Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27528/2013

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

On 5 August 2014 **On 8 August 2014**

Before

UPPER TRIBUNAL JUDGE WARR

Between

H
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mackenzie, Counsel, instructed by West12 Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

The appellant is granted anonymity throughout these proceedings and unless and until the court decides otherwise shall be referred to as H. No report of

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these proceedings shall directly or indirectly identify the appellant. Failure to comply with this direction could lead to a contempt of court.

1. The appellant is a citizen of Singapore born in 1983 who entered the UK on 19 September 2004 as a student. It is not disputed that she was a genuine student. She sought further leave to remain to sit certain modules for her course in October 2012 and was granted leave until 15 November 2012. On 14 November 2012 she applied for further leave to remain on form FLR(0). In the form the appellant stated she was transgendered and lesbian and that her gender was not legally or socially recognised in Singapore. The respondent refused the application under paragraph 276ADE of the Immigration Rules (HC 395). There were no exceptional circumstances justifying consideration of a grant of leave under Article 8 outside the Rules and the appellant should in the circumstances have applied for asylum at an asylum screening unit.

2. An appeal was launched against the decision on asylum and human rights grounds.

3. The appeal came before First-tier Tribunal Judge P-J White on 10 January 2014.

4. The judge summarised the appellant's claim in paragraph 6 of his determination noting that the appellant had been born a male child and had realised in about 2002 that she was psychologically female and since 2004 had presented herself as female and behaved and socialised as such in the United Kingdom. The judge continues:

   > "In Singapore her identity card and birth certificate continue to carry her original name although she changed her name by deed poll in the United Kingdom in 2009. She has been able to use her new name in her most recent Singaporean passport. It is not possible for her to seek a variation of her gender to female under the law in Singapore. If removed to Singapore she will be subject to inhumane and degrading treatment, including liability for continuing duties as a male military reservist, because her transferred status will not be recognised officially unless she undergoes intrusive gender reassignment surgery. Being a transgender person is not a matter of a particular social group."

5. The appellant was represented before the First-tier Judge, as she is before me, by Mr Mackenzie.

6. Apart from the oral evidence of the appellant the judge refers to three reports which had been submitted for his consideration. There was a psychiatric report prepared by Dr Lorimer, a legal opinion from Mr Ravi, a lawyer in Singapore and a report from Refworld published in January 2013. The judge summarises the material between paragraphs 27 – 36 of the determination.

7. The judge accepted the evidence that the appellant was a non-operative transgender who had made a transition to the adoption of a female identity since her arrival in the United Kingdom culminating in a deed poll by which she had changed her name to a recognisably female one. She had no wish to undergo gender reassignment surgery. She would be viewed as male in Singapore unless she underwent surgery. Her identity card issued in 1995 identified her as male, as did her driving licence issued in 2004. Her passport issued in 2012 gave her female name but indicated her sex as male. None of the documents could be changed in respect of her gender unless she underwent surgery.

8. The judge accepted that if the appellant were at risk of persecution arising from her gender identity that would fall within the ambit of the Refugee Convention and that she could not reasonably be expected to undergo gender reassignment surgery to avoid any risk of persecution. There was no risk of prosecution given the background material.

9. The judge accepted that the appellant would face difficulties arising from the need on a regular basis to produce official identity documents which would show her as male, although the authorities had accepted her deed poll and issued the appellant with a new passport in her female name and had accepted a photograph of the appellant as she currently appeared. Her gender on her documents could not be changed although it appeared that official recognisor of a change of name was possible in Singapore and it seemed inevitable to the judge that the authorities would be prepared to issue new identity cards and driving licences so that the name on these official documents matched the new official name of the individual. Similarly up-to-date photographs would be required in the view of the judge.

10. In relation to the report from Mr Ravi, the judge stated that he understood Singapore to be a comparatively conservative country although the limited background evidence indicated possibly a gradual change in attitudes.

