



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01648/2016

**THE IMMIGRATION ACTS**

At Field House  
Determined on the papers

Decision & Reasons Promulgated  
On 24 June 2019

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MA  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**DECISION AND REASONS**

1. In a determination promulgated on 12 November 2018, I found an error of law in the decision of First-tier Tribunal Judge Mill promulgated on 1 June 2018, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 16 September 2015 was dismissed. A copy of that decision is enclosed as an annex, the contents of which set out the background to this appeal and shall not be repeated save where is necessary. Further to the error of law decision, the parties confirmed that no further evidence was to be relied upon and therefore the Appellant requested his appeal be determined on the papers, with both parties making written submissions on the appeal.

*Applicable law*

2. It is for an Appellant to show that he is a refugee. By Article 1A(2) of the Refugee Convention, a refugee is a person who is out of the country of his or her nationality and who, owing to a well-founded fear of persecution for reasons of race, religion, nationality or membership of a particular social group or political opinion, is unable or unwilling to avail him or herself of the protection of the country of origin.
3. The degree of likelihood of persecution needed to establish an entitlement to asylum is decided on a basis lower than the civil standard of the balance of probabilities. This was expressed as a “reasonable chance”, “a serious possibility” or “substantial grounds for thinking” in the various authorities. That basis of probability not only applies to the history of the matter and to the situation at the date of decision, but also to the question of persecution in the future if the Appellant were to be returned.
4. Under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, a person is to be regarded as a refugee if they fall within the definition set out in Article 1A of the Refugee Convention (see above) and are not excluded by Articles 1D, 1E or 1F of the Refugee Convention (Regulation 7 of the Qualification Regulations).
5. The current country guidance in relation to Sri Lanka is set out in **GJ & Others (post-civil war: returnees) Sri Lanka [2013] UKUT 00319 (IAC)** and summarised in the headnote to the determination. It was found that the focus of the Sri Lankan government’s concern has changed since the end of the civil war in May 2009 and the present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary of the Sri Lankan state. The current categories of persons at real risk of persecution or serious harm on return to Sri Lanka, whether in detention or otherwise are as follows:

*(7)(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.*

6. The Tribunal also found as follows:

(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.*

7. In ME (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1486, the Court of Appeal further noted the relevance of a person’s arrest after the cessation of the conflict in Sri Lanka in paragraph 16 as follows:

*“The following are, in my judgment, the pertinent points. ME’s arrest took place long after the cessation of the conflict in Sri Lanka. That led (or ought to have led) to the conclusion that he was perceived at that time as being of significant interest to the authorities. He was therefore a person who had fallen into category (a) of the risk categories identified in GJ. It would have needed an exceptionally strong case to persuade the FTT that he had now ceased to be at risk. The mere fact that he was released without charge and without reporting restrictions was not enough, because the authorities not only made two subsequent visits to his home; but they also searched it. The conclusion that should be drawn from that is that ME was still a person of significant interest; and moreover, that the authorities perceived that he might have more to tell them. ...”*

8. Paragraph 339C of the Immigration Rules provide for a grant of humanitarian protection in circumstances where a person does not qualify as a refugee but can show substantial grounds for believing that they would, if returned to their country of return, face a real risk of suffering serious harm. The applicant must be unable or owing to such risk unwilling to avail himself of the protection of that country.

9. This appeal is also brought under the 2002 Act because the Appellant alleges that the Respondent has in making his decision acted in breach of the Appellant’s human

rights. The Appellant relies upon Articles 2 (Right to Life) and 3 (Prohibition of Torture). The burden of proof of demonstration that the Appellant's removal would breach this country's obligations under the Convention rests upon the Appellant and the standard of proof is the lower standard, that there is a reasonable chance or likelihood that harm will come to the Appellant if removed.

*The Appellant's claim*

10. In summary, the Appellant's claim is that he has a well-founded fear of persecution in Sri Lanka on the basis of his imputed political opinion, namely having been accused of assisting with the LTTE. His account is as follows.
11. The Appellant went to visit a friend in the Eastern Province of Sri Lanka in 2009 for a holiday, during which time he was asked by his friend to deliver a parcel to the uncle of someone he met on this trip, in Colombo. The Appellant agreed and didn't ask any questions about the contents of the parcel as he trusted his friend, dropping it off before work the following day. Two weeks later, on 28 May 2009, the Appellant states that four or five plain clothes police officers came to his home and charged him with transporting parcels for the LTTE. He was arrested, dragged out of his house and detained. During the period of detention, the Appellant was interrogated on a daily basis about the parcel, his involvement with the LTTE and so on. The Appellant was tortured on a daily basis, stripped naked; placed on blocks of ice with cold water poured on him; beaten with batons and iron rods, not given sufficient food and was sexually assaulted. The Appellant did not have any access to a lawyer, there was no formal investigation and he was not presented at court.
12. The Appellant was released from detention with the help of an agent arranged by his family, with a bribe paid by his brothers. The Appellant was released on 18 June 2009 on condition that he had to report once a week at the local police station. The Appellant was traumatised following his release and suffered a mental breakdown on 14 July 2009. He was treated in hospital with Electric Compulsive Therapy and given medication. He was diagnosed with psychosis and depression. The Appellant resigned from his job on 10 September 2009 as he was not able to function at all, suffering from flashbacks and nightmares.
13. The Appellant reported to his local police station for two months after release from detention but then went into hiding and stopped reporting. He travelled to an agent's house in Colombo and stayed there for approximately three or four months and ultimately came to the United Kingdom as a student in January 2010.
14. The Appellant visited Sri Lanka in the summer of 2012 to see his wife, staying for four weeks and encountered no problems whilst there. He returned again in August 2013 with no problems on entry. While at home, he received a letter from the authorities saying that he was to appear in court on 29 August 2013 in relation to charges brought against him. The Appellant states that he ignored this letter given that it had by then been four years since his detention and he thought it was all over. However, the authorities came to look for the Appellant three or four days later, showing his family an arrest warrant for questioning the Appellant regarding his

non – appearance in court related to the 2009 charges. A copy of the arrest warrant has been produced from the Magistrate Courts in Colombo dated 29 August 2013 with particulars of the alleged offence and reason for issue of arrest warrant being stated as ‘not appearing at the court hearing’.

15. The Appellant was arrested and detained again. He was interrogated about the parcel delivery and people involved in this and was tortured again in a similar way to previously. The Appellant was released with the assistance of an agent after five days and payment of a bribe. He stayed in hiding in Colombo for two weeks until returning to the United Kingdom with the assistance of an agent. The authorities have subsequently visited the Appellant’s family home in Sri Lanka.
16. The Appellant had a student visa valid to 2014, did not know about the asylum procedure and therefore did not claim asylum until 8 October 2014 on the basis that he could not safely return to Sri Lanka. The Appellant does not support the LTTE, nor does any of his family and he strongly disagrees with the way that they fight for their cause given that his father was paralysed from a bombing carried out by the LTTE. The Appellant states that he is not against the Sri Lankan government, although he is angry and upset that he was falsely accused by them of helping the LTTE, being detained and tortured on two occasions for this reason.
17. The Appellant fears return to Sri Lanka on the basis that he would be arrested and tortured again by them for the same reasons that he has been in the past. The Appellant, in his written statements, also set out his mental health problems and treatment. The Appellant’s bundle contains extensive medical records in relation to the same.
18. The Respondent’s reasons for refusing the Appellant’s claim are set out in the error of law decision in the annex and need not be repeated here.

