PA/09978/2016, PA/13288/2018

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

BETWEEN

KK & RS (SRI LANKA)

Appellants

and

SSHD

Respondent

APPELLANTS' SKELETON ARGUMENT
APPPENDIX 3: FFM REPORT, CPIN, DFAT REPORT

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1. In this Appendix the Appellants address (i) the SSHD's FFM Report, (ii) her CPIN and (iii) the DFAT Report, on which the CPIN places significant weight.

(i) FFM Report

2. The Appellants submit that no substantial weight should be given to the FFM Report.

3. Although described as a report on a 'fact-finding mission', the FFM report is in fact based on notes taken by the SSHD of the opinions expressed by various anonymous interlocutors, some of which have been verified by the interlocutors themselves. There are serious problems throughout with the identity and range of the sources themselves and with the questions posed and answers given[1].

(a) 'Fact-finding mission' reports generally

4. As to the use of opinion evidence in FFM reports generally, the Tribunal in *EM Zimbabwe CG* [2011] UKUT 98 (IAC) said at [93] that:

[1] In addition to the analysis below, the Tribunal is referred to the analysis of the FFM report in the report by the Asylum Research Centre Foundation ("the ARC report"): AB/2659ff. A similar analysis by ARC of the SSHD's COI material was commended – with some provisos – in *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163 (IAC) at [177]-[185].

> it has been acknowledged by the COIS that Fact-Finding Mission reports are essentially about the gathering of opinions from informed sources in the country in question, albeit based upon what those sources consider to be the factual position […]. Indeed, in the Tribunal's experience, it is clear to anyone reading an FFM report produced in proceedings in the United Kingdom that such a report is an assemblage of opinions.

5. As to anonymity, in *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG* [2011] UKUT 00445 (IAC), the Tribunal drew attention at [162] to the EU Common Guidelines on Joint Fact Finding Missions of November 2010, which stated that 'as a general rule sources should be named in order to give credibility and transparency to an FFM report'. The Guidelines, as quoted, went on to say that:

> [if it is] not possible to quote a source by name, it may be possible to list only the organisation a person is representing. If a source is to be listed anonymously this can be done in various ways. For example 'a doctor', 'a lawyer', 'a police officer', 'a human rights defender', possibly providing some further indication where they were located or the city they were interviewed in. Or it may be appropriate to refer to them just as an international NGO … Alternatively they could be listed as 'a source who did not wish to be named' or even 'source A'.

6. The Tribunal considered at [164] that the Strasbourg Court's suggestion in *Sufi and Elmi v UK* (2012) 54 EHRR 9 that it was 'impossible' to assess the reliability of anonymous sources in a Fact Finding Mission on Somalia was 'too sweeping', because the Court had not apparently been shown the EU Common Guidelines, and it ought to have been apparent from what *was* known about the sources that they must have based their views on their observations of what was happening in Somalia.

7. However, when one of the appeals in *EM* returned to the Tribunal in *CM (EM country guidance; disclosure) Zimbabwe CG* [2013] UKUT 00059 (IAC)[2], an issue arose at [140] onwards as to whether there had been unfairness in the use of anonymous sources in the FFM report which was under consideration in both cases. The Tribunal said:

> 157. Anonymous material is not infrequently relied on by appellants as indicative of deteriorating conditions or general risk. The Tribunal should be free to accept such material but will do its best to evaluate by reference to what if anything is known about the source, the circumstances in which information was given and the overall context of the issues it relates to and the rest of the evidence available.
>
> 158. The problem is not one of admissibility of such material as forming part of the background data from which risk assessments are made, but the weight to be attached to such data. It is common sense and common justice that the less that is known about a source and its means of acquiring information, the more hesitant should a Tribunal

[2] following an appeal to the Court of Appeal, settled by consent: see [6]-[8]

> judge be to afford anonymous unsupported assessment substantial weight, particularly where it conflicts with assessment from sources known to be reliable. In our judgment it is neither possible nor desirable to be more prescriptive than this, and the task of evaluation of weight is a matter for the judgment of an expert Tribunal that is regularly asked to take into account un-sourced data whether submitted by claimants or respondents. Provided a judge is alert to the problems caused by anonymous evidence and the principles we have summarised above, we do not consider that an issue of law arises.

8. It went on to say that, despite difficulties with the FFM report considered in both *CM* and earlier in *EM*, it was satisfied that 'the interlocutors (whether they wished to be quoted in an individual or representative capacity) were content with the final version of the summaries of their information and knew the context in which it was being gathered', that the 'informants in the report were not predominantly anonymous', that the 'known sources were all reputable and independent and had the capacity to supply relevant data within the area or field of their operation'.

9. It added:

> 164. We accept that where reliance is placed on informants from anonymous organisations and an undertaking of confidentiality is not sufficient to give assurance to the informant to cooperate with the investigation, the respondent should normally give all reasonable assistance to the appellant and the Tribunal in evaluating the nature, size, capacity and independence of the source in question, and the extent to which its opinions are supported or contradicted by others.
>
> 165. Where there is a breach of recognised guidelines and best practice it is open to the judge deciding an asylum appeal to afford no weight to unsupported anonymous material because no realistic assessment can be made of its reliability. However, this is a fact sensitive case by case assessment and not the application of a general exclusionary rule […].

10. That passage was upheld on appeal: *CM (Zimbabwe) v SSHD* [2013] EWCA Civ 1303 at [16]. Laws LJ added at [17] that there is no rule that 'uncorroborated anonymous material can never be relied on in a country guidance case or any other case'; whether it can be relied on depends on the circumstances, but '[g]enerally of course the effect of anonymity will go to the weight to be attached to the material in question and care must always be taken in assessing the weight of such material'.

11. It is also clear that the evidence contained in FFM reports is not expected to meet the standards of an expert report. The Tribunal in *EM Zimbabwe* did not accept criticism of the FFM report in that case, but that was precisely <u>because</u> the sources used were by their

very nature not impartial: the interviewees could not 'be expected to give views which are unslanted or unbiased, in the sense of being uninfluenced by the concerns, aims and objectives of the bodies concerned'[3].

12. It is therefore important to bear in mind, in so far as it is necessary to compare and contrast the material in the FFM report with the opinions of the experts, that such a process does not involve comparing like with like.

13. The FFM report itself is expressed to be intended to 'to complement existing publicly available material': AB/865. It thus explicitly makes no attempt to be comprehensive or to override information obtained from other sources; at best it can be said to sit alongside those (see e.g. the ITJP letter of 15 June 2020 for commentary on the fact that the FFM report makes no attempt to reconcile what has been said by publicly available sources: AB/3952-3968).

