



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/11464/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 5th July 2016

**Decision & Reasons
Promulgated
On 27th July 2016**

Before

**MR JUSTICE WARBY
UPPER TRIBUNAL JUDGE RIMINGTON**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**N S
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr A Slatter instructed by Wimbledon Solicitors (Balham High Road)

DECISION AND REASONS

1. The appeal, with permission, was made by the Secretary of State, but nonetheless we shall refer to the parties as they were before the First-tier Tribunal, that is, the Secretary of State as the respondent and Mr N S as the appellant.

2. The Secretary of State asserts that the First-tier Tribunal erred in law in finding that the appellant was not to be excluded from the Refugee Convention under Article 1F(a) and 1F(b). The Secretary of State contends that the judge failed to analyse properly the role of the appellant in the LTTE, when allowing the appeal against the decision by the Respondent dated 29th July 2015. The judge, it was asserted, applied too high a threshold for considering whether the appellant was excluded or materially failed to properly listen to the evidence advanced by the Secretary of State. In relation to Article 1F(b) the judge's findings were perverse.

Background

3. The appellant is a national of Sri Lanka and his date of birth is 14th June 1979. He claimed asylum and the respondent decided that he fell to be excluded from the protection of the Refugee Convention under Articles 1F(a) and (b) but nonetheless considered that he would be at risk of treatment that would amount to a breach of Article 3 if he was returned and therefore he was granted leave in line with the Home Office Asylum Policy Instruction.

Secretary of State's Reasons for Refusal

4. The reasons for refusal in summary set out that the LTTE had no legal right to arrest or detain people in the Jaffna area and transfer them from territory under control of the Sri Lankan government to areas under the control of the LTTE. Similarly the LTTE had no legal right to administer punishment to people it believed had informed against them. The respondent stated there were serious reasons for considering that the people were taken against their will. The respondent advanced that owing to the widespread and systematic basis upon which the LTTE carried out actions against people regarded as traitors meant that those could be classed as crimes against humanity. In respect of the appellant's own actions the respondent concluded that the appellant gathered and transmitted information or transmitted intelligence on informers to the LTTE and did this in the knowledge that people would be detained, taken to LTTE controlled areas for imprisonment or as the appellant described, severe punishment. The respondent thus concluded the appellant was part of the joint enterprise.
5. In respect of Article 1F(b) the respondent took into account the appellant's claim that he transmitted messages to his superiors in the LTTE requesting the supply of weapons and as a result weapons were sent from LTTE controlled areas into government controlled areas. This the respondent considered was contrary to the law of Sri Lanka. Although the appellant stated he was unaware of the purpose for which the particular weapons could be used the respondent concluded that the circumstances gave serious reasons for considering that the appellant committed a serious non-political crime.
6. The Secretary of State issued a certificate under Section 55 of the Immigration, Asylum and Nationality Act 2006. It was accepted that the

appellant would be afforded protection under Article 3 of the European Convention on Human Rights.

Appeal to First-tier Tribunal

7. The appellant appealed that decision. The grounds asserted that the appellant had not committed any war crimes or crimes against humanity. It was stated that he “associated with the LTTE to protect the Tamil community and his nation. He has never shot anyone during his membership with the LTTE no intentional shootings or killings took place”.
8. The issue in the appeal was in essence whether the appellant fell for exclusion from the Refugee Convention.
9. The appellant was allowed in relation to the exclusion point.

Application for Permission to Appeal

10. The legal tests are enunciated in **JS (Sri Lanka) R in the application of v The Secretary of State for the Home Department Rev 1 [2010] UKSC 15**. The legal test for the Secretary of State is whether there are

“serious grounds for considering that the appellant has voluntarily contributed in a significant way to the organisation’s ability to pursue its purpose for committing war crimes, aware that his assistance will in fact further that purpose”.

11. The Secretary of State asserted that :-

(i) The judge erroneously “embarked” on a search for an actual number of informers and concluded that because the appellant “could be one of thousands of people” considered that “he had in fact a very low profile within the LTTE”. This was materially wrong as it was immaterial whether one or 10,000 others did this role. It was incumbent upon the judge to consider what the appellant did himself and come to the conclusion whether there were serious grounds for considering that the appellant had voluntarily contributed towards crimes against humanity. That he had a low profile was an immaterial basis for the judge’s conclusion. However low a profile, that role could still be one which engaged Article 1F.