#### *The Appellant’s brother’s evidence*

19. The Appellant’s brother came to the United Kingdom in 2002 and was naturalised as a British citizen in 2014. In his written statement, he describes being told by his elder brother in Sri Lanka on 28 May 2009 that the Appellant had been taken by the Terrorist Investigation Department on terrorism charges, following which the family arranged an agent to assist with the Appellant’s release, which took place on 18 June 2009. Upon release, the Appellant was a changed man, he lost lots of weight, was traumatised and soon became completely unable to speak. He was diagnosed with depression on 14 July 2009 and resigned from his job in September that year as he could not cope. The Appellant’s brother suggested he should leave Sri Lanka, continue with his studies abroad and try to forget about what happened. The Appellant obtained a student visa in December 2009 arrived in the United Kingdom in 2010. The Appellant had a mental health breakdown in August 2011, suffering from depression and a further episode of mutism. He was referred to the crisis team for ongoing care for his mental health.

20. The Appellant returned to Sri Lanka in August 2012, staying for four weeks to see his wife and family and returned to the United Kingdom without any problems. He returned again to Sri Lanka in August 2013. The Appellant's brother received a phone call from his elder brother on 2 September 2013 to say that the Appellant was in trouble with the Terrorist Investigation Department coming for him again. An agent was arranged to get the Appellant out of prison, which happened on 7 September 2013 and the Appellant stayed with the agent until he could safely return to the United Kingdom. On return, the Appellant was struggling to continue with his studies and had a further mental health relapse.

*Medico-legal report from Dr RK Sinha*

21. In a report dated 2 January 2017, Dr Sinha, an Independent Medical Practitioner, set out the Appellant's account, medical history and assessment of the Appellant's mental and physical state following examination. The report sets out a history of mental health problems since 2010, following the Appellant's first detention and mistreatment in Sri Lanka. The Appellant's symptoms indicated a recurrent depressive disorder, which was compatible and consistent with the Appellant's claimed history, reported symptoms and observations. The Appellant also has trauma-related symptoms but did not meet the criteria for a diagnosis of PTSD.
22. Dr Sinha also recorded a number of scars on the Appellant, two of which the Appellant claimed were caused by being burnt with the end of a heated metal rod, which Dr Sinha found were consistent with the attributed cause.
23. There was concern that if removed to Sri Lanka, the Appellant's mental state may deteriorate significantly, with increased symptoms of depression and trauma and an increased risk of suicide.

*Psychologist report from Dr Rachel Thomas*

24. In a report dated 21 May 2018, Dr Thomas, a Consultant Clinical Psychologist, sets out her assessment of the mental state of the Appellant. Dr Thomas describes the Appellant's history as including chronic mental health conditions ongoing from more than eight years, with evidence of different diagnoses over the years, including schizophrenia, schizoaffective disorder, recurrent depressive disorder with psychosis, major depressive disorder with post-traumatic traits, as well as an episode of mutism. He has been in receipt of primary and secondary mental health care both in Sri Lanka and in the United Kingdom. Dr Thomas' view is that at the time of her assessment, the Appellant had a chronic, depressive illness and the report sets out his symptoms. In particular, the symptoms include short-term memory impairment, lack of concentration and suicidal ideation. It is Dr Thomas' view that the Appellant's ability to give evidence in court was questionable (and should only be done with specific measures being put in place first) and noted that his GP had already said that he was not fit to do so.
25. Dr Thomas considered the Appellant to be credible psychiatrically, with self-reported symptoms and personal history being consistently matched with his effect

throughout the consultation and with subjective presentation. The Appellant is recorded as having presented a considered and balanced view of his psychiatric symptoms, which would be most unusual for someone attempting to fabricate a psychiatric order, where symptoms are normally reported in extremis. The Appellant's presentation was also highly congruent with the psychological research and evidence in terms of the usual psychological profile of victims of abuse/exploitation, both in terms of symptoms and in terms of clinical presentation at assessment. The symptoms suffered are said to be consequent on the experience of cumulatively traumatic life events.

26. At present, the Appellant has a number of protective factors in the United Kingdom, including safety and support from his brother and family and the hope of being reunited with his wife in a situation of external safety. If forcibly removed to Sri Lanka, the protective factors would be negated and Dr Thomas considered that the risk of an enacted suicide attempt would be high. Dr Thomas's view is that given how psychiatrically unwell and traumatised the Appellant is already, with existing suicidal ideation, he would be unable to tolerate further traumatising likely to be produced by return to his country of origin. Although the Appellant has accessed mental health treatment in Sri Lanka in around 2010, Dr Thomas considers that given his current psychiatric state he would be too frightened and re-traumatised to access them on return now, with an increased fear of the authorities in Sri Lanka. He would be vulnerable to further abuse and/or exploitation and his ability to seek protection would be highly impoverished given his lack of trust in authority figures and his degree of psychiatric illness and traumatising.
27. In conclusion, Dr Thomas stated that the Appellant is a traumatised man who presented in a manner entirely consistent with an individual suffering from moderate symptoms of Major Depressive Disorder with additional post-traumatic traits; the principal cause of which being traumatic experiences of torture in Sri Lanka which were considered to be psychologically credible. In accordance with the terms of the Istanbul Protocol, the Appellant's psychiatric presentation was highly consistent with a typical psychological profile of victims of abuse/maltreatment in accordance with the Protocol. The Appellant's psychological profile is also congruent with that of victims of abuse and torture according to the existing psychological research literature. Recommendations were also made for future treatment.

*Opinion of Kumaravadivel Guruparan*

28. Mr Guruparan is a Senior Lecturer and Head of the Department of Law at the University of Jaffna in Sri Lanka who was called to the bar in Sri Lanka in December 2010 and who has had an extensive practice in the Civil Appellate, District and Magistrates courts in the Northern Province, as well as appearing in the Supreme Court in Fundamental Rights cases. He prepared a report dated 21 March 2018 in relation to the arrest warrant relied upon by the Appellant.

29. Mr Guruparan stated that the arrest warrant relied upon is consistent with such documents issued by the Magistrate Courts in Sri Lanka and that the original arrest warrant in Sinhala is in the usual form with internally consistent details contained on it. He stated that through a lawyer in Colombo, a motion was filed on 14 March 2018 in the Colombo Magistrates Court seeking a certified copy of the arrest warrant along with the entire case record, however the Registry stated they could not provide the copies unless the last date on which the case was last called or the next date on which the case is to be called is provided. The Court Registries are not digitised, with any searches having to be conducted physically and files cannot realistically be located without this information. In the circumstances, it was not possible for Mr Guruparan to obtain a certified copy of the arrest warrant and from his experience it would be very difficult or impossible to be able to do so, particularly where the document is at least five years old. He further commented that corruption is low within the judicial system in Sri Lanka and it would be extremely unlikely for a person to have been able to fraudulently obtain an arrest warrant.