14. The Appellants therefore respectfully submit that the correct approach to the assessment of the evidence in the FFM report is that:

- First, the Tribunal's starting point should be that, absent special reasons, it should not give significant weight to anonymous material, particularly where this contradicts evidence from known, reliable sources (whether publicly available material or expert reports).
- Second, before giving any weight to such sources, it should consider what, if anything, is known about the source, including as to the extent to which it can be considered, on the information known about it, to be neutral or balanced; the nature and extent of its activities in the country in question; and whether there were good reasons why anonymity was sought and/or granted.
- Third, it should consider whether the opinions expressed by the source are opinions which it is competent to express, i.e. whether they fall within the source's known remit, knowledge or experience.

[3] Notably, by comparison, none of the sources interviewed in the FFM report in *EM Zimbabwe* appears to have been connected to the government: they were all described as 'civil society organisations': [94]. In *AMM Somalia*, the FFM had visited Nairobi (not Somalia itself) and it appears that none of the sources consulted was linked to the Somali government: [157]. Where, as here, reliance is placed on sources from within the very government which is accused of persecuting the groups of people concerned, the point about interviewees not being 'expected to give views which are unslanted or unbiased' applies with additional force.

(b) The FFM Report in this case

15. The FFM Report in this case is of little value because:

    i. much of it consists of commentary or 'narrative' summary, written by an unidentified but apparently non-expert author, on evidence provided by sources;

    ii. it is out of date;

    iii. none of its sources is named and none is available to be cross-examined;

    iv. several of its sources are obviously tainted;

    v. sources which are not tainted are not shown to have relevant knowledge or experience on the matters being discussed, and some of them self-confessedly do not have it;

    vi. such evidence as was given is plainly wrong in places and was not adequately explored in others.

16. At its highest, the FFM report consists of opinion evidence from unidentified individuals whose qualifications to give that evidence have not been established and who are not available to be cross-examined. Where that evidence comes from a source which appears to be competent to give it and corroborates evidence from better-established sources, it may merit some weight: an example would be the comments by the unidentified 'human rights activist' at AB/896-897 that TGTE members would face arrest on return to Sri Lanka and that activists in both Sri Lanka and the UK are monitored by the Sri Lankan security forces: points with which all three experts agree. Where it is at odds with other evidence and/or where it cannot be shown that the source in question is speaking from a position of knowledge or experience, the Tribunal is asked to exercise caution in giving it any weight, let alone to preferring it to evidence from known, reliable sources.

(c) Structure of the FFM Report

17. As the report itself notes, it is divided into four parts: AB/865:

    a) an introduction
    b) an executive summary
    c) a 'thematically arranged narrative', containing 'some' direct quotations from sources
    d) annexes, setting out (at D) notes of the meetings with the sources.

18. Of these, (a) is uncontroversial (at least as regards its factual contents, so far as they go). (b) and (c) are of no evidential value, having been written by an author who is assumed to be a member of staff of the SSHD, but who is unnamed and whose knowledge or expertise (if any) are not explained[4]. The executive summary and narrative sections may potentially be of value to the SSHD in order to guide her caseworkers, but that does not entitle them to any evidential weight before the Tribunal. In *EM Zimbabwe*, the Tribunal recorded at [111], in respect of a similarly structured FFM report, that counsel for the SSHD had:

> informed the Tribunal that no reliance was placed on the executive summary or, indeed, the summaries of responses from the interviewees […]. We have taken no account of those summaries in reaching our findings. Although it is not a matter for us, it may be that those responsible for the preparation of future FFM reports would in future do well to eschew such summaries, leaving decision makers and judicial fact-finders to draw their own conclusions from the full versions of the questions and answers of the interviewees.

19. As to the notes of the interviews themselves, the Tribunal noted at [82] that it was 'a major point for the respondent that, having regard to the approval process, these interview notes represented the actual views of the interviewees', although it then went on to identify a number of places where the FFM report did not in fact reflect accurately the 'actual views of the interviewees'.

20. A similar approach was taken, with reference to *EM Zimbabwe*, in *AMM* at [163]:

> The Tribunal in *EM* found that the value of the Zimbabwe FFM report lay not in any summary or analysis but solely in the views and opinions of the interviewees, as set out in the approved records of interview. That is the approach we have adopted in relation to the present UKBA FFM report.

21. In *MST (national service – risk categories) Eritrea CG* [2016] UKUT 443 (IAC) at [172], the SSHD confirmed her reliance on a Danish FFM report only for 'the evidence disclosed by the Report's notes of interviews'; and at [193] & [195], a UK FFM report was noted to have neither an executive summary nor a 'commentary' or anything equivalent to the 'thematically arranged narrative' included in this case; indeed, the Tribunal regarded it as 'frankly absurd' to suggest that it would have been assisted by any such commentary on the evidence by the SSHD.

[4] See also the criticisms of the Executive Summary and 'thematically arranged narrative' in the ARC report at: AB/2678-2698.

22. It is presently not clear whether the SSHD proposes to place weight on (b) or (c) in this case, but if so, it would appear to be necessary for her to show why she does not stand by her concession in *EM* and why the Tribunal's approach in that case and in *AMM* and *MST* was wrong.

23. Only (d) seems to represent evidence from the sources themselves, but even that appears to be second-hand, i.e. notes written by the FFM team, rather than by the sources themselves. With the anomalous exception of the TNA and UNHCR interviews (AB/904-905; AB/915-918), none of the notes appears to be written in the first person or to represent direct speech by the interviewee(s).

24. Sources appear to have been told that they would be given 'an opportunity to review the notes of the interview to ensure they are an accurate reflection of the conversation', but in the event only 11 of them agreed that the notes were accurate, some after making amendments; six did not reply; and one did not want the notes used at all: AB/866. A further reason for doubting the weight to be given to the FFM report is that it is unclear which of the sets of notes quoted at (d) were verified in that way and which were not; compare and contrast the stress on 'the approval process' in *EM* and on 'the approved records of interview' in *AMM*, above.

25. In two cases – the visits to the airport and the National Mental Health Institute – no notes are available at all (although the report says that notes were taken for all 18 meetings or interviews: AB/866). The references to them in the FFM report itself appear to consist entirely of the observations of one or more members of the FFM team, who have not provided witness statements. It is unclear whether these observations were checked or approved by any or all of the interlocutors on those visits.

