Upper Tribunal
(Immigration and Asylum Chamber)

AS (s.55 "exclusion" certificate - process) Sri Lanka [2013] UKUT 00571 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 September 2013	.....

Before

UPPER TRIBUNAL JUDGE PETER LANE

UPPER TRIBUNAL JUDGE PITT

Between

AS

(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms S Jegarajah of Counsel instructed by Shanthi & Co.

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

1. Section 55 of the Immigration, Asylum and Nationality Act 2006 does not require a decision on exclusion from asylum to be made at the outset of a hearing and prior to consideration of any other matters.

2. The effect of s.55 is to require a Tribunal in its written determination to decide exclusion from asylum first, before proceeding to address any other head of claim.

3. Deciding exclusion first is merely common sense, regardless of whether a s.55 certificate has been made by the respondent as it determines whether substantive consideration of the asylum claim is necessary.

4. There is no statutory provision akin to s.55 that can be applied when an applicant makes a claim for Humanitarian Protection. However, given the exclusion criteria in paragraph 339D of HC 395 (the Immigration Rules), which are very similar to those in Article 1F(a), a Tribunal should also decide on exclusion from Humanitarian Protection before substantive consideration of that claim.

DETERMINATION AND REASONS

1.
The appellant is a national of Sri Lanka and was born in 1978.

Appeal History

2.
The appellant arrived in the UK on 15 October 2010 as a visitor with his wife and two children. On 10 November 2010 the appellant applied for asylum and humanitarian protection status under Council Directive 2004/83/EC (the Qualification Directive) with his family as his dependants. He also maintained that he was entitled to protection under Article 3 of the ECHR.

3.
In a letter dated 1 September 2011 the respondent refused the appellant's application on all heads and made a decision under Section 10 of the Immigration and Asylum Act 1999 to remove the appellant and his family to Sri Lanka.

4.
In addition, the respondent certified the appellant's asylum claim under s.55 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"). It is the respondent's case that the appellant is excluded from the protection of the Refugee Convention by operation of Article 1F (a), as there are serious reasons for considering he has committed a war crime or a crime against humanity.

5.
The appellant appealed to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge Mensah on 1 December 2011 and 6 January 2012. In her determination dated 20 January 2012, Judge Mensah upheld the s.55 certificate and dismissed the appeal on all grounds.

6.
On 17 February 2012, the appellant was granted permission to appeal Judge Mensah's decision to the Upper Tribunal. After a hearing on 4 February 2013, we found that the determination of Judge Mensah disclosed a material error on a point of law such that it should be set aside.

7.
A copy of our decision on the error of law is appended to this determination. The error of law was such that the determination of the First-tier Tribunal had to be set aside entirely and re-made de novo . It is therefore our task now to re-make the asylum and other claims, doing so in line with the provisions of s.55 of the 2006 Act.

8.
We must also make a decision on an additional submission made to us by Ms Jegarajah, that the correct process in a s.55 case is to hear evidence and submissions and make a decision on exclusion at a hearing before proceeding to hear evidence and submissions on any other issue.

The Appellant's Claim

9.
In order to provide a context for the legal submissions made to us on the correct procedure for dealing with a s.55 certificate, we now set out the appellant's claim.

10.

The appellant maintains that from 2007 to 2009 he worked as a member of a special unit of the Sri Lankan police force. He worked in a team of twelve people drawn from different armed services and his team also included members of the criminal underworld.

11.
The appellant would receive orders directly from the Deputy General of Police and the Superintendent of Police using a mobile phone given to him specifically and uniquely for this purpose. The unit did not have a fixed location but would meet in places such as abandoned houses.

12.
The order would come to go to arrest a certain person who was a suspected LTTE member. The appellant and his colleagues would be armed. They would arrest and tie up and blindfold the detainee, and place them in the foot well of an unmarked vehicle. The detainee would then be handed over to other individuals working for the government, usually in an abandoned house, sometimes passing them over to men from another unmarked vehicle, sometimes taking the person to a police station, the handover location only being given at the last minute.

13.
The appellant maintains that for most of the time that he worked for this unit, he did not know what happened to the people arrested after they left his charge. He knew only that the work he was doing was part of an effort to stop the high number of LTTE suicide bombings taking place at that time.

14.
However, in approximately May 2009 he became aware of reports in the media that it was likely that after people he arrested were handed over to others they were tortured and possibly killed.

15.
The appellant was greatly concerned by this but uncertain of what to do and concerned for his own safety. He applied for a transfer but remained active within the unit until December 2009 when he took part in an operation for the last time and then left the unit in January 2010. During 2009 the arrests were widened to include other civilians and members of the criminal underworld who were suspected of acting against the government.

16.
During 2010 the appellant signed on weekly but noticed that three other members of the unit, known to him only by their numbers, were no longer signing on. Another member, someone he had known previously and so had known the name of, Ranatanuga, was also no longer going to the gym where he had seen him regularly since leaving the unit. He raised Ranatanuga’s absence with his superior but was told in clear terms that it was not his business. Ranatanunga’s wife told the appellant that he had disappeared but that the police were not investigating his disappearance.

17.
At the same time, the appellant’s father reported unknown individuals hanging around the family home who, when challenged, said that they were waiting for a friend. The appellant was concerned that he was being followed and spent as much time as possible away from his home at police barracks.

18.
The appellant feared that he was at risk either from a government which suspected him of disclosing information about the torture and murder of LTTE suspects or from the criminal underworld who had been both informers to the unit and, in 2009, arrested by the unit. He decided to leave the country.