*Expert report from Frederica Jansz*

30. In a report dated 29 April 2018, Ms Jansz was asked to provide an overview of political and security developments in Sri Lanka which are relevant to the Appellant's claim. The report deals firstly with the arrest warrant relied upon by the Appellant, the difficulties in the Respondent's approach to the TID (Terrorist Investigation Department) in Sri Lanka, notably corruption and breach of court orders, as well as its ability to more easily trace a certified copy of an arrest warrant through their own records but with the same difficulties of obtaining one through the Court Registry as described in Mr Guruparan's opinion (of which she had had sight).
31. Ms Jansz sets out the current risk to persons associated with the LTTE in Sri Lanka, by reference to the powers in the Prevention of Terrorism Act 1979, which remain in force, including with the regulations following the end of the Civil War; and by reference to the country guidance in GJ; including that there remains a risk of arbitrary detention and torture of those with perceived links to the LTTE. Given the risk is from the state authorities there is no internal relocation option in Sri Lanka, albeit the Appellant would be less vulnerable away from Colombo and the airport, but could still be subject to police checks to locate his whereabouts.
32. In her instructions, Ms Jansz was also asked to comment on treatment or therapy available mental health issues such as depression in Sri Lanka. She states that although mental health care is in theory available in Sri Lanka, the type of support systems available are extremely limited in quantity and quality, making access to services very difficult, particularly for a person like the Appellant.

*Submissions on behalf of the Respondent*

33. The Respondent accepts the application of the Presidential Guidance on vulnerable witnesses from 2010 to this Appellant, in light of his accepted mental health issues. However, it is not accepted that even applying this guidance, discrepancies in the Appellant's account cannot be attributed to vulnerability and further, cannot be



disregarded. The Respondent continues to rely on discrepancies identified by First-tier Tribunal Judge Mill, set out in paragraphs 30 to 37 in the decision and in relation to which no error of law has been found. These inconsistencies include, in paragraph 30, that the Appellant stated he was released from detention in Sri Lanka on 18 June 2009, reported on a weekly basis at a local police station for around two months and then went into hiding for about two months before coming to the United Kingdom with the assistance of an agent. However, he did not actually travel to the United Kingdom until January 2010, some three months later than claimed. Further, in paragraph 36, it is noted that the Appellant stated that he did not disclose any further torture upon his return in September 2013 to his GP because he was not aware consultations were in confidence and his brother recommended he did not divulge this information. However, the Appellant's brother denied offering any such advice about withholding information. Finally, in paragraph 37 there was an inconsistency in the claim as to when the arrest warrant was produced, either in August 2013 at the time of the Appellant's arrest, or alternatively, when the authorities attended the Appellant's home in Sri Lanka with it in 2015, some two years later. The remaining points made in paragraph 30 to 37 of the decision deal with an assessment of plausibility rather than identifying inconsistencies in the Appellant's claim

34. In relation to the opinion of Mr Guruparan, the Respondent submits that this is of extremely limited value and that little weight should be attached to it. Mr Guruparan is personally known to the Appellant's father, such that his partiality is questioned and in any event, the evidence is based on opinion rather than reference to any source material or detailed explanation for the assertions made. There is no conclusion as to whether the arrest warrant is genuine, only an explanation of the difficulties in obtaining a certified copy without enclosing copies of any of the correspondence in relation to attempts to obtain the same.
35. Further, Mr Guruparan asserts that corruption is very low within the judicial system in Sri Lanka, but without any supporting evidence or explanation. The Respondent states that this is contrary to information readily available, for example a report from the Colombo Telegraph dated 7 December 2016 on judicial corruption which is quoted in full in the written submissions made. It refers to a significant judicial corruption and the Government of Sri Lanka being forced to concede that the people of Sri Lanka have no trust and confidence in the justice system. In light of this, it is entirely conceivable that a false document could be procured from the Sri Lankan judiciary.
36. In relation to Dr Thomas' report, the Respondent states that as the report was based on the Appellant's account, it should be assessed as having little value given the Appellant's lack of credibility, when assessing all of the evidence in the round. Dr Thomas does not consider any alternative causes or any explanation as to why her opinion is the only feasible conclusion in the circumstances. As to the risk of suicide recorded by Dr Thomas, the Respondent notes that the possible positive effect on the Appellant being reunited with his wife and other family members in Sri Lanka is not considered by Dr Thomas, nor is the possibility that the Appellant would be able to continue speaking to his wife and brother, whether or not in the United Kingdom.

Further, the Appellant's wife would be able to assist him in accessing psychiatric treatment in Sri Lanka return.

37. The Respondent submits that Dr Sinha's report, from January 2017, does little to assist the Appellant's claim given the passage of time and lack of further information becoming available.
38. In relation to the Appellant's brother's evidence, the Respondent submits that this does not enable the Appellant to discharge the burden of proof upon him with regard to his credibility.
39. In relation to Article 3 of the European Convention on Human Rights, the Respondent's position is that the Appellant does not meet the high threshold applicable to such cases. In particular the Appellant has no clear plans to commit suicide if returned, has not explained how his mental health needs cannot be met in Sri Lanka, nor has he given any specific details as to how the background evidence he relies upon applies to his own case.

*Submissions on behalf of the Appellant*

40. The written submissions on behalf of the Appellant, repeat and rely on those made previously in the skeleton argument on his behalf and in the grounds in support of the application for permission to appeal to the Upper Tribunal. Further submissions are then made in response to those submitted on behalf of the Respondent.
41. In relation to the evidence of Mr Guruparan, the submission on behalf of the Appellant is that the newspaper extract relied upon by the Respondent does not undermine the reliability of the opinion given or the reasons for it. The extract relates more to concerns about bias in the high judiciary and in particular the failure of the constitutional principle of the separation of powers and does not concern the reliability of documentation processes within court buildings. It is submitted that the opinion should be given sufficient weight in light of Mr Guruparan's qualifications and experience.
42. The medical reports from both Dr Sinha and Dr Thomas set out the Appellant's poor mental health and the report from Dr Thomas in particular sets out the Appellant's associated difficulties and impairments. The Appellant's claim and the credibility of the same must be assessed against this background and it must be determined whether any lack of clarity, consistency or plausibility could have been affected by cognitive impairment, trauma or memory problems. In particular, the assessment of plausibility of the claim must be assessed against the backdrop of someone suffering from a serious mental illness, which would affect the assessment undertaken by a person of apparent risk-taking in Sri Lanka, i.e. by ignoring an official letter. Further, the account of torture in 2013 and its aftermath must be assessed in the context of recall of trauma and supporting evidence from the Appellant's brother, which was not in fact inconsistent with the Appellant's claim (the Appellants brother's evidence was that he told the Appellant that if he did not want to talk about what happened to him he did not have to, as opposed to advising him not to disclose details to his GP).