11. While there were reports of harassment and abuse in Refworld they did not have direct evidence from any of the appellant's friends or acquaintances who had actually experienced harassment, abuse or assault and added

> “I have no reason to doubt Singapore has a functioning police force and judicial system and no evidence has been put before me to suggest that, certainly so far as physical assault is concerned, sufficiency of protection from the state would not be available.”

12. The determination continues as follows:

> “47. The appellant tells me that she would be under pressure to present and live generally as a male. That specific evidence was

not challenged, and I accept that there may well be such pressure. It seems likely that she will have at least some degree of family support in resisting it, and I have very little indication of how strong it will be or how it will in fact be applied.

48. I accept that the appellant will be unable to live officially as female. I think it reasonable to suppose that she will face some difficulties living openly as female, not least because every time she has to present an official identity document it would reveal, certainly to those who notice the details, that she is officially male. Those difficulties will be increased so long as her identity documents show her former name, rather than her changed name, but I have already commented on the possibility that such details could be changed.

49. The appellant further told me that the transgender community is very small and mostly underground. I have to bear in mind that she has on the evidence been out of Singapore for most of the last nine years now, and that the transition and most of her consequent social connections have already been made in this country. I make that observation because the comments already noted in the Refworld report are themselves an indication that there is an LGBT community in Singapore ad that it is not entirely underground.

50. The appellant says that she will be unable to marry. It seems to me that technically she could marry another woman, on the basis of being officially male, but I accept that she could not marry another woman on the basis that she is herself also female. That is a consequence of the fact that Singapore like many if not most of the countries of the world, does not give official recognition to same-sex unions, and I do not think it can be regarded as amounting to persecution.

51. The most significant indication in my judgement is the evidence about national service. As to this I accept the evidence that the appellant will, so long as she remains officially male, also remain liable for two weeks service as a reservist each year. I accept that this is likely to mean a period of living communally with other male reservists. I note and accept her evidence that when she had to fulfil her primary national service it was very distressing for her and I have no doubt that any repetitions will also be distressing and difficult for her. She will clearly not, during that limited period, be able to live openly as a woman.

52. On the other hand, her own evidence is that friends or acquaintances of hers have also had to undergo this and her understanding is that while some of them may have hastened their progress to surgery, in order to avoid the problem, others

may simply have stuck it out. It has not, in other words, been so harsh for them as to be unendurable.

53. I have noted Mr Lorimer's evidence that return to Singapore would be very deleterious to the appellant, because she needs acceptance as a woman and would not receive it. Quite apart from the factual issue over the extent to which she would be unable to live and be accepted as a woman in practice Mr Lorimer does to say anything about actual psychiatric consequences, whether in the form of any psychiatric disorder currently experienced or of any such disorder which he fears might be induced by the conditions he understands she might face in Singapore. It is difficult therefore to understand quite how deleterious he thinks return might be.

54. I also note in this regard that the appellant and those acting on her behalf have been assiduous in gathering evidence, both expert evidence and objective evidence, about the position in Singapore. In those circumstances the lack of more direct evidence about the actual sufferings and fears of LGBT people in Singapore assumes some significance. If evidence existed of systematic discrimination or worse it seems likely that they would have found and produced that evidence.

55. I have considered all of this evidence with care and concern, but while I am satisfied that the appellant is likely to face some difficulties, and may well face some degree of discrimination in Singapore I am not persuaded that the treatment she is at risk of suffering has been shown, either in individual instances or considered cumulatively to reach the level of really serious harm, to have sufficiently serious prejudicial consequences. It is not every type of discrimination or societal stigma that will amount to persecution. In these circumstances I find that the claims to asylum or humanitarian protection and under Article 8 fail, on the basis that it has not been shown that the appellant is at real risk of harm of the severity against which those provisions give protection."

