Neutral Citation Number: [2019] EWCA Civ 160

Case No: C5/2016/3142

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal (Immigration and Asylum Chamber)
Upper Tribunal Judge McGeachy
Appeal number: AA/09527/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2019

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE BAKER
and
LORD JUSTICE GREEN

- -

Between:

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

- -
- -

Patrick Lewis (instructed by **York Solicitors**) for the **Appellant**
Hafsah Masood (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 24th January 2019

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Judgment Approved

Lord Justice Green:

A. Introduction

1. This appeal comes before the Court by leave of David Richards LJ granted at an oral hearing on 22nd March 2018.

2. The decision under appeal is that of the Upper Tribunal (Immigration and Asylum Chamber) (the "Upper Tribunal") of 19th May 2016 dismissing the appeal of the Appellant against the determination of the First-tier Tribunal (FtT) dated 15th March 2016 which, in turn, dismissed the Appellant's appeal against the refusal by the Respondent of his asylum claim set out in a decision dated 9th June 2015 ("the Decision").

3. In granting permission it was acknowledged that it was "*highly unusual"* for there to be a second appeal on what was essentially a challenge to findings of fact. In his detailed reasons granting permission David Richards LJ identified certain inconsistencies in the logic and fact finding of the FtT which warranted further consideration.

4. For reasons set out below I would allow the appeal from the decision of the Upper Tribunal and set aside the determination of the FtT. I would remit the case to the FtT to be taken again before a different Judge.

B. The Facts

The Appellant's basic case

5. The Appellant is a citizen of Sri Lanka born on the 6th August 1979. He arrived in the United Kingdom on the 25th January 2010. He had previously applied for leave to enter and remain in the UK as a dependent upon his wife's student visa which had been granted on 23rd December 2009, valid until the 31st July 2011. On 22nd July 2011 the Appellant's wife applied for and was granted leave to remain for a post-study visa expiring 18th August 2013. Again, the Appellant's right to remain was contingent upon this application. On 24th May 2013 the Appellant's wife applied for a higher-study entrepreneur visa. This was refused on 21st June 2013 and as such the Appellant's status, being contingent, was now in doubt. On 15th August 2013 the Appellant's wife appealed the refusal but this was refused.

6. The Appellant first applied for asylum on the 7th October 2014. The evidence the Respondent relied upon in determining this application was obtained from a visa application form dated 7th October 2013, application interviews dated 3rd and 6th October 2013, a Screening Interview performed on 7th October 2014, and the record of an Asylum Interview Record conducted 31st March 2015.

7. The Appellant's account can be summarised in the following way. The Appellant lived in Columbo between 2000 and 2009. His parents live in Sri Lanka in Thambuttegama in the Northern Central Province. His wife, his three children, his younger sister and older brother all now reside in the United Kingdom. The Appellant was educated up to A-level. Following this he was employed as a Personal Assistant for a Government Minister. He worked for him until he came to the UK in late 2009. The Appellant's father was a sub-inspector in the police for 8 years but had worked in the police force

for 25 years prior to retirement. His brother was an Inspector of Police employed in the force for 14 years. The Appellant was a supporter of the UNP, a part of the ruling coalition in Sri Lanka.

8. In 2004 the Appellant met a man called Sivakumaran. He told the Appellant to contact a person named Major Alwis, and he was given a contact telephone number. Major Alwis was, it is said, an officer in the Sri Lankan army. The Appellant's contact told him that Major Alwis had dealings with the Liberation Tigers of Tamil Eelam ("LTTE") who had given him gold. The Appellant said that he was asked to sell the gold, in effect, on the black market. The Appellant had done this approximately 10 times. In 2005 the ruling party left Government and the Appellant was informed that the gold smuggling business would temporarily cease.

9. In 2009 he was contacted again. This time he was introduced to two Tamils whom it was explained had helped the contact in the smuggling business. He was told that if they were caught Major Alwis would be in trouble. He was therefore asked to accompany the two Tamils to Singapore. This he did on the 14th September 2009. The Appellant left Sri Lanka in December 2009. He returned briefly in January 2010 to attend a wedding but had not been back since then.

10. In July 2014 Major Alwis was arrested. In that month the Criminal Investigation Division ("CID") visited the Appellant's family home. Subsequently, on 20th September 2014 the CID returned and told his family that they intended to arrest the Appellant. He was accused of assisting two LTTE officers to move from Sri Lanka to Singapore where, it is suggested, they might have been active in some way in rebuilding the LTTE. He is or was also suspected of conducting pro-Tamil activities in the UK. The Appellant's father was instructed to report to the police every month until the Appellant returned to Sri Lanka and the CID periodically inquired after the Appellant's whereabouts.

The Appellant's evidence given in the asylum interview

11. It is necessary to record certain evidence given by the Appellant in the course of his interviews with Home Office officials.

12. First, in a Screening Interview on 7th October 2014 he was asked the following, standard, pro forma, question: "*Have you ever worked for any of the following organisation (state or non-state): armed forces or a reserve force. This includes the UK Armed Forces (explore if they have ever been a combatant or fought in any war). Government. Judiciary. Media. Public or civil administration. Security (including police private security companies).*" The answer inserted on the form to this multipartite and composite question was: "*No - to these questions*". In the same interview he was asked: *What is (or was) your occupation?*". The Appellant answered that he was a "*shop manager*". The Screening Interview is a cursory exercise designed to collect basic information mainly for administrative purposes. The interview completion form states: "*You will not be asked at this stage to go into detail about the substantive details of your asylum claim as, if appropriate, this will be done at a later interview*." The interviewing officer asks the scripted questions and therefore does not engage in significant supplementary questioning.

