waited so long to get out of prison'.

51. The FtT also found it 'incredible' that, if A was wanted by the authorities, he would have gone to a hospital for treatment. The treatment card referred to an assault by

unknown assailants. The FtT would not have expected him to say that he had been assaulted by government agents. But the FtT did not understand why, if he had been detained for three years, and had made a confession, he was being assaulted so long after his initial detention. A had not suggested that he resisted making a confession for three years. He had said that he was tortured for 10-15 days. It was 'not credible' that he was detained for three years, and that it was only then that the authorities thought that he was important enough to interrogate. He had not given a 'credible' explanation for his delay in producing the medical card. He said that his family were afraid, yet his sister had sent the medical card and the Red Cross letter to him. The FtT found that A was treated for injuries which he received in July 2012 but 'even to the low standard of proof applicable' the FtT did not accept that A's assailants were 'in any way connected to the authorities' (paragraph 37).

52. The FtT said that A had 'small scars', but that 'without further expert evidence I cannot be satisfied that they are consistent' with A's account of torture (paragraph 38). The Red Cross letter did no more than to say that A's mother reported A, his wife, and his son missing at the end of the war, when thousands of Tamils were displaced. Their names were added to the missing persons register (paragraph 39).

53. A had problems with his sight and was worried whether he would get suitable treatment in Sri Lanka. The FtT did not have enough evidence about A's sight problem. The FtT did not know what if any treatment he was getting, or 'even what the nature of his difficulties is' (paragraph 40).

54. The only evidence of A's sur place activities was some photographs of his attendance 'at a Tamil protest or protests in the UK on unknown dates' and the TGTE letter (paragraph 41).

55. The FtT again described the findings in the 2013 determination as 'not determinative but only part of the evidence I must consider'. Taking into account all the evidence, including the 2013 determination, the FtT was not 'satisfied even to the lowest standard of proof' that A was ever detained 'on suspicion of involvement with the LTTE, interrogated by the authorities, or ill treated by them…' (paragraph 42). The FtT accepted that A was displaced from his village with his wife and other villagers in 2009 by the fighting at the end of the civil war, but was not satisfied that he had ever been wanted by the authorities or that he had ever come to their adverse attention (paragraph 43).

56. The FtT did not accept that A had ever allowed his lorry to be used by the LTTE, that he had driven it, or that he had let it be driven by someone else. A had not said that he had employed anyone in either of his witness statements. He only gave that account when 'put on the spot in his evidence before IJ McAll' (paragraph 54). This is likely to be a reference to paragraph 40 of the 2013 determination (see paragraph 11, above). The explanation he had given for his delay in serving the medical card was not 'credible'. The injuries described in the card did not 'fit with the timeline of his account' (paragraph 45).

57. The FtT had taken into account A's Tamil Eelam card. A had shown some evidence of sur place activities, but those ended in 2018. He had provided a letter from the TGTE 'very late in the day' without any reasonable explanation for the delay. The description

of A's activity for the TGTE and his profile did not fit with his own account and 'seems greatly exaggerated'. Even if the description in the letter of the extent of A's activities was accurate, the FtT was not satisfied that those activities '(selling some tickets for a fundraiser and attending a limited number of protests)' would be known to the Sri Lankan authorities or of any interest to them. A had no influence in the TGTE. The FtT found that given the timing and level of his involvement, his activities for it were 'entirely self-serving and not motivated by a genuine commitment to the cause of an independent Tamil state'. A had given no account of any activities in the past two years. He had explained that it was difficult for him to travel because of his sight problems. The FtT was not satisfied that he had such difficulties, nor that he had an adverse profile with the Sri Lankan authorities, nor a history of detention, nor that the authorities would want to question him on his return, or that 'even with the scars that he bears, he will encounter any problems'. The FtT could 'see no reason why', if he was challenged about his scars, he could not refer to the hospital record of the assault by unknown assailants (paragraph 46).

58. The FtT did not accept that A was 'genuinely politically motivated'. He had failed to call evidence from his brother or from his son, who apparently made a similar claim. He had served evidence in 'dribs and drabs' rather than when it was available. The FtT acknowledged that corroboration was not required, but 'if relevant evidence is available, then the Tribunal is entitled to inquire why that evidence is not before the Tribunal'. When asked about this, A had said that he did not see it as 'relevant'. The FtT did not find that 'credible' (paragraph 47).