(ii) The judge misstated the concern of the author of the exclusion report over the appellant’s credibility. In fact the conclusion was that his links were broadly consistent with his activities with the LTTE. The judge noted at paragraph 60 of his decision that the author of the report acknowledged that there were potential credibility issues as to whether the appellant had exaggerated his role in the LTTE or if he was a member at paragraph 60 of his decision. At paragraph 65 the judge stated that “I consider that he embellished what he actually did in his first interview and I note the

credibility issues raised by the respondent in the report also". There were, however, no reasons given by the judge for finding that the appellant had embellished what he actually did. The exclusion decision raised the possibility that equally the appellant could be distancing himself from what he said in his role and the judge does not consider this position.

(iii) The judge had materially erred by failing to properly consider the background material as to the appellant's role. The exclusion report highlighted the actions of the LTTE in Sri Lanka at the relevant time and the First-tier Tribunal Judge failed to consider that, in conjunction with the appellant's role.

As such the judge materially erred by relying on immaterial matters and failing to give reasons for concluding the appellant had embellished his role and failed to engage with the Secretary of State's case. The background material showed people being taken and mistreated by the LTTE as a result from intelligence. That was the nexus to which the First-tier Tribunal Judge said was missing but was not in fact missing. The threshold was not high and the Secretary of State clearly demonstrated that there were serious reasons for considering that the appellant voluntarily contributed towards the LTTE's crimes against humanity and/or war crimes. The fact that not every person the appellant informed on was detained did not mean that he should not be excluded as the First-tier Tribunal Judge seem to suggest in paragraph 63.

(iv) in relation to Article 1F(b) the judge stated there was no evidential basis to show that the weapons concerning which the appellant sent messages were illegally obtained (paragraph 35). This was perverse. The LTTE organisation was a terrorist organisation which had no lawful basis for having any weapons. Whether they were used against the army or civilians for 1F(b) purposes was immaterial. It was a serious non-political crime for the appellant to assist in the transportation of weapons for the LTTE. There was no evidence cited by the First-tier Tribunal Judge that the LTTE ever lawfully had possession of firearms or had licences for them under Sri Lankan law (see page 35 of the exclusion letter). Therefore the weapons could not be said to have been lawfully obtained, let alone lawfully obtained by the LTTE. This was a serious crime given that the transportation of the weapons contravened the Sri Lankan law. The First-tier Tribunal Judge failed to engage with this issue at all.

Submissions

12. At the hearing before us, Mr Tufan effectively relied on the written submissions which we have outlined above and emphasised that the judge had not looked at the appellant's role in particular that there were people that the appellant informed upon who were punished. It was not clear why the judge had stated that the appellant was not a member of the intelligence wing of the LTTE. Mr Slatter disputed this and pointed out that the judge had made findings in relation to that point at paragraph 61, and those findings were supported by and consistent with the exclusion analysis report. Mr Tufan emphasised that the judge in particular had not dealt

with the point that the appellant was supposed to have exaggerated his claims.

13. Mr Slatter argued there was no material error of law and this was merely a disagreement with the facts and a request for further reasons given for his findings. The judge directed himself appropriately and in line with **JS**. He made findings he was entitled to make such that the appellant had not been part of the intelligence service because he had not engaged in training for six months. The judge had found that he had a very low profile in the LTTE. There was conflicting evidence as to whether he stated that he was important as evidenced and the judge had set out that he found his role was more of a foot soldier. The judge had appropriately directed himself to the extent of his role.
14. In relation to Article 1F(b) the judge had specifically stated that the respondent relied on the claim that he sent coded messages but that there was no evidential basis to show that the weapons the appellant sent messages about were illegally obtained and it was not clear how many hands the information passed through.
15. Mr Slatter submitted in the event that we found a material error of law, that we needed to reassess the appellant's evidence with new findings of fact as there was a conflict between the parties.