13. In the later Asylum Interview on 31st March 2015 the Appellant was questioned about the evidence that he had given during the earlier Screening Interview. He confirmed that during that interview he had been suffering from depression and could not then recall everything clearly. I note, in passing, that there was unchallenged medical evidence placed before the FtT which indicated that the Appellant was in fact suffering from depression at the time.

14. During the later Asylum Interview the Appellant stated that as from about 2000 until he left Sri Lanka in 2009 he had worked as a Personal Assistant for the Minister of the Environment and Natural Resources. He said that he had not however worked for the Minister after arriving in the UK. It was put to him that this answer was inconsistent with the answers given in the Screening Interview. The interviewer stated: "*In your SCR you were asked if you had ever worked for the government and you said no. Today you have said that you were PA for a minister in the government. Can you explain why it is different today?*". The question, as posed, assumed that the prior evidence was inconsistent and that working as an assistant to a Minister was the same as working for the Government and asked for an explanation of the difference. The Appellant assumed that he had made some sort of a mistake and attributed it to his medical condition at the time and an inability to remember the date or the year. It is not entirely clear what the Appellant was referring to when he referred to confusion over dates since this does not seem to relate to the matter he was being asked about. He said: "*As I said I was in a state of tension because of my depression during the SCR that is why I made a mistake on the date or the year and I couldn't remember certain things*." I observe, in passing, because it is relevant to the grounds of appeal, that the question posed did not suggest that there was any inconsistency as between the appellants employment as a Personal Assistant to a Minster and his later employment as a shop manager whilst in the UK.

15. Second, he was asked about Major Alwis. It was put to him that according to the Respondent's intelligence Major Alwis had been promoted to Jaffna as Commander of the Security Force Headquarters in November 2014, which contradicted the Appellant's account that Major Alwis had been arrested in July 2014. The Appellant stated: "*I don't think that the individual I spoke about is the one that I spoke about. There could be many Major Alwis*."

16. Third, he was asked how long he had known Major Alwis. He replied: "*From 2004 until I left the country in 2009*." He was asked to describe his appearance to which he responded: "*He was 6ft height and he is not very dark, he is fair, slim not fat*." When asked about the last occasion when he spoke to Major Alwis he said this was in 2010 and was "*just as a friend, nothing else*". However, he was unable to give the first name of Major Alwis.

17. Fourth, he was asked about his links to political activity. He explained that he had no links to the LTTE, nor did he support them. He supported the ruling party. In so far as the two individuals whom he escorted to Singapore were concerned he had no knowledge at the time that they were members of the LTTE. His family were Sinhalese and had no connection with the Tamil community.

18. Fifth, when asked whether he experienced problems in escorting the two alleged Tamils to Singapore he explained that he had used his own passport and had been responsible for presenting the passports of those he was escorting but he had experienced no difficulty in passing through security: "*No there were no problems and no questions*

were asked. I accompanied them and presented the passports." The civil war had ended 3 months earlier and it was put to the Appellant that security in the airport was high. The Appellant confirmed that there were no problems because Tamils and Muslims were travelling to Singapore for business purposes. When asked about his return to Sri Lanka, he confirmed that he had experienced no problems at airport security. He had not been asked why the people he had travelled out with were not with him on his return. He stated: "*They wouldn't know that when I went with two people and returned alone. It wouldn't have been noticed."* When he was asked why he had presented the two Tamils passports at customs he stated: "*When I left the country I didn't make any note or any remark that I travelled with two other people so when I went back I was not asked. It was not known to them."*

19. Sixth, in relation to whether he was paid for escorting the two Tamils to Singapore he said that he was not.

20. Seventh, in relation to alleged visits by the CID to the family home the first visit was on the 10th July 2014 and the second on 20th September 2014. It was during the course of those visits that the CID indicated that they wished to arrest the Appellant. When he was asked why he waited until October 2014 to claim asylum if he did, in fact, fear for his life he said: "*When they went for the first time looking for me I thought it would calm down eventually. When they went looking for me in September it looked like a very serious threat. Then I considered claiming asylum."*

21. Eighth, it was put to the Appellant that the CID had not visited his family home in Sri Lanka since September 2014 and the CID were not making regular checks on the family which showed a lack of interest on their part in him. He stated: "*I think that they don't come to our home, they would be coming in a vehicle and checking to make sure the existence of my family in the house and my father or my family wouldn't talk about this to me because I would be concerned about their safety."*

The Home Office Decision ("the Decision")

22. On 9th June 2015 the Appellant's asylum application was refused. The Decision focused upon 3 matters. First, the Appellant's case that he assisted two Tamils to leave Sri Lanka for Singapore. Second the general assessment of risk of death or arrest for political activity if returned. Third, the inferences to be drawn from the Appellant's delay in applying for asylum. These matters were analysed within the context of Articles 2, 3 and 8 ECHR. The Decision also addressed whether there were exceptional circumstances justifying the grant of leave to remain and/or the exercise of discretion.

23. Turning first to the Appellant's claim that he was at risk for having helped two LTTE intelligence officers escape on 14th September 2009, the Respondent first considered the Appellant's claim that he worked as a Personal Assistant for a Minister from 2000 until he came to the UK in December 2009. The Respondent relied upon an alleged inconsistency in the evidence given by the Appellant in the Interviews when it is said that he had (variously) stated that he had been employed as a shop manager and then as a Parliamentary Assistant to a Minister. The Respondent rejected his explanation for this alleged inconsistency, that he was confused about dates due to stress, as lacking credibility and merit and the Decision goes on to conclude that the Appellant had never been employed as a Personal Assistant to a Government Minister.