26. It is also relevant to the weight to be given to the report that, in contrast to *EM Zimbabwe* and *MST Eritrea*, no statement has been provided from anyone involved in planning or carrying out the FFM.

(d) FFM Report is out of date

27. The FFM was conducted in September-October 2019. As the SSHD would have been aware, Sri Lanka was about to have a presidential election, in which Gotabaya Rajapaksa was the front-runner. It is unclear why the FFM was not postponed at least until it was

clear who the winner was, and preferably until some clarity as to his intentions was available.

28. In that regard, it is relevant that the FFM report places significant weight (at least in its executive summary and narrative report) on improvements prior to the 2019 election:

> Since the end of the civil war the focus of the Sri Lankan government has changed and between 2015 and late 2019 under the new government, led by President Sirisena, there were improvements in the general feeling of personal freedom within the country. [Executive Summary: AB/868]
>
> All the sources asked during the mission described the situation post-2015, when a new government led by President Maithripala Sirisena was elected, as having improved with people in general feeling no threat from the government or security forces. [narrative report, AB/871 §1.1.1]

29. Some interviewees do say that they fear the return of the Rajapaksas (see e.g. AB/909; AB/911), a fact which underlines how unpromising it was for the SSHD to conduct, or publish, this exercise in the first place; the extent to which those fears have been realised is unexplored.

(e) Anonymous sources

30. None of the names of the interviewees is given and some do not even belong to an identifiable organisation. No attempt is made in the FFM report itself to establish them as reliable or knowledgeable; indeed, remarkably, the FFM report itself states that the SSHD is not necessarily able to endorse the sources or their evidence: AB/866:

> That a particular source was interviewed, and the notes of that interview have been included should not be considered as endorsement of that source or the information provided. Rather, all sources and information provided needs to be critically assessed and considered against other publicly available material.

31. It is not explained how the reader can 'critically assess' the evidence of people who are not identified and may not have approved the notes reproduced.

32. Nor is it presently clear whether the SSHD is intending to invite the Tribunal to place weight on sources which she herself cannot unequivocally endorse.

33. It is notable that all the interviewees appear to have cited the need for anonymity in order to 'protect their professional privacy and/or to protect their safety': AB/866. It is not clear why people connected to the government or security forces would need to be cautious about

either privacy or safety, nor is it apparent why journalists would need privacy, even if they might be concerned for their safety. As regards people not connected to the government, the fact that they appear to have feared for their safety, even before the return to power of the Rajapaksas, is revealing.

34. But whether or not the sources had good reason to seek anonymity is less important than the undoubted fact that they were and remain anonymous, with all the difficulties that that presents for placing weight on them.[5]

(f) Tainted sources

35. In this case, remarkably, at least a third of the interviewees, and possible as many as half, were part of the security forces, or of the wider government, or closely associated with the government. Specifically:

- There are eighteen separate interviewees or groups of interviewees (some interviews may have involved more than one person[6]).
- Of these, seven (just over one third) consisted of members of the security forces or government officials:
    - SCRM ('an executive agency under the office of the Prime Minister')
    - Ministry of National Policies, Economic Affairs Resettlement and Rehabilitation (MNPEA) (a Ministry 'under the office of the Prime Minister')
    - Criminal Investigation Department (i.e. the police)
    - Immigration officials

[5] By comparison, in the FFM report considered in *EM Zimbabwe*, only four or six of the interviewees (depending on the version of the report) were anonymous, two of whom were identified to the tribunal and parties and the remainder of which were described in some detail by reference to their activities: see [96]-[101]. In *MST Eritrea*, 3 out of 32 sources were completely anonymous, others being identified by specific job title or organisation: [111]; the Tribunal appears to have found a degree of anonymity to be justified by what it had called at [191] 'the closed nature of the Eritrean state'.

[6] It is unclear in several instances how many people were present during the interviews, whether all the answers were given by the same person and whether there were any differences of view within the organisations concerned. The FFM report specifies at AB/866 that the team met 'more than 50 people' over the course of 18 interviews; given that approximately five of the interviewees are identified in the singular (the 'Human rights activist', the 'Northern province politician', Journalist 1, Journalist 2 and the 'Representative from the Northern province community'), that suggests that others, mainly the government sources, must have involved multiple interviewees. It would therefore seem that the 50 people, counted individually, must have been mainly police officers and other government officials.

- Bureau of the Commissioner General of Rehabilitation
- Attorney General's Department
- 'Visit to arrivals Colombo airport' (it is specified at §8 of the narrative report (AB/884) that this was a guided visit and that the matters set out include 'information given to the FFT by immigration officials, members of CID and healthcare professionals based at the airport': in other words, the CID and immigration officials were consulted twice by the FFM, more than any other source)

- Two more (taking the total to nine, or half the sources) were closely associated with the government, even if it is unclear whether they were necessarily government officials:
  - Human Rights Commission (its members are appointed by the President[7])
  - National Mental Health Institute of Sri Lanka (it is not made clear who was spoken to on this occasion, but it is reasonable to assume that it was either government-employed doctors or health service officials)

36. Generally, as discussed elsewhere in this skeleton argument, members of the government have been part of a long-standing institutional culture of denial of human rights abuses and of denigration and persecution of those seeking to publicise them. The security forces as a whole are notoriously violent, corrupt and racist. There is no apparent recognition in the FFM report that such interviewees, even if sufficiently well-informed to comment, may simply be lying about the government's human rights record; cf. *MST Eritrea* at [199]:

> the notes of interviews conducted with Eritrean government representatives or ruling party members or supporters or persons who may be beholden to the Eritrean government must be treated with very considerable caution. They are helpful to us in understanding the approach of government representatives and supporters, but we do not consider, without more, their contents should be relied on in any significant way.

37. Whilst it is not suggested that the Sri Lankan state is as closed as the Eritrean one, an equivalent approach should nevertheless apply here, taking account of what is known about the government and its tolerance of dissent. As Professor Gunaratna points out (answers to

[7] On the recommendation of a Constitution Council, comprising MPs and 'distinguished citizens': HRCSL's submission to the ESCR, May 2017, at AB/1311 §1. See Dr Nadarajah's addendum report at AB/446 §74 onwards for comments on the (lack of) independence and ineffectiveness of the HRC and criticisms of it for acting 'as apologists for the Rajapaksa government': AB/446-7 §§76-77.

questions: AB/48 §21), the authorities 'are not going to disclose who they are interested in investigating and the likely profile of a terrorist to someone who is producing an openly available document'[8]. For avoidance of doubt, the need for caution includes the Attorney-General's Department, which has been criticised by HRW as politically influenced and institutionally unwilling to take action against human rights abusers within the police: AB/3627; AB/3629-30.

