PROSCRIBED ORGANISATIONS APPEAL COMMISSION

Appeal No: PC/06/2022
Hearing Dates: 13th & 14th March 2024
Date of Judgment: 21st June 2024

Before

THE HONOURABLE MR JUSTICE JAY
MR JONATHAN GLASSON KC
MR NEIL JACOBSEN

Between

ARUMUGAM & OTHERS

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Mr Peter Haynes KC and Ms Shanthi Sivakumaran (instructed by **Public Law Interest Centre**) appeared on behalf of the Appellants

Mr Ben Watson KC, Mr Andrew Deakin and Mr Will Hays (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr Tom Forster KC and Ms Rachel Toney (supported by **Special Advocates' Support Office**) appeared as Special Advocates

MR JUSTICE JAY

INTRODUCTION

1. The Appellants are members of the Transnational Government of Tamil Eelam ("TGTE") who support the creation of an independent Tamil state in north-east Sri Lanka where Tamils are in the majority. The TGTE are not proscribed in the United Kingdom and seek to pursue their political and ideological objectives through non-violent means. The Government of Sri Lanka ("GoSL") takes a different view of the TGTE's methods but that is largely irrelevant for our present purposes.

2. The Appellants' rationale for bringing these proceedings is that their legitimate and lawful activities to organise and campaign for a separate state of Tamil Eelam are hampered by what they describe as a conflation of these aims with the historical objectives of the Liberation Tigers of Tamil Eelam ("LTTE"). The Appellants' case is that that the LTTE no longer exists and that in any event they do not subscribe to their methods and tactics.

3. The LTTE was founded in 1976 by their iconic leader, Vellupillai Prabhakaran. Between 1983 and 2009 a state of civil war existed in Sri Lanka between the GoSL, which was largely drawn from the Sinhalese ethnic group, and the LTTE. On 29 March 2001 the Secretary of State[1] added the LTTE to the list of proscribed organisations in Schedule 2 of the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001. The civil war came to a violent end in May 2009 when Vellupillai Prabhakaran was killed and the military forces of LTTE were defeated. Most of LTTE's military leadership was either killed or captured. 11,000 cadres and supporters underwent "rehabilitation" which lasted up to two years. Thereafter, these individuals were subject to monitoring, residence and reporting conditions.

4. There have been previous attempts to de-proscribe the LTTE. Most of the earlier history is not relevant for present purposes. On 7 December 2018 the Appellants applied to the Respondent for the LTTE to be removed from Schedule 2 pursuant to section 4 of the Terrorism Act 2000. Following a review process which entailed the commissioning of assessments by the Joint Terrorism Analysis Centre ("JTAC")[2], the Foreign, Commonwealth and Development Office ("FCDO"), a Community Impact

[1] When the Secretary of State for the Home Department is being referred to personally, she will be designated as "the Secretary of State". When we are intending to refer to her department, that will be described as "the Respondent".

[2] JTAC is the UK's centre for the analysis and assessment of the domestic and international terrorism threat. It operates, as what Mr Willis described in his statement, as a "self-standing" organisation composed of representatives from a number of government departments and agencies. The Head of JTAC reports to the Director General of MI5. JTAC's work involves analysing and assessing intelligence relating to international terrorism both at home and overseas. As part of its work it produces intelligence reports concerning proscription: on the topic of whether an organisation is "concerned in terrorism".

Assessment and a meeting of the Proscription Review Group ("PRG")[3], the Secretary of State refused the application on 8 March 2019.

5. On 21 October 2020 this Commission ("POAC") allowed the Appellants' appeal on two bases (POAC's judgment[4] will be described hereafter as "POAC 1"). First, POAC was concerned about the "accuracy" with which the PRG's views were communicated to the Secretary of State (para 114). Secondly, and relatedly, the Ministerial Submission materially misstated the PRG's views about the discretionary factors in two different ways (para 115). It is to be noted that the grounds of appeal in POAC 1 did not include the argument that the LTTE no longer exists.

6. POAC 1 did have a report from JTAC dated 6th February 2019. JTAC's assessment was that the LTTE's international network remained largely intact following its military defeat in 2009 which "largely destroyed its Sri-Lankan based terrorist infrastructure and capability". As we have already said, its leaders were mostly killed or captured. It no longer had the leadership structure which oversaw the attacks before 2009. From 2012-17 there had been a number of reports from a range of sources which "highlight individuals or groups, which JTAC assesses to be conducting activity indicating the extent to develop some terrorist capability and/or revive the group". It is to be noted that according to POAC 1's summary at least JTAC did not appear to be saying that the LTTE continued to operate through informal cellular structures. The same point may be made in the context of the somewhat brief OPEN gist of JTAC's 2017 report.

7. POAC issued its judgment on relief in POAC 1 on 18 February 2021. Following this, by an order dated 13 May 2021 POAC required the Appellants to provide any further representations on their application for de-proscription by 3 June 2021 and required the Secretary of State to take her decision on the application to de-proscribe by no later than 31 August 2021.

8. Following the handing down of the judgment on relief, the Secretary of State took a new decision to maintain proscription of LTTE which was notified to the Appellants on 31 August 2021. The Appellants lodged an appeal against that decision on 12 October 2021. Thereafter, another group ("Group 1") made an application for de-proscription and that too was refused by the Secretary of State. Group 1 then appealed that decision and on 9 May 2022 POAC directed that the two appeals be joined. However, Group 1 withdrew their appeal on 18 December 2023 and the parties are agreed that it is unnecessary to say anything further about it. The

[3] The PRG is a cross-government group, chaired by the Home Office, which makes recommendations and provides advice to the Secretary of State and the Respondent on issues relating to the implementation of the proscription regime, including de-proscription applications.

[4] *Armugam and others v Secretary of State for the Home Department*, PC/04/2019 (Elisabeth Laing J, Mr Whittam QC and Mr Nelson CMG).

position is that we are seized of only one appeal and can properly ignore the Group 1 appeal.

9. There were other preliminary issues which fell away when the hearing commenced. We are grateful to the parties for the good sense and air of realism which characterised their oral submissions before us. Points which were never going to acquire any traction have been abandoned, and the focus has been on those matters which are properly arguable.

THE GROUNDS OF APPEAL

10. There are four grounds of appeal:

- GROUND 1: the LTTE is no longer an organisation capable of proscription.
- GROUND 2: there were no reasonable grounds for the Secretary of State to have formed the belief that the LTTE is currently "concerned in terrorism".
- GROUND 3: the Secretary of State erred in the exercise of her discretion to maintain proscription.
- GROUND 4: the continued proscription of the LTTE is not a necessary, justified or proportionate interference with the Appellants' rights to freedom of expression, assembly and association.

THE LEGAL FRAMEWORK

11. This was fully set out in POAC 1 (see paras 3-21 of the judgment) and is not substantially in dispute between the parties. However, in light of the oral arguments by the parties and the questions raised by POAC itself as the hearing progressed, we highlight the following matters.

12. First, the definition of "organisation" in section 121 of the Terrorism Act 2000 is wide. Section 121 provides that "organisation" "includes any association or combination of persons". Contrary to the opinion relied upon by the Appellants of Professor Zachariah Mampilly, who is a social scientist, an organisation defined in these broad terms does not have to possess "a clear structure in which orders issued by a centralised command are enacted by members lower down in the hierarchy". The statutory definition contains no such requirements for such formal mechanisms of "centralised command" and/or "hierarchy". Parliament has used deliberately loose language to ensure that the net is wide enough to catch entities where the links and interactions between the component individuals may be little more than the sharing of the common purpose to be "concerned in terrorism", as defined in section 3(5), and *some* degree of interaction between them. It is the sharing of that

purpose and the taking of steps to pursue that purpose (as listed in sub-paras (a) – (d) of section 3(5)) that makes the individuals in question something more than just disparate individuals but an organisation.

13. Secondly, an organisation is "concerned in terrorism" for the purposes of section 3(5) if it:

> "(a) commits or participates in acts of terrorism,
>
> (b) prepares for terrorism,
>
> (c) promotes or encourages terrorism, or
>
> (d) is otherwise concerned in terrorism."

The present case is concerned with sub-sections (b) and (c), and not sub-sections (a) and (d). Here, the focus is in the activities of the organisation although it is implicit in the sub-section that the individuals comprising the organisation will share a common ideology or set of objectives. It is that ideology or those objectives which are sought to be advanced by terrorist means.

14. Thirdly, the Terrorism Act 2006 introduced new sub-sections (5A) and (5B) into section 5 of the Terrorism Act 2000. These expand the definition of promoting or encouraging terrorism to include its unlawful glorification. Although this concept is to some extent in play in the present case, the Appellants have raised no argument as to what it means. In any event, the statutory language is in our view clear.

15. Fourthly, a reasonable belief in the Secretary of State that an organisation is "concerned in terrorism" is necessary but not sufficient to warrant proscription. It is common ground that the Secretary of State has a discretion and not a duty to proscribe. For these reasons the parties have described the "concerned with terrorism" issue as "Stage 1" and whether to exercise the discretion as "Stage 2"[5]. The evidence of Mr Matthew Willis, Head of Domestic Pursue in the Counter-Terrorism Pursue Unit of the Home Office, is that when the Terrorism Bill (as it then was) was passing through Parliament[6] five "discretionary factors" were identified:

(1) The nature and scale of the organisation's activities.

(2) The specific threat it poses to the United Kingdom.

(3) The specific threat it poses to British nationals overseas.

(4) The extent of the organisation's presence in the United Kingdom.

[5] Consistent with the approach taken by the parties before POAC in the Lord Alton case: see paras 67 and 68 of POAC's open determination in that case.

[6] No objection is taken to the admissibility of this evidence.

(5) The need to support other members of the international community in the global fight against terrorism.

16. Fifthly, the leading authority on the application of the Terrorism Act 2000 to proceedings in POAC remains *Lord Alton of Liverpool and others v SSHD* [2008] EWCA Civ 443; [2008] 1 WLR 2341. Although a decision of the Court of Appeal (Lord Phillips CJ, Sedley and Arden LJJ) on a renewed application for permission to appeal, that Court specifically directed that it may be cited.

17. The Court of Appeal endorsed at para 31 POAC's distinction[7] between two types of case. The first was of an organisation that retained its body of supporters without any military capability or any attempts to acquire weapons, even if its leaders asserted that at some unspecified time in the future it might seek to recommence a campaign of violence. Such an organisation did not meet the statutory test. The second was of an organisation that was currently inactive for tactical or pragmatic reasons but harboured an intent to reactivate its military wing in the future if it perceived it to be in the organisation's interests to do so – such an organisation would meet the statutory test, specifically that set out in section 3(5)(d) (see para 36 of the Court of Appeal's judgment) because it retains its military capacity for the purpose of carrying out terrorist activities.

18. Para 37 of the Court of Appeal's judgment is of relevance to the way the Appellants have framed their case before us:

> "We agree with POAC that an organisation that has no capacity to carry on terrorist activities cannot be said to be "concerned in terrorism" simply because its leaders have the contingent intention to resort to terrorism in the future. The nexus between such an organisation and the commission of terrorist activities is too remote to fall within the description "concerned in terrorism"."

19. The other aspect of the *Lord Alton* case that is valuable for present purposes is its analysis of section 5(3) of the Terrorism Act 2000, which provides:

> "The Commission shall allow an appeal against a refusal to de-proscribe an organisation … if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review."

This sub-section must be read in conjunction with section 3(4), which makes it clear that the power in the Secretary of State to proscribe is triggered "only if he believes that [the organisation] is concerned in terrorism [as defined in section 3(5)]". Given that the Secretary of State's belief (which must mean, reasonable belief) is under

[7] The distinction was set out in paras 126 and 127 of POAC's open determination

scrutiny, it is hardly surprising that Parliament has conferred an appeal right which is tethered to the application of judicial review principles.