59. In paragraph 48, the FtT said that the difficulty with the claim was not that it was inconsistent with the background evidence but that it 'is inherently incredible' and not supported by 'sufficient reliable evidence' (paragraph 49). The FtT was not satisfied that A would encounter any difficulties on his return to Sri Lanka. The FtT was not satisfied that A was known to the authorities. It found that A left on his own passport and would not be in difficulty for leaving illegally. He would not be at a real risk of persecution for any reason. He was not in any of the risk categories in *GJ*. The up-to-date background evidence gave the FtT no cause to depart from the country guidance (paragraph 49). The FtT dismissed the protection claim.

A's grounds of appeal from the 2020 determination

60. A relied on two grounds of appeal. One concerned article 8. The other ground concerned his protection claim. A contended that the FtT had made irrational findings of fact and that its reasoning was inadequate. A argued that the FtT had given inadequate reasons for finding that A's account was not credible and that he would not be at risk on return to Sri Lanka. Its reasons for not accepting A's account of detention and torture were inadequate, as were its reasons for finding that his political motivation was not genuine. A's evidence 'collaborated' his account of his politically motivated activities in the United Kingdom. The FtT had given inadequate reasons for finding that A would not be at risk on return 'if he were found to be a genuine supporter of the TGTE, or…in view of the FtT's findings…as a perceived supporter'.

The grant of permission to appeal to the UT

61. The FtT was not impressed by the grounds of appeal. It considered the 2020 determination, nevertheless, to see whether it disclosed any obvious, arguable, and

material errors of law. The FtT considered it arguable that the conclusion that A had not had the experiences he alleged was based on irrelevant considerations. The FtT referred to paragraphs 36 and 37 of 2020 determination. It was arguable that the FtT, in finding aspects of A's account 'incredible' had substituted its view of what was reasonable for 'that global assessment which is the essence of an assessment of credibility' and 'the term "incredible" arguably amounted to a pure rejection of [A's claims] of fact'. As the FtT did not expressly limit its grant of permission to appeal, A had permission to argue all his grounds at the UT hearing.

The UT's determination

62. A was represented by Mr Islam. The UT said that Mr Islam had derived five points from the two identified by the FtT when it had given permission to appeal. The UT held that the FtT had not erred in law in paragraphs 36 and 37. In its grant of permission to appeal, the FtT had been critical of the word 'incredible', but what the FtT had really meant by 'incredible' was 'implausible'. The UT considered the authorities about the meaning of 'implausible' and 'incredible' in the asylum context. The third point was that the FtT 'was wrong' in paragraphs 41 and 46 to reject A's account that he would be at risk on return to Sri Lanka because of his sur place activities in Sri Lanka. The context was that A had been found, in the 2013 and in the 2020 determinations, not to have been involved with the LTTE in Sri Lanka, and that he did not claim to have done anything after 2018. The FtT was entitled to find that A had no genuine political motivation, and consistently with the country guidance, that A was not on a stop list, was not known to the authorities and was not likely to be questioned on return. The UT added, 'Of course, if he were questioned, [A] could not truthfully say that he was an LTTE supporter and had previously been detained by the Sri Lankan authorities or that he had engaged in genuine sur place activities' (paragraph 24). A also took issue with the finding that he had not left Sri Lanka illegally, which was contrary to paragraph 4 of his 2018 witness statement. He contended that the FtT had not given adequate reasons for that finding. The UT held that the FtT was entitled to reject A's evidence about that. The UT also rejected A's challenge to the FtT's treatment of his article 8 claim.

The application for permission to appeal to this Court

63. There were three grounds of appeal.
    i. The UT had erred in law in substituting 'implausible' for 'incredible'. The FtT had erred in law by finding A's claim incredible, and thus applying a higher standard of proof than it should have done. The UT had relied on authorities about implausibility. They were irrelevant, because the FtT had not taken that approach.
    ii. The FtT had applied the wrong legal test to A's sur place activities. The test was not 'genuine commitment'. The authorities have sophisticated means of monitor anti-government activities in the United Kingdom. A took part in such activities. He would be stopped and questioned on his return and would have to answer any questions about his political views truthfully. 'Once [A] says that he did attend such anti-government activities/protests…the nuance of whether "he really meant it or not" will not save him'. The new and old country guidance show that 'persecution will follow'.

iii. 'If necessary' the UT's approach to paragraph 276ADE of the Rules was incorrect.

64. The UT refused permission to appeal. When the FtT said 'incredible' it plainly meant 'implausible'. It was open to the FtT to reject that part of A's account. A was wrong to rely on the most recent country guidance, as it had not been promulgated by the time of the FtT's determination. The article 8 claim had been correctly decided.

65. A renewed his application for permission to appeal to this Court. In an order dated 21 December 2021, Nicola Davies LJ gave permission on all three grounds.