38. Of the interviewees not clearly connected to the government, it is unclear what, if any, political affiliation several of them had, including the (vaguely identified) 'representative from the Northern province community' and the two journalists. It is at least plausible, for instance, that a Tamil journalist based in Jaffna or Kilinochchi would have given different answers to a Sinhalese journalist based in Colombo. In *MST* at [160], the Tribunal observed that 'the value of FFM evidence depends on careful prior preparation aimed to ensure the interlocutors cover a wide spectrum of views', but although the FFM report says at AB/866 that the team 'sought to interview a wide range of informed sources', it does not appear that this was actually done in this case. Only one of the sources – the TNA representative[9] – can necessarily be assumed to have been Tamil, and the only sources who can be assumed to be in any way politically opposed to the government are, again the TNA representative and arguably the 'human rights activist'. (The government sources – who, as already identified, made up at least a third and arguably as many as half of the 18 sources – are all very likely to have been Sinhalese.)

39. It is not said whether or not those identified as staff of organisations (IOM, UNHCR etc) are giving the official views of those organisations. It is not clear what role those staff played within the organisation (no job titles are given, nor any indication of their seniority) and it is not indicated how many of them were interviewed on each occasion. For instance, the IOM representative appears to deny that discrimination against Tamils occurs – contrary to views expressed elsewhere in the same report, e.g. from TNA and UNHCR – and demonstrates a surprisingly hostile view of the diaspora, effectively accusing them of inventing untrue allegations of discrimination ('There is no distinction between the Tamil

[8] Compare also *Drrias v SSHD* [1997] ImmAR 346, CA, in which the SSHD had relied on an assurance by the Sudanese government's head of external security that a claim that returnees to Sudan were to be arrested was based on a forgery; Thorpe LJ retorted that 'confirmation sought from the head of external security, alternatively from the Government of Sudan, was hardly likely to result in any other answer than an assertion of forgery'.
[9] identified in Annex B as a 'Northern province politician', but presumably the same as the person identified at AB/903-904, as being from the Tamil National Alliance

and Sinhalese speaking communities, the diaspora is saying otherwise to their own ends': AB/915. It would be surprising if those comments represented the official view of the IOM, and they certainly do not coincide with the views of human rights groups, but the point is unexplained.

40. Nor is it clear where any of the interviews took place (except in the case of the guided tour of the airport given by the CID and immigration officials), which may have affected the frankness of the answers given by some of the interviewees.

(g) Sources without relevant knowledge

41. The primary purpose of the FFM is said to have been 'to gather accurate and up-to-date information from a range of sources about a number of issues concerning the treatment of Tamils including the government's attitude to diaspora activities and the treatment of members of diaspora groups, in particular members of the Transnational Government of Tamil Eelam (TGTE)': AB/865. It is unclear, however, how many of the sources had knowledge of this issue; some of them clearly did not and others were either not asked to demonstrate that they possessed it or were not asked questions on the topic at all.

42. In that regard, it is notable that only ten of the eighteen sets of interviewees[10] were asked about the TGTE or the diaspora at all; several of these professed to know little or nothing about this topic or gave irrelevant answers (in particular SCRM, UNHCR, CID, TNA; the CID for instance claimed that 'they were not experts on the TGTE': AB/900[11].

43. It is not made clear why the same questions were not asked of each source (the answer cannot be that the questions were adapted to reflect the known remit of each source, because, as just indicated, some of the sources were asked questions which they could not answer and could have been predicted to be unable to answer). In some cases, it is not clear what questions were asked at all, as only summaries of discussions are given[12].

[10] SCRM, the 'human rights activist', CID, TNA, 'Journalist 1', 'Journalist 2', an 'NGO', the 'Representative from the Northern province community', UNHCR and the Attorney-General's Department. Eight sets of interviewees were therefore not asked at all about the supposed primary topic of investigation.
[11] Professor Gunaratna points out that the CID are in any event not responsible for counter-terrorism, which is the responsibility of the Terrorism Investigations Division (TID): answers to questions, AB/48 §21. The TID was conspicuously not interviewed by the FFM team.
[12] See the analysis of the inconsistent questioning at AB/2669-2675 of the ARC report.

44. Of the identifiable non-governmental organisations, some had only a limited remit: for instance, UNHCR makes clear that it does not monitor enforced returns and (aside from a focus on foreign refugees in Sri Lanka) has a focus on Sri Lankan refugees in India, and only on those who are returning voluntarily. Its comments on risk on return or on the number of people arrested recently need to be seen in that light.

45. Nor is it always apparent that the interviewees restricted themselves to comments on their own areas of expertise: for instance:

- The IOM interviewee(s) opines that that demonstrations abroad are not of interest as this not an offence and also that people demonstrating in Sri Lanka are not detained, but it is not clear made clear how either comment is within the IOM's remit: AB/914. Indeed the IOM interviewee(s) went on to say that they were 'not aware of all proscribed entities', which might be thought to undermine their entitlement to express a view on which of them would be of interest to the authorities.
- Similarly, the TNA representative is asked about risk to TGTE supporters, but perhaps unsurprisingly is keen to distance their party from the TGTE and professes not to know about whether TGTE supporters would be at risk or whether the GoSL monitors the diaspora: AB/905[13].

(h) Incorrect statements

46. Numerous statements are made by interviewees which are transparently inaccurate, but which are reproduced as if deserving of weight. For instance:

- 'Journalist 2' claims to be 'under the impression that torture did not occur now but that it could occur under the rule of Rajapaksa' (AB/909), which might be felt to cast doubt on their competence to give an opinion about anything of any substance, given the widespread evidence, discussed elsewhere in this skeleton argument, of the use of torture even during the Sirisena regime.
- A member of the Attorney-General's Department is quoted as professing not to know that the TGTE is banned (AB/918), which again (even assuming this person was not

[13] In that regard, it is noteworthy that in March 2015, a spokesperson for the TNA 'warned the Tamil diaspora that it was still not safe to return': AB/3529, col. 2.

being deliberately misleading) would seem to disqualify them from expressing a view on whether members would be at risk.

- As noted above, the IOM representative offers the surprising view that claims of discrimination against Tamils are fabricated.

47. In other cases, obvious follow-up questions are not asked, leaving the answers at best partial or misleading (this contrasts markedly with the detailed and searching questions posed of the experts by the SSHD in this case): for instance:

- The TNA representative, asked what would happen to a returning supporter of the LTTE or TGTE, says that it '[d]epends on [the] circumstance[s] of each case', but is not then asked to specify what the circumstances would be in which such a person would be at risk.