43. The medical reports both specifically consider the possibility that the Appellant is feigning his symptoms and rejected for credible reasons. The other points raised by the Respondent are merely points of speculation and do not undermine the weight to be attached to the report. The reports both clearly find the Appellant to be psychiatrically credible, with causation being trauma cumulatively suffered in Sri Lanka. The Appellant's mental health was found to be highly consistent and typical of the psychological profile of someone who has been tortured.
44. The evidence from the Appellant's brother remains material, providing support to the Appellant's claim, specifically in light of his mental health.
45. Overall it was submitted that the Appellant has made a credible claim, supported by evidence from his brother and various experts, showing that he would be at real risk on return to Sri Lanka due to his perceived links to the LTTE and post-conflict arrest and detention.
46. In the alternative, the Appellant claims that his removal from the United Kingdom would breach Article 3 of the European Convention on Human Rights. The report from Dr Thomas confirms that forced removal of the Appellant to Sri Lanka carries a high risk of enacted suicide attempt and that given the Appellant's current mental state, he would be unable to tolerate further traumatising which would be produced by return to Sri Lanka and would almost certainly precipitate a psychiatric crisis.
47. Appellant relies upon the guidance in GJ as to the lack of available mental health care in Sri Lanka, supported by the more recent report of a Home Office Fact Finding mission regarding the treatment of Tamils and people who have a real perceived association with the former LTTE, dated July 2016. It is submitted that in circumstances where Sri Lanka does not have the mental health facilities to treat or manage the Appellant's mental health needs suicide risk, he is at risk of treatment engage in Article 3.

### **Findings and reasons**

48. At the outset I record that the Appellant falls within the provisions of the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance, on the basis of his accepted poor mental health dating back at least to 2010. As such I consider his claim and evidence in accordance with that guidance and in particular take into account the assessment from Dr Thomas that the Appellant's ability to give a coherent account of his claim would be affected by "much-heightened anxiety, cognitive impairment (especially very poor short-term memory), suicidal ideation and post-traumatic hyper-arousal". There are extensive medical records available showing a long history of severe mental illness, with a number of severe episodes or breakdowns.
49. In terms of consistency of the Appellant's claim, there is only one inconsistency which casts doubt on the credibility of the claim (in relation to the timing of knowledge of the arrest warrant), particularly when applying the Joint Presidential

Guidance Note, which is sufficient to undermine the credibility of his claim. The first inconsistency relied upon by the Respondent, as to the length of time between his first detention in Sri Lanka from the end of May 2009, to his departure from the United Kingdom is not highly material to the issue of credibility and in any event is not a significant inconsistency when considering a claim by someone with severe mental illness, cognitive impairment and short-term memory problems. Nothing in particular turns on the length of time between these events.

50. The second inconsistency is as to the Appellant's explanation as to why he did not disclose the torture in 2013 to his GP at the time. The Appellant's submission that the Appellant's brother's evidence on this point was more nuanced than that recorded by Judge Mill in the decision (which is supported by the handwritten record of proceedings that in re-examination the Appellant's brother said if you don't want to talk about it don't) shows that there was not really an inconsistency on this basis at all between the two accounts and in any event there is a plausible and credible explanation for the lack of detailed reporting of torture at this time (and in relation to further details of the torture in 2009 being revealed by the Appellant many years later, specifically the sexual abuse suffered) being the Appellant's mental health and trauma suffered. As Dr Thomas explains in her report, it is not uncommon for individuals in situations of trauma not to be able to disclose the full details until a later time and doing so does not necessarily undermine the credibility of such claims. It is not the Appellant's claim that he suffered from any significant physical injuries during detention in 2013 for which medical treatment was required, but he and his brother claim that he suffered a relapse and deterioration in his mental health. Overall, I do not find that there is any inconsistency or lack of credibility in the explanation given as to the Appellant's lack of disclosure to his GP in 2013 of his claims to detention and torture in Sri Lanka that year.
51. The third inconsistency relied upon by the Respondent is as to the date on which the Appellant and/or his family were aware of or saw the arrest warrant dated 29 August 2013. In the Appellant's written statement, this was said to have been shown at the time the authorities attended the Appellant's home in Sri Lanka in 2013 at the time of his arrest, and on the other account, given by the Appellant and his brother, was that the family only learned of the arrest warrant in 2015, some two years after it was issued, when the authorities again came looking for the Appellant and a copy was subsequently obtained through one of the Appellant's brothers. There is no express explanation as to this inconsistency and it can not be explained by the Appellant's vulnerability or impairments.
52. The Appellant's claim was that he received a letter from the authorities requiring him to attend a court hearing in August 2013, which he ignored, with an arrest warrant being obtained on 29 August 2013 and him being arrested and detained three or four days later on 2 September 2013; followed by a copy of an arrest warrant being obtained in 2015. It would be reasonable to infer that the Appellant's arrest and detention on 2 September 2013 was pursuant to the warrant issued on 29 August 2013 and therefore that the Appellant at least would have knowledge of it at the time.

This is consistent with the Appellant's written statement, but not with the later evidence of it being produced only two years later.

53. The key issues in this claim are as to whether the Appellant was arrested, detained and tortured in September 2013 and whether or not there is an outstanding arrest warrant for him in Sri Lanka. However, at the outset I deal with the earlier part of the Appellant's claim of arrest, detention and torture by the Sri Lankan authorities in 2009.
54. I find to the lower standard of proof that the Appellant was arrested, detained and tortured by the Sri Lankan authorities in May/June 2009 on the basis that he has provided a consistent account of this part of his claim; it is accepted that he has suffered from chronic mental health problems since this time, found by Dr Thomas to be psychologically credible and consistent with him being a victim of abuse/torture and caused by cumulative traumatic experiences in Sri Lanka. Similar findings were made by Dr Sinha in the earlier report.
55. The Respondent's primary submission in relation to Dr Thomas' report is that should be given little weight as it is based on the Appellant's account and his claim lacks credibility, when assessing all of the evidence in the round. However, it is clear from the express reasons given in the report that in addition to the Appellant's account, objective assessment has been made of the Appellant's presentation and mental health with clear findings that he is psychiatrically credible and that his presentation is consistent with what is known about victims of abuse/torture. For these reasons I attach significant weight to the main conclusions in the report as to the state of the Appellant's mental health and the attributable cause being cumulative trauma in Sri Lanka. I deal separately below with the Respondent's submissions as to the assessment of suicide risk by Dr Thomas.
56. The Appellant's claim is supported by evidence from his brother, who states he was contacted by family members in Sri Lanka at the time of events and his credibility on this point has not been substantively challenged. Further, the Appellant's account is consistent with background objective evidence as to actions of the Sri Lankan authorities against those suspected of links with the LTTE during the civil war. Finally, the Respondent's submissions do not substantively address this part of the Appellant's claim (other than the inconsistency as to period of time between release from detention and departure to the United Kingdom dealt with above), focusing more on the latter parts of his claim in relation to events in 2013 and future risk.
57. In relation to the arrest warrant issued on 29 August 2013, the Respondent previously relied upon a document verification report which concluded that the arrest warrant relied upon was not genuine, albeit for the reasons set out in VT (Article 22 Procedures Directive - confidentiality) Sri Lanka [2017] UKUT 00368 (IAC), little weight is attached to this document and the Respondent has not placed any recent reliance upon it.

