Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07037/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th March 2018	**On 6th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

BAKF
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Jones, instructed by A & P Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. I set aside the decision of the First-tier Tribunal in a decision dated 5th February 2018 following an error of law hearing in the Upper Tribunal. That decision is appended hereto.

The hearing in the Upper Tribunal

2. There were a number of findings of fact preserved. These were highlighted by Ms Jones in her skeleton argument prepared for the resumed hearing. The issues left in

dispute were those identified at (i) and (ii) at paragraph 6 of the skeleton argument and relate to the background to the Appellant's arrest in Sri Lanka in December 2007. The other issues in dispute were those identified at (vi) and (vii) of paragraph 6 of the skeleton argument which relate to the detention of the Appellant's younger brother and evidence about ongoing interest in the Appellant since his departure from Sri Lanka.

3. In remaking the decision in this appeal I had the following documents before me:

- The Respondent's First-tier Tribunal bundle.
- Appellant's First-tier Tribunal bundle.
- Appellant's supplementary bundle.
- Appellant's chronology.
- Appellant's Upper Tribunal Skeleton argument.

4. I heard oral evidence from the Appellant through an interpreter having ensured that the Appellant and the interpreter understood each other. I heard submissions from Mr Clarke and Ms Jones and I reserved my decision.

5. In oral evidence the Appellant adopted his two witness statements of 22nd August 2017 and 5th March 2018. He drew attention to a Human Rights Watch report which was exhibited to his witness statement highlighting that one of the case studies reported therein was a Sinhalese person who had been arrested by the authorities. He was asked in examination-in-chief why in his asylum interview at question 86 he referred only to one visit by the authorities to his family home in December 2016 and he said that he answered the question as he understood it. He understood that he was being asked about recent visits by the authorities and that is why he only mentioned the most recent visit.

6. In cross-examination the Appellant was asked a number of questions about the application said to have been made in 2010. He was asked questions about the two men he had said stayed at his father's house in 2007.

My Findings

Asylum

7. The First-tier Tribunal Judge made a number of findings of fact which were not challenged and have been preserved. It has been accepted that the Appellant was detained on 24th December 2007 and was released by way of a bribe on 21st January 2008. It was accepted that he had been ill-treated in detention. The Appellant remained in Sri Lanka until June or July 2008 when he came to the UK on his own passport. The Appellant claimed asylum on 4th January 2017.

8. One of the issues in dispute before me is around the reasons for the Appellant's arrest and detention in 2007. In oral evidence the Appellant said that the two men were staying in his father's house. In the asylum interview at question 99 the Appellant said that he was arrested because the authorities thought that he was involved and he helped them providing accommodation and being friendly with these two men.

9. The Appellant said in his asylum interview that two friends of his brothers stayed in the Appellant's family home and that the Appellant and his brother were arrested. The Appellant said that when he returned to Sri Lanka from Russia these two friends were staying in his room in the Appellant's family home. He said that these two men left in October 2007 and that in December 2007 the authorities came and arrested the Appellant and his brother for questioning. The Appellant said (question 34) that when he was arrested he was shown photographs and asked if he could identify any people. These included the two men who had stayed in the family home. This had arisen because the two men who had stayed in the house were said by the authorities to have been involved in an attack on an air force camp and that they both died in that attack. In his asylum interview the Appellant said that he did not know why his father had not been arrested but said that it was because his father was elderly (question 41).

10. Mr Clarke submitted that there was a conflict between what the Appellant said in his asylum interview and what he said in oral evidence. However, I accept the Appellant's account that he was arrested because these two men had stayed in their house and because the Appellant had been friendly with them. I do not accept the fact that the Appellant's father was not arrested to cast any significant doubt on the Appellant's account as to why he was arrested. In the context of the judge's unchallenged findings that the Appellant was arrested and tortured as claimed, I accept the reasons given by the Appellant for being arrested in these circumstances.

11. In considering the issue of risk on return I have considered Section 8 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. The Appellant entered the UK in June or July 2008 and did not claim asylum until 4th January 2017. There was therefore a very significant delay in claiming asylum.