- The same TNA representative, asked a surprisingly broad question about whether '[s]omeone who has claimed asylum in UK would […] have a reasonable fear [presumably: of persecution] when they return', replies delphically that it may depend on whether they have 'been involved in some activity that puts them at risk', but again is not asked what activities would place someone at risk. (If the answer is – as it may be – that the TNA representative was afraid of speaking more bluntly, (a) that in itself speaks volumes and (b) it might be felt to call into question the utility of gathering information in this manner.)

- 'Journalist 1' states that 'It may be problematic for genuine members or supporters as the TGTE is banned in Sri Lanka', but is not asked to specify what 'it' refers to (returning? carrying out activities within Sri Lanka?) and is not asked what level of support would trigger interest.

- 'Journalist 2' states that 'A high profile TGTE member returning to Sri Lanka would face arrest and be accused of LTTE links', but is not asked why they think only high-profile members would face such arrest; nor are they asked to clarify whether they mean such a person would be arrested or simply (as they say later in the same answer) 'questioned'.

- The interviewee from the Attorney-General's Department, despite professing to have been unaware that the TGTE was banned, then implausibly claims to know that '[i]f returning TGTE supporters have committed an offence here then we can take action but

if they arrived peacefully into the country, they wouldn't face any trouble', but is not asked what would constitute an offence.

- The HRC is quoted as describing itself as able to 'provide protection', but is not asked how it is supposed to protect people against the security forces, and there is no consideration of whether the HRC might have an incentive to exaggerate its own effectiveness.
- The HRC is also permitted to claim simultaneously that police action 'against findings of torture'[14] is 'routine' but also that implementation of the law is 'lax' and the conviction rate is 'not high', with no attempt to explore the apparent contradiction.

Conclusion on FFM Report

48. In short, the FFM report presents the opinions of a number of anonymous people, at least some of whom have an obvious incentive to mislead, some of whom are part of a state machinery which has been lying for years about human rights abuses, and others of whom simply cannot be assessed by the Tribunal for the reliability or otherwise of their contribution.

49. The Tribunal is invited to give little weight to the interview notes, except in so far as they may corroborate evidence provided by other sources, and, in line with the approach in earlier cases, none at all to the executive summary or 'thematically arranged narrative'.

(ii) CPIN

50. At the request of the SSHD, the experts were asked a number of questions based on the contents of the CPIN. As with the FFM, it is important not to lose sight of the fact that comparing experts' opinions with the contents of a CPIN is not comparing like with like.

51. Published on 12 May 2020, the CPIN sets out the SSHD's position on claims of a 'fear of persecution or serious harm by the state due to a person's actual or perceived support for, or involvement with, Tamil separatist groups': AB/776. It is divided into two sections, entitled 'assessment' and 'country information.' The country information consists of a

[14] That said, the meaning of 'against' in this context is unclear and the HRC may have been intending to say that the police take action against the accusers, rather than against the perpetrators. For avoidance of doubt, AB/881 §6.1.7 of the narrative section of the report claims that the HRC said that some police have been punished with 10-year sentences, but no such statement appears in the notes of the interview with HRC and the claim made in the narrative section seems to be untrue.

series of extracts from original COI reports, thematically arranged. The assessment represents the Respondent's analysis of that COI, and the SSHD's policy on country conditions.

52. There are significant issues with the Respondent's 'assessment', which selectively cites COI to support policy conclusions which are on occasion, inconsistent with the cited material. The assessment is no more than the SSHD's opinion on country conditions. The Tribunal should look critically at reliance upon the FFM and DFAT reports and should approach the COI extracts in the usual way, assessing the reliability of the source and giving weight accordingly.

(a) General approach to Country Policy and Information Notes

53. CPINs were so named from 2016, following criticism by this Tribunal that the earlier terminology of Country Information and Guidance, risked creating confusion between country guidance, the function of the Tribunal, and operational or policy guidance, the function of the executive (*MST Eritrea*, [8]). CPINs replaced Operational Guidance Notes (OGNs) as statements of the SSHD's country policy.

54. In *MD (Women) Ivory Coast CG* [2010] UKUT 215 (IAC), the Tribunal confirmed that country policy should be regarded as no more than the SSHD's submissions, not as country information in the normal sense, nor should it be read as expert evidence:

> 265. Operational Guidance Notes fall into a different category. They are, in essence, policy statements. On many occasions, the Operational Guidance Notes will be supported by references to background material and may have sought assistance from RDS, as well as Tribunal case law taken from reported decisions. Insofar as they include background material, the background material is to be regarded like any other background information, subject to the fact that its selection may not have the same objectivity and is not independently scrutinised.
>
> 266. In the case of the Ivory Coast Operational Guidance Note, much of the contents are supported by references to key documents and the FCO Country Profile and other background material. Such background material must be evaluated in the normal way. Insofar as its contents are a statement of policy, it should be regarded as the Secretary of State's submission. It should not be regarded as country information in the normal sense but as the caseworker's own assessment of that material. As such, it is to be assessed on its merits but should not be treated as if it were an expert report or having greater authority solely by reason of its coming from the UK Border Agency.

And see *LP (LTTE area - Tamils - Colombo - risk?) Sri Lanka* CG [2007] UKAIT 00076 (OGNs 'certainly nothing more than [...] submissions and are the Respondent's view on issues only' [70].

55. There have been long standing concerns about the conflation in functions of country information provision and the publication of country policy. In *EM Zimbabwe*, it was recorded that, as long ago as 2005, the Home Office Minister had 'accepted the panel's[15] advice that as a matter of good practice, the two functions [country information and policy functions carried out by Country Information and Policy Unit] should be undertaken by different parts of the organisation; and that Home Office country information material would not be perceived as impartial while it was being produced by a unit that was engaged in the development of country specific asylum policy': Appendix A, §153.