Procedure for a Section 55 Certificate

19.
The relevant provisions of s.55 of the 2006 Act are as follows:

Refugee Convention: certification

(1) This section applies to an asylum appeal where the Secretary of State issues a certificate that the appellant is not entitled to the protection of Article 33(1) of the Refugee Convention because—

(a) Article 1(F) applies to him (whether or not he would otherwise be entitled to protection), or

(b) Article 33(2) applies to him on grounds of national security (whether or not he would otherwise be entitled to protection).

(2) In this section—

(a) 'asylum appeal' means an appeal—

(i) which is brought under section 82, 83 or 101 of the Nationality, Immigration and Asylum Act 2002 (c. 41) or section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68), and

(ii) in which the appellant claims that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under the Refugee Convention, and

(b) 'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951.

(3) The Asylum and Immigration Tribunal or the Special Immigration Appeals Commission must begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate.

(4) If the Tribunal or Commission agrees with those statements it must dismiss such part of the asylum appeal as amounts to an asylum claim (before considering any other aspect of the case).

20.
Ms Jegarajah submitted that the wording of s.55 requires a Tribunal to determine exclusion from asylum at the outset of a hearing and before going on to hear evidence or submissions on any other claims. Her skeleton argument maintained that "the current practice of leaving matters until the conclusion of the hearing is contrary to statute."

21.
Ms Jegarajah's argument relied, in particular, on the wording of s.55(3) and s.55(4), that the Tribunal "must begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate" and, if the certificate is upheld, dismiss the asylum claim "before considering any other aspect of the case."

22.
Deciding exclusion from asylum at the outset of a hearing was consistent with the intention of s.55(3), Ms Jegarajah continued. This was to ensure that the respondent's case against an appellant was clearly defined at the beginning of a hearing. This, in turn, prevented an insubstantial case for exclusion being augmented or altered during the hearing as a result of the appellant's evidence,

thereby depriving the appellant of an opportunity to rebut the new allegations from the respondent that could lead to exclusion.

23.
Mr Jarvis did not accept that dealing with the s.55 certificate discretely at the outset of proceedings was a correct interpretation of the statute or that this procedure was practical. In his view, the statute could not be read as a “procedural straitjacket” in the terms put forward by Ms Jegarajah.

24.
We did not find that we could agree with Ms Jegarajah for a number of reasons. Firstly, we did not accept that an ordinary and normal reading of the wording of s.55 permitted the interpretation she put forward. The provisions of s.55(3) require the Tribunal to address exclusion at the beginning of its “substantive deliberations on the asylum appeal.” In our judgement, this was a straightforward reference to the assessment conducted by a Tribunal after a hearing in order to make a decision. There is no reference to the “substantive deliberations” taking place at a hearing. For the statute to provide for the procedure described by Ms Jegarajah, far clearer and more specific wording would be required.

25.
Secondly, it was also our view that there is nothing in the wording of s.55(4) that supports an interpretation that a decision on exclusion must take place at the beginning of a hearing. T he words “before considering any other aspect of the case” in s.55(4) are, again, simply a reference to the judicial assessment that may (and in such cases usually does) take place after a hearing.

26.
Thirdly, we did not consider that, in practice, it would be expedient or possible to deal with the exclusion issue in isolation at the outset of a hearing. It is not uncommon, as in this appeal, for the respondent’s exclusion case and the appellant’s refugee claim to rely on the same evidence. Hearing evidence on the exclusion case would inevitably include evidence on the appellant’s substantive asylum claim.

27.
Fourthly, even if the exclusion case and the substantive asylum claim are founded on different parts of the appellant’s evidence, it would be artificial to make a finding on one entirely separately from the other. An assessment of whether an appellant is excluded from refugee protection, even if the standard for that assessment is different, must take account of his evidence as a whole, not just a part of it.

28.
Fifthly, we did not accept that unfairness would inevitably arise if the exclusion issue was not decided at the outset of a hearing. It is the nature of litigation, certainly in the Immigration and Asylum Chamber, for new evidence or issues to arise during a hearing. If a party considers that they have not been given a sufficient opportunity to deal with the new point, an application for an adjournment can be made. If the respondent’s case on exclusion changes during a hearing this can be addressed in the same way, by an adjournment, short or longer, depending on the particular circumstances. Alternatively, it would be open to the Tribunal to rule that, in the circumstances, it would be unfair to raise the new matter.

29.

It is therefore our view that s.55 does not require a decision on exclusion from asylum to be made at the outset of a hearing and prior to consideration of any other matters.

30.
The effect of s.55 is to require a Tribunal in its written determination to decide exclusion from asylum first, before proceeding to address any other head of claim.

31.
Deciding exclusion first is merely common sense, regardless of whether a s.55 certificate has been made by the respondent as it determines whether substantive consideration of the asylum claim is necessary.

32.
There is no statutory provision akin to s.55 that can be applied when an applicant makes a claim for Humanitarian Protection. However, given the exclusion criteria in paragraph 339D of HC 395 (the Immigration Rules), very similar to those in Article 1F(a), a Tribunal should also decide on exclusion from Humanitarian Protection before substantive consideration of that claim.

Exclusion from the Refugee Convention – The Law

33.
Following our own guidance, we turn first to the question of whether the appellant is excluded from the Refugee Convention.

34.
We looked first at the law and legal definitions for the various tests that the respondent must make out.

War Crimes and Crimes Against Humanity

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

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

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

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

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

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

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

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

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

(f) Torture

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

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, on other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Joint Criminal Enterprise and Aiding and Abetting

39.
Art 12(3) of the Qualification Directive provides that someone does not have to personally commit the excluded act and can be excluded if they “instigate or otherwise participate in the commission of [crimes against humanity]”. Article 25(3)(b) of the ICC Statute sets out the different levels of involvement that an individual must have to be criminally responsible. Article 25(3)(c) establishes individual criminal responsibility if a person “aids, abets or otherwise assists…” as a subsidiary form of participation.