12. The Appellant claimed that two weeks after he arrived in the UK his brother disappeared being re-detained by the authorities. It appears that the Appellant's leave to enter the UK expired at some time in 2010. The Appellant claimed that an application for further leave to remain was made on his behalf in 2010. At the hearing Mr Clarke submitted a Home Office document entitled 'Notice of Immigration Decision Notice of Removal' in relation to the Appellant dated 23rd March 2016 which states that the Appellant was a person with no leave to enter or remain in the UK and that a decision had been made to curtail/revoke his leave so that it expired with immediate effect. The reasons given for that decision were that the Appellant had no legal basis in the UK and failed to regularise his stay or leave in the UK committing offence under Section 24(1)(b)(i) of the Immigration Act 1971. The Notice states that the Appellant arrived in the UK on 28th April 2005 with a

general family visit visa dated until 28th October 2005. At the hearing it was clarified that this related to a previous visit to the UK. The notice goes on to state that on 16th June 2010 the Appellant made an application for leave outside of the Immigration Rules which was refused on 22nd June 2010. The notice stated that the Appellant had made no attempt to regularise his stay since his application for leave to remain on 22nd June 2010 and that he had no outstanding applications or appeals.

13. In his supplementary bundle the Appellant submitted a letter from his previous representative and a letter from the Home Office dated 4th November 2010 in relation to an application for a certificate of approval for marriage for the Appellant and his wife. Both letters are dated 4th November 2010. The Appellant said in oral evidence that he had not received any correspondence in 2010 in relation to his 2010 application. He said in oral evidence that he believed that the application made in 2010 was outstanding and pending with no decision and that he was not informed of anything at all during the period from 2010 until 2016. He said that he chased up the application by enquiring with his solicitor who acted for him until 2016. He said that when he enquired about the 2010 application his solicitor told him to wait patiently and said that his passport and other documents were still with the Home Office and they were in the process of considering it. He said that this went on for six years. He said that he paid his solicitors for this work. He said that when he saw his solicitor in 2010 he told him about his fear in Sri Lanka but he did not claim asylum because the solicitor told him that if he was sent home that nothing could be done about it. He said that his previous solicitor told him not to claim asylum as he would be sent back to Sri Lanka. The solicitor told him that the alternative application which was being made would take some time and would succeed and the Appellant would not be caused any problems during the period whilst waiting for the decision. He said that he used to go to the solicitor's office and spoke to him every two months or so and each time he was told to wait and be patient as the application was being processed. He was asked whether he had made any complaint about the solicitor since he instructed his new solicitors. He said that he had told them but he did not know whether any complaint had been made.

14. There are significant discrepancies between this oral evidence and what the Appellant said in the asylum interview on 14th June 2017.

15. At question 98 the Appellant was asked why he did not claim asylum upon arrival in the UK. He said that he saw a solicitor when he arrived and as he had a visa for two years he was frightened but he thought that when his brother was released that he could go back to Sri Lanka within the two years time. He was asked at question 103 why he did not claim asylum when his leave to remain in the UK expired but he answered that it had not expired because he had applied for "FLRO". He claims that the response to the FLRO came "last year". At question 106 the Appellant was asked why he could not remember where his solicitor was based if it was only last year when he was dealing with them and the Appellant said, "I applied for FLRO in 2010 and I did not go to the office but I think it is in Uxbridge. If I go to see him I need to pay the fees. I haven't got the fees". In my view this is clearly a conflict with the Appellant's oral evidence that he went to see his solicitor every two months between

2010 and 2016. There is also conflict between the Appellant's oral evidence when he said that he did not owe his solicitor any fees. This conflict goes to the core of the Appellant's claimed reason for not claiming asylum between 2010 and 2016 and his claim that he believed that his application was pending with the Home Office for six years. It may well be that he failed to contact his former solicitor during those years. There is no evidence from the previous solicitors to corroborate the Appellant's claim that he was not aware of the refusal in 2010 until 2016.