Submissions

66. This Court gave Mr Mahmood permission to rely on a replacement skeleton argument which was served on 26 April 2022 (the hearing was listed on 28 April 2022). This was a more substantial document than his original skeleton argument. A continued to rely on his three grounds of appeal.

67. Mr Mahmood made no oral submissions on ground 1. He indicated that he was content to rely on his written submissions on that ground, which I will now summarise. He argued that the FtT's use of the word 'incredible' showed that it had applied a higher standard of proof than 'the required lower standard of proof'. The UT had been wrong to explain this away by saying that the FtT had meant 'implausible'. The lower standard of proof required A to show that there was 'a reasonable degree of likelihood' that A would be persecuted for a Convention reason, or that there was a 'real and substantial risk of persecution' (*R v Secretary of State for the Home Department ex p Sivakumaran*). 'Incredible' and 'implausible' have different meanings. An account may be implausible and yet may be believed and may be plausible and not be believed. In any event, A's account was not incredible.

68. A cited paragraph 18 of the judgment of Sedley LJ in *Karanakaran v Secretary of State for the Home Department* [200] EWCA Civ 11; [2000] INLR 122. Walker LJ agreed with his judgment. The issue on appeal was internal relocation. In paragraph 16 Sedley LJ said that the issues on an asylum appeal are not issues of hard fact, but of evaluation, such as whether an appellant has a well-founded fear of persecution.

> *'Into all of these, of course, a mass of factual questions enters. What has happened to the applicant? What happens to others like him or her? Is the situation the same as when he fled…In separable from these are questions of evaluation; did what happened to the applicant amount to persecution? If so, what was the reason for it? Does what has been happening to others shed light on the applicant's fear?…What matters throughout is that the applicant's autobiographical account is only part of the picture. People who have not yet suffered actual persecution …may have a very well-founded fear of persecution should they remain. People who have suffered appalling persecution may for one reason or another not come within the protection of the Convention.'*

69. The civil standard of proof 'has no logical bearing on the assessment of the likelihood of future events or (by parity of reasoning) the quality of past ones… in general legal process partitions its material so as to segregate past events and apply the civil standard of proof to them: so that liability for negligence will depend on a probabilistic conclusion as to what happened…' (paragraph 17). In paragraph 18 Sedley LJ referred to a decision of Federal Court of Australia and to a decision of the High Court of Australia about asylum claims. It was not erroneous for a decision maker, presented with a mass of material, to decide which facts, if any, had been established and which had not. 'It is not an error of law for such a decision-maker to test the material provided by the criterion of what is considered to be objectively shown, so long as, in the end, he or she performs the function of speculation about the "real chance of persecution"…Secondly, a decision-maker must not, by a process of factual findings on particular elements of the material which is provided, foreclose reasonable speculation upon the chances of persecution arising from a consideration of the whole of the material.'

70. In paragraph 19, Sedley LJ said that 'Testing a claim ordinarily involves no choice between two conflicting accounts but an evaluation of the intrinsic and extrinsic credibility, and ultimately the significant of, the applicant's case…everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair and provided their decision logically addresses the Convention issues. Finally and importantly, the Convention issues from first to last are evaluative, not factual. The facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions…'

71. In his written submissions on ground 2, A argued that the FtT had, by asking itself whether A's political motivation or commitment was genuine, asked itself the wrong question. The authorities show that the real question is whether A would face a serious risk of persecution on return. A cited *Secretary of State for the Home Department v MSM (Somalia)* [2016] EWCA Civ 715. It did not matter if he would face that risk because of his own conduct or sur place activities, however cynical or unreasonable those might be. A, on being questioned at the airport, or, having been monitored from the airport and on being questioned on return to his home area, would be asked about his time in the United Kingdom. His anti-government and separatist views would be established quickly. He could not be expected to lie about his sur place activities. His predicament would be worse because the TGTE is a proscribed organisation. The principle in *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 applies just as much to political opinion as it does to homosexuality (see paragraphs 25-26 of *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38; [2013] 1 AC 152). 'Nobody should be forced to have or express an opinion in which he does not believe. He should not be required to dissemble on pain of persecution' (at paragraph 24, per Lord Dyson JSC).

72. A, as the FtT had done, quoted paragraph 351 of *GJ*. He also quoted paragraph 352, which says that if a Tamil asks for a travel document in London, a file will be created in Sri Lanka. He will be interviewed. By the time a travel document is emailed to London, the authorities will know what activities he has done outside Sri Lanka and whether he poses a real threat to the state on return. Of course, other features of a

person's profile could mean that, even if his sur place activities were not such as to put him at risk, he might, nevertheless, be at risk on return (see per Underhill LJ in paragraph 50 of *MP (Sri Lanka) v Secretary of State for the Home Department* [2014] EWCA Civ 819).