13. The judge then turned to consider Article 8 which the judge noted required consideration outside the Rules on the basis that returning to Singapore would involve a denial of her rights. The determination concludes as follows:

"59. Claims involving the breach in such circumstances of Articles which give rise to qualified rights were discussed by the House of Lords in **EM (Lebanon) v SSHD [2008] UKHL 64**, itself a case involving Articles 8 and 14. The conclusion was that such cases are certainly capable of engaging the Convention and justifying a grant of leave but it will be rare. Appellants are not

in general entitled to rely on the differing social, cultural or even discriminatory legal systems in their home countries as a basis for a claim to remain in one of the Contracting States. What must be shown is that return to the country of nationality will involve a flagrant denial of the appellant's rights under the relevant Article. In discussing the meaning of 'flagrant denial' the House, particularly in the speech of Lord Bingham made clear than what was required was an interference which would effectively deny or nullify the right which the Article existed to protect. The point can be illustrated from the facts of **EM**, which involved a woman with a young child from Lebanon who had come to the United Kingdom to avoid the transfer of custody of the child to his father, a transfer which would have arisen automatically by reason of his age under the family law of Lebanon. That the system of Sharia law in force in Lebanon would produce such a result because it was directly and obviously discriminatory against women, and entirely contrary to the approach of the courts in this country, was not sufficient to prevent removal. What tipped the balance was that on the particular facts a close and loving family life was established between mother and son which would be entirely destroyed by their enforced separation on return, while no meaningful family life existed between father and son. He had been guilty of domestic violence, been imprisoned for failing to provide financial support for his son, and his son did not know him. In was in these circumstances that the House was persuaded that the rights of both mother and child to family life would be entirely nullified by removal and it was on that basis that the claim succeeded.

60. In this case the appellant's concerns arise from legal and society discrimination against transgender people in Singapore. As **EM** makes clear, Article 8 does not require Contracting States to guarantee to citizens of every country in the world the full range of civil and other rights which their own citizens enjoy. I have found that the consequences which the appellant is likely to face do not reach the level at which they would be a breach of her rights under either the Refugee Convention or Article 3. I am not satisfied that the discrimination that she fears will amount to a flagrant denial in the sense of a complete nullification of her rights under Article 8. In those circumstances I conclude that, even on a traditional Article 8 approach, the appeal cannot succeed."

14. Mr Mackenzie drafted the grounds of appeal and submitted that the judge had misdirected himself in paragraph 52 of the determination (which I have set out above) when referring to what the appellant's friends had experienced as being not "so harsh for them as to be unendurable".

15. Mr Mackenzie submitted that this was putting the test too high and referred to **Ravichandran v Secretary of State [1996] ImmAR 97**. The judge had also erred (ground 2) in approaching the question of sufficiency of protection because the appellant would have to reveal her gender in any interaction with the authorities which would render her vulnerable to discrimination and hostility.

16. In ground 3 it was submitted that the cumulative effect of the risks which had been accepted met the test in **EM (Lebanon)** and amounted to a flagrant breach. Permission to appeal was granted on all grounds on 19 June 2014. There was a brief response to the grounds under cover of a letter dated 20 June 2014. Mr Mackenzie noted that the judge had accepted that the appellant would be required to undertake military service for two weeks each year until 2023. The appellant had undertaken military service between December 2001 and June 2004.

17. Mr Mackenzie submitted that the judge had materially misdirected himself in referring in paragraph 52 to her friends and acquaintances not finding military service so harsh as to be unendurable. This was a crucial aspect of the determination on which the judge had clearly erred.

18. Mr Mackenzie referred me to **Ravichandran** and the definition of persecution in **ex parte Jonah [1985] Imm A R 7** as well as extracts from the Law of Refugee Status by Professor Hathaway. Although the context in **Ravichandran** was somewhat different (arbitrary detention for young male Tamils in Colombo) the appellant's case fitted within the second category of persecution as defined by Professor Hathaway. The Canadian courts had recognised the need to view any sustained attack "on one's physical, moral and intellectual integrity". In Hathaway at page 112 it is said: "In sum, persecution is most appropriately defined as the sustained to systemic failure of state protection in relation to of the core entitlements which has been recognised by the international community."

19. There was no dispute about the facts in this case and Singapore was a controlling society and the appellant would have to produce identification when interacting with the authorities and it would be difficult to live only as a woman. The judge had applied too high a test. He should have considered whether there was a sufficiently serious breach of the appellant's personal integrity and privacy.