16. The Appellant is seeking to rely on alleged poor advice from his previous solicitor yet there is no evidence that any complaint was made about the solicitor or that the solicitor was given any opportunity to address the complaints made about him. This is particularly relevant in light of the decision in **BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311** where the guidance is summarised in the head note as follows:

> "If an appeal is based in whole or in part on allegations about the conduct of former representatives, there must be evidence that those allegations have been put to the former representative, and the Tribunal must be shown either the response or correspondence indicating that there has been no response."

17. In the absence of any evidence that these have been put to the former solicitors I cannot attach weight to these allegations.

18. A further issue which arises from the correspondence in the supplementary Appellant's bundle is the contents of a letter from the Appellant's previous solicitors dated 12th April 2016 which refers to the notice of removal of March 2016 referred to above. The section 120 notice gives a number of reasons for the Appellant's inability to return to Sri Lanka including the fact that the Appellant's wife was said to be a Sri Lankan Sinhalese national and his wife is a failed asylum seeker whose fear of persecution remains undiminished and that he fears for his life and liberty on the basis of his imputed political opinion as the husband of one who fears persecution for a Convention reason. There is no mention of the Appellant's own claimed fears of return to Sri Lanka. When I asked him about this in oral evidence the Appellant said that the solicitor told him that he was writing a reply to what the Home Office had sent him and that when he received feedback he would take the next step. However this response does not make sense in the context of a section 120 notice.

19. The Appellant has not established that he did not receive the decision of 2010 as claimed. He failed to claim asylum in 2010 and has provided no evidence that his allegations that he received poor advice were put to his former solicitors. Further, he has given an inadequate explanation as to why he failed to claim asylum in 2016 when he says that he was aware of the refusal of his application. He has failed to put claims of negligence or the failure to give proper advice to his previous solicitors and has not pursued any complaint against them.

20. In these circumstances I find that the Appellant's failure to claim asylum on arrival, in 2010, or in 2016 when he claims that he knew that his application had been refused, significantly damages his credibility. He has not provided any reasonable

explanation for his failure to do so. The Appellant has already been found credible in relation to his description of events in Sri Lanka. However, in my view the Appellant's failure to claim asylum damages the credibility of his claim that he is at ongoing risk upon return to Sri Lanka.

21. A further issue in dispute is around visits to his father by the authorities. In his asylum interview at question 86 the Appellant was asked why he felt the authorities would still be interested in him if he returned. He answered, "last December 2016, there was a visit from CID to my house, they searched the home". The Appellant went on to say that the authorities had called because the Appellant's father was looking for his brother and they told him not to tell people that his son was missing and they said that if his father looked for the brother they would look for him as well. He said that they were searching the house to see if there was any involvement with the Appellant and his family and find out where the Appellant was living [Q. 91]. He was again asked why the authorities would be still interested in him and he said that they threatened that if he did not stop looking for his brother they would find the Appellant. In oral evidence the Appellant said that by 2010 the authorities had visited his father "many times". In cross-examination the Appellant was asked why he said in his asylum interview at question 86 that the authorities had come in December 2016 and he said that he was answering the question he had been asked and he understood that it referred to the most recent visit and that is why he referred to the most recent visit. However in the series of questions from Q86-92 about the authorities visits the Appellant failed to mention more than one visit and he did not give any explanation for that failure.

22. I note that in his first witness statement at paragraphs 23 and 24 the Appellant said that he spoke to his father two weeks after he arrived in the UK and he said that the authorities had called to look for the Appellant and that they took his younger brother and at paragraph 24 he said that the Sri Lankan authorities had been going to his parents' house continually from the time of his escape from detention.

23. The Appellant's father made two witness statements. In his first witness statement dated 18th August 2017 he said that the authorities were continuously visiting his family home after the Appellant escaped from detention and that they took the younger son when they were unable to find the Appellant. He said that the Sri Lankan authorities came to their home more than 50 times during the ten year period and the last time they had come was 22nd June 2017. In his witness statement dated 28th February 2018 he said that the authorities continued to come to the family home and the last time they visited was on 11th February 2018.