73. It was clear from the most recent country guidance, *KK and RS (sur place activities: risk) Sri Lanka CG* [2021] UKUT 0130 (IAC) (in which permission to appeal was recently refused by this Court - [2022] EWCA Civ 119) that the decision of the Supreme Court in *HJ (Iran)* was not considered in *GJ*. The FtT and the UT in this case erred in law in not following the approach in *HJ (Iran)*. This applied to A's (admittedly) low-level sur place activities. The UT had been wrong, in paragraph 24, to say otherwise. The interrogator would not care if A's motivation was genuine. It would be enough if A truthfully admitted 'his support and activities for the proscribed organisation and other matters'.

74. A submitted that ten factors would make him stand out to the authorities on his return to Sri Lanka.
    i. He is a Tamil.
    ii. He is from Jaffna, a separatist area.
    iii. He has lived in London, a 'diaspora hotspot' for over ten years.
    iv. He has scars (to his hip, leg, and foot).
    v. He was treated in hospital in 2012.
    vi. He has a Tamil Eelam card.
    vii. Photographs show him at demonstrations in the United Kingdom.
    viii. A letter from the TGTE describes A as a 'volunteer'; the FtT did not dismiss the letter as false.
    ix. A is a 'low-level helper' of the TGTE. His activities include local community work.
    x. The TGTE has been proscribed in Sri Lanka since 25 February 2014.

75. 'On any fair basis', there are substantial reasons for concluding that A will be at risk in Sri Lanka, whether because he is a Tamil, or because he is a Tamil, combined with his actual or imputed political opinion. He 'cannot conceivably' have a valid Sri Lankan passport, as he has been in the United Kingdom for over ten years. He will have to apply for a new passport and would be questioned by the Sri Lankan Embassy. He would then be on a watch list if he were returned to Sri Lanka.

76. Paragraph 276ADE of the Rules was applied wrongly, because with his profile, A would not be able to live safely in Sri Lanka. His return would cause unjustifiably harsh consequences. He was 66 at the FtT hearing. He has mental and physical health issues.

77. Mr Mahmood made oral submissions about ground 2. A premise of those submissions was that A would be asked, on his return to Sri Lanka, about his activities in the United Kingdom. Mr Mahmood was asked during his submissions to refer the Court to any evidence which was before the FtT and which supported the contention that A would be questioned on his return. He acknowledged that that was a hurdle he had to overcome. He did not, in the event, refer to any such evidence. Mr Mahmood submitted, in any event, that A could not be expected to lie if he was questioned.

78. Mr Mahmood emphasised that the proscription of the TGTE in 2014 was a major change since the decision in *GJ*. This meant that association with the TGTE would be problematic. Underhill LJ suggested in argument that association with the TGTE would only be a problem if A had been found to have a significant role with the TGTE, and it had been found that he had not. Mr Mahmood said he would come to that point. The evidence conclusively showed a link between A and the TGTE. As Underhill LJ pointed out in a further question, the premise of *RT (Zimbabwe)* is that the appellant has genuine political views which he would wish to express and which he should not be required to suppress. An appellant who has no such beliefs is not exposed to a similar risk. The argument based on *HJ (Iran)* and on *RT (Zimbabwe)* was irrelevant, on the FtT's findings of fact. Mr Mahmood did not accept that. The appellant in the second case had no political beliefs and did not wish to sing the Zanu PF song. Mr Mahmood did 'not necessarily' accept that the underlying principle was the same.

79. Mr Mahmood relied on the TGTE letter. He appeared to challenge the FtT's finding of fact in paragraph 46 that the letter from the TGTE did not fit with A's own account and seemed greatly exaggerated. It was pointed out to him by the Court that this was not a ground of appeal and faced difficulties in any event, as there was no record of A's cross-examination. There is only one sentence in his 2018 witness statement about sur place activities. Paragraph 13 says 'I also did some work for [the TGTE]'. He accepted that there was no witness statement from Mr Yogalingam. But Mr Yogalingam had given evidence in *KK*. The UT in that case described his evidence as 'candid'. Mr Mahmood submitted that, in any event, the FtT had not held that A had no link with the TGTE.

80. Mr Mahmood repeated, orally, his written submission that the FtT had, in paragraphs 46 and 47, applied the wrong legal test to A's sur place activities. He made a number of more specific points, though they were not all clearly related to that central ground.