56. In January 2018, the Independent Chief Inspector of Borders and Immigration published a detailed report, 'An inspection of the Home Office's production and use of Country of Origin Information' from April – August 2017, in which he was critical of the conflation of country policy and country information in the new format CPINs. In the foreword to that report he said:

> However, the inspection identified a more fundamental problem with COI, and one that requires urgent attention. In order to achieve the purpose set out by UNHCR and recognised in the Immigration Rules, COI must be not only "reliable and up-to-date", but must also be presented in a way that permits decision makers to reach their own objective judgements and decisions on individual applications. As currently constructed, the Home Office's COI products do not do this.
>
> As their title implies, Country Policy and Information Notes (CPINs) combine country information and "Policy". This is wrong in principle and, whatever the intention, the effect is to direct the user towards a predetermined outcome, particularly where a significant body of asylum decision makers are inexperienced, unfamiliar with COI, have insufficient time to master every detail, and are likely to interpret anything labelled "Policy" as something they are required to follow.
>
> IAGCI will continue its programme of reviewing and advising on the content of specific COI products, and in doing so will undoubtedly add value by ensuring that information is as reliable, up-to-date and complete as possible. I will continue to send reports based on IAGCI's work to the Home Secretary to ensure that COI receives the attention it merits.
>
> However, while it persists with COI products that combine country information and "Policy", produced by a team that has "Policy" in its title that sits in the Border, Immigration and Citizenship Policy and Strategy Directorate, any assurances I am able to give in relation to this area of the Home Office's work must remain heavily qualified.

[15] The Advisory Panel on Country Information which was succeeded in 2009 by the IACGI: footnote added.

57. Despite that earlier acceptance of issues of impartiality, in response to the Chief Inspectors Report of 2018, the SSHD disagreed[16] with the finding that she should not produce country policy alongside country information, noting:

> We do not accept the contention that the Country Policy and Information Team (CPIT) should not produce "policy" guidance alongside its COI products. It is common practice to produce an analysis of the COI (whether this is called analysis, policy, guidance or a country position), to help hard-pressed caseworkers draw appropriate conclusions from the COI, while respecting that ultimately it is for them to adapt the COI material to the facts of the case before them. [para 1.6]
>
> However, all CPINs state in their preface that they provide general guidance and that each case must be considered on its individual merits; none of them tell a decision maker what decision they must make […]. [para 1.10]
>
> Although the Home Office does not agree that the CPINs use the word "policy" inappropriately, we recognise that the term may be misinterpreted and to avoid any possible ground for confusion we will make it clear that this part of the CPIN provides an analysis of the COI. [para 1.12]

58. In *FS (domestic violence - SN and HM - OGN) Pakistan* CG [2006] UKAIT 00023, the Tribunal confirmed (headnote) that:

> Operational Guidance Notes (OGNs) provided by the Secretary of State for the Home Department for the guidance of his caseworkers are a statement of the position taken by him at the date they were issued but must be considered in the context of subsequent evidence about the situation in the country of origin.

59. The Tribunal held that, 'where [the OGN] concedes that there is a risk to a particular class of person, then it must be considered as a statement of [the SSHD's] views of the country in question on the date of the OGN': [50].

60. The principle that the SSHD is expected to abide by her published country policies – and not to make submissions before the Tribunal which are inconsistent with them – is further illustrated in the case of *MA (Operational Guidance - prison conditions - significance) Sudan* [2005] UKAIT 00149. The Tribunal said of Operational Guidance Notes (which then had the function now taken by the assessment in CPINs) that:

> 22. It is clear that the current Operational Guidance of the Home Office relating to the Sudan considers prison conditions in that country to breach the Article 3 threshold.
>
> 23. So long as that executive guidance remains essentially the same, we take the view that at the judicial level it should be expected that the Home Office will likewise concede on Article 3 grounds all appeals in which it is accepted that the appellant has

[16] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/677540/Use_of_COI_Home_Office_Response.pdf

been able to demonstrate a real risk of imprisonment on return to Sudan. Where such risk is related to one of the five Refugee Convention grounds, it will also be expected that the Home Office will normally concede on asylum grounds. In order to avoid unnecessary waste of judicial time and resources, any concessions made should not be left to the last minute.

61. As to communications such as the letter of 18 May 2017 from the British High Commission which is at Appendix A to the CPIN (AB/850), they are not inadmissible, but should be assessed with care. In *LP (Sri Lanka*) the Tribunal noted at [45]:

> As to evidence, such as the letters from the British High Commission, it is true to say that High Commissions and Embassies come within the auspices of the Foreign and Commonwealth Office. That, like the respondent, is an arm of the executive. In this case the evidence in the letters has been obtained at the specific request of the respondent. Little is known about the information-gathering process, where the raw data came from, or the extent to which it has been filtered. It is also unclear whether more than one source was consulted and, whether competing views were sought. That all goes to how much weight can properly be put on the evidence. Immigration judges should be slow to find bad faith on either side, even though they must approach the evidence with an open and enquiring mind as to the appropriate weight to be put upon it.

62. In *MD (Ivory Coast) v SSHD* [2011] EWCA Civ 989, Sullivan LJ observed at [42]:

> In [*LP*] the tribunal had relied on letters from the British High Commission. The European Court of Human Rights [in *NA v United Kingdom* [2008] ECHR 616] did not suggest that that was an impermissible practice and indeed in paragraph 121 it expressly acknowledged that States through their diplomatic missions and their ability to gather information will often be able to provide highly relevant information. However, that information is not simply to be taken at face value. As with background information that is contained in reports from other non-governmental organisations such as Amnesty International or other government sources such as the United States State Department, the information provided by the United Kingdom Diplomatic Service must be assessed in the light of all relevant factors including those factors specifically mentioned in paragraph 120 of *NA* [...]: independence, reliability, objectivity, corroboration et cetera.

63. Pill LJ, concurring, stated that it would be an 'error' to give information from the British Embassy 'special status' and that '[t]he weight and value of British Embassy or High Commission information will depend on the view the tribunal takes of it in the particular circumstances': [53].

(b) Sources relied upon

64. The CPIN contains wording, standard to such reports, at AB/772, which states that 'country information in this note has been carefully selected in accordance with the general

principles of COI research […] taking into account the COI's relevance, reliability, accuracy, balance, currency, transparency and traceability.' It goes on, '[a]ll information is publicly accessible or can be made publicly available, and is from generally reliable sources. Sources and the information they provide are carefully considered before inclusion': AB/772-3. It concludes at AB/773:

> Multiple sourcing is used to ensure that the information is accurate, balanced and corroborated, so that a comprehensive and up-to-date picture at the time of publication is provided of the issues relevant to this note.
>
> Information is compared and contrasted, whenever possible, to provide a range of views and opinions. The inclusion of a source, however, is not an endorsement of it or any view(s) expressed.