24. I find that there is a very significant discrepancy between the Appellant's answers in his asylum interview and in the witness statements and oral evidence given subsequently. In the context of all of the questions asked I do not accept the Appellant's explanation that he was only being asked about recent visits. I find that the Appellant's evidence since the asylum interview has been embellished. His credibility in relation to this issue has been seriously undermined.

25. In oral evidence the appellant said that he had never supported the LTTE or Tamil separatists and that he had never been involved in any anti-Sri Lanka Government activities in the UK. He confirmed that he was not aware of having been the subject of any arrest warrant in Sri Lanka and had not been charged with any offences. When asked by Mr Clarke why he had not instructed a legal adviser in Sri Lanka to deal with the issues with the authorities there he gave no explanation saying that he watches and reads the news from here.

26. The relevant country guidance is that set out in **GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)**. The guidance is summarised in the head note as follows:

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

authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.
(d) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.

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

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

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

27. In **MP & NT v SSHD [2014] EWCA Civ 829** Underhill LJ said at paragraph 50:

"…I would, however, like to emphasise one point. The clear message of the Upper Tribunal's guidance is that a record of past LTTE activism does not as such constitute a risk factor for Tamils returning to Sri Lanka, because the Government's concern is now only with current or future threats to the integrity of Sri Lanka as a unitary state; and that that is so even if the returnee's past links with the LTTE were of the kind characterised by UNHCR as "more elaborate". I respectfully agree with the Vice-President that that is a conclusion which it was entitled to reach. It is also clear that the Tribunal believed that "diaspora activism", actual or perceived, is the principal basis on which the Government of Sri Lanka is likely to treat returning Tamils as posing a current or future threat; and I agree that that too was a conclusion which it was entitled to reach. But I do not read para. 356 (7) (a) of its determination as prescribing that diaspora activism is the only basis on which a returning Tamil might be regarded as posing such a threat and thus of being at risk on return. Even apart from cases falling under heads (b)-(d) in para. 356 (7), there may, though untypically, be other cases (of which NT may be an example) where the evidence shows particular grounds for concluding that the Government might regard the applicant as posing a current threat to the integrity of Sri Lanka as a single state even in the absence of evidence that he or she has been involved in diaspora activism."

28. On the preserved findings and my additional findings in relation to the background in Sri Lanka the appellant was detained on 24th December 2007 because of two young Tamils who had been staying in the family home. He was tortured in detention. He was released following the payment of a bribe on 21st January 2008. This past persecution is relevant, however in determining whether the Appellant is at risk on return I must consider the Appellant's account of past persecution and ongoing interest in light of the background and risk factors identified in **GJ**.

29. Ms Jones submitted that at paragraph 50 of **MP** Underhill LJ highlighted that there may be other cases which could be allowed. She submitted that the Appellant comes within the UNHCR guidelines referred to in **MP** and that the Appellant comes within 7 (iv) or (vi) of those guidelines. However in my view the Appellant was perceived to have been associated with two young Tamil men in 2007 he accepts that he is not a Tamil and has had no links with the LTTE or Tamil separatist groups and has been involved in no activity in the UK. I do not accept that his past perceived association could conceivably seen as a tamil activist within the guidelines set out in **GJ**.

30. There are fundamental conflicts between the Appellant's account in his asylum interview and since then as to claimed ongoing visits to his father's house by the authorities. This conflict undermines the credibility of his account in relation to this matter. Significantly the Appellant did not claim asylum for 9 years in the UK. I have not accepted the explanations he has given for this failure and this too fundamentally undermines his claim. Further, even in 2016 when his then representatives raised asylum issues these were only raised in the context of his wife's claimed fear in Sri Lanka. This too undermines the Appellant's claim to have been in fear of return to Sri Lanka. Significantly too, there are no arrest warrants or charges against the Appellant and he does not support the LTTE or Sri Lanka separatists and has not been involved in any diaspora activities. In these circumstances he does not come with any of the risk factors in **GJ**.