81. The FtT had erred, he contended, in not specifically considering the impact of the TGTE's proscription in 2014. The appeal should have succeeded because of the ten factors on which A relied (see paragraph 74, above). It was common ground that the TGTE was still proscribed and the FtT had not evaluated that change in the position since *GJ*, and what proscription meant for A. That was an error of law.

82. Mr Mahmood also submitted that the FtT had erred in making a finding, in paragraph 23, that A's explanation for calling no witnesses was not credible. The FtT should have postponed any such finding until it considered the protection claim overall, in paragraphs 35-50. In the light of the FtT's obvious mistake in paragraph 11 (see paragraph 30, above) no weight could be given to the FtT's statement, in paragraph 20, that it had to make a holistic assessment of all the evidence as it stood at the date of hearing. We were, he submitted, 'miles away' from a holistic assessment of the evidence. He quoted paragraph 19 of Sedley LJ's judgment in *Karanakaran*. The question of a person's role was not straightforward, but A's role was not the only relevant factor: there were also the ten factors on which he relied.

83. Mr Mahmood also made submissions about travel documents. The premise of those was that A did not have any, or access to any. He would therefore have to go to the Sri Lankan High Commission ('the SLHC'), where he would be asked questions. The Court suggested that that would not be a problem for him if, as the FtT had found, his activities were not of such a character that he was of interest to the authorities. His

response was that A would have to answer truthfully. The Court noted that the FtT found that A had no genuine political commitment. Mr Mahmood's response was that the authorities helped A on this point. In any event, the FtT had found that A did have a link to the TGTE.

84. Mr Mahmood was asked to summarise his submissions in three sentences. He said that things have moved on significantly since *GJ* because the TGTE is now a proscribed organisation. A would have to get a travel document from SLHC. When A was asked questions at the SLHC, he would have to be truthful. He would be likely to get through the airport at Colombo, but would be picked up later. There was no nuance in the approach of the authorities in Sri Lanka. A had a link with a proscribed organisation and would be persecuted. Both the FtT and the UT had erred in law in concluding otherwise.

85. Mr Keith submitted in his skeleton argument, in short, that nothing turned on the words 'incredible' and 'implausible'. The real issue was whether the FtT's overall assessment of the evidence was lawful. The FtT had made a clear and well-reasoned decision and there was no need for the UT to substitute 'plausible' for 'credible'. The FtT was entitled to find that the claim failed and did not err in law in reaching that conclusion. Mr Keith, as I will describe in the next section of this judgment, also referred to some of the relevant authorities. The Court indicated to Mr Keith that unless he wished to, it would not require him to make any oral submissions. Having taken instructions, he did not do so.

Discussion

86. It is convenient to start with ground 1 and with the obvious slip in the 2020 determination to which I have referred in paragraph 30, above. Mr Mahmood did not rely on this error in his written submissions on ground 1, but I am troubled by it. It suggests, first, that the judge did not take the care in writing the 2020 determination which is important in every appeal, and particularly in an asylum appeal. Second, as Mr Mahmood in effect submitted, in relation to ground 2, it is evidence of an automatic and uncritical use of a standard paragraph. It potentially undermines the reader's trust in other legal directions in the 2020 determination. Those directions, too, might be as irrelevant to the FtT's actual process of reasoning as the ritual paragraph reciting the FtT's careful attention to the best interests of non-existent children. Part of Mr Mahmood's argument on ground 1 is that the FtT in effect applied the wrong burden of proof to this claim. This error has prompted me, as part of this Court's duty of anxious scrutiny, to consider the FtT's reasoning carefully, in order to see, first, whether it stated the law correctly, and second, whether or not it did, in substance, apply the law which it said it was applying.

87. Before I do so, I will consider, briefly, what that law is. As the FtT correctly observed, the Qualification Directive puts the burden of proof on A. To establish his claim, he had to show that there was a 'real risk' of harm, or of a breach of Convention rights. The existence of a risk is not something which can be shown on the balance of probabilities. Whether there is such a risk is for the decision-maker to assess, on the available materials. To the extent that those materials consistent of factual assertions, the decision-maker is entitled, and may, in some cases, be bound, to decide whether or not the asserted facts are true. The decision-maker is entitled to find, if that is the case,

that there is not enough evidence to show that an assertion in true. The decision maker is also entitled, if the assertion is incredible, to say so, and to reject it on that ground, provided he or she explains that conclusion. Having looked at the assertions made by a claimant, the decision maker might be satisfied that some assertions are true, and not satisfied that others are true; and may not be able to form a view one way or the other about other assertions.

88. It is true that the FtT did not refer to *Karanakaran*. However, it is inconceivable that the FtT was not aware of that case, not least because the 2013 determination, which the FtT used as the starting point for its findings of fact, referred to *Karanakaran* in paragraph 28 (see paragraph 8, above). Moreover, the FtT's express approach to the evidence is consistent with *Karanakaran*: see paragraph 91, below.