24. Next, the Respondent considered that there was an inconsistency with the Appellant's account as to the risk he faced if returned and his ability to depart and return to the airport using his own passport during a period of high sensitivity and security. The Decision sets out the details of the levels of security at the airport and the extensive steps taken by the authorities to identify precisely who was entering and leaving the jurisdiction. The Respondent considered that the Appellant's account was inconsistent and lacked credibility. It was not believable that two LTTE operatives would be permitted to leave the airport without being stopped and questioned. And if they had been stopped the Appellant would likewise have been detained. The Appellant also used his own valid passport to exit Sri Lanka in 2014 which undermined his claim that he was of present and on-going interest to the Sri Lankan authorities. I note in passing that the reference to 2014 was an error. It was common ground before this court that the Appellant had not returned to Sri Lanka after 2010. I address the significance of this error below at paragraphs [59] – [61].

25. Next, the Decision states that the Appellant had maintained contact with Major Alwis since departing Sri Lanka as a friend but nonetheless was unaware of his first name. It was inherently improbable that a person who, on his own account, put his life in danger by selling gold for the LTTE despite working for the Government and who also smuggled Tamils members out of the country, would not know the first name of the person he was helping.

26. With regard to the Appellant's case that he was at risk of death if returned to Sri Lanka on the basis of Country Guidance, persons in the position of the Appellant were <u>not</u> at risk from the authorities of Sri Lanka. This conclusion was buttressed by the Appellant's evidence that he had never played an active role in fighting for the LTTE, or had been an operative or person playing an active role in international procurement responsible for financing the LTTE or ensuring that it would be supplied with arms or otherwise providing logistical support to Tamil activists in the diaspora who were working for Tamil separatism.

27. Finally, the Decision drew an adverse inference from the fact that there was a delay on the part of the Appellant in applying for asylum (namely 7th October 2014) despite his claim that he became aware that he was subject of interest to the CID on the 10th July 2014. The Appellant's explanation that it was only when the CID returned to the family home in September that he took the risk seriously was rejected.

28. There was no risk to the Appellant because of him being a failed asylum seeker. There was no evidence of any pro-Tamil activity engaged in by the Appellant whilst in the United Kingdom. He was not a journalist. He had not given any anti-Government evidence to the Lessons Learned and Reconciliation Commission. He was not considered to be on a computerised "stop" list. There were no issues relating to internal relocation. There were no humanitarian considerations which were to be weighed in the scales. His claims under Article 2,3 and 8 ECHR were rejected. There were no exceptional circumstances or discretionary considerations justifying leave.

Appeal to the First-tier Tribunal ("FtT")

29. The Appellant appealed to the FtT. The Judge addressed himself to the approach he was required in law to take. Before he could make an adverse finding on credibility, he was required to exercise caution and allowance had to be made in favour of the

Appellant in relation to his nervousness at hearing. It was possible for a witness to be telling the truth even if certain elements of the story were exaggerated for effect. It was not necessary for the Appellant's account to be corroborated. The Judge had to look at the matters in the round applying a "*low-standard of proof required of the Appellant".*

30. By a determination promulgated on 15th August 2016 the appeal was rejected. The Judge rejected the Appellant's account of gold smuggling and of assisting Tamil / LTTE operatives to escape. He rejected the Appellant's evidence "*in its entirety*". His account was "*…riddled with inconsistencies and incredible*". The Judge set out the central strands of the Appellant's case and rejected them all. Some of the matters identified and rejected do not have any direct bearing upon the question of risk on return but are contextual matters. In the scheme of the Judge's reasoning they are however important because the Judge relied upon them as powerful ballast and support for his rejection of the credibility of the Appellant's evidence on other matters which were more directly related to risk.

31. I set out below the findings and conclusions in the Judgment that Mr Lewis, for the Appellant, primarily focused his attack upon.

32. **First - The Appellant's employment position**: The Judge held that the "*most obvious inconsistency*" was that between the Appellant's initial evidence to immigration officers when he stated that he had been employed as a shop manager and his subsequent evidence when he stated that he worked for Government or a Government Minister (Judgment paragraph [21]). His explanation for the inconsistency (as a mistake over dates during a tense Screening Interview) was rejected as "*not credible*". I note that (at paragraph [28]) the Judge records evidence given by a Dr Zapata as to the clinical depression that the Appellant had suffered from. The Judge does not reject this evidence and concluded only that it was not severe or of particular significance. The Judge does not reject the Appellant's explanation given in interview to immigration officials that at that time he was suffering from depression and had recently made a failed suicide attempt.

33. **Second - Travelling to and from airports in Sri Lanka unhindered**: The Judge recorded that the Appellant had travelled to and from Sri Lanka after ceasing his gold smuggling and people smuggling activities "*… without incident …. He experienced no problem…*" (Judgment paragraph [25]). He did not therefore focus upon passage through the airport during 2009 when the Appellant says that he escorted the two Tamil men out of Sri Lanka. At paragraph [4] the Judge (recording a finding in the Decision at paragraph [37])) said that the Appellant had used his own passport to exit Sri Lanka in 2014. He noted that according to the Respondent and the Country Guidance (see below)
there were sufficient checks on persons leaving and returning to Sri Lanka to enable governmental agencies to detain, question or take into custody anyone who was of interest to them. This undermined the Appellant's claim to be of interest to the authorities.

34. **Third - The Appellant's low level of interest in the civil war**: The Judge was critical of the Appellant's evidence that he had not given "*much attention*" to the civil war. The Judge said that this was "*not likely to be true*" given that the war had erupted 4 years after the Appellant was born and lasted, on and off, until 2009 (Judgment paragraph [22]).