65. The CPIN records that changes since the last version of the note included '[u]pdated country information to include recent sources and country information gathered on the 2019 Fact-Finding Mission to Sri Lanka': AB/860. For the reasons identified, the Tribunal should give little weight to the passages relying on the interview notes from FFM report, in particular where reliance is placed upon anonymous sources or those that run counter to reliable, identified sources or the expert evidence, and none to any passages from the CPIN relying on the executive summary or 'thematically arranged narrative' from the FFM report.

66. Where the SSHD does quote sources from the FFM Report in the CPIN, those sources are on occasion misquoted. At the CPIN records '[s]ome members of diaspora groups have been able to return to Sri Lanka without encountering any problems on return': AB/782 §2.4.32. This is an important point in the context of the assessment of risk arising from sur place activity but is misquoted from the FFM summary which does not refer to members of <u>diaspora groups</u> but rather states that 'several [sources] stat[ed] that they were aware of family members or members of the Tamil diaspora who have returned to Sri Lanka and not encountered any difficulty': AB/878 §4.1.5. This is of course materially different.

67. This FFM summary in any event further misquotes the FFM interview notes, as only one source in fact says that they are aware of people from diaspora groups going back to Sri Lanka and not encountering issues. The 'representative of the Northern Provincial Community' is cited as saying that '[s]ome US/UK Tamil groups, GTF members, come and go (into/out of Sri Lanka) and face no problems': AB/912. According to Professor Gunaratna, the Global Tamil Forum (GTF) started collaborating with the GOSL after

President Sirisena came to power: AB/31 §2(1)(b); thus this is improperly conflated by the author of the FFM summary as relevant to all diaspora groups. There are no other sources that state that diaspora groups are able to return to Sri Lanka without issue.

68. In relation to the 'Human Rights Activist', he/she is recorded as informing the FFM that a person 'was arrested and detained for a few hours who had participated in a protest abroad. He was picked up at the airport in 2017/18 for protesting about the war in 2008/09 and this is the first time he had returned': AB/896. The 'journalist' records that they '[were] not aware of random Tamils being targeted on return. His Tamil relatives have visited Sri Lanka from abroad and not faced any issues since 2015. However if the government changes, they would not return': AB/909. Neither of these sources therefore refer to persons involved in diaspora groups returning safely or otherwise beyond the GTF.

69. In respect of the DFAT, on which reliance is placed in the CPIN, there should be caution exercised in viewing the DFAT report as a source in itself. As addressed at (iii) below, the DFAT report presents an unclear summary of unidentified sources and unreferenced open sources in a manner that renders the reliability of sources opaque.

(c) Assessment

70. It is notable that the SSHD does not propose in the CPIN that the country guidance in *GJ* is outdated or should fundamentally be departed from. The SSHD accepts that there has been slow progress on developments in accountability and positive improvements in 2018-2019 and that there are expressed concerns about the shrinking of civil society space since the election of Gotabaya Rajapaksa: AB/778, §2.4.6. To that extent, the CPIN assessment is uncontentious.

71. It is also noted that at AB/821-2, §6.3.3-4 of the CPIN, weight is placed on assessments of the Australian DFAT report, to the effect that:

> DFAT assesses that a non-rehabilitated returnee with links to the LTTE, particularly high-level links, could be subjected to a rehabilitation process should they return to Sri Lanka.

And that:

> any low-profile former LTTE members who came to the attention of the Sri Lankan authorities, particularly if suspected of having a combat function during the war, would likely be detained and may be sent to the remaining rehabilitation centre.

72. If that is thought to be a reliable assessment, it is unclear why former LTTE members at any level are not accepted by the SSHD to be at risk of persecution, it having been common ground in *GJ* that 'rehabilitation' involved long-term detention without judicial oversight and was therefore persecutory. (For avoidance of doubt, the Appellants do not agree that the DFAT report is generally reliable, for the reasons given below; but the fact remains that the above assessments are cited as apparently reliable in a document which is supposed to represent the SSHD's submissions: cf. *FS Pakistan* and *MA Sudan*, above.)

73. In assessing specifically the risk arising from Tamil diaspora activity, however, the assessment is unexplained, overly simplistic and in significant respects, wrong. Without prejudice to the generality of the criticisms just made of the CPIN, the Appellants make the following observations.

- *LTTE inactive*

74. The bare conclusion that there no evidence that the LTTE has reformed or is active fails to address the fact that (a) there have been reports of attacks engineered or supported by the LTTE in the post-war period: Professor Gunaratna, AB/70 §7.1; answers to questions AB/37, §8 and Annex 1; (b) that the ideology of the LTTE lives on post-conflict; and (c) that the perception of the GOSL is that Tamil diaspora organisations are fronts for – or indeed parts of – the LTTE.

- *Proscribed/de-proscribed organisations*

75. The assessment that de-proscription means that the organisations concerned are no longer of interest is wrong on the expert evidence and fails to address the motivations behind the decision to de-proscribe by the Sirisena government. The expert evidence identifies that de-proscription was as a result of that government coming under pressure to take steps towards reconciliation: Dr Nadarajah, AB/308 §125. The Sirisena government is anyway no longer in power, and was strongly criticised by the Rajapaksas themselves for taking exactly these steps.

76. The SSHD's conclusion on the de-proscription of separatist grounds is addressed at AB/806-807 §4.8. She relies upon a letter from the British High Commission in Sri Lanka which records that '[m]embership or affiliation to the [de-proscribed] groups is no longer regarded by the government of Sri Lanka as terrorism or terrorist activity. The members of

these groups whether active or lay, have no reason to fear persecution as a consequence of their affiliation to them from the government of Sri Lanka.' There is no source provided for the statement. This can only therefore be read as the opinion of the (unidentified) author at the BHC.

77. The weight of expert evidence is that this conclusion is flawed; in any event, the Tribunal should not place any significant weight on the BHC's unattributed and unexplained opinion.

- *General human rights situation*

78. As Dr Nadarajah points out (AB/454-5, §93-95), the assessment of the risk of torture at AB/786 §2.4.52 does not accord with the summary in the same document of recent incidents of torture at AB/828-831 §6.6.6-10. President Sirisena's reported statement that secret detention does not occur (AB/826 §6.5.1) is inconsistent with the views expressed to the FFM (AB/831, §6.6.10) that it does.

79. The CPIN fails to properly assess the impact on the human rights situation of the return of the Rajapaksas to power despite recording '[f]ears about a potential crackdown on critics of the newly returned Rajapaksa dynasty' and that 'officials and journalists who investigated the Rajapaksa's [sic] for human rights abuses and corruption began trying to flee the country' (AB/791 §3.3.5); and that 'the prospect of former President Mahinda Rajapaksa returning to power casts a dark shadow on the country's chances of making meaningful progress on delivering accountability for recent human rights abuses' (AB/828 §6.6.4, citing Freedom from Torture).