31. Taking all of the evidence into account I find that the Appellant has not demonstrated that he has a well-founded fear of persecution in Sri Lanka for a Convention reason.

Humanitarian Protection

32. I find that, for the reasons above, the Appellant has not established that he would face a real risk of suffering serious harm in Sri Lanka.

Articles 2 & 3

33. In light of my findings above I am not satisfied that if he returns to China the Appellant may be subjected to torture, inhuman or degrading treatment or punishment or face death in breach of Articles 2 or 3 of the ECHR.

Private and Family life

Article 8

34. At the hearing Ms Jones relied on the skeleton argument in relation to the Appellant's private and family life. It is claimed that he has a wife and daughter aged 6. However there was no oral evidence from the Appellant as to his private and family life. I had no witness statement or oral evidence from the Appellant's wife. There was no evidence as to her immigration status. Although the marriage certificate and the daughter's birth certificate were produced in the Appellant's First-tier Tribunal bundle there was little evidence before me as to the nature and extent of the family life enjoyed by the Appellant. In the absence of adequate evidence I am unable to find that the Appellant has established that there will be a disproportionate interference with his private or family life in the UK.

Notice of Decision

The appeal is dismissed on humanitarian protection and human rights grounds.

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 their 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: 30th March 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

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

Signed Date: 30th March 2018

Deputy Upper Tribunal Judge Grimes

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07037/2017

THE IMMIGRATION ACTS

Heard at Field House
On 16th January 2018

Decision & Reasons Promulgated

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Before

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Between

BAKF
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Jones, Counsel, instructed by A & P Solicitors
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

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

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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.

1. The Appellant, a citizen of Sri Lanka, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 5th July 2017 to refuse his application for asylum. First-tier Tribunal Judge Cameron dismissed his appeal in a decision promulgated on 8th September 2017. The Appellant appeals to this Tribunal with permission granted by First-tier Tribunal Judge Pickup on 21st November 2017.

2. The Appellant claims that he is a Sri Lankan national of Sinhalese origin. He claims that two of his brother's friends who were Tamils were living in their family home and that in December 2007 he and his brother were taken by the CID and detained for a period of three weeks during which time he was questioned about the two men. He claims that he has two younger brothers. He says that the brother next to him lives in Russia with his Russian wife and that the youngest brother is the one who was arrested with him. He claims that he was released upon payment of a bribe and taken to his maternal uncle's house and that his youngest brother was released three weeks later and came to their uncle's house as well. The Appellant claims that he left Sri Lanka on a student visa. He entered the UK on foot of that visa in June or July in 2008. He claimed asylum on 4th January 2017.

3. The First-tier Tribunal Judge considered the witness statement and the oral evidence of the Appellant along with the witness statement from his father and medical evidence from Dr Izquierdo-Martin. The judge concluded at paragraph 69:

> "69. The Appellant's evidence in relation to his detention in 2007 has on the whole been consistent. He has provided medical evidence confirming that he has a number of scars on his body which support his statement that he was ill-treated during his detention. The medical report provided by Dr Izquierdo-Martin deals with the relevant scars which are stated to be either consistent or typical within the Istanbul Protocol. I do place particular weight on the burn scars the Appellant has which are consistent with the independent evidence available in relation to the type of torture used by the Sri Lankan authorities and which Dr Izquierdo-Martin finds to be typical of unwilling and deliberately caused injuries.
>
> 70. I have had an opportunity to hear oral evidence from the Appellant and to consider all of the other evidence available. I am satisfied to the lower standard of proof that the Appellant was detained in 2007 and was subjected to ill-treatment. The Appellant's evidence as to the extent of that ill-treatment is consistent and is supported by the medical evidence now provided."

The judge went on to accept that the Appellant was released on the payment of a bribe. These findings have not been challenged.