20. The Court of Appeal's approach to section 3(5) was as follows:

> "43 … The question of whether an organisation is concerned in terrorism is essentially a question of fact. Justification of significant interference with human rights is in issue. We agree with POAC that the appropriate course was to conduct an intense and detailed scrutiny of both open and closed material in order to decide whether this amounted to reasonable grounds for the belief that the PMOI was concerned in terrorism.
>
> 44. On the facts of this case the question of the approach to POAC's review, debated at such length, proved academic, for POAC held that even the application of the conventional *Wednesbury* test …. led to the conclusion that the Secretary of State's decision was flawed."

21. There are two points that we would make in regard to this aspect of the Court of Appeal's judgment. First, the reference to the "conventional *Wednesbury* test" needs properly to be understood. There, the Court of Appeal was doing no more than draw a distinction between the "conventional *Wednesbury* test" and the heightened *Wednesbury* test that applies to situations where human rights are in play. POAC, and more frequently SIAC, is well acquainted with that distinction. Even if the intensity of review is greater, the ultimate question for the relevant Commission is the same: are there reasonable grounds for the belief that the organisation at issue is concerned in terrorism? Critically, the posing of that ultimate question does not entail the relevant Commission forming its own view of the underlying material.

22. The second point that we would make concerns the Court of Appeal's view that "the question of whether an organisation is concerned in terrorism is essentially a question of fact". Here, the Court of Appeal was rejecting the submission advanced by Mr Jonathan Swift (as he then was) on behalf of the Respondent that this was an evaluative question – akin to a national security assessment of whether an individual was a threat to national security or whether an emergency existed that threatened the life of the nation - which depended on special expertise within the Respondent to which the courts should defer in accordance with *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153 and A *v Secretary of State for the Home Department (No 2)* [2004] UKHL 56; [2005] 1 WLR 414 (see the final sentence of para 42). Although the Court of Appeal did not specifically refer here to paras 119-121 of the determination of POAC under appeal, the Court of Appeal's view is consistent with POAC's conclusion that where essentially factual questions are under consideration, POAC does not defer to the expertise of the Respondent. However even at the first stage ("concerned in terrorism"), POAC recognised that

part of the material to be considered involves evaluation and assessments made by appropriate officials and agencies to which a degree of deference should be given (see para 120 of the determination). Where policy issues and, more particularly, assessments of foreign policy and national security are under scrutiny, a greater deference must be accorded to the assessments and judgment of the Respondent even under the heightened scrutiny test.

23. Drawing these strands together, it seems to us that there is no bright-line between intense scrutiny on the one hand and deference on the other. In a case involving fundamental human rights, intense scrutiny will always be exercised by the relevant Commission even if deference may also be required. These two approaches are not mutually exclusive. Further, the degree of deference may vary and will be context-driven. There may be purely factual questions which require no deference whatsoever on POAC's part. There may also be matters of evaluation and assessment where some deference is required. Whether an organisation exists at all, or if it exists is concerned in terrorism, may well require a hybrid approach. When it comes to the discretionary factors, POAC's approach should recognise the expertise and institutional competence of the decision-maker.

24. Sixthly, and finally, we must address a document entitled "Individual v Organisation Actions" which was exhibited to Mr Willis' first witness statement in November 2022. Mr Willis said in his statement that the document "provides guidance on the factors which may be relevant to the question of whether particular terrorist activity can be regarded as linked to the organisation under consideration or is attributable to an individual only". He goes on to say "In this case the document was not circulated to the PRG". It is not clear whether the guidance came from JTAC, the PRG, or someone else altogether but ultimately that does not matter although the fact that it was not provided to the PRG is an issue of significance.

25. The guidance recognises that attribution of individual action to an organisation can be a difficult question. It states that many organisations have cellular structures "where individuals or small groups operate "independently" of each other" (para 6 of the guidance). Further:

> "7 … Having considered previous cases the following questions appear to be relevant for the PRG and the Home Secretary in making an assessment as to whether an individual's action can be linked to an organisation to the extent that proscription can be justified:
>
> i. What is the nature of the individual's links (if any) to the organisation?
>
> ii. Is the action in line with the organisation's aims, conducted in their geographical region and consistent with previous modus operandi?

iii. Has the organisation acknowledged responsibility? Is this claim credible?

iv. Is there any other evidence to support an assessment that the organisation is responsible for the terrorist activity?"

26. The guidance states that "[a]ny decision should always be made on the basis of all the available evidence. While the PRG should consider these questions, they should remain informal guidelines in aiding an assessment as to whether, or not, an organisation is responsible for terrorist activity." (para 8). The document also states that if there is uncertainty as to whether an organisation is "concerned in terrorism" the views of First Treasury Counsel should be sought (para 9).

27. Mr Willis does not explain in his statement why the guidance was not provided to the PRG or to the Secretary of State nor was Mr Watson KC able to explain the omission. In our judgment, it was so obviously relevant to the PRG's decision that it ought to have been provided to the PRG. The fact that this is informal guidance is nothing to the point: the document states in terms that the PRG will need to be clear about the issue of attribution, and non-exhaustive relevant factors are then set out to enable that clarity to be attained. The real issue for us to determine is whether the failure (by whomever) to ensure that the PRG were properly provided with the guidance made any difference to the outcome. The fact that the guidance contains obviously relevant factors cuts both ways.

THE RESPONDENT'S DECISION-MAKING PROCESS

28. Following the Order in POAC 1 dated 13 May 2021, members of the PRG were invited to a meeting and JTAC was instructed to prepare an assessment of the LTTE for the purposes of considering the application for de-proscription. The OPEN version of the JTAC report relevant to this case is dated "mid-2021". By way of summary of that document (we will consider relevant passages in greater detail when we come to address the Appellants' grounds):

    (1) Any previous JTAC proscription assessments on LTTE should be disregarded.

    (2) Whilst the LTTE's overt military capacity was largely destroyed in 2009, reducing its capability to conduct and prepare for attacks in Sri Lanka, JTAC assessed that a covert capability continues to exist: activity continues to be undertaken by small cells of individuals who were LTTE members before 2009 (often referred to in OPEN source as "former members") and individuals ideologically aligned to the LTTE. The nature of this activity is consistent with the methodology and materials deployed by the LTTE before 2009, including the possession and recovery of caches of arms and explosives associated with the LTTE as well as possession of LTTE paraphernalia.

(3) Following the military defeat of 2009, the majority of the LTTE's remaining leadership did not renounce violence and did not decommission its arms.

(4) Since 2009, there has been a continuous stream of reporting from the media, allies and regional partners indicating attempts by the LTTE to revive activity in Sri Lanka and amongst its international network.

(5) Before 2009 the LTTE operated through both conventional military and non-conventional cellular structures. These latter structures have lived on. These comprise small isolated cadres of operatives intended to operate without the need for structured oversight.

(6) In support of its assessment that the LTTE prepares for terrorism, JTAC referenced five incidents whose occurrence is supported by OPEN source reporting. This material we will examine in greater detail below.

(7) In support of its assessment that the LTTE promotes or encourages terrorism, JTAC referenced two specific matters vouched by OPEN source reporting. First, in March 2021 two individuals were arrested in Jaffna for promoting the LTTE online. They ran a YouTube channel and a website carrying speeches by Mr Prabhakaran as well as LTTE iconography. Secondly, on 18 May 2020 multiple websites were hacked by the "Tamil Eelam Cyber Force". The perpetrators alleged acts of genocide against the Tamil population and posted the flag of the LTTE (this has specific writing and not just the yellow tiger).

(8) In terms of the discretionary factors, three were relied on by JTAC. First, reliance was placed on the nature and scale of the LTTE's activities within the past 18 months. Secondly, JTAC assessed that the LTTE poses a threat to UK nationals overseas. Although Sri Lankan officials and civilians are the primary targets, there is a risk of collateral UK casualties from a successful attack. Thirdly, JTAC assessed that there was a LTTE presence in the UK, noting the commemorative activities and the use of LTTE symbology by some individuals here.

29. As Mr Willis explains, the fifth discretionary factor is addressed by the FCDO and not by JTAC. The FCDO provided a submission dated 20 July 2021. It presupposed that LTTE was an organisation concerned in terrorism. Overall, the FCDO strongly recommended that LTTE should remain proscribed. The main concerns related to the UK's bilateral relations with Sri Lanka and India, the UK's reputation as a reliable security partner, and the UK's global credibility on counter-terrorism.

30. A Community Impact Assessment was also prepared, assessing the impact any decision to de-proscribe LTTE would have on various communities, including the Tamil community.

31. On receipt of these reports, a meeting of the PRG was held on 28 July 2021. An OPEN version of the minutes has been made available. The meeting was chaired by Mr Willis. Three JTAC members were present as well as a Home Office Legal Adviser,

two FCDO officials and various others. The documentary material made available to the PRG has been listed under para 23 of Mr Willis' first witness statement. This included the Appellants' representations, the documents we have previously summarised and the judgment of this Commission in POAC 1. Although we were not taken to the entirety of this material during the course of the hearing, we have examined it carefully before concluding this judgment. It is necessary in our view to remind ourselves that we are applying judicial review principles to this appeal, and we need to consider the whole of the PRG minutes as well as the entirety of the available material in order to evaluate whether the PRG could properly advise the Secretary of State that the LTTE continues to exist.

32. By way of summary of the PRG Minutes:

(1) After some discussion JTAC confirmed the accuracy of Mr Willis' "summation" of the position: the LTTE was a quasi-State actor when it was an overt military force; the LTTE had operated, at least in part, through cellular structures before 2009; after 2009 the LTTE continued to act as a traditional terrorist network through the ad hoc cells that had always existed - in this way the LTTE could operate with deniability; the LTTE had not been wholly destroyed in Sri Lanka, and it survived with its organisational structures largely intact in the diaspora; the LTTE is still a "group" for the purposes of section 121 of the Terrorism Act 2000 (we note that this is a mistake, and that section 121 refers to "organisation" and not "group". However, no submission was made about this, and we consider that nothing turns on the error).

(2) JTAC then "ran through" its report. JTAC was now relying – expressly at least - on three incidents rather than on five.

(3) Explosive and weapons caches were located at the properties of individuals who were former members of the LTTE. There is evidence in at least one of the reported incidents relating to arms caches that those arrested had recently recovered arms and explosives from a cache. Mr Willis noted that the caching of weapons and explosives seemed to be a "systemic issue". JTAC confirmed that it had taken into account the fact that many of the arms caches had been buried a long time ago. Mr Willis asked if there were any updates on the arrests, in particular the criminal justice outcomes. That point was discussed with PRG members.

(4) Added to this evidential mix is the fact that LTTE paraphernalia, including flags, was found at the home of an arrested individual.

(5) JTAC assessed that the LTTE promotes or encourages terrorism. The example given was the multiple hacking incident on 18 May 2020. It was almost certain that the perpetrators were aligned to the LTTE: see the posting of the flag of the LTTE. The 18 May date is significant because it is Sri Lanka's Remembrance Day marking the end of the civil war.

(6) The PRG minutes also recorded the following discussion between Mr Willis and JTAC:

> "… regarding the difference between Black Tigers Day[8] and the commemorative events held, including the members attending, indicative of the events being wider than just family and friends of LTTE fighters. JTAC explained that the nature of Black Tigers Day was to commemorate suicide bombers and the event has previously been used to recruit new "Black Tigers".
>
> It was noted that there are other commemorative events[9] which do not lionise only suicide bombers but [are] a wider mourning for those who have lost their lives in the fighting and that there was a significant difference between the two events."

(7) Everyone present at the meeting agreed that the statutory test was met. The PRG placed "most weight" on the preparatory limb of the statutory test.

(8) The PRG then went on to address the discretionary factors as well as other matters such as police outreach and community impact. The PRG agreed that the discretionary factors weighed in favour of continued proscription.