Our Conclusions

16. We did find that the judge took into account immaterial matters in reaching his decision in relation to the Article 1F(a) case as outlined by the Secretary of State. Further the judge failed to give reasons for concluding that the appellant had embellished his role.
17. Ground (i) At paragraph 58 the judge states

“I have also carefully considered the report provided by the Home Office (special cases analysis report). I would note that the report provides details of incidents and events which occurred in Sri Lanka said to be committed by the LTTE in the Jaffna area between 2004 and 2007. However, even if the appellant was aware of some of these incidents it does not mean he was aware that his actions would lead to the particular incidents identified or to war crimes.”
18. The judge set out the relevant law and burden and standard of proof between paragraphs 39 and 42 but needed to assess the role and contribution of the appellant to war crimes. The judge took into account immaterial factors such as the number of other people who were active. That does not necessarily diminish the role of the appellant. There were contradictory findings. On reaching paragraph 63 it is clear that he acknowledged that the appellant's role was important but also stated

“I have carefully looked at the appellant's evidence. The appellant has never said that he was in command over any person. *He stated his role was important though.* However, this comment has to be

seen in context. The number of people passing information to the LTTE has not been stated or established. The appellant could be one of thousands of people. It is clear to me that the appellant is not a member of the intelligence wing from the information he provided. I consider that he had in fact a very low profile role within the LTTE. I also consider that there is not sufficient nexus between any information that the appellant might have given and any mistreatment of individuals. There could have been thousands of pieces of information given, by a great number of individuals. It has not been established that the person who ultimately decided if action was taken against a person was connected to the appellant directly, or to the information that the appellant provided. The appellant was asked to speculate about the results of passing on this information but I accept he did not know in each case, and the decision as to what will happen was taken by others higher up the chain. The appellant described that people could get a warning. That is clearly not a war crime. The appellant did not state that he was aware that every person or people he provided information about would be abducted. What the appellant meant by severe punishment was not established in the interview, and at the hearing the appellant did not describe this to mean death, or torture or anything of that nature.”

19. At paragraph 64 the judge states “I have looked carefully at the appellant’s role and the credibility of what he said he did. I consider that the appellant’s contribution was a small one by the information that he passed, if he did pass such information”. Specifically it is stated by the judge in paragraph 63 that the appellant described people could get a warning and that was not a war crime. But that is not what the appellant stated. The appellant gave his own evidence. The appellant’s case is that he was important and passed information such that persons would be detained [see the appellant’s recorded evidence below].
20. In response to ground (ii), at paragraph 65 the judge states that he considered the appellant embellished what he actually did in his interview and noted the credibility issues raised by the respondent and considered that the appellant’s role was “much more of a foot soldier” and concluded that he did not have a sufficient role to be attributed with criminal responsibility. The exclusion report states that he may have been deliberately distancing himself.
21. Ground (iii) Although the judge said there was insufficient nexus between the appellant and events and that the appellant was insufficiently aware of events that does not chime with his membership of the LTTE, his self professed role as important and the wealth of background material produced by the Secretary of State of the well documented events in Sri Lanka regarding the activities of the LTTE.
22. Nor when considering ground (iv) did the judge allude to the evidence produced by the Secretary of State in relation to the laws of Sri Lanka governing the possession of arms.

23. For the reasons given above we are therefore satisfied that the decision of the First-tier Tribunal Judge contains material errors of law.
24. We, however, preserve the paragraphs in relation to the appellant's oral evidence given at paragraphs 45 to 55;
 - “45. The appellant asserts that he was required by orders given by higher ranks within the LTTE and had no choice but to follow them. I should state at this point that Ms Parker stated that she did not rely upon the defence of superior orders and hence I do not consider this aspect further. In any event I consider that the appellant is an intelligent man and he had a choice to relocate within the southern parts of Sri Lanka and avoid the LTTE.
 46. The appellant in oral evidence stated that he passed information mainly about the army and the movements of the army. He explained that the collection of information was to warn people not to do what they were doing. It was done for safety and security. He stated he did not know what others would decide in respect of those individuals. His instruction was to pass the information on. He agreed he had stated to the Home Office that he was aware that if the people had been warned before they were likely to be punished. He stated though that at the time he passed on information he was not actually aware they would be punished as it was a ceasefire at the time. He explained that as the LTTE were involved in peace talks they would not be able to punish individuals. He stated that the LTTE usually punished people but during the ceasefire they did not do such things.
 47. In respect of the weapons information, the appellant stated he was providing an example of information. He stated that he did not have any direct involvement with weapons. He stated that there wasn't a direct need to pass weapons information.
 48. In respect of the answers that the appellant gave at interview, he stated that he simply passed on the information and didn't have an in depth knowledge of the kinds and types of weapons, or how many the LTTE had. He stated he thought the use of claymores and grenades was for attacks against the army. He stated that the weapons were used to stop the war on the Tamil people.
 49. He explained that he did not know the details of the LTTE killing people. He stated he had helped provide hiding for LTTE fighters and in getting them accommodation. He explained that he was confused during his interview with the Home Office and that was why the change to communications office from intelligence officer.
 50. He stated that the Tamil community considered the LTTE to be freedom fighters. He explained that he only knew that the LTTE was banned in the UK when he arrived in the UK and during the asylum process.