35. **Fourth – Not being paid for people smuggling**: As part of his account about helping Tamils / LTTE operatives out of the country the Appellant had stated that he had not been paid. The Judge did not believe this. He said that since the Appellant was a gold smuggler and his interests were mercenary it made no sense that he would not be interested in gain as a result of the dangerous activity of people smuggling (Judgment paragraph [24]).

36. **Fifth - Not knowing the first name of Major Alwis**: The Judge inferred from the Appellant's evidence that he did not know the first name of Major Alwis, whom he knew as a friend and who had attended his wedding, that his evidence about Major Alwis was untrue. And he relied upon this as supporting his conclusion that the entire account was false.

37. **Sixth - The continuing interest of the CID in the Appellant:** The Judge rejected the Appellant's evidence that there was in 2016 continued interest on the part of the CID in the Appellant. Although there is no reference anywhere else in the Judgment to the details of a letter from the Appellant's father attesting to continued interest the Judge (without setting out details) stated that the letter "*could have been written by anyone*" (ie could have been a forgery). But even if it was genuine the Judge held that it did not represent "*an accurate account*" (Judgment paragraph [26]).

Appeal to the Upper Tribunal

38. Permission to appeal to the Upper Tribunal was granted on the 12th April 2016. By a short judgment given on 19th May 2016 the appeal was dismissed. The Upper Tribunal considered that the Judge was within his right to reject the evidence of the Appellant as lacking credibility. The Appellant had not put his case upon the basis that he would be subject to criminal sanction upon his return. There was a "*paucity of evidence"* about Major Alwis. The Judge took account of relevant Country Guidance. He found that the Appellant lacked credibility and his evidence was riddled with inconsistencies. The Judge was entitled to conclude that there was an unacceptable inconsistency between the Appellant describing himself first as a shop manager and only subsequently, when it suited his argument, as employed on behalf of the Government. The Judge was entitled to place weight on the fact that the Appellant was hostile to the political objectives of the LTTE and described it as a terrorist organisation. The Judge was also entitled to place weight upon the facts that the Appellant's family were policemen and that the Appellant was, himself, Sinhalese and not a supporter of the LTTE. The Judge was entitled to categorise the Appellant as of low political interest to the authorities. The Judge was entitled to place weight upon the fact that the claimed visit of the police to the Appellant's father's house was coincidental in time with his claim for asylum. The Judge was, also, entitled to arrive at the conclusion that if the Appellant was of interest to the authorities it was for non-political criminal activity. There was no evidence that the Appellant would be implicated by association, membership or activities with the LTTE. No criticism could be made of the Judge's lack of reliance upon the report of Dr Smith who had opined that the Appellant's claim was plausible. The Judge was not bound to accept the evidence of the Appellant's expert, it was for the Judge to reach his own conclusions relating to the credibility of the Appellant.

C. Second appeals – the test to be applied

39. This is a second appeal. The test for the grant of permission is set out in CPR rule 52.7(2), namely that:

> "(a) the appeal would –
>
> (i) have a real prospect of success; and
>
> (ii) raise an important point of principle or practice; or
>
> (b) there is some other compelling reason for the Court of Appeal to hear it."

40. It was confirmed in *ME (Sri Lanka) v SSHD* [2018] EWCA Civ 1486 ("*ME*") that once the second appeal test was satisfied, with the result that permission to appeal was granted, the appeal proceeded in the same way as for a first appeal. The Court cited *Cathie v Secretary of State for Business, Innovation and Skills* [2012] EWCA Civ 739, at paragraphs [59] to [60] as authority for this proposition. That was not an immigration case and the observations as to the scope of a second appeal were made upon the practical basis that the evidence and the manner in which the Judge had assessed the evidence in that case "*was susceptible to analysis in this appeal*". The approach this Court must take, permission having been granted, is therefore the same as that performed on a first appeal. The Court is however determining whether the Upper Tribunal was correct to conclude that there was no material error of law in the FtT's determination. In practical terms, as counsel recognised through their submissions, the focus of attack is on the reasoning of the FtT since, if this was materially in error, then the Upper Tribunal should have so found and allowed the appeal.

D. Credibility – the approach to the assessment of the evidence

41. The decision of the FtT turns upon the credibility of the Appellant's evidence. The credibility of an appellant often lies at the centre of these cases. Evidence is often indirect. So, in this case there was no direct evidence of the risk posed to the Appellant if returned, for example, from the Sri Lankan authorities confirming or denying that the Appellant was of interest to them and, if so, for what reason. The Judge did not have the "stop" list referred to in the Country Guidance. He did not have evidence from those supposedly detaining Major Alwis confirming that he was in fact detained, and for what, and whether he had named the Appellant as potentially complicit in anti-Government activities. Evidence before a tribunal will therefore frequently be circumstantial and based upon the credibility of an Appellant's account.

42. Some of the indirect evidence is recognised (in Country Guidance) as a fair proxy measurement of risk, such as whether a person has been able to pass unhindered through an airport at a point in time when he or she should have been at risk, or whether the person has engaged in activities known to place that person in present jeopardy of arrest. But other pieces of evidence are remote from any indicia of, or proxy for, risk and concern only whether the individual is telling the truth which itself is *then* used in deciding whether the individual's account of the risk posed by return, is credible and truthful.

43. In this case certain pieces of evidence fell within the Country Guidance (especially paragraph 7(a) and (d)) as being pertinent to the assessment of risk. But much of the evidence was remote from the issue of risk and went only to general credibility. Such background material can be relevant to the analysis but it needs to be borne in mind that *per se* it indicates little about risk and, as the Judge properly recognised, even genuine asylum seekers might exaggerate or fabricate evidence in order to reduce the risk that their case is wrongly rejected.