58. The Appellant relies on the opinion of Mr Guruparan that the arrest warrant is consistent with such documents issued by the courts in Sri Lanka, albeit the authenticity of this particular arrest warrant could not be verified for the reasons explained in the opinion. For the avoidance of doubt, I find little force in the submissions of the Respondent in relation to this opinion and in particular about the corruption or otherwise of the judiciary in Sri Lanka, which is not the key point in the opinion or in the context of this appeal.
59. However, the report in any event provides little support for the Appellant's claim in circumstances where there is a complete absence of any explanation as to how the copy of the arrest warrant was obtained by family members two years after its issue. The absence of any such explanation is pertinent given Mr Guruparan's opinion (supported by the report of Ms Jansz) that the lack of digital Court records means that further information, unknown to him, as to the last court date, would be required for the records to be found in the Court Registry. There is no explanation as to how the Appellant's family could obtain a copy of the arrest warrant without this information, or if they had it, why it was not given to Mr Guruparan to enable him to obtain a certified copy from the court. For these reasons I attach little weight to the opinion and find that it does not significantly advance or support the Appellant's claim, given that although consistent in style, the arrest warrant itself could not be verified and there is no explanation as to how it was obtained.
60. In addition, it is entirely unexplained as to why an arrest warrant dated 29 August 2013 remains live and would be relied upon by the authorities looking for the Appellant in 2015, or now, in circumstances where the Appellant was in fact arrested and detained on 2 September 2013, only a few days after the arrest warrant was issued. It would be reasonable to infer that the Appellant's arrest in September 2013 was pursuant to the arrest warrant issued only days before. There is no reason as to why it would remain outstanding if used within days of its issue, even in circumstances where the Appellant was released from detention on payment of a bribe.
61. There is also a complete absence of any explanation as to why the authorities in Sri Lanka would have any interest in the Appellant in 2013, having shown no interest in him since 2009 or since the end of the civil war. The Appellant was able to return to Sri Lanka for approximately four weeks in 2012 without any difficulties and has not claimed any involvement in sur place activities or any LTTE involvement at all. There is no suggestion that his family, with whom he has been in regular contact, had any visits from or difficulties with the authorities before 2013. There is no identification as to any event or issue which would give rise to the authorities having a renewed interest in the Appellant in late 2013 but not in the period 2010 to early 2013.
62. In accordance with the findings in GJ, the focus of the Sri Lankan authorities has shifted since the end of the civil war in 2009 to identifying Tamil activists in the diaspora who are actively working for Tamil separatism and to destabilise the unitary of the Sri Lankan state. There is nothing about this Appellant or in anything

that he has claimed to suggest that he is or would be suspected of being an activist or that he is pursuing Tamil separatism. To the contrary, he expressly states that neither he nor his family have any involvement with the LTTE; that being for good reason given his father's injuries from a bomb blast caused by the LTTE. With regards to his claim of further detention in 2013, the Appellant only stated that he was asked again about delivery of the parcel in 2009 and the people involved in this. Such questioning is not consistent with the current focus of the Sri Lankan authorities and there is no background evidence to suggest that there has been any change in this focus since GJ.

63. I have considered specifically whether the Appellant's account on this point has or could have been affected by his status as a vulnerable witness in accordance with the Presidential Guidance Note, for example due to a difficulty in recalling details in the context of trauma, but this is not a point on which any late disclosure has been made (contrary to, for example, further disclosure to Dr Thomas of sexual abuse during the period of detention in 2009), there is simply nothing to suggest that anything has been left out of the account as to what he was questioned about, contrary to, for example, claimed mistreatment not being set out or set out in full at the first opportunity. I do not find any basis upon which it is likely that this point lacking in the Appellant's claim has anything to do with his vulnerability or impairment, particularly in light of the country guidance.
64. In relation to the Appellant's claim of further arrest, detention and torture in September 2013, although corroboration is not required, this is not specifically supported by any wider evidence save for that from the Appellant's brother. The consistent reports of Dr Sinha and Dr Thomas as to the Appellant's poor mental health conclude that this was caused by cumulative trauma in Sri Lanka; although it is impossible to separate out specifically from these reports claimed trauma in 2013 as distinct from that in 2009 and from the Appellant's father's injuries from a bomb blast previously. There is no specific detail at all as to events in 2013 or any worsening of mental health following the second claimed period of detention; with trauma and chronic mental health problems having been established several years previously.
65. Although I have found above that there was no significant inconsistency in relation to the reasons given as to why the Appellant did not disclose any further trauma in 2013 to his GP, the medical evidence available does not support the claims made by the Appellant and his brother of a relapse and deterioration in the Appellant's health after his return from Sri Lanka in September 2013. In fact, to the contrary, a letter from the Harrow Community Recovery Team dated 25 September 2013 records that the Appellant is doing very well indeed, he is not depressed and there have been no further episodes of mutism; his studies are progressing well. The conclusion is that on assessment on 24 September 2013, there were no cognitive or biological symptoms of depression, nor psychotic symptoms and the Appellant was not suicidal.
66. Whether or not the Appellant had disclosed claimed recent events to his GP, it would be reasonable to expect objective signs of deterioration in his mental health to be

evidenced so soon after his claimed arrest, detention and torture only a few weeks before and having only returned from Sri Lanka a matter of days before the assessment. There is nothing in the medical records to suggest any relapse, deterioration or severe episode of mental health problems in the aftermath of the Appellant's return to the United Kingdom in September 2013. The next medical records available in November 2013 and March 2014 also show no deterioration or relapse and on the latter date, the Appellant is recorded as being in remission.

67. It would be reasonable to expect that if the Appellant had been arrested, detained and tortured for a second period in September 2013; then there would be objective medical evidence of his claimed deterioration in his mental health from that time. Not only is there no such evidence, to the contrary there are repeated positive assessments of the Appellant's health between late September 2013 and March 2014, together with references to employment and progression with studies.
68. The Appellant has not claimed that he suffered from any serious injuries during detention in 2013 and there is therefore no evidence of any physical injuries or scarring from this time in support of the claim of further detention and mistreatment.
69. In the context of the above, I attach little weight to the Appellant's brother's evidence of events in 2013 and their effect on the Appellant, which is inconsistent with, in particular, the medical evidence as to the Appellant's mental health in the six months after the claimed detention.
70. Although I have found the Appellant's claim in relation to his arrest, detention and torture in 2009 to be credible; for the reasons set out above, I do not find his claim in relation to the same in 2013 to be credible nor to meet the lower standard of proof applicable in asylum claims. In so doing, I have taken into account paragraph 339K of the Immigration Rules to the effect that a person who has already been subject to persecution or serious harm will be regarded as a serious indication of the person's well-founded fear or persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. The good reasons applicable in the present case are the end of the civil war in Sri Lanka and the findings in GJ which are binding on me, that there has been a shift in the focus of the Sri Lankan authorities after the end of the civil war and a consequent significant change in the categories of this at risk on return.
71. For the reasons set out above, I do not find that the Appellant falls within any of the risk categories in GJ, in particular he has not established, even to the lower standard of proof, that he would be or would be 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. There is no suggestion that any of the other risk categories would apply and I have not found that there is an outstanding arrest warrant in relation to the Appellant.
72. There is no plausible basis upon which the Appellant's claim to have delivered a single parcel to someone in Colombo before the end of the civil war in 2009 and