51. The appellant first joined the LTTE in 2004. He stated, at question 40 of his first interview, that he was working for the political wing but was gathering information about people who passed information to the army or other paramilitary groups. He stated he arranged for places to stay for LTTE members and arranged food and gathered intelligence information. He explained in interview that although he was an ordinary member he was important. He stated later in interview that he was given training for 14 days which included physical training and gathering secret information and exchanging it.
 52. The appellant stated that in August 2006 the peace agreement broke down and the fighting escalated. He stated he continued to help by gathering information for the LTTE. He stated the information included about people who had connections to the army. He explained that the people were given a warning and if they did not heed the warning they were taken to the LTTE controlled areas and imprisoned there. He stated that he did not know what else happened to them. He stated though that he suspected that they may have been punished, some severely. Later he stated his functions gradually reduced and in February 2008 he decided to leave Sri Lanka.
 53. In his later interview in 2013 the appellant stated he had never identified informers but was with other people who had done that. He further explained that he passed information given to him and this is what he had stated in his first interview. He stated that others would write reports and he would pass the information on. He stated that he did not gather the information.
 54. In relation to the coded messages the appellant sent, for bombs to be sent to Jaffna, he was asked what type of bombs there were and he answered that there were claymore, grenade and pistols. (See question 72). The appellant also stated that he had no awareness of the attacks by the LTTE on other groups.
 55. The appellant explained that he was at risk in Sri Lanka because he organised Pongu Tamil events. The appellant also stated that the LTTE are not a terrorist group but are freedom fighters.”
25. Throughout this we have taken into account that the appellant has subsequently had a diagnosis of post-traumatic stress disorder and he has been suffering from a moderate depressive episode. That said his evidence in his interviews was relatively consistent and his representations at that time were that he was of good health. Nonetheless we have considered the evidence in the light of the Guidelines for Vulnerable Witnesses.
26. The law is set out clearly in **AS (Section 55 exclusion certificate process) Sri Lanka [2013] UKUT 00571 (IAC)**. This makes reference to **JS (Sri Lanka)**, which we have set out above, and the case of **MT**

(Article 1F(a) aiding and abetting) Zimbabwe and also sets out the standard of proof:

War Crimes and Crimes Against Humanity

35. Article 1F(a) of the Refugee Convention states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) *He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*

36. *The terms of Article 1F are reflected in Article 12 (2) of the Qualification Directive, the provision under which the appellant seeks to be recognised as a refugee.*

37. *In R (JS) (Sri Lanka) v SSHD [2010] UKSC 15 Lord Brown said that when considering whether an applicant is disqualified from asylum by virtue of crimes against humanity under Article 1F(a) the starting point should be the Rome Statute of the International Criminal Court (“the ICC Statute”).*

38. Article 7(1) of the ICC Statute defines crimes against humanity as follows:

1. *For the purpose of this Statute “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

(a) *Murder;*

(b) *Extermination;*

(c) *Enslavement;*

(d) *Deportation or **forcible transfer of population;***

(e) ***Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;***

(f) *Torture*

(g) *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*

- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, on other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Joint Criminal Enterprise and Aiding and Abetting

39. Art 12(3) of the Qualification Directive provides that someone **does not have to personally commit** the excluded act and can be excluded if they “instigate **or otherwise participate** in the commission of [crimes against humanity]”. Article 25(3)(b) of the ICC Statute sets out the different levels of involvement that an individual must have to be criminally responsible. Article 25(3)(c) establishes individual criminal responsibility if a person “aids, abets or otherwise assists...” as a subsidiary form of participation.
40. The case of **MT (Article 1F (a) - aiding and abetting) Zimbabwe** [2012] UKUT 00015 (IAC) explains at [119] that:

“Aiding and abetting differs from joint criminal responsibility (jce) in that whilst the former generally only requires the knowledge that the assistance contributes to the main crime, participation in jce requires both a common purpose and an intentional contribution of the participant (Triffterer, pp. 756-758) to a group crime. **Aiding and abetting encompasses any assistance, physical or psychological**, that has a substantial effect on the commission of the crime. Article 2 para 3(d) of the 1996 Draft Code requires that aiding and abetting should be “direct and substantial”, i.e. the contribution should facilitate the commission of a crime in “some significant way”. The Trial Chamber in *Tadic II*, the Trial Chamber in the *Prosecutor v Naletilic and Martinovic* (IT-98-34) cases and the Appeal Chamber in *Prosecutor v Akeyesu* (Case No. IT-95-14/I-T), paras 484, 706) interpreted “substantial” to mean that the contribution has an effect on the commission, that is have a causal relationship with the result and it included within the concept “all acts of assistance by words or acts that lend encouragement or support”. In *Prosecutor v Furundzija* (IT-95-17/1-T, 10 December 1998), paras 199, 232, 273-4, the Trial Chamber said that assistance need not be tangible: “moral support and encouragement” can suffice, albeit it must “make a significant

difference to the commission of the criminal act by the principal”: see also Prosecutor v Brdanin (IT-99-36-A, Appeal Chamber, 3 April 2007) and Prosecutor v Perisic (IT-04-81-T, 6 September 2011). The requisite knowledge may be inferred from all relevant circumstances, i.e. it may be proven by circumstantial evidence (Prosecutor v Tadic, para 689; Prosecutor v Akeyesu para 498).”

Duress

41. *Article 31 of the ICC Statute provides:*

Article 31

Grounds for excluding criminal responsibility

(1) In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

...

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) made by other persons; or

(ii) constituted by other circumstances beyond that person’s control.

42. *Article 33 of the ICC Statute operates to exclude the “only following orders” defence as orders to commit crimes against humanity are by reason of their subject matter deemed “manifestly unlawful”.*

Standard of Proof

43. *There was agreement between the parties that the standard of proof when deciding exclusion was for there to be “serious reasons for considering” which imported a higher test than what is commonly referred to as the “lower standard” of “reasonable grounds for suspecting” used in asylum and Article 3 substantive claims.*

44. *The Supreme Court indicated at [75] of Al-Sirri v Secretary of State for the Home Department [2012] UKSC 54 that although a domestic standard of proof could not be imported into the Refugee Convention:*

“...if the decision-maker is satisfied that it is more likely than not that the applicant has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is.”

45. *We applied this guidance in reaching our findings on the exclusion issue, bearing in mind also that the burden in that regard falls on the respondent.*
27. We have added our own emphases in the above to draw attention to the factors we consider specifically pertinent in this case. As indicated in **AS**, key requirements of Article 7(1) include that the appellant’s act must have been committed “as part of a widespread or systematic attack directed against any civilian population and the appellant must have had “a knowledge of that attack”.
28. The appellant accepts that he worked for the LTTE between January 2004 and June 2007. That he accepts that is confirmed at AIR 2 question 112. The exclusion report at pages 7 to 18 identifies the evidence which supports the assertions and identifies the methods employed by the LTTE that led to its emergence as an effective insurgent force.
29. The evidence of Dr Chris Smith dated 11th May 2008, an expert on Sri Lanka, was cited in the country background material. Dr Smith stated that the LTTE continued to engage in human rights abuses. He has, himself, specifically cited the report of the United Nations Economic and Social Council Commission on Human Rights dated 27th March 2006 which identifies that the LTTE identified those Tamils opposed to them as traitors and their opponents, and often murdered to enforce obedience within the Tamil population.
30. Further reports, such as the Information Bulletin Number 47 of 17th April 2009 University Teachers for Human Rights Jaffna monitored the situation in Sri Lanka following the 2002 ceasefire during the time of the appellant’s involvement with the LTTE and evidenced that the LTTE continued to commit international crimes on a widespread and systematic basis, and noted for example that the

“LTTE has no excuse for killing of any civilians”

As noted by one human rights group

“the LTTE went on targeting their perceived opponents and increased forcible child recruitment amidst the ceremony of peace talks ... The peace process became meaningless without any mechanism in place to restrain the LTTE or the government from human rights abuses targeted killings and all like rhetoric.”

31. Jane's Intelligence Review 1st March 2006 states that by January 2006 there had been a total of 3,500 ceasefire violations committed by the LTTE.