44. All of this explains why first instance judges need carefully to assess credibility and why appellate courts will accord due deference to the fact finder who is experienced in sifting evidence of this sort. But it also explains why an appellate court needs to be able to satisfy itself that the fact finder has at least identified the most relevant pieces of evidence and given sufficient reasons (which might be quite concise) for accepting or rejecting it.

45. Tribunal judges are experienced at resolving the sorts of evidential disputes which arise in cases such as the present. Different countries tend to throw up issues of a similar type and cases involving Sri Lanka are no exception. Judges hearing these cases become versed in dealing with such disputes. They have a good grasp of what is credible, and what is not. Equally on an appeal to the Upper Tribunal the appeal judge, as a specialist in the area, is also familiar with these sorts of evidential disputes. By contrast the Court of Appeal does not have that institutional, every-day, experience and it is two steps removed from the initial fact finding. To this extent, where the issue on appeal is as to the evaluation of the facts by the trial judge, an appropriate degree of deference will apply (see authorities referred to paragraph [63] below).

46. In cases (such as the present) where the credibility of the appellant is in issue courts adopt a variety of different evaluative techniques to assess the evidence. The court will for instance consider: (i) the consistency (or otherwise) of accounts given to investigators at different points in time; (ii) the consistency (or otherwise) of an appellant's narrative case for asylum with his actual conduct at earlier stages and periods in time; (iii) whether, on facts found or agreed or which are incontrovertible, the appellant is a person who can be categorised as at risk if returned, and, if so, as to the nature and extent of that risk (taking account of applicable Country Guidance); (iv) the adequacy (or by contrast paucity) of evidence on relevant issues that, logically, the appellant should be able to adduce in order to support his or her case; and (v), the overall plausibility of an appellant's account.

47. This list is not intended to be exhaustive. In this case the Judge adopted all these techniques. The criticisms now made of the Judge are not however as to his reliance upon such techniques but instead focus upon (a) the intrinsic logic of the inferences that he drew from the facts and (b) the failure to identify and address what is said to be *prima facie* relevant evidence which contradicts his findings.

48. If a judge makes material errors in the evaluation of evidence, for instance because the inference drawn from a fact found is logically not one that properly can be drawn, then an appellate court will interfere. A material error in logic is an error of law. In *ME* (ibid) the appellant was a Tamil who was well known to the Sri Lankan authorities and had already been beaten and tortured by them. The Court of Appeal allowed an appeal and concluded, in relation to inferences drawn by the judge about the risk to the Appellant

if returned, that there was a "*serious gap in the FTTs chain of reasoning which is sufficient to amount to an error of law*".

49. Equally, the evaluation of the evidence must bear in mind that the relevant question that the court is dealing with is risk, not actuality. In *ME* (ibid) the Court was critical of the way the judge expressed his understanding of risk: "*I also consider that it is unsatisfactory in a case of this kind for the fact-finder to express findings of fact in the negative. For example, at [35] the FTT said (more than once) "I do not find that he is now perceived as a threat." If the test were that of the balance of probability, a finding expressed in that way is equivalent to a finding that he is not perceived as a threat. That is because whether a fact has been proved is a binary question, which can only be answered "yes" or "no". But where the question is whether there is a real risk that ME is perceived as a threat, a finding expressed in those terms does not squarely confront the relevant question*" (ibid per Lewison LJ at paragraph [18]).

E. Analysis

50. With these general considerations in mind I turn to the facts of the present case. I turn now to address the principal findings made by the Judge which are the focus of the challenge. I have set these out at paragraphs [31] – [37] above.

Inconsistencies in the evidence about the Appellant's employment

51. The Judge stated: "*The most obvious inconsistency is the appellant's initial denial of working for the government or a government minister, and saying that he was a shop manager. Attributing this to making a mistake during a tense screening interview is not credible.*" The Judge appears to have rejected the Appellant's case that he was ever employed as a Personal Assistant to a Minister (as had been the case in the Decision). The Judge relied upon answers given by the Appellant to questions posed during the Screening Interview and later the Asylum Interview. The details are summarised at paragraph [11] – [21] above. I have difficulty in understanding precisely what the Judge was concluding here. But in my view the Judge erred in at least three respects.

52. First, I fail to understand how there was inconsistency in the Appellant's accounts, even on the Judge's understanding of the answers given. The Appellant said that he was *not* working for the Government so how can it be *inconsistent* with this answer for him to say that he *was* working as a shop manager?

53. Second, the Judge might have been saying that there was inconsistency between the Appellant's evidence that he was working for the Government (as the Personal Assistant to the Minister) and also working as a shop manager. If this is what the Judge meant the Appellant's answer that he was a shop manager was in response to a question posed in interview in the following terms: "*What is (or was) your occupation?*". The question can be construed as referring to present employment, but if there is no present employment the most recent employment. The Appellant gave his *present* occupation, which was shop manager. The accuracy of this answer is not in dispute. The answer which addressed his status as a government employee concerned *past* employment.

Since the answers concern two different periods of time when a person might well have different jobs, it is hard to comprehend how the answers could ever be inconsistent.