33. On 10 August 2021 a submission ("the MinSub") was sent to the Secretary of State. Annexed to the MinSub were 13 separate documents that broadly speaking replicated the material provided to the PRG, although the Secretary of State was also sent the minutes of the PRG meeting we have just summarised. The Secretary of State was provided with a succinct summary of her powers and of the background to the LTTE litigation. At one stage we were concerned that the Secretary of State was given a misleading summary of the judgment in POAC 1, but having looked at it again with the benefit of Mr Ben Watson KC's assistance we have concluded that those concerns were not well-founded. The statutory test was explained to the Secretary of State as well as the five discretionary factors. The Secretary of State was informed that on 28 July the PRG had unanimously agreed to recommend to her that the proscription of the LTTE should be maintained.

34. The Secretary of State was told that the LTTE continues to be listed as a terrorist organisation in over 30 countries, as well as being listed under the EU sanctions regime. As we will later explain in more detail, this first assertion was not correct. The PRG's reasons for concluding that the LTTE continue to exist as a terrorist organisation were summarised for the Secretary of State. We consider that the summary given was accurate.

[8] 5th July

[9] The principal of these takes place in late November. This is an annual event, Maarveerar Nahal, for mourning all LTTE war dead. It takes place on the day following the birthday of Mr Prabhakaran.

35. The Secretary of State was informed of JTAC's assessment that the LTTE prepares for terrorism. Although she was told that "JTAC's assessment identifies several incidents of preparatory activity", only two incidents were expressly referenced. Both incidents featured in OPEN source reporting. These include an incident on 4 July 2020 when a former LTTE intelligence operative, Thangaras Thevathasan, was manufacturing an IED: it exploded prematurely, and he died from his injuries five days later. It was assessed as "almost certain" (the phrase used in the OPEN gist) that Mr Thevathasan was constructing the IED for use in a terrorist attack. It was further assessed as "highly likely" that he intended to conduct the attack to mark Black Tigers Day. The second incident specifically referred to occurred in December 2020 when a couple, including a former LTTE member, were arrested on public transport between Jaffna and Kandy. They were found to be in possession of a claymore mine secreted in a bag. A search of their property reportedly revealed a hand grenade buried in the ground. These weapons were consistent with LTTE methodology. It was assessed as "likely" that the device was intended for use in an LTTE attack.

36. The Secretary of State was also advised that JTAC assessed that the LTTE promotes or encourages terrorism. Reference was made to the hacking of multiple websites on 18 May 2020 – assessed to have been carried out on behalf of the LTTE. More generally, the Secretary of State was advised that the PRG placed "some weight" on the Black Tigers Day event (which takes place in July) in satisfying itself that this limb of the statutory test was met. JTAC explained to the meeting that the Black Tigers Day event routinely "lionises" those who committed suicide attacks during the civil war "to the extent that it could encourage emulation".

37. Further:

> "JTAC confirmed that, as part of its consideration of each limb of the statutory test, it had considered the veracity of any open source reporting and how much reliance could be placed on it."

38. The Secretary of State was advised that the PRG unanimously agreed that the statutory test was satisfied, enabling her to hold a reasonable belief that the LTTE is concerned in terrorism for the purposes of section 3 of the Terrorism Act 2000.

39. Turning now to the discretionary factors, the Secretary of State was informed that the PRG unanimously agreed that the statutory test was satisfied and that there "was no meaningful" evidence to suggest that proscription would lead to a disproportionate impact on LTTE members or on Sri Lankan Tamils advocating for an independent state.

40. As for the nature and scale of the LTTE's activities, reliance was placed on the incidents previously summarised. These showed that the group remained active and encouraged terrorism in Sri Lanka. The Black Tiger Day events in July 2020 were said

to be global in nature, taking place in France, Germany, Switzerland, Australia and New Zealand, all of which countries were said to "list" the group.

41. Although the LTTE targeted Sri Lankan and Indian officials, there was a risk that UK nationals would be killed or injured given the indiscriminate nature of the weapons used.

42. The Secretary of State was advised that de-proscription of the LTTE had the potential to disrupt the UK's co-operation with Sri Lankan and Indian authorities. The PRG noted that key partners globally, including Five Eyes, continue to list the LTTE as a terrorist organisation.

43. The Secretary of State was also advised that the PRG agreed that "it would be useful" to seek an update on the criminal justice outcomes in relation to the arrests. However, the statutory test was met on the basis of the information currently available, and the MinSub recommended that the Secretary of State proceed to take the decision in light of the end of August deadline.

44. As for ECHR considerations, the Secretary of State was advised that public order police have a "good understanding" of the different flags and symbols associated with Tamil Eelam and the LTTE, and that the PRG observed that there was no evidence of wrongful arrests associated with the display of the Tamil Eelam flag. The PRG considered that proscription does not prevent the display of symbology associated with Tamil independence.

45. Finally:

> "The PRG unanimously agreed that the statutory test continues to be met and that it is proportionate to maintain the LTTE's proscription. JTAC [word or words missing] that the statutory test is satisfied. The PRG accepted this analysis; however we think it is worth noting that the evidence available to demonstrate that the preparation limb is satisfied is sufficient in its own right to form a reasonable and honest belief that the statutory test is satisfied; and there is no significant evidence to suggest proscription is disproportionate. The PRG recommends that you (Home Secretary) maintain the LTTE's proscription. Do you agree?"

46. The Secretary of State accepted the recommendation in the MinSub. The Appellants were informed of her decision by letter sent on 31 August 2021. In this letter the Secretary of State recorded her belief that "small cells of individuals who were members of the traditional military structures of the LTTE prior to 2009 (often referred to in OPEN source reporting as "former members") are responsible for the incidents described above, and others that I have been made aware of". The specific incidents set out in the letter were the two we have summarised under §35 above. In that context, the Secretary of State said that her reasonable belief was based on

"several incidents identified in the intelligence assessment" although she had placed "greatest weight" on the two specific matters. We note that the Secretary of State would not have been aware of any other incidents if her reading concluded with the MinSub, but she would have been had she delved into the underlying material. The letter in all other respects summarised the MinSub.

47. As for the Discretionary Factors, the decision letter stated as follows:

> "I have also taken advice on whether the discretionary factors are in favour of maintaining proscription and whether proscription is proportionate.
>
> On the basis of the totality of the information available to me, I have concluded that it is appropriate to maintain the proscription of the LTTE. The statutory test is satisfied and three of the discretionary factors are in favour of proscription (the nature and scale of the LTTE's activities, the specific threat from the LTTE to British nationals overseas, and the need to support other members of the international community in the global fight against terrorism). The LTTE's activities within the past 18 months have included the recovery of arms and explosives caches, which are likely for use in terrorism attacks; transportation of an explosive device likely for use in an attack; and manufacture of devices almost certainly for use in an LTTE attack highly likely planned for Black Tigers' Day. This shows that the group is active and concerned in terrorism in Sri Lanka. In light of this activity, I am concerned about the risk to British nationals overseas, specifically in Sri Lanka, given the LTTE's past terrorist attacks included indiscriminate attacks against civilian targets."

THE APPELLANTS' CONTEXTUAL ARGUMENTS

48. Before turning to address the Appellants' grounds, it is convenient at this stage to summarise the overarching and contextual arguments eloquently presented to us at the start of the Appellants' oral submissions of Mr Peter Haynes KC. We should specifically record our admiration for Mr Haynes' precise and moderate submissions in support of his clients' case. They have been extremely well-served by him and by his junior, Ms Shanthi Sivakumaran, who provided great assistance in oral argument in relation to the two Upper Tribunal decisions which we will be discussing in due course (we do not ignore all the sterling work she has also carried out in connection with the Appellants' skeleton argument, which we think is a very helpful document).

49. Mr Haynes emphasised that before its military defeat in 2009 the LTTE was a substantial and sophisticated organisation. It was geocentric, focused in north-east Sri Lanka and nowhere else. Mr Haynes described the events of May 2009 as

"catastrophic": every piece of the quasi-State was dismantled, and 40,000 people including women and children were killed. In Mr Haynes' words, the "defeat left nothing other than an ideology". Despite the wide availability of buried arms etc., Mr Haynes' submission was that to all intents and purposes the LTTE has since 2009 been silent. No terrorist attacks have been carried out anywhere in the world. There have also been no events and demonstrations. Mr Haynes drew our attention to a Press Release dated February 2020. This recorded the statement President Rajapaksa gave to the Sri Lankan Parliament in 2011 that since 2009 there have been no terrorist activities. Further:

> "Independent reputable publications issued by the UNHCR, the US Department of State and Janes Defence Weekly confirmed that LTTE had ceased all activities in Sri Lanka in 2009."

50. In another statement made before 2015, President Rajapaksa opined that the "grand finale" in 2009 resulted in terrorism being "totally eradicated".

51. Mr Haynes drew to our attention the position of the EU. Anti-terrorism sanctions against the LTTE were annulled in 2014 albeit re-imposed in 2015.

52. In November 2019 the Department of Foreign Affairs and Trade ("DFAT") in Australia assessed that the LTTE was no longer "an organised force" in Sri Lanka and "any former LTTE members within Sri Lanka would have only minimal capacity to exert influence on Sri Lankans including those returning from abroad".

53. Mr Haynes relied on the opinion of Lord Anderson KC, then Independent Reviewer of Terrorism Legislation. In his opinion the LTTE was not currently involved in terrorism, in the terms of the Court of Appeal's judgment in Lord Alton's case.

54. Turning now to the international plane, Mr Haynes pointed out that only six countries (out of the 193 in the United Nations) currently proscribe the LTTE in the sense that membership is criminalised. These are: Sri Lanka; India; Malaysia; United Kingdom; United States of America; Canada. 27 other countries have the LTTE on their list of sanctions: these comprise the 26 Member States of the EU, and Australia. Mr Haynes' submission was that the UK is "an outlier" in terms of the countries that continue to proscribe the LTTE.

55. Mr Haynes submitted that the LTTE has never harmed British interests nor harmed a UK national.

56. Mr Haynes submitted that the concept of "former members" of the LTTE is inconsistent with the proposition that these individuals could simultaneously be "current members". In May 2009 just under 12,000 LTTE members were arrested and incarcerated under a rehabilitation regime that lasted for at least two years. Mr Haynes submitted that these individuals would always be "former members".

57. Mr Haynes then addressed what he called JTAC's cellular-structure "theory". He pointed out that the main reference to this in JTAC's report was not footnoted. He critiqued the suggestion that LTTE activity continues to be undertaken in small cells of "former members" who used the same basic methodologies as were deployed before 2009. Mr Haynes' essential point was that the cellular-structure "theory" failed to differentiate between individual lone actors and those acting on behalf of an organisation. "Former members" were as likely to fall into the former category as the latter.

58. Mr Haynes' final contextual point of general application was that the MinSub and decision letter appeared to rely entirely on OPEN source information. He added that pretty much every word of every report relied on by the Secretary of State is more properly termed a Sri Lankan government source. Ultimately, the source was a police officer, an army officer, or counsel for the prosecution. These factors behove a closer scrutiny of the material relied on.

TWO DECISIONS OF THE UPPER TRIBUNAL

59. Mr Haynes placed considerable reliance on these decisions because he argued that they demonstrated that the Respondent has adopted inconsistent and contradictory positions in the Upper Tribunal and POAC.

60. The first of these decisions is *GJ and others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 00319 (IAC). The issue in that case was whether the Respondent's refusal of entry clearances on asylum, human rights and humanitarian grounds was lawful. In order to determine that issue, the Upper Tribunal had to assess the risk in Sri Lanka of individuals who were or were perceived to be supporters of Tamil separatism in that country. In the Upper Tribunal's view, the LTTE was a "spent force" in Sri Lanka, there had been no terrorist incidents since the end of the civil war, and the current focus of GoSL was to prevent both a resurgence of the LTTE or any similar Tamil separatist organisation and a revival of the civil war within Sri Lanka.