undertaken no activity since in relation to the LTTE or Tamil separatism would engage the authority's adverse attention again in 2013 and not in the intervening period. As I do not find that the Appellant has established that he was arrested, detained or tortured in 2013, the Court of Appeal's comments in ME about the pertinence of a post-conflict arrest do not assist the Appellant. In these circumstances, the Appellant has not established a well-founded fear of persecution on return to Sri Lanka and his appeal under the Refugee Convention must therefore be dismissed. For the same reasons, the Appellant is not entitled to a grant of humanitarian protection nor is there any breach of his rights under Articles 2 and 3 of the European Convention on Human Rights on the basis of fear of the Sri Lankan authorities (his mental health claims will be considered separately below).

73. In the application for permission to appeal and course of these proceedings before the Upper Tribunal; the Appellant did not specifically challenge the findings of the First-tier Tribunal in relation to the separate consideration of his claim under Article 3 of the European Convention on Human Rights on health grounds. Paragraph 31 of the grounds of appeal submitted that there was a mistake of fact, or alternatively an unreasoned conclusion by the First-tier Tribunal that Dr Thomas' report raised only a "theoretical" possibility of suicide, although the consequence or otherwise of this point was not fully developed in submissions. This point is dealt with in paragraphs 22 and 23 of the error of law decision annexed, with the conclusion overall that the First-tier Tribunal erred on its approach to the evidence of Dr Thomas and failed to give it sufficient weight, also failing to accurately summarise its contents. Those errors have not been specifically relied upon by the Appellant to challenge the findings of the First-tier Tribunal in relation to Article 3 on medical grounds, but arguably infect the conclusions in paragraphs 47 to 49 on this point. Pursuant further directions issued to the parties, the Appellant confirmed that he continued to rely on a discreet Article 3 claim on mental health grounds and written submissions were made by both parties on this point. I therefore go on to remake that part of the decision as well.
74. It is well established that there is a very high threshold for a breach of Article 3 of the European Convention on Human Rights in health cases, as set out in N v Secretary of State for the Home Department [2005] UKHL 31.
75. In relation specifically to the risk of suicide from enforced return, in J v Home Secretary [2005] EWCA Civ 629, the Court of Appeal identified the following five stages of the correct test to be considered in such cases.

*"27. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see Ullah paras [28-39].*

28. *Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in Soering at para [91], the court said:*

*"In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."(emphasis added).*

*See also para [108] of Vilvarajah where the court said that the examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka..."*

29. *Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of D and para [40] of Bensaid.*
30. *Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of Bensaid).*
31. *Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.*
32. *Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights."*

76. In Y (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 362, the Court of Appeal qualified the fifth factor in J as follows in paragraph 16 of the judgement:

*"16. One can accordingly add to the fifth principle in J that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return."*

77. As already set out above, the medical evidence in this case is that the Appellant has a relatively long history of serious mental health problems and the most recent report from Dr Thomas confirmed his presentation at that time, concluding that he would be at high risk of suicide if forcibly removed to Sri Lanka and would be unable to effectively access treatment on return there. Dr Thomas' opinion was however based

upon an assumption that the entirety of the Appellant's protection claim and history was credible, specifically that he was detained and tortured not only in 2009 but also in 2013. For the reasons already given above the Appellant has not established that he was arrested, detained or tortured in 2013 and it is therefore unknown what effect, if any this would have on Dr Thomas's view as to the situation if forcibly returned now. There is arguably a potentially significant difference given that the Appellant returned to Sri Lanka in both 2012 and 2013, without any suggestion of re-traumatisation or fear on return on either occasion.

78. The further difficulty with Dr Thomas' conclusion that the Appellant would not be able to access mental health treatment on return to Sri Lanka, is that no consideration is given to the fact that the Appellant has supportive family in Sri Lanka, including his parents, siblings and his wife and no explanation whatsoever is given as to why this family network and support would be ineffective to enable the Appellant to seek any treatment required.
79. In these circumstances, although I attach great weight to the report of Dr Thomas, it has, for the reasons set out above, much more limited value in relation to suicide risk in the event of forcible return to Sri Lanka. However, I do take into account the background evidence, as set out in GJ and supported more recently by the Respondent's own Fact Finding Mission, that mental health facilities in Sri Lanka are incredibly limited and I do not find that it necessarily follows that because the Appellant was able to access treatment in 2010, that he would be able to do so on return now.
80. Although the Appellant's fear on return to Sri Lanka has not been established to be objectively well-founded, given his past<sup>9</sup> accepted history, particularly relation to events in 2009, I accept that his fear on return is genuinely held.
81. Taking all of these matters in the round, although the Appellant faces a high hurdle to establish a real risk of breach of Article 3 on return for mental health reasons and although there are unanswered questions and weaknesses in the evidence available, I find that given the Appellant's significant history of serious mental health problems caused cumulatively by trauma in Sri Lanka, including from his arrest, detention and torture in 2009, taken together with the significant lack of mental health facilities in Sri Lanka, that he just meets the threshold of a real risk such that his appeal is allowed on Article 3 grounds.
82. In the application for permission to appeal and course of these proceedings before the Upper Tribunal; the Appellant has not specifically challenged nor made any submissions in relation to the findings dismissing his appeal on private or family life grounds (either under the Immigration Rules or outside of them on the basis of Article 8 of the European Convention on Human Rights) and those findings therefore stand from the decision of First-tier Tribunal Judge Mill. The appeal is dismissed on human rights grounds.

**Notice of Decision**

For the reasons set out in the decision annexed, the making of the decision of the First-tier Tribunal did involve the making of a material error of law and as such it was necessary to set aside the decision.

The appeal is remade as follows:

The Appellant's appeal is dismissed on protection grounds.

The Appellant's appeal is allowed on human rights grounds, with reference to Article 3 of the European Convention on Human Rights only.

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

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

Signed



Date

20<sup>th</sup> June 2019

Upper Tribunal Judge Jackson

ANNEX



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01648/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 5<sup>th</sup> October 2018

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MA  
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms K McCarthy of Counsel, instructed by Duncan Lewis & Co

For the Respondent: Ms L Kenny, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Mill promulgated on 1 June 2018, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 4 February 2016 was dismissed.
2. The Appellant is a national of Sri Lanka born on 2 April 1976, who first entered the United Kingdom on 14 January 2010 with a visa issued the previous month and with leave to remain to 11 May 2011 and later extended. On 13 June 2014, the Appellant

applied for leave to remain outside of the Immigration Rules which was refused on 18 August 2014 and the appeal against that refusal was dismissed on 24 June 2015. The Appellant claimed asylum on 16 September 2015 (although that date is disputed by the Appellant), on the basis of fear of persecution from the Sri Lankan authorities as a suspected supporter of the LTTE.