54. Third, the Judge treats the Appellant as having denied that he worked for the Government "*or a Government Minister*". This is incorrect. The Appellant did deny working for the Government but he never denied working for a Government Minister. No one questioned the Appellant about the status of his claimed employment as a Personal Assistant to a Minister in Sri Lanka. In a Witness Statement before the Judge the Appellant explained that this was a "*political appointment*" not a Government job. There was also evidence before the Judge corroborating the Appellant's case in the form of a letter from the Foreign Relations Protocol Office of the Sri Lankan Parliament to the visa officer at the British High Commission which indicated that Mr Bandaranayake (the Appellant's purported employer) was due to visit the UK on a private tour. The letter stated that he would be accompanied by his "Personal Assistant", the Appellant. It has not been challenged as a forgery. It is said that the Appellant was granted entry clearance in this capacity. The Judge does not refer to or address this evidence. The Judge thus (i) failed to address the distinction between working for the Government, and working for a Minister as a political employee and (ii) rejected the Appellant's case that he was a Personal Assistant to a Minister in the face of unchallenged evidence to the contrary without addressing potentially relevant evidence.

55. In my judgment these are material errors. They flow from a failure on the part of the Judge properly to analyse the evidence which led him to a conclusion which itself is illogical and inconsistent. The Decision makes the same error. The Judge appears to have assumed that the Decision was correct without verifying the underlying interview records to verify whether the adverse conclusion drawn in the Decision was correct.

56. Yet, the Judge highlights this as the highwater mark of the Appellant's inconsistent approach to the evidence. This was, in his view, powerful evidence undermining the Appellant's credibility, as a whole. Given its centrality in the Judge's thinking and reasoning the errors made cannot be said to be immaterial.

The Appellant's ability to pass through the airport unhindered

57. The second area where I conclude that the Judgment is plainly in error is in relation to the Judge's finding as to the Appellant's ability to pass through the airport as indicating that he was of low risk. This is a recognised indicator of risk (see paragraphs [7(d)] and [9] of the Country Guidance set out below at paragraph [72] below). The Judge stated: "*The appellant travelled to and from Sri Lanka without incident after ending his purported gold smuggling and people smuggling activities. Indeed, he left Sri Lanka with his own passport and through normal passport controls. He experienced no problem*". No dates are referred to, but the period of time identified is 2009 onwards "*after*" the people smuggling activities ceased. In paragraph 4 of the Judgment the Judge recites the Decision at paragraph [37] which records that by his own admission the Appellant used his own passport to exit Sri Lanka in 2014. The Decision states: "*This is believed to undermine your claim to be of adverse interest to the Sri Lankan authorities*". The Judge refers to this as one of the inconsistencies riddling the Appellant's overall account.

58. The nub of this point relates to timing. The Appellant accepts that he passed through the airport when he left Sri Lanka in 2009 to come to the UK and he also gave evidence that he returned in early January 2010 to attend a wedding. He says that he returned that same month to the UK and has not been back to Sri Lanka since. He says that he only came to the attention of the authorities much later, when Major Alwis was arrested in 2014, and that therefore the fact that he passed through the airport without hindrance in 2009 and 2010 is not inconsistent with Country Guidance. There is no reason why he would have been of interest to the authorities in 2010. In my view the Judge has made two significant errors.

59. First, insofar as the Judge is assuming that the Appellant used his passport in Sri Lanka in 2014 – as is set out in the Decision - this is plainly wrong. It is properly accepted as such by counsel for the Respondent in this appeal. As authority for the 2014 date the Decision refers to Screening Interview question 2.1. But this makes clear that the Appellant last left Sri Lanka on 25th January 2010 and there is no evidence that the Appellant travelled to and from Sri Lanka in 2014. The reference in the Decision to 2014 is a transcription error and should therefore be to 2010. The author of the Decision regrettably failed to verify the source and compounded the transcription error by treating the 2014 date as significant. This error was then perpetuated by the Judge who clearly did not verify its accuracy by reference to the interview notes. It is evident that in so far as the passage through the airport in 2009 to come to the UK with his wife and the visit back to Sri Lanka for the wedding 2010 are concerned, on the Appellant's account, these would not be significant since they long pre-dated the arrest of Major Alwis. Indeed, it has not been suggested in this appeal that these episodes are significant under the Country Guidance or otherwise.

60. But even if, for the sake of testing the argument further, the Appellant had travelled unhindered by the authorities to and from Sri Lanka in 2014 this would still only have been significant if the travelling had been after the point in time when Major Alwis was arrested and, it is to be inferred, named the Appellant as involved in illicit activity. The Judge did not however address even this timing point.

61. These errors are material. Although the Judge addressed the issue only briefly in his Judgment (as he did all the issues) the significant part of the paragraph in question is the observation of the Judge that the Appellant had travelled "*without problem*". This is, in my view, an oblique reference to the Country Guidance (paragraphs 7(d) and 9) which, as observed, treats passing unhindered through an airport as a significant indicator of lack of risk. The error here therefore relates to risk which is at the heart of the case. As such it can hardly be said to be immaterial.

Areas where there is a lack of reasoning.

62. I turn now to other criticisms of the Judgment which relate to both failures to address relevant evidence and lack of reasoning in the Judgment. The two points are often interrelated as this case shows, since a failure to address relevant evidence will inevitably be accompanied (and compounded) by a failure to provide any reasoning or discussion about that evidence. Mr Lewis referred to the judgment of the President of the Upper Tribunal in *MK (duty to give reasons) Pakistan* [2013] UKUT 00641 (IAC). There the President stated that, if a tribunal finds oral evidence to be implausible, incredible or unreliable, or a document to be worthy of no weight whatsoever, it was

necessary to state as much in the determination and for such findings to be supported by reasons. In my view this proposition flows from ordinary principles of law relating to the duty to give reasons. The rationale underpinning the duty to give reasons is generally said to be threefold: to enable the parties to know why they have won or lost; to enable an appellate court to understand the reasons for a decision so that it can perform its supervisory function; and finally, to enable the public to know why a decision of public significance was taken.