89. There is no authority which suggests that it is an error of law to assess the credibility, or the reasonable likelihood, of the factual aspects of a protection claim as part of the overall evaluation of a protection claim. The authorities, rather, warn against the danger of an assessment of credibility or reasonable likelihood which is over-influenced by cultural differences and which is then used as the sole basis for rejecting the whole claim: see, for example, paragraphs 29-30 of *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 per Neuberger LJ (as he then was) and paragraph 27 of *Y v Secretary of State for the Home Department* [2006] EWCA Civ 1223 (per Keene LJ). It is likely that this line of authorities, to which Mr Keith referred in his skeleton argument, influenced the FtT's grant of permission to appeal (see paragraph 61, above).

90. The UT considered, in some detail, the authorities about 'plausibility' and 'credibility'. It is not necessary to examine those authorities. I accept Mr Keith's submission that, in this case, any distinction between those two words is of little significance, and that, since the FtT did not use plausibility as a touchstone, the authorities which use that term are not directly relevant. In any event, as this Court observed in paragraph 127 of *MN v Secretary of State for the Home Department* [2020] EWCA Civ 1746, 'plausible' and 'credible' are not terms of art. I also accept Mr Keith's submission that the UT was correct to say that *HK* and *Y* show that in evaluating the strength of a claim, the decision-maker must look at all the evidence and may, without legal error, conclude that parts of it are not 'plausible' (or, for that matter, 'credible').

91. For those reasons I do not consider that the FtT's reference to the lack of credibility of aspects of A's factual account is, in itself, a misdirection. Moreover, there is no overt misdirection in the 2020 determination. On the contrary, the textual evidence strongly supports the view that the FtT stated the law correctly. The FtT summarised and applied the relevant provisions of the Qualification Directive. It stated, correctly, that the burden of proof was on A. It stated, in four places in paragraphs 9 and 10, that the standard A must reach was to show, as regards each aspect of his claim, that there was a 'real risk' (such as a real risk of persecution for a Convention reason). The FtT therefore said that it would apply, to all aspects of A's claim, a standard of proof which was as favourable to A as it could be. It took the same approach in paragraph 49 (see paragraph 59, above). In paragraph 37, the FtT described the standard of proof as 'the low standard of proof applicable'. In paragraph 42, the FtT said 'I am not satisfied, even to the lowest standard of proof…' Those two passages support the view that, as well as stating the law correctly, the FtT also applied that approach in practice.

92. After its summary of the 2013 determination, the FtT said that it must 'undertake a holistic assessment of all the evidence before me as it stands as a date [sic] of the hearing'. It also said, in paragraph 20, that the findings in the 2013 determination were not conclusive. It repeated, in paragraphs 35 and 42, that it had taken into account all the evidence, adding, in paragraph 42, that that included the findings in the 2013 determination, which were not 'determinative'. The FtT considered the up-to-date background evidence in paragraphs 29 and 30, and the relevant country guidance in paragraphs 31-33. It noted, in paragraph 34, the Secretary of State's submission that A had not produced any evidence that his name was on a stop list. It also noted, again, that A bore the burden of proof. It said, nevertheless, that it was not aware of any mechanism by which A could get information showing his name was on a stop list, and therefore decided that A's failure in this regard did not damage his credibility. In paragraphs 24(c) and 48, it acknowledged that A's claim was consistent with the background evidence. Again, the FtT not only said that it was doing what it should do; it is also clear to me from reading the 2020 determination, that, in substance, the FtT did what it said it was going to do.

93. Ground 1 relates to the first aspect of A's protection claim; his account, which the FtT had rejected in 2013, of his involvement with the LTTE between about 2006 and 2012. The FtT considered the evidence about that in great detail in paragraphs 22-28, noting gaps and inconsistencies in that evidence as it did so. It found one answer (to a question why A had not called witnesses) 'not…credible'. It also found the explanation for A's long delay in providing the Red Cross letter 'not…credible'.

94. When it made its findings of fact, in paragraphs 35-49, the FtT found that seven aspects of A's evidence were 'not credible' or 'incredible'. In most instances, the FtT explained, either in its findings of fact or in its summary of, and commentary on, the evidence, why it had reached that view. Those strictures were not the only reason why the FtT did not accept A's claims. The FtT also observed that it did not have enough evidence to be satisfied of various aspects of A's factual account. For example, 'without further expert evidence', the FtT could not be satisfied that A's scars were consistent with his account of torture (paragraph 38). It also had 'insufficient evidence' of A's eye problems; it did not know what his problems were, or what treatment he was being given (paragraph 40). The FtT also described, in paragraph 46, many deficiencies in A's evidence about his sur place activities. As it observed in its summary of A's claim (paragraph 48) the difficulty with A's claim was that it was 'inherently incredible and not supported by sufficient reliable evidence'.