32. Finally, the University Teachers for Human Rights Bulletin 38 dated 21st July 2005 recorded that

“the LTTE were holding hundreds of civilians for suspected political dissent within a large bunker prisons in Vanni and Batticoloa and indeed the UN Special Rapporteur on judicial executions reported in 2005 that the ‘LTTE’s classification of its political opponents within the Tamil community as traitors and its efforts to enforce obedience with killings constituted fundamental violation of human rights ... the government and the LTTE had both engaged in the targeted killing of individuals suspected of collaborating the other party .. the LTTE has stepped up its indiscriminate attacks on civilians for the apparent purpose of terrorising the population”

and in a special reference to Jaffna, which is the locality of the appellant, the Special Rapporteur noted

“the LTTE also commits extrajudicial executions against suspected informants and that “there are no exact statistics on the number of extrajudicial executions in Jaffna. In part, this is because enforced disappearances are common and while many of the disappeared are ultimately executed many others are not.”

33. During 2007 and 2008 the International Crisis Group reported that the LTTE had systematically violated civil and political rights and were responsible for killings in Jaffna and other areas of northern Sri Lanka and described the LTTE as a ruthless terrorist organisation.

34. In the light of the above, we accept that during the period of the appellant's claimed involvement with the LTTE its actions fall to be characterised as a widespread and systematic attack directed at a civilian population.

The Appellant's Knowledge of the Widespread of Systematic Attacks

35. For the appellant's actions to be characterised as war crimes or crimes against humanity Article 7(1) of the ICC Statute requires serious grounds to consider that he committed them “with knowledge” of the “widespread or system attack directed against any civilian population” for example the Tamil population. In his first interview at question 40 the appellant was asked about this role in the LTTE, and he stated

“I was working with the political wing that was gathering information about people who passed information to the army or to either paramilitary group. Arranging places for LTTE members to stay when they visit, arranging food supplies for them and gathering intelligence information”.

He stated, when asked if he was high up in the LTTE structure, “you can’t say that I was an ordinary member but I was considered to be important”. When asked what kind of information he gathered he said “information is about people who have connections with the army, location of army camps, movements of the army like when they are coming or going into Tamil area” (question 54) and he was asked

“What happened to the people you gave information about”

and he responded

“They were given warning by the LTTE not to work with the army or the paramilitary. If they continued to do without heeding the warning they were taken by LTTE to the LTTE controlled areas.”

When asked

“What happened to them there.”

He responded

“They were imprisoned there. What else happened to them I don’t know.”

What else do you suspect may have happened to them?

“Depending on the crimes they committed they may have been punished.”

Question 58: What sort of crimes do you refer to?

He answered

“If they identified any LTTE supporters or sympathisers which resulted in those people being killed by the army then they may face severe punishment.

36. The appellant then went on to attempt to qualify that by stating that they would be given work to do in the LTTE area and then released afterwards but we do not accept that that would be classified as severe punishment.
37. It is inconceivable that the appellant would not know of the widespread or systematic attacks that took place in relation to those on whom he informed if he classified himself as important. Not only did he state that he was important within the LTTE organisation, he also stated that he had undergone fourteen days training as a fighter. He worked for the LTTE for a considerable amount of time, that is between 2004 and 2007 and appeared to have engaged voluntarily with them. Specifically the appellant gave evidence himself of the fact that he would inform on people and that they would be removed to other areas. He was able to state when the ceasefire broke down in Sri Lanka, which was in August 2006. He was also able to give detailed information about the movements of the army (AIR 2 question 38).

38. At question 41 AIR 2 he stated that he was not engaged in identifying informers but when asked “why did you say in your first interview that part of your role was to identify informers”

he responded,

“So my role was to pass the information which was given by my friend to the LTTE beyond that I don’t know who the informer is, that’s what I had mentioned in my first interview. The information is given to you by your friend, you have to pass it to the LTTE, I had even helped in giving them their parties and collecting their money, that is my main role”

and in response to question 44, he said

“If my colleague or friend gives me certain names then I will pass the names on to the LTTE that my job finishes.”

39. In response to question 44 “during the ceasefire period I travelled to Killinochi very frequently so I passed the information to them that I had collected in Jaffna”.
40. He, therefore, confirmed at question 44 that he was aware that information was going from the informers to the LTTE.
41. When asked at question 53 AIR 2 what punishments would informers get, he said

“As far as I know they would be taken to Killinochi and subject to an enquiry some of them given a first time warning, **sometimes they may imprison them.** After that process I am not aware.”