3. The Respondent refused the application the basis that the Appellant was not accepted as having given a credible account of his claim having returned to Sri Lanka after he says he initially faced problems and the arrest warrant was not accepted as a genuine document. There was no medical evidence in support of the claimed injuries from torture. Overall it was not accepted that the Appellant would be at risk on return to Sri Lanka even taking his claim at its highest. There were no grounds for a grant of leave to remain on medical grounds, or family and private life grounds. In particular, medical treatment was available to the Appellant on return to Sri Lanka, he did not satisfy the requirements of the Immigration Rules as an adult dependent relative on his brother in the United Kingdom and had no other family here, and did not meet the requirements of paragraph 276ADE of the Immigration Rules in relation to private life. No exceptional circumstances to warrant a grant of leave to remain were found.
4. Judge Khan initially dismissed the appeal in a decision promulgated on 16 June 2017, however that was set aside following the finding of an error of law by the Upper Tribunal on 5 December 2017. The appeal was remitted back to the First-tier Tribunal for a fresh hearing which came before Judge Mill on 22 May 2018. The appeal was dismissed in a decision promulgated on 1 June 2018 largely on adverse credibility grounds. The Appellant's account was found to be inconsistent in a number of respects and his claim inherently implausible, particularly as regards his return to Sri Lanka in 2012 and 2013 despite his claimed history of detention and torture in 2009.
5. The First-tier Tribunal did not give any weight to an expert report from Kumaravadivel Guruparan as to the authenticity of an arrest warrant relied upon by the Appellant and found that the arrest warrant was not genuine and could not be relied upon. Further, a medico-legal report from Dr Ritesh Sinha was not considered as lending significant weight to the Appellant's claim, nor was a report from Frederica Jansz.
6. The Appellant's mental health was not considered to be something which added weight to the Appellant's protection claim and was instead considered as part of a separate Article 3 claim, although it was found that the circumstances did not meet the high threshold in such a case.
7. Overall, the Appellant was not found to fall into any risk categories identified in GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC) and not to be at risk on return to Sri Lanka. His appeal was also dismissed on human rights grounds.

## The appeal

8. The Appellant appeals on five grounds. First, that the First-tier Tribunal failed to apply the Joint Presidential Guidance Note number 2 of 2010 (the “Presidential Guidance”) in assessment of the Appellant’s credibility as a vulnerable adult. In particular, that his accepted mental health difficulties were not taken into account during the substantive consideration of his protection claim. Secondly, the First-tier Tribunal failed to make any findings about the Appellant’s brother’s credibility, nor was the evidence from him summarised or referred to at all in the decision. Thirdly, that the First-tier Tribunal applied the wrong standard of proof in relation to the reports from Dr Thomas and Dr Sinha, failing to give this evidence anxious scrutiny nor consider it in the round. In particular, reference was made to evidence not being conclusive rather than being assessed in accordance with the lower standard of proof and no consideration given of the totality of the psychological and physical evidence. Fourthly, the First-tier Tribunal erred in placing no weight on the authentication of the arrest warrant by an independent witness whose expertise was not canvassed by the Tribunal and the reasons for rejecting it were partly based on a mistake of fact as to the availability of a required date for verification purposes. Finally, there was a mistake of fact by the First-tier Tribunal in that the Appellant claimed asylum on 8 October 2014 and not in 2015 after finding out about the arrest warrant and other examples are given of factual errors which did not accurately record the evidence before the First-tier Tribunal.
9. Permission to appeal was granted by Judge Murray on 13 August 2018 on all grounds.
10. At the oral hearing, Counsel for the Appellant made submissions in line with the written grounds of appeal, with reference to relevant parts of the evidence before the First-tier Tribunal and highlighting the factual errors in the decision, lack of reasons and consideration of the evidence before the First-tier Tribunal and application of the wrong standard of proof.
11. On behalf of the Respondent, it was submitted that the evidence and decision must be looked at in the round and when doing so, there were no errors of law. It was highlighted that the Presidential Guidance on vulnerable witnesses had been acknowledged but even taking mental health matters into account, there were discrepancies in the Appellant’s evidence which could not be put down to any issues of vulnerability. There were material discrepancies in the chronology and a lack of any report to medical practitioner of claimed injuries at the relevant time. The findings in relation to plausibility were unaffected by any issues of vulnerability.
12. It was submitted that the First-tier Tribunal gave sufficient reasons for the weight being attached to the report of Mr Gurupuran, including that it was opinion based rather than evidence-based with no conclusion or opinion as to the verification of the actual arrest warrant. Concerns were raised about the independence of the author on the corruption point and it was submitted that the ground of appeal in this regard amounted only to disagreement with the findings rather than any error of law.

Similarly, in relation to the mental health report, it was submitted that sufficient reasons were given for the weight attached to it and it was appropriately considered as part of the evidence in the round applying the correct standard of proof. It was accepted that evidence would only rarely be diagnostic of something, so this is a factor which should be considered. The Home Office Presenting Officer submitted that paragraph 47 of the decision accurately represents the contents of Dr Thomas' report and adequate consideration was given to it.

### **Findings and reasons**

13. In relation to the first ground of appeal, the First-tier Tribunal was clearly alive to and accepted the Appellant's mental health and it was expressly stated in paragraph 19 that there was no difficulty in applying the Presidential Guidance for this reason. However, in paragraph 42, consideration was given as to whether the Appellant's mental health was something which added weight to claims of detention and torture but it was not found that it did such that the evidence in relation to mental health was considered only in relation to his separate Article 3 claim. The First-tier Tribunal stated that there was no clear correlation between the state of the Appellant's mental ill-health and his claim to torture which he found his asylum claim upon.
14. The Presidential Guidance includes guidance for the Tribunal prior to and at the substantive hearing, and also guidance on the assessment of evidence given by a vulnerable witness. It states that when assessing evidence, account should be taken of potentially corroborative evidence and the need to be aware that the order and manner in which evidence is given may be affected by mental, psychological or emotional trauma and comprehension may have been impaired. A Tribunal should consider the extent to which the age, vulnerability or sensitivity of the witness was an element in any clear discrepancies in the evidence or lack of clarity. A decision of the Tribunal should record the effect it considered the identified vulnerability had in assessing the evidence before it and in asylum appeals, weight should be given to objective indications of risk rather than lead to a state of mind.
15. The First-tier Tribunal's decision does expressly conclude that the Appellant's mental health has no clear correlation with his claims of torture and adds little weight to his protection claim, however it does not expressly set out any consideration of or conclusion as to whether the Appellant's mental health has been taken into account in the assessment of the evidence that he gave. It is not a matter of whether the Appellant's mental health adds weight to the claim, but whether it has affected the evidence he has given and if so, whether it is appropriate to draw adverse credibility findings in such circumstances.
16. In particular, the decision makes no reference to the detailed psychological assessment from Dr Thomas which stated that the Appellant's ability to give a coherent account was affected by "much-heightened anxiety, cognitive impairment (especially very poor short-term memory), suicidal ideation and post-traumatic hyper-arousal". The contents of Dr Thomas' report were only considered later on in



the decision and not with reference to the assessment of credibility in relation to the protection claim.