95. I reject Mr Mahmood's submission that the FtT erred in law in paragraph 23 of the 2020 determination because that paragraph shows that the FtT did not consider the evidence as a whole before reaching its overall conclusion. In assessing A's explanation for not calling witnesses the FtT was, as is clear from the structure of the 2020 determination, considering an issue which was distinct from its evaluation of A's claim as a whole. The FtT was entitled to express its surprise that A had not called available supporting evidence. The FtT was also entitled, as it did, to take into account its view that A's explanation for that failure was not credible in the distinct exercise of evaluating his claim (paragraph 47): see paragraph 16 of the judgment of Thomas LJ (as he then was) in *TK (Burundi) v Secretary of State for the Home Department* [2009] EWCA Civ 40, to which Mr Keith referred in his skeleton argument.

96. In short, the FtT directed itself correctly in law about the risk of persecution based on A's account of his experiences in Sri Lanka. The authorities relied on by Mr Mahmood (see paragraphs 68-70, above) support the FtT's legal approach. It applied the correct burden of proof in form and in substance. It was entitled to decide whether or not it was satisfied of the facts asserted by A. In doing so, it did not err in law in describing parts of his account as incredible, and explaining why it found them incredible. Its use of the credibility of those claims as a tool for assessing them does not show that it applied the wrong standard of proof to A. I would dismiss ground 1.

97. The main plank of ground 2 is that the FtT asked itself whether A had a genuine commitment to the TGTE and said, in two places in the determination (in paragraphs 46 and 47), that he did not. Had the FtT used the genuineness of A's political motivation as the only test of the validity of his claim based on his activities sur place, it would have erred in law. It is clear to me, however, that if paragraphs 46 and 47 are read as a whole, together with paragraph 24(e), in which the FtT commented on the letter from the TGTE, that the FtT did not reject A's sur place claim simply because it considered that his commitment was not genuine.

98. On the contrary, the FtT rejected this part of A's claim for a number of quite different, but sound, reasons.
    i. The evidence in support of that part of the claim had been submitted very late, with no reasonable explanation for that delay.
    ii. The evidence was limited. It consisted of some photographs of A attending a Tamil protest or protests in the United Kingdom on unknown dates, and the TGTE letter.
    iii. On his own case, A had not engaged in any activities for two years.
    iv. His explanation for the lack of recent activity was not supported by any evidence.
    v. The description of A's activities in the TGTE letter did 'not fit with his own account and seem[ed] greatly exaggerated'.
    vi. Even if the letter was accurate about what A had done, the FtT was not satisfied that those limited activities would be known to the Sri Lankan authorities or of any interest to them.

99. Mr Mahmood emphasised, on the basis of *HJ (Iran)* and *RT (Zimbabwe)* that if A was asked questions about his activities in the United Kingdom, he could not be expected to tell lies. It is not clear that this point was raised in the FtT or in the UT, although it is fair to say that the UT alluded to this point in paragraph 24 (see paragraph 62, above). It is not obviously included in the grounds of appeal to this Court. There are, in any event, two answers to it. First, if A told the truth, he would say no more than that he had sold some tickets for a fund-raiser, and attended a limited number of protests, before 2018, and that the timing and level of involvement were 'entirely self-serving and not motivated by any genuine commitment to the cause of a Tamil state'. Second, and more fundamentally, and as Underhill LJ pointed out in argument, there was no evidence in this case to support the proposition that A would, in any event, be questioned on his return, for the reasons given by the FtT in the 2020 determination.

100. Mr Mahmood also stressed that there had been a significant development since *GJ*, that is, the proscription of the TGTE. Again, it is not clear that this point was raised in the

FtT or in the UT. Nor, again, is it obviously included in the grounds of appeal to this Court. Be that as it may, far from ignoring this point, the FtT noted, from the recent background material, that the TGTE had been proscribed, and that, depending on the facts, known involvement with the TGTE can cause difficulties (paragraph 29) (see paragraph 46, above). The FtT added, significantly, that that up-to-date background evidence did not cause it to depart from the country guidance (paragraph 49) (see paragraph 59, above). The Secretary of State also mentioned this point in the Decision.