42. During this period the LTTE had no right to arrest or detain people in the Jaffna area and transfer them from territory under the control of the Sri Lankan government to areas under the LTTE control or to administer punishment or detention particularly people he believed had informed against them. That people were subject to forcible transfer and/ or imprisonment, which the appellant knew about is considered a war crime under Article 7(1) of the ICC Statute.
43. We turn to the factors to be considered when addressing criminal complicity as set out in **JS (Sri Lanka)**. As **JS** paragraph 36 states
- “Put simply I would hold an accused disqualified under Article 1F(a) if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation’s ability to pursue its purpose of committing war crimes of where that his assistance will in fact further that purpose.”
44. The key question is whether the appellant made a significant contribution to an organisation’s ability to pursue its purpose of committing war crimes or other crimes contrary to Article 1F(a).

45. The relevant various considerations include:
- (1) the nature and size of the organisation;
 - (2) whether and by whom the organisation was proscribed;
 - (3) how the asylum seeker was recruited;
 - (4) the length of time spent in the organisation;
 - (5) his position, rank, standing and influence in the organisation;
 - (6) his knowledge of the organisation's war crimes activities; and
 - (7) his own personal involvement and role in the organisation particularly whatever contribution he made to the commission of war crimes.
46. The appellant worked voluntarily for the LTTE between 2004 and 2007. The activities of the LTTE have been cited above. As can be identified from the information above, the asylum interviews, specifically the second interview, and his oral evidence the appellant's position, rank and standing and the influence in the organisation were such that he stated he was important. He was in a position to hand over information leading to a person's forcible removal, detention and punishment. This he accepts he knew as indicated in Article 30 of the ICC Statute. It is plain that if a person is aware that in the ordinary course of events a particular consequence will follow from his actions he is taken to have acted both with knowledge and intent.
47. It is quite clear from the responses given by the appellant in either of his asylum interviews that he was voluntarily contributing to the LTTE's ability to pursue its purpose of war crimes as it extended a regime of fear and intimidation particularly of removing and detaining those it considered to be informants or those assisting with the army.
48. As seen from Article 7(1) of the ICC Statute, the deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, and violation of the fundamental rules of international law, are defined as crimes against humanity. It is on the appellant's own evidence that he contributed to that by passing on messages as to the identity of those informants which led and here is the nexus to their transfer, detention or punishment.
49. Individual criminal responsibility extends to lesser participants; see **SK [2010] UKUT 327** and although **KJ (Sri Lanka)** made clear a foot soldier would be excluded, the key test is as set out in **JS**. To that end the appellant has accepted his own personal involvement and role in the organisation and accepted that he made a contribution towards the apprehension and detention and removal of people from Jaffna.

50. With regard to aiding and abetting the question is whether a given act constitutes substantial assistance to a crime. This requires a fact based enquiry. Practical assistance can be given before or after the act. In international criminal law aiding means knowingly giving assistance to someone. Passing the names to higher authorities in the knowledge that those persons would be punished must fall into this category. Had he not passed on the name the information relay and connection would be broken such that a person would not be identified.
51. In our view the appellant's work passing on information regarding suspects between 2004 and 2007 made a significant contribution to the detention and punishment of such persons and he knew this to be so. Reference is made to the credibility of the appellant and we have noted carefully his oral evidence as given to the First-tier Tribunal.
52. We can accept that simply being a member of the LTTE is not sufficient, but there is a significant difference between just being a member, and, passing information up a chain such that civilians will be identified. Reliance on the defence of superior orders was specifically abandoned at the hearing before the First-tier Tribunal, and although the appellant in oral evidence stated that he passed information mainly about the army and the movements of the army it was quite clear, on his own evidence, that this was not all that he did. Although he stated in oral evidence he did not know what others would decide in respect of the individuals his instruction was to pass the information on. He agreed that he had stated to the Home Office that he was aware if the people had been warned before they were likely to be punished but claimed that at the time he was not actually aware that they would be. That is entirely inconsistent with his asylum interviews as identified above. It is no explanation to say that the LTTE were involved in peace talks that they would not be able to punish individuals and that they did not do so during the ceasefire. Indeed, that is not consistent with the evidence either his own or the background evidence.
53. He maintains that he was confused during the interview with the Home Office and that is why he changed his role to communications officer from intelligence officer but he confirmed that he was in good health during the interview. Whatever the name of the role and whether he was intelligence officer or communications officer is irrelevant, as he identified what he had actually undertaken as described above. Indeed, as recorded in the oral evidence at paragraph 52 of the First-tier Tribunal Judge's decision

"He stated he continued to help by gathering information for the LTTE. He stated the information included about people who had connections to the army. He explained that the people were given warnings and if they did not heed the warning they were taken to the LTT controlled areas and imprisoned there. He stated that he did not know what else happened to them. He stated though that he suspected they may have been punished some severely."