61. Since the hearing we have read and carefully considered the entirety of the Upper Tribunal's lengthy decision. In our view, whether the LTTE was still extant as a terrorist organisation was an issue which did not really feature. "Spent force" was not a term which featured in the submissions of Mr Jonathan Hall (as he was then) for the Respondent, at least as summarised by the Upper Tribunal at paras 166 ff. The terms of para 297 of the Upper Tribunal's decision should, however, be recorded:

> "The LTTE was crushed and within Sri Lanka is now a spent force. There have been no terrorist incidents at all since May 2009. The GoSL has control of the whole country and internal relocation is not

> an option if the security forces have an adverse interest in an individual, since there are no LTTE areas where an individual may be safe…"

62. The Upper Tribunal did not say that the LTTE had been utterly destroyed. "Spent force" suggests an entity that it powerless but may continue to exist. Whether "spent force" is a synonym for "inactive", and is therefore inconsistent with the idea that the LTTE could be preparing for terrorism, is a matter which we will consider below.

63. The second Upper Tribunal decision which we have carefully considered is *KK and RS (sur place activities: risk) Sri Lanka CG* [2021] UKUT 00130 (IAC). The issue in that case was the extent to which *sur place* activities by Tamils in the UK placed them at risk in the event of return to Sri Lanka. The Respondent's position before the Upper Tribunal was that the GoSL did not regard all supporters of self-determination as Tamil separatists and as "fronts" for the LTTE. The Respondent also emphasised the need to distinguish the rhetoric from reality when considering the position of the GoSL. It submitted that the risk of resurgence within Sri Lanka of the LTTE was "overplayed".

64. After the hearing before the Upper Tribunal but before it gave its decision the determination in POAC 1 was promulgated and both parties provided brief written submissions to the Upper Tribunal on the significance or otherwise of POAC's determination. KK and RS submitted that the Respondent's argument to the effect that the LTTE was a spent force and the GoSL's rhetoric should be treated with caution "stood in tension" with her position before POAC where she had argued that the organisation was "concerned in terrorism". In response, the Respondent submitted that her positions in both pieces of litigation was consistent. It was accepted that the LTTE had elements of support outside Sri Lanka and was concerned in terrorism. At the same time, the organisation remained inactive in Sri Lanka and the GoSL's rhetoric had to be viewed in that context.

65. The Upper Tribunal's conclusion on this topic was as follows:

> "344. As for the POAC judgment … and the evidence adduced before us pertaining thereto, we have taken the view that neither materially undermines the position adopted by the respondent in these appeals, nor materially advances the appellants' case. The thrust of the respondent's submissions on "rhetoric and reality" went to the uncontroversial fact that the LTTE are not an active force within Sri Lanka and that GoSL's utterances should be seen in that context. She has not suggested that the organisation has ceased to exist in any form outside the country. We also take into account the relatively narrow basis on which POAC allowed the appeal against the decision to maintain proscription under the Terrorism Act 2000. In short, we

see no real tension between the respondent's stance before us and as adopted in the POAC proceedings.

345. On the other hand, the POAC case does not detract from the appellant's argument that GoSL genuinely perceives the LTTE to represent an ongoing threat to the unity of the Sri Lankan state. It is unlikely that GoSL's view of the LTTE will have been altered by the proceedings in POAC. If anything, the case (including the respondent's position adopted therein) may have simply reaffirmed an existing belief that the LTTE (in whatever form it takes) continues to instigate attacks in Sri Lanka from abroad. In any event, the decision in [POAC 1] has not played a material part in our overall conclusion, as set out below.

346. Having regard to all relevant considerations, we conclude that much, if not all, of the rhetoric emanating from senior members of the political and military establishment since 2012 has represented an accurate reflection of GoSL's position and has not simply represented hyperbolic or vacuous pronouncements. We are satisfied that there is deemed to be an imperative need to ensure that any nascent movement, organisational capabilities, political voice, and even sympathies, related to the "separatist ideology" within Sri Lanka are firmly suppressed.

…

349. Drawing all of the above together, we conclude as follows. The core focus of GoSL is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam. GoSL draws no distinction between, on the one hand, the avowedly violent means of the LTTE in furtherance of Tamil Eelam, and non-violent political advocacy, for that result on the other … Whilst there is currently limited space for pro-Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of any avowedly separatist or perceived separatist beliefs."

66. Reading these paras in *KK and RS* and nothing else, we can see some force in the Appellants' argument before us that the Respondent has adopted inconsistent positions in two pieces of litigation. Mr Haynes argued forcefully that the proposition that the LTTE is "inactive" is flatly inconsistent with the notion that it is "concerned in terrorism". The thesis that there could be consistency is "contrary to all sensible boundaries of language".

67. With respect, it seems to us that that the Upper Tribunal may have slightly skated over the full nuance and sophistication of the Respondent's case. One reason why it

may have done so is that the Upper Tribunal had rather a lot on its metaphorical plate on this occasion, and that this somewhat recondite issue was never going to be dispositive. Ultimately what matters however is our own analysis of whether there is a material inconsistency between the Respondent's position before the Upper Tribunal and before us.

68. Mr Willis discusses the two decisions carefully in paras 7-10 of his second witness statement and we accept his explanation of the Respondent's position before the Upper Tribunal and before POAC.

69. Mr Willis explains that in counsels' note dated 12 January 2021 it was pointed out that there is no inconsistency between "spent force" on the one hand (sc. a reference to the LTTE's overt military capability being largely destroyed) and the notion that the LTTE was "concerned in terrorism" on the other. Activities in relation to the latter were not wholly outside Sri Lanka. As the Upper Tribunal pointed out in *KK and RS*, at paras 340 and 341:

> "The argument that much of the governmental and military pronouncements are simply rhetorical and should be viewed with real caution is further undermined, at least to some extent, by the fact, as we find it to be, of a number of unsuccessful LTTE-inspired plots to carry out attacks within Sri Lanka since *GJ* was decided … Added to this list [of unsuccessful attacks] a variety of sources address the failed attempt by an ex-LTTE operative to undertake a suicide bombing in July 2020. The plot was said to have been instigated by an LTTE member residing in France.
>
> These incidents certainly cannot be said to equate to general operational capabilities of the LTTE within Sri Lanka or to a meaningful resurgence of that organisation. However, they do add force to the appellants' argument that the rhetoric and the expression of determination to prevent any form of resurgent separatism does in fact have a basis in reality. In our view, the reality in this equation must be seen in the context of GoSL's authoritarian nature and Sri Lanka's violent history over the last four decades."

70. Moreover, counsels' note dated 12 January 2021 also stated in relation to Sri Lanka itself that "any attempts of LTTE revival or attacks have been relatively few and unsuccessful". This made it tolerably clear that the Respondent was saying that the LTTE was largely quiescent in Sri Lanka, and inactive as an overt military force, but it was not non-existent.

THE SPECIFIC INCIDENTS REFERRED TO BY JTAC

71. Paras 6-11 of JTAC's report dated "mid-2021" refer to five specific incidents. Mr Haynes addressed these in their chronological order.

72. First, OPEN source reporting from January 2020 indicated that 15 people, including former LTTE members, were arrested in Sri Lanka for plotting to assassinate a Tamil National Alliance member of Parliament and "other political leaders who oppose LTTE". According to the article, the suspects had recovered weapons and explosives that had been cached by the LTTE during the war. Police searches recovered two pistols and a claymore mine. These items were consistent with use in LTTE terrorist attacks in and before 2009.

73. According to the text of the newspaper article dated 30 January 2020, most of the suspects were drug traffickers and the LTTE suspects had worked with powerful underworld leaders to revive the LTTE. The suspects were arrested by the Colombo Crimes Division on information received by the Intelligence Unit relating to the discovery of the weapons. One suspect had carried a claymore mine to a car from the Killnochchi bus stand. The plot had been organised from abroad. In fact, there had been several attempts to assassinate this particular politician.

74. Mr Haynes linked these arrests to a document provided to the Respondent by the GoSL, under the heading "Updates on Judicial Proceedings related to revamping attempts of the LTTE in Sri Lanka". One of the updates relates to "MP Sumanthiran assassination attempt", and he is the same member of Parliament mentioned in the foregoing newspaper article. The update is dated 29 March 2021 and "four persons are held in remand custody". Mr Haynes' point is that this assassination attempt dates back to 2018 and is outside the 18-month time-period on which the Respondent appears to rely.

75. According to the minutes of the PRG, "OPEN source reporting from January 2020 indicates that 5 persons, including former LTTE members, were arrested in Sri Lanka for plotting to assassinate a Tamil National Alliance Member of Parliament". Police searches had uncovered two pistols and a claymore mine. It may be seen that this discovery tallies with the JTAC report, although on this occasion there were five suspects and not 15. It is unclear whether this is simply a typographical error.

76. Mr Watson chose not to address this particular example assuming that there is only one. Although it was one of the three cases specifically referred to by the PRG, it was not one of the two cases expressly relied on in the MinSub – although, and as we have seen, that referred to several incidents. Mr Haynes's interpretation may possibly be correct here, not least because the same MP is the target of the plot. Even so, the possibility that there was more than one incident involving this particular MP cannot be excluded and we note that the description of the weapons and explosives in the update is not the same as in the newspaper article. Taken in isolation, we are prepared to conclude that this incident could reasonably provide no

more than weak support for the proposition that a limited number of potentially relevant individuals were concerned with terrorism.

77. Secondly, the JTAC report references OPEN source reporting in March 2020 to the effect that Sri Lankan security forces arrested six former LTTE cadres for allegedly planning to assassinate a prominent Tamil politician in the north of the country. They recovered communications equipment and a "stock of powerful explosives". On the back of the newspaper report that has been included in the bundle, Mr Haynes submitted that this was another syndicated version of the same story as was first reported in January 2020. We do not consider that this can be right, not least because there is a reference to a "safe house" and the description of the items found is different. One "ex-LTTE cadre" who was arrested held a German passport – that had not featured in the previous report. Although this incident did not find its way into the PRG minutes or the MinSub, it does provide some support for the Respondent's case that a limited number of potentially relevant individuals were concerned in terrorism.

78. Thirdly, the JTAC report references OPEN source reporting indicating that an explosion occurred on 4 July 2020 at a residential property in Kilinochchi. This took place when a former LTTE intelligence operative, Thangaras Thevathasan, was manufacturing an IED from gunpowder, nuts and bolts. He was fatally wounded. A search of the property revealed three more IEDs and detonators as well as a banner inscribed with "Black Tigers Day". That was the following day. JTAC assessed that Mr Thevathasan had constructed the IEDs for use in an LTTE terrorist attack, and highly likely that he was going to do so on "Black Tigers Day".

79. The evidence relating to this incident is a post on the Sri Lankan Ministry of Defence website dated 9th July 2020. This stated that Mr Thevathasan had succumbed to burn injuries earlier that week. The date of his death is not clear. If the website post is to be believed, Mr Thevathasan was interviewed by officers of the Terrorism Investigation Division and admitted to his interlocutors that he was funded by a senior LTTE supporter now living in France. Mr Haynes submitted that torture is commonplace in Sri Lanka and that the Respondent should have been very cautious before relying on this material.