101. Mr Mahmood further submitted the proscription of the TGTE is a factor which, as the most recent country guidance shows, is relevant to risk on return. This came close to a suggestion that the FtT had erred in law in not anticipating the reasoning in *KK*. It is not, however, an error of law for the FtT to fail to refer to or to follow a country guidance decision which had not been promulgated at the date of its determination (*MA (Iraq) v Secretary of State for the Home Department* [2021] EWCA Civ 1467, paragraphs 79, 97 and 98). In any event, the FtT was aware of that point from the recent background evidence; and that point does not help A. A's otherwise hopeless claim could not have been rescued by the facts (in any event recognised by the FtT) that the TGTE had been proscribed and that that could be a risk factor. Compared with the many reasons why, the FtT held, and was entitled to hold, the claim failed, the proscription of the TGTE and its impact on A's risk was a straw in the wind. There is nothing in *KK* (if it were relevant, and it is not) to suggest otherwise. I would therefore dismiss ground 2.
102. Ground 3 is a contention that the UT erred in its approach to paragraph 276ADE of the Rules. In order to have a viable claim under paragraph 276ADE, A would have had to persuade the UT (and, more importantly, the FtT) of the truth of the core of his protection claim: essentially, that his profile was such that he would be at risk of ill treatment by the authorities if he returned to Sri Lanka (see paragraph 76, above). He did not do so. I have held that the FtT did not err in law in dismissing the protection claim. It follows from that conclusion that I would also dismiss ground 3.

Conclusion

103. For the reasons I have given above, I would dismiss this appeal.

Lord Justice Dingemans

104. I agree with both judgments.

Lord Justice Underhill

105. I agree that this appeal should be dismissed. My reasons are essentially the same as those of Elisabeth Laing LJ, but I will shortly summarise in my own words the points that may be of some more general significance. I confine myself to the grounds of appeal, though I have to say that Mr Mahmood sometimes strayed quite a long way from them.

106. As to ground (1), there is no basis to find that the FTT Judge misunderstood or misapplied the standard of proof. Mr Mahmood's point based on her findings that various aspects of the Appellant's account were "incredible" is, with respect, hopeless – which may be why he chose initially not to develop it in his oral submissions (though he did revert to it later in the context of his submissions on ground 2). It is a consequence of the lower standard that a judge is not required to make a positive finding

that the evidence on which an applicant relies in support of their claim is true. But it does not of course follow that if the judge finds all or part of that evidence to be incredible that is irrelevant to the overall assessment which has to be made. I am not sure that the distinction between "credibility" and "plausibility" is material in this context; but I take this opportunity to commend the observations of Ouseley J in paras. 15 and 16 of the judgment in *MM (DRC: Plausibility: Democratic Republic of Congo)* [2005] UKIAT 19, where he says:

> "15. … The assessment of plausibility is not … a separate stage in the assessment of credibility but is an aspect which may vary in its importance, from case to case. A story may be implausible and yet may properly be taken as credible; it may be plausible and yet properly not believed. There is a danger in erecting too many stages of reasoning with different tests, as opposed to recognising different aspects of reasoning. This is especially so as credibility, while often decisive, is however not the true or ultimate focus of decision in an asylum or human rights case.
>
> 16. But there is a danger of '*plausibility*' becoming a term of art, yet with no clear definition or consistent usage. It is simply that the inherent likelihood or apparent reasonableness of a claim, is an aspect of its credibility, and an aspect which may well be related to background material, which assists in judging it. …"

107. As to ground 2, it is well-established that in some circumstances an applicant for asylum can, however unpalatable this may be, rely on *sur place* activities undertaken opportunistically and without genuinely holding the political opinions that are said to put them at risk on return: see most recently (and in a Sri Lankan context) para. 15 of the judgment of this Court in *KK (Sri Lanka) v Secretary of State for the Home Department* [2022] EWCA Civ 119. But, again, it does not follow that it was irrelevant for the tribunal to consider whether the Appellant's professed separatist opinions were genuinely held. In the first place, if they were not genuine that is relevant to – though not, I accept, decisive of – the question whether they are likely to have come to the attention of the Sri Lankan authorities or (if they did) to have been taken seriously by them. Perhaps more importantly, a finding that the opinions are not genuinely held is fatal to any argument based on *RT (Zimbabwe)*. If the Appellant does not genuinely hold separatist opinions, he will not be put in a position where he is compelled to conceal those opinions on return or, to address a point particularly made by Mr Mahmood, to lie if questioned at the airport – quite apart from the point that the FTT found as a fact that he was of no interest to the authorities, in which case there was no reason to suppose that he would undergo any such questioning.

108. As to ground 3, Mr Mahmood accepted that this was parasitic on his other grounds and he did not seek to develop it in his oral submissions.