40.
The case of MT (Article 1F (a) – aiding and abetting) Zimbabwe [2012] UKUT 00015 (IAC) explains at [119] that:

“ Aiding and abetting differs from joint criminal responsibility (jce) in that whilst the former generally only requires the knowledge that the assistance contributes to the main crime, participation in jce requires both a common purpose and an intentional contribution of the participant (Triffterer, pp. 756-758) to a group crime. Aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime. Article 2 para 3(d) of the 1996 Draft Code requires that aiding and abetting should be “direct and substantial”, i.e. the contribution should facilitate the commission of a crime in “some significant way”. The Trial Chamber

in Tadic II, the Trial Chamber in the Prosecutor v Naletilic and Martinovic (IT-98-34) cases and the Appeal Chamber in Prosecutor v Akeyesu (Case No. IT-95-14/l-T), paras 484, 706) interpreted "substantial" to mean that the contribution has an effect on the commission, that is have a causal relationship with the result and it included within the concept "all acts of assistance by words or acts that lend encouragement or support". In Prosecutor v Furundzija (IT-95-17/1-T, 10 December 1998), paras 199, 232, 273-4, the Trial Chamber said that assistance need not be tangible: "moral support and encouragement" can suffice, albeit it must "make a significant difference to the commission of the criminal act by the principal": see also Prosecutor v Brdanin (IT-99-36-A, Appeal Chamber, 3 April 2007) and Prosecutor v Perisic (IT-04-81-T, 6 September 2011). The requisite knowledge may be inferred from all relevant circumstances, i.e. it may be proven by circumstantial evidence (Prosecutor v Tadic , para 689; Prosecutor v Akeyesu para 498). "

Duress

41.
Article 31 of the ICC Statute provides:

Article 31

Grounds for excluding criminal responsibility

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

…

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

(i) made by other persons; or

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

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

Standard of Proof

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

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

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

45.
We applied this guidance in reaching our findings on the exclusion issue, bearing in mind also that the burden in that regard falls on the respondent.

Exclusion from the Refugee Convention - Our Findings

46.
The respondent’s case (at M1 of her bundle) is that whilst the appellant was in the special unit from 2007 to 2009 the Sri Lankan authorities committed a widespread and systematic attack against the civilian population, Tamils in particular, and that the appellant had knowledge of that attack.

47.
The respondent also maintains that the appellant committed war crimes or crimes against humanity either as part of a joint criminal enterprise and/or aided and abetted the crimes of torture and extra judicial killings by arresting terrorist suspects and handing them over for interrogation.

48.
The respondent goes on to submit that the appellant knew that people who were arrested by his unit and handed over to other authorities were then tortured and extrajudicially killed.

49.
The respondent does not accept that the appellant was under duress or attempted to distance himself from those crimes.

“Widespread or Systemic Attack Directed Against Any Civilian Population”

50.
As confirmed in MT , the chapeau requirement of Article 7(1) is an essential element in the definition of a crime against humanity. The appellant’s acts must have been committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, a crime against humanity” and the appellant must have had “knowledge” of that attack.

51.
Ms Jegarajah submitted that the respondent had not made out this primary part of her case.

52.
We, however, found that during the period of the appellant’s service in the special unit that the actions of Sri Lankan authorities were well-characterised as “a widespread and systematic attack” directed at the civilian population, in particular those of Tamil ethnicity. Indeed, it was difficult to conclude otherwise, this being the consistent view across the human rights and country reports on Sri Lanka for that period.

53.
Ms Jegarajah provided us with an extract from “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka” dated 21 December 2012.

Reference to the full section of this report dealing with exclusion from refugee protection reveals the position of UNCHR to be as follows:

“Since the issuance of the July 2010 guidelines, testimonies and footage have been released in the public domain with credible information on serious violations by all parties of international human rights and international humanitarian law during the conflict in Sri Lanka. The findings of the UN panel of experts concluded that both government forces and the LTTE conducted military operations “with flagrant disregard for the protection, rights, welfare and lives of civilians and failed to respect the norms of international law.” Mistreatment or torture in detention facilities or police stations both during and after the conflict is also documented in recently published reports.

…

In the context of Sri Lanka, exclusion considerations may arise in the cases of asylum-seekers with certain backgrounds and profiles. Careful consideration needs to be given in particular to the following profiles (in no particular order):

…

(iii) Certain (former) members of the Sri Lanka Police Service (SLPS), including the Criminal Investigation Division (CID), the Terrorist Investigation Department (TID) and the Special Task Force (STF)… “

54.
The US State Department Human Rights Report 2007 (issued in 2008) states:

“ The government's respect for human rights continued to decline due in part to the escalation of the armed conflict. While ethnic Tamils composed approximately 16 percent of the overall population, the overwhelming majority of victims of human rights violations, such as killings and disappearances, were young male Tamils. Credible reports cited unlawful killings by government agents, assassinations by unknown perpetrators, politically motivated killings and child soldier recruitment by paramilitary forces associated with the government, disappearances, arbitrary arrests and detention, poor prison conditions, denial of fair public trial, government corruption and lack of transparency, infringement of religious freedom, infringement of freedom of movement, and discrimination against minorities. There were numerous reports that the army, police, and progovernment paramilitary groups participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity. The situation deteriorated particularly in the government-controlled Jaffna peninsula. By year's end extrajudicial killings occurred in Jaffna nearly on a daily basis and allegedly perpetrated by military intelligence units or associated paramilitaries. There were few arrests and no prosecutions as a result of these abuses, although a number of older cases continued to make slow progress through the judicial system. Government security forces used the broad 2005 emergency regulations to detain civilians arbitrarily, including journalists and members of civil society.