(iii) DFAT report

80. The Australian Government, Department of Foreign Affairs and Trade (DFAT), published a Country Information Report on Sri Lanka on 4 November 2019. The report is significant in these proceedings in that the CPIN cites or refers to the DFAT report extensively (on 30 occasions).

81. There are however limitations to the DFAT Report which has been considered by the ARC Foundation as 'diverg[ing] from some of the accepted principles and standards of COI': AB/2705. The SSHD does not appear to have looked critically at the DFAT report to assess whether information therein is reliable, balanced or accurate, before the relying upon it in

the CPIN. The Tribunal is invited, akin to the approach to the (UK) FFM report, to look critically upon the methodology of the DFAT Report and to be cautious in relying on conclusions reached that do not accord with reliable sources of country information or country experts.

(a) Sources and methodology of DFAT report

82. The purpose of the DFAT report is described at AB/1476, §1.1, as being for 'protection status determination purposes only'. It is recorded a 'provid[ing] DFAT's best judgement and assessment at the time of writing and is distinct from the Australian Government policy with respect to Sri Lanka': AB/1476 §1.1. The report expressly states that it is intended to be a general, as opposed to exhaustive overview: AB/1476, §1.4.

83. In relation to sources, the report records that was informed by 'on-the-ground knowledge and discussions with a range of sources in Sri Lanka' as well as 'relevant and credible open source reports' (AB/1476 §1.4) including 'the US Department of State, the UK Home Office, the World Bank and the International Monetary Fund; relevant UN agencies, including the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations High Commissioner for Refugees (UNHCR), the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA) and the International Organization for Migration (IOM); leading human rights organisations such as Human Rights Watch, Amnesty International and Freedom House; Sri Lankan non-governmental organisations (NGOs); and reputable news organisations.' The authors note '[w]here DFAT does not refer to a specific source of a report or allegation, this may be to protect the source': AB/1476, §1.4. A degree of circularity is also notable, in that the DFAT cites the SSHD as a source, while the SSHD cites the DFAT as a source.

84. Throughout the report sources are referred to as 'official sources', 'local sources', 'some Tamils', 'one source' or 'multiple sources' without any description or explanation.

85. The use of sources is problematic, affecting the weight that should be placed upon it for the following reasons:

- There is limited reference to open sources
- Where open sources are relied upon, there is rarely citation of the publication relied upon, so that the date, nature and currency of the information is regularly indiscernible

- The report fails to directly quote any source, such that it is not possible to identify what is a quote, what is a summary of source material and what is author's opinion or assessment
- There is no bibliography or list of references
- There is a failure to identity or describe the on-the-ground sources; for instance there is no identification of the 'Sri Lankan NGOs' or 'reputable news organisations', and no indication of who assessed the latter to be reputable
- A number of sources are undisclosed such that it is impossible to make a critical judgment on reliability or currency
- Where the author refers to 'credible sources' there is no description of how the assessment of credibility has been made

86. The report refers to sources having 'told DFAT' certain pieces of information (for example AB/1499 §3.44, AB/1503 §3.65, AB/1538 §5.46). There is no explanation of the circumstances of these conversations, or when or how that information was gathered. It is also not clear whether the DFAT conducted a fact-finding mission to prepare the report. If there was a FFM, there is no description of the methodology or terms of reference and no interview notes or records are provided. If the information from on-the-ground sources was obtained in another manner, again there is a failure to explain this.

87. The combination of these factors renders it difficult to identify and assess what material informed the report or what weight can be placed upon it. As identified by ARC, it is best practice in the interests of transparency, for COI reports to include a bibliography of all sources consulted and in what time frame, '[m]oreover each sentence should be accurately referenced and it be made clear if information is directly quoted, summarised COI or an interpretation/assessment of COI': AB/1476. The effect of the failure to properly identify sources, is that little meaningful assessment can be made of the reliability of sources, of the commonality and/or divergence of opinions cited and the analysis or assessment contained within the report.

(b) Currency of DFAT report

88. The report fails to identify when sources were consulted so that it is in most instances, not possible to assess the currency of the information relied upon.

89. Further, the report was published on 4 November 2019 when it was known that presidential elections were to be held on 16 November 2019. As with the (UK) FFM, the DFAT did not postpone the publication of the report to allow an opportunity to address the outcome of the election, notwithstanding the outcome being of clear relevance to the country situation and assessment of risk. This is particularly surprising given that the DFAT report identifies that '[l]ocal sources, Tamil and non-Tamil, expressed concern to DFAT that the human rights improvements achieved since 2015, including in relation to freedom of expression, could be reversed if Rajapaksa or an individual close to him returned to power': AB/1483-4 §2.39. The absence of consideration of the return of Rajapaksa as president, renders the report out of date.

(c) Substance of the DFAT report

90. The analysis within the report is in parts, severely lacking in detail, exploration or consideration of a broad range of information that was available to the DFAT at the time of publication of the report. Without prejudice to the generally of the above criticisms, the following matters, of particular relevance in this case, are not explored or addressed:

- There is limited consideration given to Tamil diaspora activism abroad. The report refers to monitoring of elements of the diaspora deemed 'radical' (AB/1505 §3.75, AB/1506, §3.82), and although that would appear to be broadly supportive of the Appellants' position, there is no explanation of what that means.
- Reference is made to 'pro-LTTE diaspora groups, particularly diaspora groups banned under Sri Lankan law' (AB/1506, §3.80), again without identification of which organisations are being referred to or whether it is being suggested that proscribed groups are or are not to be treated differently to non- or de-proscribed groups.
- Reference is made to people being included on a watch list for 'suspected separatist or criminal activities' (AB/1502 §3.57), without explaining what activity would be suspected as separatist or criminal activity.
- There is very limited information related to monitoring of the 'foreign groups, including some in the Tamil diaspora' beyond confirming that monitoring does occur: AB/1493 §3.12. There is no explanation of the monitoring methods employed.
- The report surprisingly concludes that DFAT was 'unable to verify allegations of torture since 2016' (AB/1527, §4.23), although numerous other sources, including the

UN SR on torture, have not suffered from the same inability (see main skeleton argument).

91. As addressed in the submissions in the Appellants' main skeleton argument, there is reliable information in the public domain that could have been accessed and considered by DFAT in preparation of their report. The failure to consider available reliable evidence leaves the report as presenting a partial and unexplored picture of country conditions.

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