54. In respect of Article 1F(a) it is clear that the subject gathered information and transmitted intelligence on informers according to his first interview or transmitted intelligence on informers to the LTTE according to the second interview. He did this in the knowledge of what would happen to them. This gives serious reasons for considering that the subject was part of a joint criminal enterprise to commit the war crimes and/or crimes against humanity as identified above. The other members of this joint criminal enterprise included the LTTE personnel who gathered intelligence and informers, the LTTE personnel who detained informers and then the senior LTTE officers to whom the subject transmitted intelligence reports.
55. The question of the credibility of the appellant was raised but bearing in mind the information that the appellant was able to give, and that he has voluntarily and willingly described his role in the LTTE and produced a credible account of serving with the LTTE, we find that his first interview reflects more accurately as to his knowledge of and involvement in LTTE activities. The second interview is an attempt to distance himself from those crimes. This is an intelligent appellant who confirmed that he studied at the University of Jaffna in 2002 and then became involved in politics and, in 2005 in demonstrations. Following that in 2005 he engaged in military training for the LTTE albeit for only 14 days. On completion of his training he returned to university in Jaffna.
56. We note that in joint criminal enterprise the participant's mental state can amount to recklessness and even negligence but, in this instance, because the appellant volunteered in his interviews and oral evidence (see the oral evidence recorded by the First-tier Tribunal decision paragraph 52 and recited above) that he knowingly engaged in the execution of a common criminal purpose. The gravity of such participation is no less than that of carrying out the act in question. He continued with his work after the ceasefire ended in August 2006. He stated that he worked in the Jaffna area until 2007 and left Sri Lanka in 2008.
57. We thus conclude that he knew what he was doing and knew the consequences. We find that the evidence as we have set it out is not consistent with a finding that he embellished his role. The exclusion report toys with the possibility that he was not credible but in view of the extensive evidence he has given both in his role in the LTTE, the time spent, the training given and the work he did we find that he was credible and consistent with regards his actual work.
58. There are indeed "serious grounds for considering that the appellant has voluntarily contributed in a significant way to the organisation's ability to pursue its purpose for committing war crimes, aware that his assistance will in fact further that purpose".
59. With regard to Article 1F(b) the appellant stated that whilst serving under cover in a communications role for the LTTE in Jaffna in 2004 to 2007 he transmitted messages from fellow LTTE members to his LTTE superior officers in the Vanni region requesting the supply of weapons; and that as a result of these requests weapons were sent from the LTTE controlled

territory into government controlled territory. The appellant claims that he was not aware of how any of the weapons whose transfer he facilitated were used once they reached Jaffna. As set out in the Exclusion Report the importation, possession and transfer of weapons in Sri Lanka was regulated under the Sri Lankan Firearms Ordinance No. 33 of 1916. The appellant confirmed that he was operating undercover, and communicated in code, and arranged the procurement of weapons on behalf of the terrorist organisation. That in turn gives serious reasons for considering that the weapons in question were illegally imported or that those who requested the supply of weapons did not hold the requisite documentation to own or transfer weapons. It was accepted the appellant had not personally handled the weapons but he sent coded messages requesting arms and ammunitions. He thus made a significant contribution to the process by which the LTTE members in the Jaffna area were able to acquire arms and ammunition. In both of his asylum interviews he referred to his passing of secret messages for the movement of weapons (AIR 1 Qs 119 and AIR 2 Q72). Although he did not handle the weapons those weapons included claymore mines. This gives serious reasons for considering that the appellant committed serious non-political crimes, that is the movement of unauthorised weaponry and as such fell to be excluded from the protection of the Refugee Convention under Article 1F(b).

60. The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007.
61. We therefore allow the appeal of the Secretary of State and dismiss the appellant's appeal against the revocation of his refugee status.

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

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

Signed

Date **27th July 2016**

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed

Date **27th July 2016**

Upper Tribunal Judge Rimington