80. Mr Haynes' oral submissions on this incident, which had not been set out in writing in his skeleton argument, may initially appear to have some traction. However, a close examination of the JTAC report and of the PRG Minutes reveals that those advising the Respondent did not choose to rely on anything the deceased had allegedly said when presumably in hospital. The website post includes a photograph of Mr Thevathasan before he died swathed in bandages. His injuries were obviously terminal and the notion that he could properly have been interrogated in these circumstances seems very difficult to accept. However, whatever Mr Thevathasan had to say about what happened – assuming that he was in a fit state to say anything – did not form the basis of JTAC's assessment. Frankly, the facts spoke for

themselves: the evidence of an explosion; the fact that he had been trying to make an IED; that a flag emblazoned with "Black Tigers Day" was found on his premises the day before he blew himself up; that he was an ex-LTTE intelligence operative; and so forth. JTAC's assessments seem to us to be entirely justified.

81. Fourthly, in December 2020 OPEN source media reporting indicated that a couple, one of whom was a former LTTE member, was arrested on 2 December 2020 on a bus travelling from Jaffna to Kandy. They were found to be in possession of a claymore mine hidden in a bag. A search of their property reportedly revealed a hand grenade buried in the ground. The mine and this grenade were said to be consistent with the type of weapons used by the LTTE in 2009 and before. JTAC assessed it to be likely that the mine was intended to be used in a terrorist attack.

82. Mr Haynes submitted that this incident was extremely suspicious. It allegedly took place a few weeks after POAC 1 was handed down. The press reporting all emanated from Sri Lankan government sources, including Lt Gen Shavendra Silva and "army intelligence officials". The attack had been planned from Switzerland and this was now the 15th attempt by what was described as the diaspora LTTE network to launch a terrorist attack in Sri Lanka itself. Mr Haynes further submitted that there is no evidence of any criminal justice outcome (see the update document to which we have already referred) and he suggested that this report bears some similarities, in terms of at least its implausibility, with an incident described in POAC 1 at paras 42 and 43 of its judgment. The way he put it in oral argument was that there was "some synergy between the stories". Finally, Mr Haynes relied on what he described as an "extraordinary" press report dated 4 December 2020 (i.e. just two days after the arrests) in which detailed information was placed into the public domain, presumably on the basis of police interrogation, about the underlying conspiracy and how the claymore mine had been transported etc.

83. Mr Haynes may be right that there are features of the "Claymore couple" case that appear rather odd: the absence of any reported criminal justice outcome; and, the detailed press reporting within two days of the incident, no doubt fed by information from the police, which certainly would not have been put out in the UK through fear of prejudicing a continuing investigation and/or any upcoming criminal trial. However, we entirely reject his thinly-veiled suggestion that this incident was fabricated as demonstrated by some similarities with an incident analysed in detail in POAC 1 (in our view, there are no real similarities). What is more the incident is too close to the publication of the judgment in POAC 1 for it to be seriously suggested that it was fabricated. It is not impossible that the Sri Lankan authorities were acting in bad faith but we have to say that such fabrication is implausible. In any event, it was for JTAC, and then the PRG, to form their own view as to how much weight could be placed on OPEN source reporting in all the circumstances.

84. Fifthly, OPEN source reporting from May 2021 indicated that an explosives and weapons cache was recovered in Jaffna and a former LTTE member arrested. The

items included pistol ammunition, rifle ammunition, heavy machine gun ammunition, detonation cord and a claymore mine. This was assessed by JTAC to be a LTTE weapons cache. According to a press report, a former LTTE member was arrested. No further information was provided. Mr Haynes made the perfectly valid point that this arrest did not feature in the PRG's discussions and it did not form any part of the MinSub.

85. We do not read the MinSub or the Secretary of State's decision letter as abandoning reliance on all bar two of these five incidents. Our interpretation of these documents is that the Secretary of State was advised to, and ultimately did, rely on the two incidents which were the most striking, but the others remained in the background as relevant factors. This means that it would not be fatal to the Respondent's case if the other three incidents were undermined by Mr Haynes. The position would arguably be different if these two key incidents were demonstrably flawed in either an *Edwards v Bairstow* or a *Wednesbury* sense.

86. We cannot conclude that these high thresholds are met. The Secretary of State was entitled to form the reasonable belief that these events occurred and that the individual perpetrators were concerned in terrorism. We will address under the rubric of Grounds 1 and 2 the separate question of whether the individuals concerned were acting on behalf of the LTTE rather than as lone actors. As for the other three incidents, we have set out our conclusions as to their potential relevance recognising always that the ultimate assessment is not for us but for those advising the Secretary of State. The ascriptions we have applied to these incidents (sc. incidents 1, 2 and 5 in the foregoing list) is that their strength varies from "some support" to "no more than weak support". Taken in isolation, we think that the Respondent's case might struggle but that takes the Appellants nowhere. These incidents reasonably were judged to form part of the overall picture that was presented to the Secretary of State, and – subject always to the need to establish a link to the LTTE rather than singleton, terrorist action – we have concluded that the Appellants have failed to establish a sufficient legal flaw to require us to exclude them from account.

THE APPELLANTS' HIGH-LEVEL CRITICISMS OF THE RESPONDENT'S APPROACH

87. Before developing his four grounds of challenge, Mr Haynes advanced a series of what may be described as high-level criticisms based on a summary of well-known authority. He submitted that the Secretary of State would likely err if she failed to take into account a material consideration, namely one that no reasonable Secretary of State would have failed to take into account. He submitted that it was incumbent on those advising the Secretary of State to ensure that she was presented with a balanced and not asymmetric picture, and that the key points being advanced on behalf of the Appellants were properly identified and flagged. He submitted that

non-statutory guidance had to be considered, on the basis that it was so obviously relevant to the decision at issue. Furthermore, the Respondent's policies should be consistently applied. He submitted that those providing advice within the Respondent, and indeed the Secretary of State herself, should undertake reasonable inquiry and that POAC could intervene if it were to conclude that no reasonable decision-maker would have failed to undertake further inquiry.

88. Against this familiar legal backdrop, Mr Haynes submitted that those advising the Secretary of State failed to ensure that she was provided with the full picture. The missing material and information included the following: the two Upper Tribunal decisions we have already summarised; a proper analysis of the fact that all the underlying material relating to the incidents at issue emanated from the GoSL, who could not be trusted; the informal guidance document that we have already summarised; the materials provided by the Appellants; further and better updates from Sri Lanka concerning the criminal justice outcomes in the five cases referenced by JTAC; and the pursuit of obvious lines of inquiry in relation to the exiguous accounts set out in the media reporting.

89. We recognise that Mr Haynes advanced a number of powerful points. We deal with them in turn.

    a. We have already been critical of those advising the Respondent in failing to ensure that the "Individuals v Organisation Actions" guidance document was before both JTAC and the PRG, and then included as an Annex to the MinSub. In light of that unexplained failure, we will need to examine with great care when we come to the Appellants' grounds whether that failure was immaterial to the decision that was taken, because the relevant factors were in the event properly considered.

    b. We have already addressed the two Upper Tribunal decisions heavily relied on by the Appellants and have accepted the Respondent's argument, advanced through Mr Willis, to the effect that inconsistent positions have not been taken in front of different tribunals.

    c. We have referred to the fact that JTAC did consider what weight could be given to the OPEN source reporting in all these circumstances, even if JTAC's inner workings have not been fully displayed. Ideally, it would have been desirable for more to be known about the criminal justice outcomes in Sri Lanka, in particular in relation to the Claymore couple and the incident in December 2020. However, the Respondent did not exhibit a public law flaw in advising the Secretary of State that there was already sufficient material without that additional information being available. It could of course be said that this additional information might have served to undermine rather than support the proposition that the individuals in question were concerned in terrorism, but (a) the criminal justice system operates a different standard of

proof, (b) had there been more information and had that supported the Respondent's case, we venture to think that it would have been strongly submitted in these proceedings that reliance could not be placed on the findings of a legal system in an authoritarian state, and (c) the Respondent was acting under some time pressure. We say more about this issue generally in our CLOSED judgment.

90. More generally, there is some force in Mr Haynes' submission that those advising the Respondent ought to have pursued further lines of inquiry. These matters are neatly encapsulated in the Appellants' reply skeleton argument. Of course, the Respondent might have done more. The Respondent might have asked questions of the Sri Lankans in relation to some if not all of the incidents referred to in press reporting, and an objective observer might well say that there was some reason to doubt the credibility and reliability of what was being said. However, there is no reason to suppose that these fairly obvious points were not considered by the decision-makers, and we have already referred to the extract from the minutes of the PRG meeting, as gisted into OPEN, stating that JTAC had specifically considered what weight could be given to the OPEN source reporting in these circumstances (see §37 above). Given the very high threshold that the Appellants must surmount in order to bring home a challenge based on a failure to undertake reasonable inquiry, we cannot accept that this argument is sufficiently strong to amount to a legal flaw for the purposes of section 5(3).

91. We were initially attracted by the submission that the MinSub did not give the Secretary of State a fair and balanced picture. However, there is no evidence that the Secretary of State placed any weight on the representations advanced on behalf of GoSL (although it was right that she was made aware of those views, whatever their shortcomings), she was provided with 35 pages of representations from the Appellants, including a number of witness statements and two expert reports, and – most significantly in this regard - JTAC had assessed that certain statutory tests and discretionary factors were satisfied. The PRG unanimously agreed and made its recommendation to the Secretary of State accordingly. Ideally, the Appellants' key arguments should have been summarised in one paragraph for a busy Secretary of State to take on board, but we cannot conclude in the circumstances of the present case that the MinSub, viewed overall and in conjunction with its somewhat voluminous Annexes, gave the ultimate decision-maker an imbalanced picture to the extent that this Commission should intervene on the ground of legal flaw.

92. Overall, we reject Mr Haynes' high-level legal criticisms of the Respondent's approach, and now proceed to consider the Appellants' four grounds of challenge.

GROUND 1

The Appellants' Submissions

93. Mr Haynes submitted that the Secretary of State's conclusion that the LTTE continues to exist for the purposes of the proscription regime in the Terrorism Act 2000 is vitiated by a number of errors. We have already addressed some of the submissions he advanced under this rubric (in particular, his arguments directed to the two Upper Tribunal decisions) but there were several others.

94. First, neither the PRG nor the Secretary of State herself had recourse to the guidance document, Individual v Organisation Actions. This was a significant failing because the guidance emphasised the difficulties in attributing individual action to an organisation. The five factors listed in the guidance were all relevant and, notwithstanding Mr Willis' evidence to the contrary, were not specifically considered during the course of the decision-making process. There does not appear to be any record of a discussion as to whether the LTTE had acknowledged responsibility for their actions (the third relevant factor itemised in the guidance), nor as to whether the assertions in media reporting that the individuals concerned were "former members" of the LTTE had any supporting evidence.

95. A related point, and one that was pressed (*arguendo*) by the Chairman during the course of the hearing, was that it is very difficult in a case such as this to differentiate between individual action which is not attributable to an organisation and individual action which may be so attributed. At the very least the guidance focuses attention on this issue. The need to differentiate in a fair and balanced way is particularly acute in circumstances where the OPEN evidence discloses no material demonstrating that the LTTE has an identifiable leadership, membership, physical resources or finances, and no physical or internet presence in Sri Lanka. On the foot of these considerations Mr Haynes submitted that JTAC's cellular structure theory, which had not previously featured in its reports and does not appear to be supported as a concept by GoSL, assumes what needs to be proved.

96. Another aspect of the guidance, and one which was not followed, is that it states that the views of First Treasury Counsel should be sought if there were any uncertainty as to whether an organisation is concerned in terrorism. Strictly speaking, the guidance does not state that those views should be sought if there were any uncertainty as to the logically anterior question of whether a putative organisation exists at all. Be that as it may, the views of JTAC and of the PRG were unanimous. It is not for this Commission to say whether these entities ought to have found themselves in a state of uncertainty: the fact remains that they were not in doubt. It follows that the failure to obtain the views of First Treasury Counsel is a non-point.