…

There were numerous, credible reports that the government or its agents committed arbitrary or unlawful killings.

During the year approximately 1,000 of the estimated 3,200 deaths associated with the hostilities between government security forces and the LTTE were civilians, according to public sources.

International organizations have documented approximately one-third of these. The casualties occurred in part as a result of artillery fire into populated areas, aerial bombings, land mines, and other military action, but international organizations noted that most of the civilian casualties occurred in "individual incidents," such as extrajudicial killings. Reliable statistics on such killings were not available, since this crime often goes unreported by families who fear reprisals if they file complaints. The numbers reported by different organizations therefore vary widely. In addition, it is likely that the majority of those reported as "disappeared," about whom there has been no further information, died.

…

According to credible sources, including UN Special Rapporteur (UNSR) on Torture Manfred Nowak, the use of torture by police and security forces to extract admissions and confessions was endemic and conducted with impunity. In addition, the emergency regulations make confessions obtained under any circumstance, including by torture, sufficient to detain a person until the individual is brought to court. On October 29, following his one week assessment mission to the country, Nowak attributed the lack of convictions for torture to the absence of effective investigation, inadequate protection for victims and witnesses of torture, and an excessive minimum sentence for torture. He stated also that the police used threats of violence or fabrication of criminal cases to prevent the victims of torture by police officers from filing complaints. Nowak added that detainees reported that the magistrates did not provide them an opportunity to complain about police torture while the perpetrators often accompanied the victims to courts and remained present during medical examinations. ”

55.
The US State Department Human Rights reports for 2008 and 2009 contain substantially similar if not identical passages.

56.
The Amnesty International (AI) Annual Report 2008 on Sri Lanka (covering 2007) observed that:

“2007 was characterized by impunity for violations of international human rights and humanitarian law. Soaring human rights abuses included hundreds of enforced disappearances, unlawful killings of humanitarian workers, arbitrary arrests and torture. Lack of protection for civilians was a key concern as heavy fighting resumed between government forces and the Liberation Tigers of Tamil Eelam (LTTE).

…

Several hundred cases of enforced disappearances were reported in the first six months of 2007. Jaffna Peninsula was particularly affected with 21 cases of enforced disappearances reported in the first three weeks of August alone. Enforced disappearances in the north and east appeared to be part of a systematic counter-insurgency strategy devised by the government. There were also a number of abductions and suspected enforced disappearances reported from Colombo.

…

The Sri Lankan police conducted mass arrests of more than 1,000 Tamils, allegedly in response to the suicide bombings carried out in Colombo on 28 November. The arrests were made on arbitrary and discriminatory grounds using sweeping powers granted by emergency regulations. According to reports, “Tamils were bundled in bus loads and taken for interrogation.”

57.
The AI Annual Report 2009 states that " Government allied armed groups committed unlawful killings and enforced disappearances", that the "government arrested and detained increasing numbers of Tamils without charge" and that:

"Enforced disappearances continued to be part of a pattern of abuse apparently linked to the government's counter-insurgency strategy. Enforced disappearances were reported in the north and east as well as previously unaffected parts of the country including in Colombo and the south. Many enforced disappearances took place inside high-security zones and during curfew hours."

58.
The AI Annual Report 2010 stated:

" The government continued to carry out enforced disappearances as part of its counter-insurgency strategy. Enforced disappearances were reported in many parts of the country, particularly in northern and eastern Sri Lanka and in Colombo ."

59.
Paragraph 8.38 of the Country of Origin Information Report (COIR) on Sri Lanka dated 11 November 2010 contains an extract from the European Commission " Report on the findings of the investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka " dated 19 October 2009. The EU report states:

" Sri Lanka has among the highest number of disappearances in the world since 2006. The numbers provided for disappearances vary between different organisations but all reports agree that the number of disappearances is substantial. The UN High Commissioner for Human Rights has stated that some 1500 persons disappeared between December 2005 and December 2007. Human Rights Watch has reported 1000 cases of disappearances were reported to the NHRC in 2006 and over 300 in the first four months of 2007. In June 2008, the UN Working Group on Enforced and Involuntary Disappearances noted that it had sent 22 urgent actions to the Sri Lankan Government in the previous two months alone and that both women and humanitarian aid workers were being targeted. The former Sri Lankan Minister of Foreign Affairs Mangala Samaraweera in January 2007 was quoted in several news agencies stating that a person was abducted in Sri Lanka every five hours. The figures made available in November 2008 by Judge Tillekeratne, Chairman of the Presidential Commission on Disappearances, showed that 886 persons disappeared in less than 12 months.

Reports indicate that in a significant number of cases individuals who initially disappeared were subsequently discovered in state detention. This strongly suggests that the state was implicated in their original disappearance. The UN Working Group on Enforced and Involuntary Disappearances has found that the Sri Lankan army, the police and the TVMP/Karuna group were responsible for many of the disappearances between November 2006 and November 2007. The report noted a growing culture of impunity enjoyed by members of the security forces and pro-government armed groups who perpetrated enforced disappearances as the government took no steps to combat the problem. Disappearances appear to be part of the Government's counter-insurgency strategy. "

60.
The same European Commission report is quoted at paragraph 8.45 of the COIR as stating:

" Unlawful killings perpetrated by soldiers, police and paramilitary groups with ties to the Government, have been a persistent problem in Sri Lanka. According to reports, many killings and

disappearances of civilians have been carried out against persons suspected of being informants for, or collaborators with, the LTTE. The army assisted by pro-government Tamil paramilitaries, reportedly engaged in a deliberate policy of extra-judicial killings against those they considered to be supportive of the LTTE... Reports from a wide range of sources indicate that the overall number of extrajudicial killings increased dramatically between 2006 and 2008...Reports also indicate that the police have engaged in summary executions. Several persons have been shot in police custody, while others have died as a result of torture ."