4. The judge considered whether the Appellant would be at risk on return to Sri Lanka at this time. The judge took into account the delay in the Appellant's claiming asylum and did not accept the Appellant's claim that he was unaware of the possibility of making an asylum claim, particularly in the context of the fact that his wife was pursuing an application for asylum. The judge concluded at paragraph 74 that, whatever the Appellant's knowledge of his wife's actual claim, he was clearly aware by August 2010 that an application for asylum could be made. The judge did not accept the Appellant's statement that he believed things would improve.

5. The challenge to this decision centres around the judge's findings in relation to a witness statement provided from the Appellant's father, who is in Sri Lanka. That statement is dated 18th August 2017. The statement says at paragraph 2:

> "[The Appellant] is my first son. I read back my son's statement dated 18th August 2017 and hereby confirm that the contents are true and accurate in respect of my son's problem in Sri Lanka. My third son is still missing and we have no clue of his whereabouts. He was arrested by CID after one week of my first son, [the Appellant], left the country. Sri Lankan authorities continuously visiting home after my son escaped from detention. When they came after my son left the country I told them that [the Appellant] went to the UK they got angry and took my second son. We are keeping quiet as we were threatened not to make any statement or publicity of his disappearance in the media or anywhere and if we fail to listen to them we would face the consequences."

6. The judge notes at paragraph 76 that there is some confusion within the letter from the father where he states that his third son is still missing and his third son was arrested one week after his first son left the country but goes on to state that this was in fact his second son. The judge noted that there was a conflict between that and the Appellant's own evidence in his witness statement which indicates that the brother next to him settled in Russia and that his youngest brother is missing. The judge said at paragraph 76: "It is not clear therefore if his brother who was arrested with him has also been released and gone to Russia." The judge returns to this issue at paragraph 85, saying that there are concerns with the father's statement and saying:

> "He refers to his third son being missing and having been arrested one week after the Appellant left for the UK. There may well be a typing error with regard to the statement then referring to that son as the second son but I do have some concerns given that the Appellant's own evidence as indicated above in his witness statement is that one of his brothers is now in Russia."

7. At paragraph 89 the judge says that, given the inconsistencies in the evidence as to when the authorities sought the Appellant after his release on a bribe, he was not satisfied "that the evidence given by the Appellant or his father can be relied upon to indicate that his younger brother was in fact taken by the authorities or that in fact the authorities have sought the Appellant subsequent to his release on the payment of a bribe".

8. Apart from the delay in claiming asylum the other main point taken against the Appellant in the assessment of credibility is at paragraph 87 where the judge said that the Appellant's father also indicated within his witness statement that the authorities told him to keep quiet and not make any statement or publicity in relation to the disappearance of his son, whereas at question 88 in the interview the Appellant said that the CID had come to the house because his father was looking for his brother and they told his father not to go on telling people that his son is missing and if he continued to look for his brother they would also look for the Appellant. At paragraph 88 the judge said that this does not "make sense" with the Appellant's father's evidence, which gives no indication that he was looking for his son.

9. It is clear from reading these paragraphs that there are three main reasons for the judge finding that he did not accept the Appellant's account of ongoing interest by the Sri Lankan authorities were the delay in the claim for asylum, the confusion within the father's witness statement, and the apparent discrepancy between the Appellant's evidence and that of his father as to whether the father was looking for the brother who had disappeared [paragraphs 87 to 90].

10. It is contended in the Grounds of Appeal that the judge made a material error of fact in that the judge mistakenly concluded from the father's witness statement that the second son (the son who, according to the Appellant, is settled in Russia) is also missing whereas the reference in the witness statement to the second son was, it was submitted, a typographical mistake and is consistent with the Appellant's father's adoption of the Appellant's own statement. It is contended that, apart from the mistaken reference in the father's statement to "second son", all of the evidence makes clear that the Appellant's second brother is in Russia, that it was his youngest brother (the third son) who was arrested with the Appellant and, again, who is missing after being taken by the authorities after the Appellant came to the UK. It is contended that this error or misunderstanding was highly material to the issue as to whether the Appellant is at risk on return today such that the judge's assessment of risk on return was fundamentally flawed.