63. The duty is contextual. The level of detail required will vary considerably from case to case and I am not suggesting that in every tribunal case a detailed evidential exegesis is required. To suggest as much would be impractical and inconsistent with the recognised limits on an appellate court interfering with the evaluative judgments of trial courts: In *Piglowska v Piglowski* [1999] UKHL 27 Lord Hoffman stated: "*...the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. ...*". Lord Hoffman cited his own judgment in *Biogen Inc v Medeva* [1996] UKHL 18 (a patent case) to the effect that "*… findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation*."

64. But there is a basic minimum which is needed and, with respect to the Judge, it is lacking in this case. I do not need to go into all the examples identified by Mr Lewis for the Appellant. I would however refer to four illustrations which concern the failure to address relevant evidence and/or the failure to provide adequate reasoning.

65. First, in paragraph [22] the Judge rejected the Appellant's evidence that he was not "*much*" interested in the civil war and he treated this evidence as indicative of a *general* lack of credibility. In fact, the reference to the Appellant not showing "*much*" interest is taken from his Witness Statement where he uses this expression to refer to his pre-school state of mind. He then goes on to say that he <u>was</u> in fact interested in politics when at school. The Judge does not refer to this evidence which paints a quite different picture. Further, even if the observation of the Judge had been correct, he does not explain why or how it could ever be significant or relevant to any issue arising. Whether the Appellant was or was not "*much*" interested in the war adds little to the argument either way. If he was genuinely disinterested, then it makes it less likely that he would be of interest now to the authorities. If he was interested only in passing, then that is natural for any citizen of a war-torn state. And even if he was *very* interested and actively involved in supporting the ultimate victors then this still hardly suggests he would now be of concern to the authorities. But if he was very interested, *and* for the losing (Tamil) side, the position might be different. In the present case the Judge drew a strong adverse inference upon the basis of no more than the throw away comment that the Appellant was not "*much interested*". The inference drawn was, in any event, too tenuous and unsubstantiated to warrant the drawing of conclusions in any direction, and certainly not against the Appellant.

66. Second, as part of his account about helping Tamils / LTTE operatives out of Sri Lanka the Appellant stated that he had not been paid. The Judge did not believe this. He said

that since the Appellant was a gold smuggler and his interests were mercenary it made no sense that he would not be interested in gain arising from the dangerous activity of people smuggling (Judgment paragraph [24]). One can see why the Judge took this view. But in his evidence the Appellant explained that with specific regard to the people smuggling he and Major Alwis took the view that for their own personal safety and security they needed to get the two young men out of the country. If this is true, and there is a surface logic to the point, it could explain why no payment was made. The Judge does not address this evidence. Had he done so this court would at least have known that he had addressed his mind to the evidence and had evaluated it.

67. Third, the Judge identified as significant, and adverse to the credibility of the Appellant, that he did not know the first name of Major Alwis (paragraph [24]). The Judge refers to no evidence on this. But in evidence the Appellant had explained that Sinhalese people normally had very long names; the Appellant himself had seven names including first name, family name and other names. In his community people normally used only one name to identify a person. There was evidence before the Judge as to custom and practice in relation to modes of address from a Dr Smith who had circa 20 years' experience as an academic, researcher and consultant on conflict, security and development issues in South Asia. He explained that given and family names could become muddled in terms of how they were ranked and linked. In Sri Lanka significant deference would also be paid to a Major in the army and it would be common for individuals to be known in quite formal terms "*even after a long acquaintance*". This was why the Appellant knew the Major only as "*Major Alwis*". The Judge did not criticise Dr Smith in the Judgment and, indeed, stated that he had given useful information on the situation in Sri Lanka. This point against the Appellant was taken in the Home Office Decision and adopted by the Judge. It seems to be a very slight matter. If the Judge was going to make anything of it, he needed at least to refer to the evidence and set out his views upon it. This could have been done relatively concisely and had it been done an appellate court would at least have known that the evidence had been identified and evaluated. In the absence of any reference to, or analysis of, the evidence this Court is forced to infer that the Judge failed to address himself to it and simply took the Decision at face value without testing it against the evidence in the case.

68. Fourth, the Judge rejected the Appellant's evidence that there was in 2016 continued interest on the part of the CID in the Appellant. There was before the Judge a translation of a letter dated 15th February 2016 said to emanate from the Appellant's father in which the Appellant's account of the visits by the CID to the family home are corroborated. The letter says that periodically the CID <u>still</u> visited the home looking for the Appellant. The letter is nowhere described in the Judgment. But there is a passing and oblique reference to it when the Judge stated that: "*The letter purported to come from the appellant's father could have been written by anyone; nevertheless, even if it was written by the Appellant's father, I do not accept that represents an accurate account*" (Judgment paragraph 26]). The Judge nowhere sets out the letter or its details. He postulates that it might be a fabrication but does not find as such. He then says it is not accurate but does not say how or why or whether in whole or in part. I infer that the letter being referred to <u>is</u> the letter of 15th February 2016, which is the only letter before the Judge on this point, and to this extent the Judge addressed himself to it, but he failed to provide any reasoning that this Court can assess as to why he rejected what was a relevant part of the Appellant's case. I am left to conclude that he rejected the letter

because of his prior conclusion that the entirety of the Appellant's case was incredible. Once again had the Judge clearly addressed the evidence and set out concisely his reasons for rejecting it then it is far more likely that this Court would have concluded that this was an evaluative matter that was better left to the trial judge who had seen the witness and appraised the evidence.