61.
We were satisfied that there was ample evidence of a "widespread" and "systemic" attack conducted by the Sri Lankan authorities, the AI and EU reports referring in terms to the abuse of the Tamil population being part of a government "strategy".

The Appellant's Knowledge of the Widespread or Systemic Attack

62.
For the appellant's actions to be categorised as war crimes or crimes against humanity, Article 7(1) of the ICC Statute requires that he committed them "with knowledge" of the "widespread or systematic attack" directed against the Tamil population.

63.
The appellant maintains that he did not know of the widespread abuses that were taking place in Sri Lanka.

64.
We did not accept that part of the appellant's evidence.

65.
As above, it is our view that the country evidence shows overwhelmingly that the Sri Lankan authorities were specifically attacking the Tamil population, the police force being agents in that attack, certainly by the way of torture and kidnapping. The US State Department refers to " numerous reports that the army, police, and progovernment paramilitary groups participated in armed attacks against civilians and practiced torture, kidnapping, hostage-taking, and extortion with impunity" and to the use of torture by police to extract confessions being "endemic". We did not find it credible that, if only from his service in the police from 2003 to 2009, that the appellant did not know of the routine and serious abuse of Tamils.

66.
We also noted that the extract from the EU report at [58] above refers to information about abductions being covered in "several news agencies" in 2007 and to a Commission in Sri Lanka reporting in 2008 on disappearances. It was therefore not only outside Sri Lanka that the abuses were being covered in the media, as submitted for the appellant. It was our view that the appellant could only but have known of the treatment of Tamils by the police, other services and of the government strategy to attack the Tamil population.

The Appellant's Knowledge of the Abuse of People he Arrested

67.
The appellant does not dispute that those he arrested and handed over were subsequently tortured or killed but maintains that he did not know this until May 2009.

68.
We also did not accept that to be so.

69.
Firstly, it is not credible where we have found that he knew of the wider abuses taking place that he would not have known that those he arrested would be subject to the same.

70.
Secondly, it appeared to us that the appellant could only but have been aware of the difference between the treatment of those he arrested as part of his police work prior to joining the special unit and those he dealt with in 2007 and 2009.

71.
At questions 64 and 65 of his second asylum interview conducted on 14 April 2011 (which he adopted in its entirety before us) the appellant described his police work prior to 2007. When he arrested people he would put them before the courts and sometimes they would be fined, sometimes imprisoned. When he arrested those people:

“ We told them what they’d done wrong. Take all the details and produce him to the courts. In between we take a statement, keep them in a police cell and then take them to court. Some OIC could give bail in some cases.”

At question 69 he referred to an officer asking a sergeant to take a statement and the sergeant asking questions.

72.
In his work in the special unit, he did not meet or know the identities of his commanding officers. He did not know the identities of his colleagues, knowing his friend Ranatanuga only by chance. He did not have an office or regular location but they would meet in an abandoned house. The unit used unmarked vehicles and would not say anything to those arrested, other than they were being taken for questioning. He would be told only immediately before he had to act of where he had to go. He would be told only after having picked up the person concerned where he had to take them. He would take them to a variety of places, including abandoned houses. He would usually hand them over to other vehicles or take them to an abandoned property.

73.
The contrast between the appellant’s earlier police work and that in the special unit is stark. It would have been obvious to him that it was very different and far more serious for those who were arrested. It would have been obvious, in the context of widespread human rights abuses that we have set out above, of which we find he was aware, that those subject to this process were highly likely to be abused.

74.
Further, in his first asylum interview conducted on 7 January 2011, the appellant stated at question 45 that his duties were mainly to “abduct”, at question 46 that he “abducted” people and helped carry out “extrajudicial executions” and at question 87 that he was told to “abduct” members of the criminal underworld.

75.
The appellant maintains that his answers to these questions were incorrectly translated. He stated that he participated in “arrests” not “abductions” and did not use the term “extrajudicial executions”.

He also states that the first interview record is incorrect at question 43 in the use of the word “bring” when what he said was “arrest”.

76.
He also maintains that he told his previous solicitor about these errors but his concerns not were not raised with the respondent until he transferred his case to his current representatives who raised the issue in the grounds of appeal to the First-tier Tribunal, after the respondent placed weight on the comments in the first interview in the refusal letter.

77.
We did not accept the appellant’s claim that he was misinterpreted during the first interview.

78.
The appellant’s case is that the interpreter was unable to translate correctly the term “arrest” from Sinhala into English at questions 45, 46 and 87. The transcript shows, however, that at questions 81, 82 and 87 the interpreter used the term “arrest” and the appellant does not dispute that at these points the interview record is correct. We found that the correct translation of “arrest” at these points of the interview suggested that the interpreter was able to translate the term “arrest” correctly and that the reason the word does not feature at questions 45, 46 and 87 is because this was not the Sinhala word that the appellant used.

79.
Ms Jegarajah highlighted the failure to record the identification number of the interpreter in the first interview. We did not find that we could infer from this that the interpreter was not competent or that this indicated that there was a deliberate attempt to conceal his identity in order to allow him to mistranslate key parts of the appellant’s case.