97. Secondly, Mr Haynes submitted that the concept of "former member" cannot be squared with that of "current member". Mr Haynes argued that again there was a degree of question-begging or circularity in JTAC's and the PRG's analysis. It is merely asserted, without evidence (so Mr Haynes' submission ran), that some of the individuals concerned in these incidents must have been continuing to act on behalf

of the LTTE. It is just as likely, and perhaps more plausible, that they were acting on their own behalf, in support of an idea which had not died even if the organisation that once pursued it had.

98. Thirdly, Mr Haynes relied on misstatements of fact in the MinSub relating to the international position. The Secretary of State was advised that the LTTE "continues to be listed as a terrorist organisation in over 30 countries". In fact, as already explained under §54 above, it is formally proscribed in only six. Mr Watson accepts that the Secretary of State was erroneously informed that the LTTE is proscribed in New Zealand and Switzerland. On the back of these considerations, Mr Haynes submitted that the repeated misstatements of the international position strongly suggested that the UK would be out of step to de-proscribe the LTTE whereas the actual picture is very different.

99. We are able to address this third point at this stage. Although it is axiomatic that a Secretary of State should be given accurate and precise information on all matters potentially germane to her decision, and it is unfortunate that these mistakes were made, we cannot think that had the Secretary of State been properly informed the outcome would have been any different. Even if it might be said that Sri Lanka and India were *parti pris*, the UK position on proscription is not out of kilter with that of two important allies, and it is also highly relevant for these purposes that the LTTE is listed under the EU counter-terrorism sanctions regime and under similar provisions in Australia. Not merely is a sanctions regime a lesser albeit still draconian form of restriction, one would not choose to list an organisation that does not exist.

The Respondent's Case

100. Having given our plaudits to the excellent work of Mr Haynes and his team, we should also recognise the detail and care with which the Respondent's case has been advanced both orally and in writing. At lunchtime on the first day of the hearing the Chairman advised Mr Watson that he should not assume that this case was other than finely balanced. Mr Watson met the challenge with which he had been presented by a clear, forceful and attractive oral argument for which we are very grateful.

101. Mr Watson advanced a number of contextual submissions as the platform for his arguments on Ground 1. These were largely based on Annex A to the JTAC report. Before 2009 the LTTE was a sophisticated and powerful terrorist organisation that regularly conducted indiscriminate acts of violence against civilians, infrastructure and government targets inside Sri Lanka. The LTTE did not claim or publicise attacks that would be widely regarded as terrorism. In 2009 the LTTE's Sri Lankan based military structure was largely (i.e. not entirely destroyed) and most (i.e. not all) of its senior leadership was either killed or captured. Its international network remained largely intact. The LTTE's remaining leadership did not renounce violence as a means

of achieving its objectives. The LTTE's arms were not decommissioned; instead, they were cached.

102. Mr Watson further submitted that since 2009 "there has been a continuous stream of reporting from the media, allies and regional partners indicating attempts to revive LTTE activity in Sri Lanka and amongst its international network".

103. Some of the material relied on by the GoSL uses the verb "revamp" rather than "revive". It could be said that "revive" conveys the notion of the restoration to life of an entity that is currently dead. That may be its very literal meaning, but we think that in context what was being said was that remnants of the LTTE in Sri Lanka were largely quiescent but that there were continuous attempts to revive them.

104. Mr Watson's submission was that this background of contextual material demonstrates that it was JTAC's view that the LTTE had not ceased to exist as an organisation. He did not accept Mr Haynes' argument that the LTTE was geocentric: indeed, the evidence shows that its international network was largely intact. In relation to Sri Lanka it was not defunct but largely dormant.

105. In relation to Ground 1 Mr Watson advanced the following submissions.

106. First, he argued that the proposition that the LTTE no longer existed was not one that was put to the Secretary of State by the Appellants before she took her decision. We can agree that this proposition was not put forward in TGTE's written representations that were before the Secretary of State, but it was advanced in the witness statement/expert report of Professor Mampilly which we have already referenced. Accordingly, we think that Mr Watson's forensic objection does not have force.

107. Secondly, and more persuasively, Mr Watson relied on the broad definition of "organisation" in section 121 of the Terrorism Act 2000. Although Mr Watson accepted, when pressed, that as a minimum requirement there must be evidence of some degree of interaction between relevant individuals, there is no need for evidence of any formal structure or network.

108. Thirdly, Mr Watson invited us to stand back from the minutiae of this case and consider the wider picture. The LTTE operated as a highly motivated, sophisticated organisation up to its military defeat in May 2009. The LTTE's ideological objectives did not suddenly disappear. The LTTE was not completely wiped out in Sri Lanka and its so-called "former members", or at least some of them, were continuing to operate in pursuit of the LTTE's ideological objectives. Those objectives could no longer be advanced through an overt military force: that had been largely destroyed. However, it could be pursued through the ad hoc cells which existed before 2009 and continued to exist thereafter. It is through these cells, these informal units, that the LTTE continues to operate and to do so with deniability.

109. Relatedly, Mr Watson contended that "former member" is not the antithesis of "current member". These individuals were only "former members" in the sense that they had previously been members of the LTTE when it was a substantial fighting force. The LTTE no longer existed in that particular sense. However, these so-called "former members" were those who continued to align themselves ideologically with the LTTE and – some of them at least – also continued to act in a manner consistent with the methodology and materials previously deployed by the LTTE: in particular, the claymore mines and the use of associated LTTE symbology.

110. Fourthly, Mr Watson did not seek to defend the failure to provide relevant guidance to the PRG. His submission was that all the factors set forth in the guidance were in the event considered.

Discussion

111. We accept Mr Watson's submission that the definition of "organisation" in section 121 of the Terrorism Act 2000 is broad. It is an inclusive definition that covers any association or combination of individuals. In enacting section 121 in these wide and expansive terms, Parliament no doubt wished to avoid a state of affairs where informal, loose-knit groups would argue that the entity to which their actions are said to be attributed lacks the necessary ingredient of formality and structure to amount to an organisation in the first place. In the UK there are a number of extreme right-wing groups who would wish to deploy arguments of that sort if these were open to them. In our judgment, they are not.

112. It is possible to envisage a collection of individuals (to use a neutral term) which is no more than that. Those individuals may think the same way about issues they are passionate about, but there is no or insufficient evidence of any interaction between any of them. The notional glue which binds individuals into an organisation for the purposes of section 121 is (a) being concerned in terrorism (i.e. sharing an ideology which pursues its objectives through a terrorist methodology), AND (b) evidence of interaction between one or more individuals acting with the common purpose to pursue those objectives. That evidence may be inferential and it will very often be a matter of evaluation and assessment.

113. The "Individual v Organisation Actions" guidance is primarily designed to assist decision-makers in determining whether any particular activity may be attributed to an organisation which exists as opposed to being regarded as singleton action. In other words, looking at its express wording, the guidance presupposes that the organisation exists; it is not there to assist decision-makers in determining the anterior question of existence. However, it seems to us that these questions cannot be strictly compartmentalised and that there is a degree of overlap between what may be described as the existential question and the logically subsequent question of how the actions of individuals (and an organisation can only act through

individuals) may be characterised. Mr Haynes chose to advance his submissions on this guidance through the prism of Ground 1; Mr Watson preferred to do so in the context of Ground 2, although he accepted that para 6 of the Guidance was capable of being relevant to Ground 1. It seems to us that we should keep a gimlet eye on the guidance for the purposes of both grounds. Equally, the inferences to be drawn from the incidents relied on by the Respondent supporting the assessment that the LTTE prepares for terrorism are also relevant to the existential question. Mr Haynes' analysis of those incidents was more concerned to demonstrate that the individuals in question were not in any meaningful sense acting on behalf of the LTTE. They were, at best, lone actors.

114. We have considered whether the *Lord Alton* case provides any assistance on Ground 1, as opposed to Ground 2. As we have noted, a distinction is drawn between an organisation that retains its body of supporters but possesses no military capability and no weapons, although at some unspecified time in the future it may seek to recommence a campaign of violence; and an organisation that by implication does retain some military capability but for tactical reasons is inactive for the time being. This distinction is not relevant to the existential question; it is solely relevant to the issue of whether the organisation, that undoubtedly does exist, is concerned in terrorism.

115. In our judgment, the Respondent's case depends to a large extent on the cellular structure theory. That is a concept that does not appear to have featured previously in POAC 1. At first blush, there seems some force in the Appellants' argument that it is no more than an assertion or a construct to circumvent the difficulty that there is no direct evidence that the LTTE is operating through ad hoc cells after May 2009. These cells provide the glue that would otherwise be lacking.

116. We have given very careful thought to this issue. Para 6 of the guidance makes it clear that "proving definite links between an "independent" cell and an organisation is also extremely problematic". Problems of the same order of difficulty apply to the related issue of whether the so-called cell is linked to an organisation at all. The question, though, is whether JTAC and then the PRG were entitled to come to the conclusions they reached on all the available evidence.

117. It is opportune at this stage to set out in full para 28 of Annex A to the JTAC report:

> "The non-conventional forces of LTTE featured both ad hoc cadres and more formalised units such as the "pistol gang" (who conducted assassinations) and the Black Tigers (who conducted guerrilla warfare and LTTE's suicide bombings). The non-conventional LTTE forces relied on a cellular structure of operatives – small isolated cadres of operatives intended to operate without the need for structured oversight. The nature of such cells is that they are able to survive and

> continue even after the formal structure of the organisation is destroyed. It is commonplace for terrorist cells to rely on caches of arms and explosives. Such caches became a hallmark of LTTE operations and continue to be discovered in Sri Lanka."

118. Aspects of this important paragraph in the JTAC report might be open to challenge on a merits appeal and could be said to be question-begging as much as answering. However, POAC's intense scrutiny should in our view nonetheless recognise the constraints operating upon us. How the LTTE operated in Sri Lanka before 2009 is within the expert knowledge of JTAC to which we should defer. There is no basis for undermining that part of JTAC's assessment. Whether those cells lived on after the military defeat of the LTTE may be more controversial, but in our judgment that is one possible and, in our judgment, reasonable interpretation of all the available evidence. The absence of a footnote referencing supporting evidence does not undermine the integrity of JTAC's assessment. The LTTE was a potent force in Sri Lanka for many years, actuated by an equally potent ideological commitment, and it was not completely wiped out in Sri Lanka. It certainly was not destroyed overseas. In Sri Lanka, some of its senior leaders have survived, and it is difficult to believe that they all have turned their backs on terrorism, particularly in circumstances where arms were cached and violence was never renounced. Equally, it is reasonable to believe that some of those who operated through or were familiar with the operation of ad hoc cells before 2009 would continue to do so, or start doing so, after 2009.

119. JTAC's assessment is that there is a strand of continuity between pre- and post-2009 LTTE activity in Sri Lanka. That analysis is capable of being supported by an examination of the individual incidents on which JTAC and the PRG have relied, some clearly much stronger evidentially than others. We have addressed these evidential strengths and weaknesses already. The question for us, at this stage of the analysis at least, is whether the Respondent could reasonably interpret these incidents as not merely preparatory for terrorism (we will revert to that question when we turn to Ground 2) but as actions and activity carried out on behalf of the LTTE.

120. We consider that the incident that occurred on 4 July 2000 is particularly telling. Thangaras Thevathasan was a former LTTE intelligence operative. He blew himself up making an improvised IED. Other similar weapons were found at his address. The Black Tigers Day banner is also an important feature of this case given the timing and its commemorative resonance. This day (5 July) commemorates the death of "Captain Miller" who died in the first LTTE suicide attack in 1987, and it memorialises all those who died in a similar fashion thereafter. The assessment that Mr Thevathsan had selected the same fate for himself and that he was acting on behalf of the LTTE is, frankly, difficult to refute.