69. As to the materiality of these errors there are three (linked) reasons why I consider them to be material. First, the overlooked evidence identified by Mr Lewis is credible and relevant to the issues being addressed by the Judge. Second, the evidence contradicts the conclusions arrived at by the Judge and thereby places those conclusions into doubt. Third, the conclusions in issue are all relied upon by the Judge as a material and operative part of his overall reasoning for rejecting the credibility of the Appellant's account.

The relevance of the Country Guidance

70. For the reasons given above I have concluded that there are material errors in the Judgment. It is nonetheless relevant to place these errors in the wider context of the Country Guidance because it was a central part of the Decision and (implicitly) the Judge's reasoning that the Appellant was a person who, applying the Guidance, was at minimal or no risk. It is correct that at first blush the Appellant is low risk. But Country Guidance must be applied with some degree of subtlety. By its nature it is "guidance"; and however valuable it cannot, and does not purport to, cover definitively every permutation of fact or circumstance which emerges. Each case must be assessed on its facts and sensibly against the Guidance.

71. The Appellant argues that his particular facts are not addressed by the Country Guidance or if they are, it applies in his favour. His basic account is that the authorities are interested in him because of *past* gold and people smuggling (in 2005 and 2009) which gives rise to a perception that he is or may be involved in *current* anti-Government activities (from the UK). He was not at risk until 2014 upon the arrest of Major Alwis. He accepts that *but for this* he would fall within the Country Guidance and properly be categorised as at no material risk.

72. In *GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC) ("*GJ*") the Upper Tribunal gave Country Guidance 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."

73. At paragraph [311] the Upper Tribunal explained that the concerns of the authorities lay with those with, or perceived to have, *on-going* anti-government sympathies:

> "The evidence is that although LTTE cadres were screened out and rehabilitated in May 2009, the government's concern now is not with past membership or sympathy, but with whether a person is a destabilising threat in *post-conflict* Sri Lanka."
>
> (Emphasis added)

74. Section 107 (3) of the Nationality, Immigration and Asylum Act 2002 empowers the Upper Tribunal to make practice directions requiring the tribunal to treat a particular

decision as authoritative as regards a particular matter. Under section 12 of the Practice Direction of 10th February 2010 a reported decision bearing the letters "CG" is to be treated as an authoritative. *GJ* bears those letters. Country Guidance remains authoritative unless and until set aside on appeal or replaced by a subsequent country guidance: *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 at paragraph [67]. The Country Guidance was promulgated in 2013 and has not been amended since then. It still applies. It was applied by the Court of Appeal in *ME* (*ibid*) *in* 2018.

75. In *KK (Application of GJ) Sri Lanka* [2013] UKUT 512 (IAC) the Upper Tribunal held at paragraph [42] that the list of persons described in paragraph (7)(a) to (d) of that Guidance was: "*… intended to be, a definitive list of those persons who 'are' at risk on return; the Tribunal did not find that those ... persons at risk 'included' people who fell within one of the categories.*" In so far as this might indicate that Country Guidance binds in every case regardless of the instant facts in *SG(Iraq) v. Secretary of State for the Home Department* [2012] EWCA Civ 940, Stanley Burnton LJ made clear (ibid paragraph [47]) that Country Guidance was indeed a powerful source of guidance but was not to be applied without qualification: " *… decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence are adduced justifying their not doing so.*" This must be right. The Guidance is by its nature incapable of covering every conceivable scenario that might arise and which might place a person at jeopardy if returned. It is, though, a very important starting point, is to be taken into account, and carries significant weight.

76. *Prima facie*, the Appellant is not, on his own case, seriously at risk. He is not from the Tamil Community. He was employed by a Government Minister. He supported the ruling Government. He is not an activist or involved in supporting a resurgence of Tamil activity. He is not a journalist or human rights activist who has criticised the Sri Lankan authorities. He has not participated in the post-conflict reconciliation process and given evidence against the authorities. The criminal activities that he says he engaged in are historical and being simply criminal in nature would not by themselves prevent removal. It is not suggested by anyone that the Appellant has been involved in activity of a political nature or activity supporting the Tamils since his arrival in this jurisdiction.

77. The Appellant's case is however more subtle, and is about perception. He says that the authorities have identified him as a result of the arrest of Major Alwis and others who were involved in criminal (gold and people) smuggling which was used (unbeknown to him) financially to assist the LTTE. He says that the authorities suspect him of offering support to the Tamil cause from the UK. Mr Lewis says that the Appellant thus falls within paraph 7(a) of the Country Guidance. He is "*perceived*" to be a person posing a significant threat to Sri Lanka because he is "*perceived*" to have a significant role in relation to "*post-conflict Tamil separatism*". Mr Lewis drew our attention to paragraph [168] of the judgment in *GJ* where it is recorded that the Government in that Guidance case had conceded that individuals held in custody in Sri Lanka "*continue to be risk of physical abuse, including sexual violence and that such risk is persecutory*." In short if detained a person is at physical risk.

78. The errors I have identified in the Judgment go directly to the Judge's emphatic finding that the Appellant's account was to be rejected in its entirety as incredible. Some of

the failings (for instance in relation to employment) go to contextual matters and as such relate to the overall rejection of the Appellant's case on risk under paragraph 7(a) of the Guidance. Others, such as passage through airports, are related to specific indicia of risk as recognised in paragraphs 7(d) and 9 of the Guidance. Either way they are material errors.

F. Conclusion

79. For the reasons given I would allow the appeal. I would set aside the decision and order of the Upper Tribunal. I would also set aside the determination of the FtT. I would remit the case to the FtT to be re-determined by a different judge.

Lord Justice Baker

80. I agree.

Lord Justice Moylan

81. I agree.