80.
Also, if the appellant had asked his former legal advisers to contact the respondent about a material mistranslation but the solicitors did not do so, we would expect there to be something from the appellant or his current legal representatives raising this serious failing with the previous solicitors or making a complaint to the appropriate authorities. There is nothing of that nature before us. There is nothing to show that the appellant raised any concerns about the transcript of his first interview until after its contents were relied on against him in the refusal letter.

81.
In addition, the appellant maintains that the second interview record is reliable. If so, it provides evidence that undermines his claims not to have known what was happening or to have been party to those abuses.

82.
At question 26 he stated that “I never arrested anyone at all.” At questions 27, 28, 31, 36 and elsewhere, however, he states that he arrested people.

83.
At questions 23, 94 and 118 of his second interview he stated that he was in charge of twelve people and was the Officer in Charge (OIC). This contrasts with the statement in his witness statement dated 24 November 2011 that he was not in command and that in his second witness statement dated 30 November 2011 that there was no command within the unit.

84.

At questions 108 and 109 of the second interview he stated that he “did not know what to do” when, in May 2009, he found out about the abuse, that he “couldn’t sleep or speak to anyone” but “couldn’t see a specialist” as he would have to have spoken about what he knew and carried on with the arrests. In his witness statement dated 24 November 2011, however, he states that from May to December 2009 he only had “misgivings” and was “not certain” about what happened to those arrested.

85.
There appeared to us to be a pattern with each ensuing account of the appellant seeking to minimise what he did during 2007 to 2009. At first he abducted people and was involved in extrajudicial killings. He seeks to retract those statements in the second interview, maintaining he only arrested people or even did not carry out any arrests. He stated in his second interview that he was in charge of his unit of twelve men and then sought to retract those statements. His level of knowledge from May to December 2009 as expressed in the second interview caused him significant anxiety such that he felt he needed but could not access specialist help but in his later witness statement was not certain and experienced only “misgivings”.

86.
Further, in his first interview at question 45 the appellant talks of how “we were guaranteed by high-ranking officers” that:

“ this would not be revealed to anyone else. What we were doing to our duty (sic) was not known to anyone, only Tamilnet was publishing this news. If any other agency published this they would be killed or punished .”

87.
We considered this to be an admission that the appellant knew that what he was doing was unlawful and had to be covered up. If he believed his work was only arresting and handing over suspects with no serious consequences for them, he would not have needed a guarantee that his work would not be revealed.

88.
It was our conclusion that, at the least, the appellant knew that those he arrested were subject to torture and extrajudicial killing.

Joint Criminal Enterprise or Aiding and Abetting

89.
The respondent maintains that the appellant aided and abetted or was part of a joint criminal enterprise in the crimes of torture and extra judicial killings.

90.
It was not clear to us from the refusal letter or Mr Jarvis’ submissions that it was the respondent’s case that the appellant had the “intentional contribution” required for the appellant to have been part of a joint criminal enterprise so we take that matter no further.

91.
It was our view that the appellant’s work arresting suspects between 2007 and 2009 was a significant contribution to torture and extrajudicial killing and that he knew this to be so. This conclusion is inevitable given the “clandestine” nature of the arrests conducted by his team of which he was the senior member, that description of the work being used by the appellant himself in his response to the

refusal letter, that he knew that what he was being asked to do was very different from his previous police work and given that we have found that he knew that abuse followed on from those arrests.

92.
We also agreed with Mr Jarvis' submission that it follows from the appellant's acceptance that from May 2009 to December 2009 he continued to hand over those he arrested even though by then he knew that it was highly probable that they would be tortured or extrajudicially killed, the appellant aided and abetted the committing of crimes against humanity.

Duress

93.
The appellant maintains at question 87 of his first interview that his life would have been in danger if he had refused to work for the special unit and that he did not do so "willingly or voluntarily".

94.
The appellant maintains at question 63 of his second interview that it was not possible to refuse to carry out the arrests and that "I knew what would happen" if he did so. At question 105 he repeated that it was not possible to refuse.

95.
On page 11 of his response to the reasons for refusal the appellant states that he applied for a transfer after May 2009 but, at page 12, that if he had pushed any harder for a transfer this would have "caused a danger to my life and that of my family." He also states that he "consciously tried to take a back seat role during this period".

96.
We did not find that these statements were sufficient to show that the appellant was at any time faced with a threat of imminent death or of continuing or imminent serious bodily harm. We did not have any country evidence showing that police officers who resigned or deserted met with threats of ill-treatment or that those threats were carried out. We have indicated above that it was our view that the appellant has tried to minimise his culpability as his evidence has developed and that this undermined his claim to have acted as he did under duress.

Exclusion from the Refugee Convention – Our Conclusion

97.
Ms Jegarajah submitted that if this appellant were to be found to come within Article 1F(a) then this would mean that all Sri Lankan policemen would equally do so which was an absurd outcome.

98.
We have been careful to indicate why this particular appellant falls to be excluded because of the particular nature of the work that he was carrying out and the extent to which it differed from the more routine police work he had been doing previously. We therefore did not accept Ms Jegarajah's submission.

99.
We found that for the reasons set out above the respondent has shown that there are serious reasons for considering that as part of a widespread or systematic attack directed against the civilian population, with knowledge of the attack, the appellant aided and abetted war crimes and crimes against humanity.

100.
In line with s.55 of the 2006 Act, we dismiss the appellant's asylum claim.

Humanitarian Protection

101.
Article 17 of the Qualification Directive states that:

A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity

102.
Article 17 (2) of the Qualification Directive provides that someone does not have to personally commit the excluded act and can be excluded if they "otherwise participate in the commission" of the act.