121. The claymore mine incident that took place on 2 December 2020 may not be quite as compelling as the one we have just discussed, but the inference or

assessment that the mine was intended to be used in an LTTE attack is in our view a reasonable one in all the circumstances. Perhaps the most important features of this cases are that one member of the couple was reported to be a former LTTE member, and a search of the couple's property revealed a buried hand grenade. These matters provide the links to the LTTE – at least on one possible interpretation of the available evidence.

122. We have already said that the other incidents are far less compelling, and that individually they would be very unlikely to form the basis of a sufficient case that the activities in question, assuming that they occurred, took place on behalf of the LTTE. However, we consider that (a) the Respondent has a sufficiently strong case for the purposes of Ground 1 even without having to rely on these other incidents, and (b) they fall to be considered as part and parcel of an overall picture where more compelling matters are at the forefront of the Respondent's consideration.

123. The factors listed under para 7 of the guidance are more obviously relevant to Ground 2. However, to the extent that they are relevant to what we are calling the existential question, it seems to us that they were considered. Both JTAC and the PRG addressed (a) the individual's links to the LTTE (i.e. through small cells and/or being former members and continuing to share the LTTE's ideology), (b) whether the actions in question were in line with the LTTE's aims and consistent with previous LTTE ideology, and (c) whether other evidence exists. The fact that the LTTE did not acknowledge responsibility is hardly surprising in circumstances where it did not acknowledge responsibility for acts committed by it before 2009. Moreover, none of the incidents we are currently considering came to fruition and the LTTE for obvious strategic and tactical reasons would wish to keep a very low profile in the current circumstances of state suppression.

124. We return to the discussion in the PRG directed to the section 121 issue (see §12 above). We note Mr Willis' summation of this issue, and have commented that the use of term "group" is inaccurate, albeit not materially so. The question for us is whether this is a reasonable or flawed conclusion applying judicial review principles to that exercise. Returning to the legal test that we have ventured to formulate (see §112 above), we consider that there is clear evidence of individuals acting in pursuit of a common purpose, clear evidence of interaction between some individuals (e.g. the members of the claymore couple, and the larger number of individuals involved in some of the other incidents), and some inferential evidence, we can only address in CLOSED, of other interactions. We note that there was no recorded dissent to JTAC's confirmation of the accuracy of Mr Willis' summation. Although the Appellants' arguments are worthy of considerable respect, they fall short of demonstrating that the PRG's conclusion was flawed.

125. Overall, and as we have already explained, the assessments of both JTAC and the PRG should be regarded by the Commission as being in the nature of expert

evaluations. JTAC in particular has knowledge of how the LTTE operated before 2009, of how terrorists operate in cellular structures, and of how these structures tend to operate in practice. We are unable to conclude that the advice given to the Secretary of State was so obviously unsound that it should be disregarded as flawed for the purposes of judicial review. This, we repeat, is not a merits-based appeal.

126. For all these reasons, and for others set out in our companion CLOSED judgment, Ground 1 must be dismissed.

GROUND 2

The Appellants' Case

127. Mr Haynes submitted that the OPEN material discloses no reasonable grounds for the belief that the LTTE is concerned in terrorism. In particular, it is said that the PRG was not in a position to come to an informed assessment that the LTTE was concerned in terrorism; that the PRG failed to inform the Secretary of State of all relevant factors when making her decision; and that the OPEN materials show that there were no reasonable grounds for a belief that the LTTE is concerned in terrorism.

128. The first of these arguments is essentially a repetition of matters that have already been addressed. These include: the failure to provide the PRG with relevant guidance (although we will return to this point below); and, the failure to interrogate the OPEN source reporting and/or appreciate its obvious flaws.

129. The second of these arguments has, we think, already been fully addressed. These include the contentions that the MinSub was imbalanced; that the Secretary of State should have been specifically advised to be wary about the submissions advanced by the GoSL; that the strength of the evidence that individuals were acting on behalf of the LTTE was overstated to the Secretary of State; that disproportionate weight was attached to the significance of Black Tigers' Day and LTTE paraphernalia; and the Respondent was misinformed as to the number and identity of states that listed the LTTE as a proscribed organisation.

130. The third of these arguments has also been trailed earlier. Mr Haynes submitted that the incidents of 4 July and 2 December 2020 do not meet the criteria set out in the guidance. This is because the evidence of individuals' links was premised on former membership rather than current membership; that possession of LTTE paraphernalia does not automatically indicate that a person is associated with or a member of the LTTE (see *KK and RS*); that the suggested actions are not consistent with the Respondent's evidence of the LTTE's *modus operandi* (sc. a rigid hierarchical command structure coupled with selection by Vellupillai Prabhakaran); and, that there was no evidence corroborating the brief press reports in the OPEN source material. Finally, Mr Haynes submitted that the cyberattack incident on 18

May 2020 could not reasonably be attributed to the LTTE: the use of the flag does not indicate membership, and Mullivaikkal Remembrance Day has no particular significance for the LTTE.

The Respondent's Case

131. Mr Watson took us through the five incidents which we have already addressed in some depth. He submitted that although the guidance was not made available to the PRG it is clear that the para 7 factors were individually considered. On the footing that the Appellants have failed on Ground 1, the LTTE must be taken to exist as an organisation and to operate through small cellular structures. He argued that is the clear starting point. Whether individual action could be regarded as attributable to the LTTE was considered within the framework of continuity of ideology, symbology, personnel, weaponry and modus operandi.

132. Mr Watson further submitted that the Respondent had expressly had regard to the likely veracity of the OPEN source material, the Appellants' evidence and submissions (including the contrary opinions of experts providing statements on the Appellants' behalf), as well as the nuances in the evidence relating to Black Tigers' Day and the other commemorative occasions germane to at least one of the cyberattacks.

133. Finally, Mr Watson submitted that there was ample evidence to support the Secretary of State's reasonable grounds for believing that the LTTE is "concerned in terrorism". In particular, Mr Watson submitted the possession of a LTTE flag (see the 4 July 2020 incident) and the posting of such a flag in a cyberattack (see the 18 May incident) could properly lead to the inferential conclusion that the persons involved were acting on behalf of the LTTE. He submitted that this was a conclusion that was not "automatically" reached, as the Appellants would have it. The absence of a claim of responsibility needs to be understood in the context of an organisation that has not claimed responsibility in the past; it does not preclude the attribution of responsibility by a reasonable Secretary of State on all the available evidence.

Discussion

134. Once Ground 1 fails it seems to us that the basis for Ground 2 largely disappears. This is because the Appellants' failure to undermine the overarching conclusion that the individuals in question comprise or are part of the cellular structures that characterise the continued activity of the LTTE in the post-2009 world must lead very swiftly to the conclusion that the LTTE is concerned in terrorism. The actions of these individuals are readily attributable to the LTTE.

135. In our judgment, it is clear that the PRG did have regard to the factors listed in paras 6 and 7 of the "Individuals v Organisation Actions" guidance document even if that document was not available to it on this occasion. The fact that terrorist organisations traditionally operate through cellular structures is specifically mentioned in para 6. Furthermore, the para 7 factors were, it seems to us, obviously considered as part and parcel of a decision-making process that entails an analysis of how, if at all, individual action may be envisaged to be and linked to the activities of an organisation whose ideology the individuals continue to espouse. We base our conclusion on our close examination of the minutes of the PRG meeting and the inferences that may properly be drawn from that examination rather than on Mr Willis' assertion that the factors in the guidance were taken into account.

136. We do not overlook Mr Haynes' submission that adherence to the terms of the guidance is important because it states more than once that the question of attribution to an organisation is "extremely problematic". Mr Haynes therefore submitted that had the attention of the PRG been drawn to this cautionary wording they might have been slower to reach the conclusion they did. However, we do not think that this terminology bears the weight placed on it by the Appellants. What is "extremely problematic" is conclusive proof or proving definite links. In our view, language of this sort is not particularly helpful in a guidance document where nothing approaching this level of proof is required. The statutory test imports a much lower standard. The question for us is whether the PRG properly interrogated the JTAC report and opinion during the course of this meeting, aware of the importance and difficulty of the issue. In our judgment, the PRG minutes read as a whole (and in particular the CLOSED version which we address elsewhere) demonstrate that appropriate attention was given to the key questions.

137. We return to the distinction drawn in the Lord Alton case between an organisation that no longer harbours a present intention to be concerned in terrorism, and one which for tactical or other reasons is biding its time (see §17 above). We think that this distinction is relevant to Ground 2 although it did not feature very strongly in Mr Haynes' submissions. This distinction needs to be applied flexibly to various factual situations, and no doubt POAC's language, and the Court of Appeal's approval of it, was tailored to the particular facts of the case before it. In the instant case, the LTTE has not relinquished its arms or renounced violence. It operates through small-scale cellular structures, and its adherents continue to deploy some of its time-honoured methods. The LTTE may be biding its time in relation to reviving itself as an organisation with an overt military capability, and that may never happen; but for the time being it operates in the manner in which we have described. The fact that some of the individuals involved have a long-standing connection to the LTTE, and that LTTE paraphernalia has accompanied some of the relevant discoveries, is relevant to the overall picture.

138. The Secretary of State was advised that the PRG placed "most weight" on the preparatory limb of the statutory test, and that it "was worth noting" that this limb was sufficient in its own right to form a reasonable and honest belief that the test was satisfied. However, the Secretary of State did not go that far in her decision letter dated 31 August 2021, and we have not been provided with evidence to show that the Secretary of State agreed with the entirety of the advice she was being given. But nothing really turns on this, because we have concluded that the 18 May 2020 incident relied on in the MinSub could properly be regarded as the promotion of terrorism. Although the perpetrators are unknown, the attacks consisted of placing the message, "Hacked by Tamil Eelam Cyber Force" followed by text regarding allegations of genocide against the Tamil population and/or the posting of the LTTE flag. The question is not whether the posting of the flag is automatically associated with membership of the LTTE but whether in all the circumstances of this case JTAC, and subsequently the PRG, could reasonably assess that it was. In our view, JTAC's assessment that these attacks were carried out on behalf of the LTTE is supportable.

139. The timing of the cyberattack – on Mullivaikkal Remembrance Day – has uncertain relevance. Para 15 of the JTAC report had stated that a security engineer for the Sri Lanka Computer Emergency Readiness Team had stated that a cyberattack of this sort is carried out every year to mark National Heroes War Day, an alternative name for Remembrance Day. What is not spelt out is whether Tamil separatists would wish to "hijack" this Remembrance Day by undermining it. It may be that little or nothing turns on the timing, but the point remains that JTAC assessed for other reasons that these attacks were carried out on behalf of the LTTE.

140. In deciding whether the promotion or encouragement limb was met, the PRG placed some weight on what it called the Black Tigers' Day event (5 July) because it "routinely "lionises" those who committed suicide attacks during the Civil War to the extent that it *could* encourage emulation". We consider that it was somewhat confusing to include this aspect in the same paragraph of the MinSub dealing with the 18 May 2020 cyberattack. This was a fresh and new point, although the PRG had addressed it during the course of its meeting. As JTAC had pointed out under para 14 of its report, in 2020 Black Tigers' Day commemorations were held in Sri Lanka and in various diaspora locations. JTAC's view, which was supported by the PRG, was that these commemorations amounted to the glorification of suicide bombings.

141. For all these reasons, and the reasons we have already provided under the rubric of Ground 1, we have concluded that Ground 2 cannot be upheld.

GROUND 3

The Appellants' Case

142. Mr Haynes submitted that the proper approach to addressing the discretionary factors is first to consider which discretionary factors are present and to what degree and then, secondly, to consider, bearing the whole picture in mind, including those discretionary factors which are not satisfied and the consequences of proscription, whether the Secretary of State's discretion should be exercised in favour of proscription.

143. Mr Haynes identified the following flaws in the Secretary of State's decision-making process.

144. First, in relation to the first Discretionary Factor (viz. the nature and scale of the LTTE's activities) it is said that actions relied on by the Respondent are insubstantial, and amount at their highest to nothing more than a small number of disparate former LTTE operatives seeking to use weapons left over from the civil war.