11. It is further contended that the First-tier Tribunal Judge erred in his assessment of risk on return to Sri Lanka in light of the fact that the Appellant is Sinhalese and could be viewed with significant suspicion upon return.

The hearing

12. At the hearing Ms Jones submitted that it is clear from all of the evidence that the Appellant has two younger brothers, the one next to him is in Russia and, apart from a mention at the beginning of the witness statement as to his whereabouts in Russia, that brother was not mentioned again in the Appellant's case. The Appellant's case is that his youngest brother was arrested and detained with him and was released after him. That brother, it is claimed, was detained after the Appellant left Sri Lanka. Ms Jones submitted that the Appellant was not asked any questions in cross-examination or by the judge about the father's letter and she submitted that no-one asked the Appellant about any confusion about which brother had been detained.

She referred to the judge's decision where the Appellant's oral evidence had been recorded and in particular highlighted paragraphs 64, 65, 66, 67 and 68, leading to the findings at paragraph 69 and further oral evidence recorded at paragraphs 73 and 74. She pointed out that none of these paragraphs refer to any issue about the father's witness statement. In her submission the claimed confusion was not put to the Appellant. She therefore submitted that this was procedurally unfair.

13. Ms Jones referred to the other apparent conflict in the evidence highlighted by the judge which she submitted was not in fact a conflict. She submitted that at paragraph 90 the judge referred to the Appellant's father making no mention of the authorities looking for the Appellant's other brother and submitted that the reference to the other brother being in Russia highlights that the judge misunderstood the evidence. It is submitted that the judge got the two brothers confused and that this led to confusion in the judge's findings. She submitted that the issue of the raised profile as a result of the Sinhalese ethnicity meant that it was incumbent on the judge to consider the risk categories set out in the country guidance case of **GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)**. She submitted that at paragraphs 87 and 88 the judge again referred to a discrepancy about whether the Appellant's father was looking for his brother whereas in fact there was no discrepancy there.

14. Ms Fijiwala submitted that the grounds seek to reargue what was before the judge. She submitted that at paragraph 33 the judge noted that the father referred to the authorities taking his second son. The judge noted the Appellant's account at paragraph 46. The judge referred at paragraph 55 to the Appellant's interview saying that the father was looking for his brother after he disappeared. The judge noted at paragraph 62 that the Appellant said that his first younger brother was in Russia and his second younger brother was missing. She submitted that the judge referred to the confusion between the father's letter and the Appellant's witness statement [76]. It is clear, in her submission, that the judge took full account of the Appellant's account and this was not a matter for cross-examination for clarification. In her submission it should have been a matter for examination-in-chief or for the Appellant's own evidence to deal with the discrepancy in the father's witness statement. The judge noted the inconsistency and in her submission it was open to the judge to find that the inconsistency affected the Appellant's credibility. She submitted that the judge highlighted further concerns in relation to the father's evidence at paragraph 85 and it was open to the judge to reach these conclusions. She highlighted that the judge noted that the Appellant stated that his parents were looking for his brother but the father's statement does not say this and in her submission it was open to the judge to conclude at paragraphs 89 and 90 that the father's evidence could not be relied upon. She submitted that the confusion was created by the evidence before the judge. Given the evidence before the judge it is unclear what more the judge could have found.

15. Ms Fijiwala submitted in relation to Ground 2 that there was nothing in the skeleton argument and no background evidence put to the judge to corroborate the assertion that the Appellant would be at increased risk because he is of Sinhalese ethnic origin.

She submitted that the judge properly considered the **GJ** risk factors and considered whether there was any ongoing risk.

16. In response Ms Jones submitted that Ms Fijiwala's submission would be to reverse the burden as a matter that appears to be an inconsistency should be put to the Appellant. The Appellant should have been given an opportunity to address that apparent confusion. She submitted that there was confusion about one brother and that the judge had attached too much weight to that. She submitted that an alternative interpretation of paragraph 2 of the father's witness statement is that the reference to his second son could be referring to the second son to be arrested, in other words, the third son. In her submission, given the finding that the Appellant had previously been subjected to persecution, the judge would have had to have strong evidence for a finding that there is no ongoing risk and should not have based that finding on what could just be a typing error. In her submission the judge created even more confusion referring to the brother who was in Russia and that this matter should have been put to the Appellant.