103.
These provisions are reflected in paragraph 339D of the Immigration Rules.

104.
The reasons we have set out for finding that the appellant is excluded from the Refugee Convention apply equally to his claim for Humanitarian Protection.

105.
We therefore find that the appellant is excluded from Humanitarian Protection and dismiss that part of his appeal.

Article 3 of the ECHR

106.
Article 3 of the ECHR is an absolute right. There is no provision for exclusion if the appellant can show that there is a real risk or reasonable likelihood that he will face torture or inhuman or degrading treatment or punishment on return to Sri Lanka. We have applied that standard of proof when assessing this aspect of the case.

107.
The appellant's case is that after he left the special unit he came under suspicion of having revealed or merely being in a position to reveal details of the abuses perpetrated by government forces. He suspects that four of his colleagues from the special unit, one of them his friend Ranatanuga, have disappeared for that reason. The specific interest in him comprised unknown individuals hanging around the family home and the appellant being followed on a few occasions.

108.
We did not find that the appellant's account showed that he was under suspicion or wanted by the authorities or anyone else in Sri Lanka.

109.
Firstly, he claims that he left the special unit in January 2010. He and his family remained in Sri Lanka until October 2010. There was ample opportunity for those who wished him harm to act in some substantive way against him but his account at its highest does not include any such evidence. If the appellant was at risk from the government itself or members of the criminal underworld, we did not find it credible that they would not have been able to access him even if he had been staying mostly in

army barracks as he claims. There is no suggestion that any of his family were harmed or threatened and they remained living openly.

110.
Secondly, he claims that four members of his unit disappeared because of adverse interest from the government or criminal underworld. We did not find that this could be inferred from their not signing on weekly or his friend Ranatanuga not going to the gym. There could be any number of innocent explanations, transfer to another unit or part of the country for example.

111.
If the appellant believed that his friend Ranatanuga had disappeared and that the police had failed to follow up the wife's report of this, we did not find it credible that the appellant made no further attempt whilst in Sri Lanka or after coming to the UK to contact the wife or in some other way find out if his friend had returned or exactly what had happened to him. We did not find his failure to do so could be explained by his evidence that he did nothing further about Ranatanuga's disappearance as he was more concerned for the safety of his own family.

112.
Thirdly, the appellant relies on three letters from his mother sent to him after he came to the UK. The first letter states that the police came to look for him as he had not reported for work for two weeks. His parents told them that he had left the country. The other two letters state that the police continued to come to ask for the appellant, searched, asked questions and made threats and that the appellant's parents decided to move to the home of a relative.

113.
We did not find we could place weight on these letters for a number of reasons. They are very basic in form and could have been produced by anyone in order to bolster the appellant's claim. The letter referring to the appellant having not reported for work for 2 weeks is postmarked 2011. As above, he came to the UK in October 2010. This is not consistent with the letter having been sent in 2011. Also, the appellant's statement at the hearing that he did not want to contact Ranatanuga's wife from the UK as he did not want the authorities to find out that he was here is not consistent with the indication in the first letter that the authorities were told of this by his parents.

114.
We accept that the Country Guidance case of GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) confirms that the Sri Lankan authorities may harm journalists or human rights activists whom they suspect of criticising the human rights record of the government or who are associated with publications critical of the government or individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the authorities.

115.
The appellant's evidence does not show that through their work in the special unit he or any of his colleagues come within those categories so as to be of adverse interest to the authorities.

116.
The appellant also maintains that the fact of his asylum claim which implicitly criticises the Sri Lankan authorities and reveals details of state-sanctioned abuses will lead to him being mistreated on return. He cannot be expected to conceal the fact or substance of his claim on return. His having left the country whilst a serving officer and making an asylum claim which criticise the state will draw heightened adverse interest as he will be viewed as a traitor.

117.
We also did not find that this claim was made out.

118.
From what we have said above, it will be clear that the case of GJ is not authority for someone who has criticised the Sri Lankan government or revealed details of atrocity in an asylum claim made in the UK being of significant adverse interest on return.

119.
This appellant has a valid Sri Lankan passport. There is therefore no need for any approach to the Sri Lankan authorities in London in order for him to be able to return to Sri Lanka.

120.
In addition, paragraph 309 of GJ states that those "with Sri Lankan passports returning on scheduled flights will be able to walk through Colombo airport without difficulty, unless their names are on a "stop" list". The appellant does not claim to be on a "stop" list.

121.
Ms Jegarajah drew our attention to paragraph 9 of the evidence of Mr Callum Macrae in Appendix H of GJ . This refers to Tamil doctors being forced to recant accounts they had given of abuses they had observed. This appellant claims, firstly, that he has not observed such abuses, knowing of them only from secondary sources. Secondly, as above, he is in a position to return to Sri Lanka without being questioned by the authorities as to the substance of his asylum claim or even whether he has claimed asylum.

122.
Ms Jegarajah also highlighted the "paranoid culture of ultra-nationalism" in Sri Lanka described by Mr Macrae at paragraph 24 of his evidence. We do not dispute the paranoia but did not accept that it had been shown that this would lead to someone with this appellant's profile being questioned about his asylum claim on return.

123.
We were also taken to the written evidence of Dr Sutharan Nadarajah at paragraph 45 of Appendix K of GJ . This states that there is "a risk to people who were even suspected of having evidence of war crimes, who were present in Sri Lanka between January and May 2009." This was not a risk category adopted by the Tribunal in their conclusions in GJ having heard and assessed all of the evidence before them. As with much of the evidence in GJ , it is made in the context of Tamils being returned to Sri Lanka, not a Sinhala former police officer returning on a valid passport.