145. Secondly, in relation to the second Discretionary Factor (viz. the specific threat the LTTE poses to the UK) it is said that the Respondent failed to take into account the fact that there was no such threat. Both JTAC and the PRG had noted that in November 2020 elements of the British Tamil diaspora displayed the Tamil Eelam flag and images of Mr Prabhakaran at multiple sites in London to mark Maaveerar Naal. However, this fell short of amounting to a specific threat.

146. Thirdly, in relation to the third Discretionary Factor (viz. the specific threat the LTTE posed to British nationals overseas), it is said that the Respondent erred in its overall evaluation of that consideration. Not merely did the Respondent assimilate "specific threat" to "general threat" (the latter being the way in which the PRG minutes characterise the issue), there is no history of the LTTE targeting British nationals overseas, and Lord Anderson KC has advised that a "specific threat" should not include a "risk that passing British nationals might be caught up incidentally" in an attack on a foreign target.

147. Fourthly, in relation to the fourth Discretionary factor (viz. LTTE presence in the UK), it is said that there is no evidence of any. The JTAC report had stated that JTAC assessed that there is a LTTE presence in the UK, "noting the commemorative activities and use of LTTE symbology by some individuals in the UK". This assessment was recorded in the PRG minutes but it did not find its way into the MinSub or the Secretary of State's decision letter.

148. Fifthly, in relation to the fifth Discretionary Factor, (viz. the need to support the international community in its global fight against terrorism), it is said that the proscription of the LTTE has no bearing on this issue. This is because the LTTE no longer exists and has no presence in the UK. Maintaining proscription of the LTTE in the UK will do little more than serve the GoSL's political agenda. Further, Mr Haynes submitted that the FCDO advice and the Secretary of State's consequent decision are premised on the risk of damage to bilateral relations with India and Sri Lanka (which

cannot be conflated with the need to support members of the international community in the global fight against terrorism), and the assertion by the PRG that Five Eyes continued to proscribe the LTTE (which was factually incorrect). Mr Haynes criticised the FCDO's note dated 20 July 2021 dealing with this fifth Discretionary factor as setting out what he called a distinct over-statement of the position internationally. Finally, the note was wrong to draw attention to the 2019 Easter Sunday bombings which had nothing to do with the LTTE.

The Respondent's Case

149. Mr Watson submitted that the material before the Secretary of State covered each of the five Discretionary Factors and also recognised where appropriate the points that favoured de-proscription. On the other hand, there were matters in addition to the Discretionary Factors that militated in favour of continued proscription, including the JTAC assessment that in the absence of a meaningful political settlement on the question of Tamil autonomy, extremists will "highly likely" continue to act on behalf of the LTTE.

150. Mr Watson submitted that Lord Anderson's opinion has been mischaracterised. What Lord Anderson was referring to was the risk that passing British nationals might be caught up incidentally in an attack on a foreign government target. That was very different from a situation whether the terrorist group in question targeted civilians on an indiscriminate basis, and there was therefore a risk of death or injury to anyone nearby.

151. As for the FCDO note, Mr Watson submitted that it contained a fair and balanced analysis of relevant considerations. The risk that de-proscription would "negatively impact on our bilateral relations" with both Sri Lanka and India was not an irrelevant consideration. It was also relevant that de-proscription "would impact our reputation as a reliable security partner", and it was in that context that reference was made to the ongoing terrorist threat in Sri Lanka following the events of Easter Sunday 2019. It was not being said that the LTTE was responsible for that atrocity. The FCDO also advised that de-proscription would "impact on the UK's global credibility on counter-terrorism". Mr Watson accepted that the FCDO note over-stated the number of countries that proscribe the LTTE and submitted that this was an immaterial consideration. This was all in the context of the FCDO "strongly recommend[ing] that the LTTE should remain proscribed".

152. Finally, Mr Watson disputed that the only reasonable decision was to de-proscribe. He submitted that the various competing factors were considered with care by officials with relevant expertise which the Secretary of State reasonably relied on. The overall conclusion was clearly a reasonable one in all the circumstances of this case.

Discussion

153. Our starting point for a consideration of Ground 3 must be (as is the case) that the Respondent has succeeded on Grounds 1 and 2. That does not mean that there is some sort of presumption in favour of maintaining proscription but the starting point must be that the LTTE is an organisation that continues to exist and is concerned in terrorism.

154. Whatever the position at the time of the JTAC report and the PRG meeting, by the date of the Secretary of State's decision the Discretionary factors militating in favour of proscription had been whittled down to three. Reliance was not being placed on the second factor (specific threat to the UK) or the fourth (presence in the UK). Para 84 of the Respondent's skeleton argument was not supported by Mr Watson in his oral submissions, and we simply do not understand it.

155. It is arguable that the Secretary of State has failed to make it clear whether the factors that have not been fulfilled are (a) neutral, or (b) in the Appellants' favour. We have carefully considered this point noting the way in which Mr Haynes advanced his submissions upon it. We think that the highest these matters may be put to their forensic advantage is that they militated very slightly in their favour. That conclusion is broadly consistent with the Secretary of State's own analysis.

156. In our judgment, the Secretary of State was entitled to take the view – implicitly at least - that the first Discretionary Factor weighed heavily in favour of continued proscription. That was the gravamen of the decision letter. The weight to be accorded to the third Discretionary Factor is not something we can expand upon in OPEN, save to say that we do not consider that the Secretary of State erred in law in taking it into account. Given the indiscriminate nature of the LTTE's attacks on civilian targets, that was at least *a* risk that British nationals might be embroiled. As for the fifth Discretionary Factor, we cannot accept the Appellants' argument that it gave inappropriate weight to any impermissible concern to placate Sri Lanka and India. In POAC 1 it was made clear that it is not the FDCO's role to "please" the authorities of a foreign state, even a friendly foreign state. However, our reading of the FCDO note is that this department did not cross the line between the need to maintain good bilateral relations on a matter of shared concern and a supine wish to keep Sri Lanka and India onside generally. The third bullet point in the FCDO's note is fairly weighted in our view, and keeps as we have said on the right side of the line in question.

157. The fourth bullet point – "the UK government's Indo-Pacific tilt" - appears at first blush to introduce an extraneous and/or irrelevant consideration. However, when one reads on the context is clear: the need to strengthen co-operation against globally proscribed terrorists and terrorist groups.

158. Although the FCDO note wrongly states that the LTTE is proscribed in over 20 countries, we do not think that this is a material error. It is, as we have already said, relevant that the LTTE is sanctioned throughout the EU. There are two members of the Five Eyes who do not formally proscribe the LTTE (and New Zealand appears not to take any form of disruptive action against them), but we cannot accept that the FCDO's overall strong recommendation in favour of continued proscription would have been any different had these points been corrected.

159. The issue for us is not simply whether it was reasonable to continue to proscribe the LTTE in all the circumstances but whether the decision to do so contains a material flaw. Our approach focuses on process rather than outcome. Taking all these matters into account, we have reached the conclusion that the Appellants have failed to demonstrate a material flaw, and that Ground 3 must therefore fail.

GROUND 4

The Appellants' Case

160. Mr Haynes drew attention to the fact that it is common ground between the parties that the Appellants' Article 10 and 11 rights are engaged and that proscription must, therefore, be a proportionate interference with those rights with any less onerous alternative mechanisms or measures being ruled out. He submitted that proscription cannot be regarded as proportionate where it prevents organisations like the TGTE from continuing to advocate for a separate Tamil nation. He further submitted that proscription has achieved nothing: the LTTE no longer exists; Tamil separatism is not a security threat to the UK; proscription has had no impact on the LTTE in Sri Lanka. He added that proscription is counter-intuitive in that it deflects from genuine threats, it gives life to the LTTE where there is none, it generates a waste of police time, and it supports the argument of the GoSL that organisations such as the TGTE are a "front" for the LTTE.

161. Mr Haynes relied on the evidence of Mr Sockalingham Yogalingam who is one of the Appellants in this appeal. Since May 2011 he has been a MP of the TGTE. On 8 October 2018 Mr Yogalingam was arrested when the TGTE organised a protest outside the Oxford Union where the then prime minister of Sri Lanka, Ranil Wickremesinghe, was giving a speech. He asserts that the police must have misunderstood the terms of the banners that were being displayed. Although in due course no further action was taken against him, Mr Yogalingam points out that the whole experience has made him extremely cautious about continuing to work for the TGTE through fear of being labelled a terrorist. He also lost his role as a trustee for a human rights charity.

The Respondent's Case

162. Mr Watson's point of departure was that that the premise of Ground 4 must be that the Secretary of State was entitled to conclude that there were reasonable grounds to believe that the LTTE is concerned in terrorism and that, but for Articles 10 and 11, she was also entitled to exercise her discretion in favour of proscription. The Appellants cannot be heard to say, and do not contend, that proscription amounts to an unlawful interference with the activities of the LTTE. On the other hand, there are no restrictions whatsoever on the activities of the TGTE.

163. Thus, submitted Mr Watson, the Appellants' entire case under Ground 4 is that proscription amounts to an unlawful interference with their rights under Articles 10 and 11 because they – as the TGTE - are wrongly confused with or mistaken for the LTTE. He submitted that the Appellants are partly responsible for that state of affairs including the fact that the Tamil Eelam flag is virtually indistinguishable from that of the LTTE. Furthermore, there was a discussion about these issues at the PRG meeting:

> "Chair noted that the appellants say proscription is restricting their lawful activity, and there is a comment that some Tamils may be deterred from peaceful political engagement. Is there more community engagement that we can do?
>
> NCTT highlighted the work the Met Police do with their strategic engagement team, reaching out to communities and feeding in the best way to take that engagement forward.
>
> CTP noted that Tamil protests are often large, but are also largely peaceful and that historically the protesters have had good relationships with the police. The only issue that is sometimes observed is that flags belonging to the LTTE, rather than the national flag of Tamil Eelam, are displayed and in those circumstances officers will speak to the protesters to ask them to stop displaying the flag."

164. Mr Willis has investigated the circumstances of the arrest of Mr Yogalingam. Counter-terrorism Policing and Thames Valley Police have confirmed that he was arrested on suspicion of an offence contrary to section 13 of the Terrorism Act 2000 (wearing a uniform and display of articles) and was subsequently investigated for other Terrorism Act offences. After what has been described as "extensive investigation" no further action was taken. Mr Yogalingam's complaint about his arrest was later dismissed.

Discussion

165. We agree with Mr Watson that the premise of Ground 4 must be that the Secretary of State was entitled to conclude that there were reasonable grounds to believe that the LTTE was concerned in terrorism, and that proscription would otherwise be justified in the exercise of her discretion. The Secretary of State has taken no action against the TGTE. That latter organisation cleaves to the same ideal of a Tamil state in north-east Sri Lanka but has chosen to pursue that objective by lawful means. We accept that the possibility for confusion exists and we consider that it is unnecessary to say too much about whose fault that may be. At the very least, the flags are fairly similar and some of the content of banners may sometimes come close to utterances made by the LTTE (although we should not be understood as concluding that they cross the line). All of these things having been said, we cannot begin to accept the proposition that proscription of a terrorist organisation, an otherwise wholly justified action, should be regarded as an unlawful interference with the Appellants' Article 10 and 11 rights merely because there is a risk, and some supporting evidence, of the police taking what some might regard as heavy-handed action, maybe because not all police officers understand the nuances. That risk is far outweighed by the strong public interest we have mentioned. The way forward is continuing community engagement with the police in order to reduce the possibility of misunderstandings.

166. We cannot see any merit in Ground 4, and it therefore fails.

CONCLUSION

167. For the reasons set out above, and in our CLOSED judgment that is being handed down at the same time, this appeal must be dismissed.