Error of Law

17. I have given careful consideration to the decision of the First-tier Tribunal in the context of the Tribunal's unchallenged finding that the Appellant was subjected to persecution in detention in Sri Lanka in 2007. It is the case that the father's witness statement is apparently inconsistent with the evidence given by the Appellant as to which son disappeared and this matter might not be material if the judge had other significant reasons for finding against the Appellant in relation to ongoing interest in him by the Sri Lankan authorities. However, on close analysis it appears that the delay in claiming asylum (which of course was a matter that the judge was entitled to consider as affecting the Appellant's credibility adversely) was one factor against the Appellant. The other main issue identified in the decision relates to the apparent inconsistency between the Appellant's evidence and that of his father as to whether the father was looking for the brother after the brother disappeared. The judge dealt with this issue at paragraph 87 where he contrasts the father's witness statement with the Appellant's answer at interview to question 88. At question 88 the Appellant was asked: "What did the CID say was the reason they came to the house?" The response was: "My father is looking for my brother and they told my father not to go telling people that his son is missing." At question 89 the Appellant was asked: "So did the CID mention anything about you personally to your family?" In response he said: "They said to my father, if they started looking for the brother, they will look for me as well." At question 90 he was asked: "Could you explain what exactly the CID said to your father?", and in response he said: "They told my father not to look for my brother. If they won't, they can look for me as well." In his witness statement the Appellant's father said: "We are keeping quiet as we were threatened not to make any statement or publicity of his disappearance in the media or anywhere and if we fail to listen to them we would face the consequences." I do not see any significant discrepancy between the Appellant's interview answers and his father's witness statement. Both refer to the father being warned not to look for the missing brother. As there is no significant discrepancy in this part of the evidence it appears

that, apart from the delay issue, the only matter left which was considered to be adverse to the Appellant's credibility is the issue of the father's witness statement and the apparent discrepancy therein.

18. I do not accept Ms Jones' submission that all matters adverse to the Appellant should have been put to him, particularly where these relate to matters in evidence from sources other than the Appellant himself. In this case the apparent discrepancy was in the evidence from the Appellant's father and it may well be that the Appellant may not have been able to given an explanation in relation to this apparent discrepancy.

19. However, in this case the judge had found the Appellant's claim as to past persecution to be credible. In light of the fact that the primary reason for rejecting the Appellant's claim that the authorities are still looking for him was based on an apparent discrepancy in the father's witness statement which was not put to the Appellant at the hearing, in these very particular circumstances I consider that the judge's findings in relation to ongoing risk on return contain a material error of law in light of the procedural unfairness.

20. I note that there has been no challenge to the findings in relation to past persecution. Accordingly this matter must be remade in relation to risk on return.

21. Whilst I indicated at the hearing that, should I determine the appeal in favour of the Appellant, it may well be appropriate to remit the appeal to the First-tier Tribunal, on reflection, given the narrow issue to be determined in relation to the assessment of risk on return, it is apparent that this does not require a wholesale assessment of evidence. Instead it is a matter in relation to which the Upper Tribunal can consider any further evidence as to events since the Appellant's departure from Sri Lanka and make an assessment of risk on return.

22. In these circumstances I find that the judge made a material error of law in relation to the assessment of risk on return. I set aside that part of the decision, maintaining the findings of fact in the decision in relation to past persecution. I accordingly adjourn the hearing to be relisted for a resumed hearing to consider risk on return.

Directions

23. The resumed hearing will take place in the Upper Tribunal on 6 March 2018.

24. The parties are directed to file any further evidence to be relied upon at the resumed hearing no later than seven days before the date of the resumed hearing.

Signed Date: 5 February 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 5 February 2018

Deputy Upper Tribunal Judge Grimes