124.
In conclusion, we did not find that the appellant had shown that he has or will be of adverse interest on return to Sri Lanka for any reason such that his rights under Article 3 of the ECHR would be breached.

Decision

125.
The First-tier Tribunal made an error of law such that its decision was set aside.

126.
We re-make the decision as dismissed on asylum, humanitarian and human rights grounds.

Anonymity

We make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which are likely to lead members of the public to identify the appellant.

Signed Date

Upper Tribunal Judge Pitt

APPENDIX - ERROR OF LAW DETERMINATION DATED 12 FEBUARY 2013

APPELLANT: AS

RESPONDENT: SECRETARY OF STATE FOR THE HOME DEPARTMENT

CASE NO: AA/10534/2011

DATE OF INITIAL HEARING IN UPPER TRIBUNAL: 4 FEBRUARY 2013

Representation:

For the Appellant: Ms S Jegarajah, instructed by Shanthi & Co

For the Respondent: Ms M Tanner, Senior Home Office Presenting Officer

REASONS FOR FINDING THAT THE FIRST-TIER TRIBUNAL MADE AN ERROR OF LAW, SUCH THAT ITS DECISION FALLS TO BE SET ASIDE AND RE-MADE

1. This is an appeal against a decision dated 20 January 2012 of First-tier Tribunal Judge Mensah who dismissed the appellant's claims on asylum and human rights grounds.

2. The appellant asserts that as part of his work for the Sri Lankan police he joined a special unit from 2007 to 2010 and that his work there included the extrajudicial arrest of LTTE suspects. He maintains that he applied for a transfer in 2009 when he first realised that suspects were being tortured.

3. In the refusal letter dated 1 September 2011, the respondent accepted the appellant's account of his work for the special unit but was of the view that he knew at all material times the individuals that he arrested would be tortured. As a result, the respondent maintained that the appellant came within the exclusion provisions of Article 1F(a) of the Refugee Convention. The respondent also issued a certificate under Section 55 of the Immigration, Asylum and Nationality Act 2006 which stated that the appellant was not entitled to the protection of the Refugee Convention.

4. Section 55 of the 2006 Act also states that the Tribunal " must begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate . " Mrs Tanner accepted that the First-tier Tribunal judge erred in failing to apply this provision of section 55. The judge did not begin her substantive findings by considering the matters raised in the certificate but from [14] to [49] purported to assess whether the appellant had shown that he would face a risk of mistreatment on return to Sri Lanka. Having found that his claim had not been made out, the judge stated at [50]:

“ As a result of my findings, I have not needed to consider whether the appellant should be excluded from the refugee convention (sic) on account of his involvement in arresting individuals who he admitted were tortured and killed in circumstances where I have found he had knowledge.”

5. Mrs Tanner submitted that this error was not material, however, as whether or not the appellant fell to be excluded from the Refugee Convention, the judge’s findings that his claim for international protection was not made out were sustainable. Even if the judge had made a decision that the appellant could not be excluded from protection, the appellant’s claim on asylum and human rights grounds would still have failed.

6. We did not find that we could agree. Notwithstanding the clear indication at [50], the judge does appear to consider and make findings on matters pertaining to the exclusion issue; see [14], [16], [25], [27] - [30], [32] - [33], [35] and [41]. We should indicate immediately that these paragraphs do not show that the judge did make a proper decision on whether the appellant should be excluded from the Refugee Convention. She could not be said to have done so in the light of her statement at [50] and the absence of any reference to or application of the correct criteria for assessing exclusion, set out in JS (Sri Lanka) v SSHD [2010] UKSC 15 and Al-Sirri v SSHD [2012] UKSC 54. The difficulty raised by these paragraphs is that matters which should have been assessed within the legal framework for consideration of exclusion are inextricably tied up with the judge’s findings on the separate matter of the merits of the appellant’s asylum and human rights claims.

7. At [25], for example, the judge states:

“ In my opinion the appellant has given contradictory answers to whether his Unit met with the officer in command of the Unit or not and this negates the appellant’s credibility as (sic) the way the Unit received instructions and his role in charge of that Unit…”,

and at [29] that the evidence:

“… suggests the appellant stayed in the special force and continued to arrest people even after May 2009 and knowing those individuals faced potential torture and death. Overall, I am of the view that this evidence undermines the appellant’s credibility … ”,

and at [30]:

“ I do not find it credible that the appellant only discovered he was responsible for arresting people who were being tortured and killed in May 2009 and yet continue (sic) to arrest individuals and wait some 9 months before applying for a passport to enable him to escape the country. ”

8. The judge appears to rely on the negative findings on the appellant’s responsibility for and knowledge of torture and extrajudicial killings, as above, made outside the correct legal framework, to find that his claim to fear mistreatment on return lacked credibility. It is therefore not possible to extract clear or untainted findings on the appellant’s substantive claim and we concluded that we were not able to preserve any part of the determination.

9. We also accepted that there was merit in Ms Jegarajah’s fourth ground of appeal that the First-tier Tribunal judge did not assess whether the act of leaving Sri Lanka and revealing details of his police activities as part of his asylum claim in the UK would lead to a risk on return for reason of imputed political opinion. This was a claim made by the appellant in his witness statement, referred to in the skeleton argument before the First-tier Tribunal and would appear to be the submission recorded at [38] of the determination. The judge assesses only whether the authorities had an adverse

interest in the appellant before he left Sri Lanka because of what he knew rather than as a result of his asylum claim made after coming to the UK, however; see [38] and [39].

10. For these reasons, we found that the decision of the First-tier Tribunal disclosed an error on a point of law and had to be set aside entirely and the appeal re-made de novo .

Signed: Date: 12 February 2013

Upper Tribunal Judge Pitt