17. I find an error of law by the First-tier Tribunal in not applying the full extent of the Presidential Guidance in the assessment of credibility and evidence in the round by reference to the Appellant's accepted poor mental health, supported by specific and detailed medical evidence. This is a material error given the adverse credibility findings were largely premised on the inconsistencies in the Appellant's claim, the delay in making it and its inherent implausibility.
18. This finding is linked to and overlaps to some extent with the second ground of appeal, the failure by the First-tier Tribunal to refer to or make any findings as to the Appellant's brother's evidence. Paragraph 20 of the decision records that there was an additional witness, the Appellant's brother, but his evidence is not referred to at all in the body of the decision or the reasons for the findings made. This evidence is potentially corroborative of the Appellant's claim and therefore potentially has an increased importance, in accordance with the guidance in assessing the evidence of a vulnerable witness. Although it is not necessary for each and every piece of evidence to be expressly considered in a decision of the First-tier Tribunal, in the circumstances of this particular case, it is an error of law not to refer to it at all in the context of adverse credibility findings made against a vulnerable witness.
19. In relation to the third ground of appeal, it is necessary to have more detailed regard to the findings made by the First-tier Tribunal in relation to the reports from Dr Thomas and Dr Sinha. The analysis of the psychological assessment by Dr Thomas 47 of the decision, which states as follows:
 

*"An independent psychological assessment is lodged on behalf of the Appellant which is recently dated 21 May 2018. This appears at pages 49 – 90 of the Appellant's supplementary bundle. The author is Dr Rachel Thomas, Consultant Clinical Psychologist and Consultant Adult Psychotherapist. She states that the Appellant is suffering from moderate symptoms of major depressive disorder with additional post-traumatic traits. She states that she considers the principal cause of the Appellant's psychiatric disorder to be the traumatic experiences of torture he has experienced in his native Sri Lanka. It is not a matter for the psychologist when offering expert opinion on his health to offer opinions on the issues of credibility. Whilst the report is Istanbul Protocol compliant, it is noted that Dr Thomas suggests that his condition of mental health is highly consistent and typical of the psychological profile of someone who was being tortured. This leaves open the existence of other causes of causation. It is not conclusive. Dr Thomas states that in the event of the Appellant being removed from the United Kingdom now that she anticipates that his psychiatric health would rapidly deteriorate to a severe psychiatric episode with increased suicidality. She does not analyse in detail any current suicidal thoughts or behaviours on the part of the Appellant nor the level of risk, albeit increased, that would come with the Appellant's removal."*
20. The reasoning in this paragraph appears on the one hand to recognise that it is not the place of an expert providing a medical opinion to assess credibility, but on the

other hand to require conclusive evidence of causation for such evidence to be taken into account in an appellant's favour. The reference to the evidence not being conclusive can only be read as implying a much higher standard of proof than the lower standard applicable in protection claims.

21. When the report is read as a whole, it is also clear that Dr Thomas has made an assessment not of the credibility of the Appellant's protection claim, but of the credibility of his psychiatric symptoms. Reasons are given from paragraph 58 onwards in the report as to why these were considered credible, including by reference to the consistency of his account, objective assessment and presentation, a balanced view of symptoms and consistent with objective evidence. To this is added a section on the impact of past abuse and torture on a person's mental health by reference to objective evidence on the area. It is not an attempt to assess credibility in the way in which a First-tier Tribunal is required to do, nor to offer conclusive evidence and the weight to be attached to it should not have been determined as if it was or was required.
22. I would add further that the summary in this paragraph, combined with the final sentence in the following paragraph that "*Dr Thomas's assessment raises only a theoretical possibility of a suicide attempt.*" is also not a fair or accurate summary of the report. Detailed analysis and consideration of suicidality is contained in the report in paragraphs 42, 76 and 77 with wider reasoning given in the surrounding paragraphs as to the impact of return on the Appellant.
23. The First-tier Tribunal's approach to the evidence of Dr Thomas, particularly when considered alongside the evidence of Dr Sinha, errs in law for the reasons given. First, it is not taken into account at all for the application of the Presidential Guidance. Secondly, the wrong standard of proof is applied when the evidence should have been considered in the round to the lower standard. Thirdly, less weight is attached the report for a lack of detail which is in fact contained in the report.
24. As to the fourth ground of appeal, in relation to the evidence of Mr Guruparan and verification of the arrest warrant, I also find an error of law. Little weight is attached to the report for a number of reasons, including that the prima facie plausible explanation for not being able to obtain a copy of the arrest warrant did not withstand scrutiny given the Appellant detailed the date on which he was summonsed to Court for a hearing. However, it appears to be assumed by the First-tier Tribunal that that is the same as the last date on which the case was called or the next day on which the case is to be called which is not necessarily the case as it may have been listed for a later date after the arrest warrant.
25. Further, the report is rejected as being inconsistent with background evidence of the prevalence of fraudulent documents, however Mr Guruparan refers to corruption in the judiciary being very low, i.e. that it is unlikely a document could be fraudulently obtained from the judicial system which is a slightly different point. For these

reasons, I find that the reasons for little weight being given to the report are not sustainable.

26. As I have found errors of law on the first four grounds of appeal, it is not necessary to consider all of the claimed mistakes of fact in the decision in detail. I have already referred above to the misrepresentation of Dr Thomas' report as to the risk of suicide and legitimate concerns have also been raised as to the characterisation of the Appellant's claim of torture against which adverse credibility findings were made.
27. The final factual issue is as to when the Appellant claimed asylum. The Respondent's records show this was in September 2015, close to the date in the First-tier Tribunal's decision and the Appellant has not provided any evidence to support his claim that this was a year earlier. In any event, I am not persuaded that if there was a mistake of fact in the date that it would be material given that even if the claim was made in 2014, there was still a delay of at least a year between the claimed torture in 2013 and the claim for asylum.
28. For the reasons set out above, the making of the decision of the First-tier Tribunal did involve the making of material errors of law and as such it is necessary to set aside the decision. Given the history of the appeal and detailed evidence already available, the appeal is retained in the Upper Tribunal for determination.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

### **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.

### **Directions**

**The Appellant and the Respondent are to confirm to the Upper Tribunal within 21 days of the date on which this decision is issued as to whether a further oral hearing is required to remake the decision on appeal or if it can be determined on the papers with the parties making written submissions. If an oral hearing is required, the parties are to**

**confirm from whom oral evidence is to be called and any special arrangements required for such evidence. On the expiry of this period, further directions will be given as to listing of a hearing if required, or for written submissions for determination on the papers.**

Signed



Date

8<sup>th</sup> November 2018

Upper Tribunal Judge Jackson