20. While it was only the first ground that would be pressed very greatly, Mr Mackenzie also submitted that the judge had erred in his treatment of sufficiency of protection for the reasons advanced in the grounds of appeal and had misdirected himself in paragraph 60 in requiring a breach of Article 3 in order to establish a breach of Article 8.

21. Mr Bramble acknowledged that the First-tier Tribunal Judge had set the test too high in paragraph 52 but submitted that in context the error was not a material one. The judge had considered all the evidence including

the report from Mr Lorimer. It was apparent from the report of Mr Ravi that the appellant would be required to complete military service as a reservist until the age of 40 and her gender identification if declared would not exempt her from reservist duty "unless she is declared operationally unfit by a certified medical examiner". With reference to the point made in Professor Hathaway at paragraph 110 the requirement to undertake military service was potentially a response to an emergency situation. The appellant might be declared to be operationally unfit according to Mr Ravi. There was a general lack of evidence before the First-tier Judge. The error was not a material one in all the circumstances.

22. The judge had taken into account all material matters when considering Article 8 and had not conflated the two Articles as contended.

23. Mr Mackenzie submitted in reply that the judge had accepted that the appellant would have to undertake military service and that she could not change her gender. He referred to **EB (Ethiopia) [2007] EWCA Civ 809** where although the facts were, he accepted, different, the appellant had been deprived of her identity documents and would suffer persecution as a result.

24. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the judge's determination if it was materially flawed in law. I am very grateful to the representatives for their helpful submissions.

25. The determination is, as is acknowledged by Mr Mackenzie in the grounds of appeal to be, as he puts it, "for the most part a careful and sensitive analysis of the appellant's circumstances ...". I would certainly endorse that since the judge has plainly taken great care with this decision. The judge directed himself correctly on legal issues in paragraphs 7 and 8 of the determination. In paragraph 40 of the decision he said this:

> "40. My concern in this appeal is over the nature of the actual consequences which the appellant may face on return. The notions of persecution or inhuman and degrading treatment involve the idea of a risk of really serious harm. I accept that it need not be shown that there is a risk of specific forms of such harm, or that any or all the consequences which are feared need to be of a particular gravity. Acts of discrimination and harassment, individually not particularly serious, may cumulatively reach the level of persecution if they lead to a substantially prejudicial effect on the person concerned."

The judge also directed himself correctly in paragraph 55 – which I have set out above and will not repeat.

26. The judge noted that there was a lack of evidence before him about the position in Singapore at various parts in the determination despite the fact

that the appellant's representatives had been "assiduous in gathering evidence ..." – see paragraph 54 of the decision. The judge examined the material before him with great care.

27. The judge found the most significant aspect of the case was the evidence about national service and the appellant would be liable for two weeks service each year. The judge accepted the appellant's evidence that she had found her full national service between 2001 and 2004 very distressing and that the two weeks military service each year would also be distressing and difficult.

28. In the context of a very carefully considered decision where the judge fully investigated all the facts and issues and directed himself correctly on the law, I do not find that the reference to the appellant's friends' experiences in paragraph 52 to indicate that the judge misunderstood the law which he had earlier set out properly.

29. It is to be borne in mind that the judge had the benefit of Mr Mackenzie's oral submissions and his skeleton argument to which he makes reference in paragraph 25 of his decision. In the submissions the judge was reminded that cumulative discrimination might amount to persecution and persecution was not limited to torture and death. The judge refers in paragraph 55 to considering matters cumulatively. In the skeleton argument Counsel goes through meticulously the relevant learning in relation to persecution and harm.

30. The judge in paragraph 52 in my view did not materially misdirect himself when making the comment about the experiences of the appellant's friends and did not intend to say and should not be understood to say that unendurability was the test which he was in fact applying in relation to the appellant. The judge considered all the evidence with great care and concern as he says in paragraph 55 of the decision, and he did not in my view materially misdirect himself on the crucial issues as contended by Mr Mackenzie.

31. Mr Mackenzie did not stress the remaining grounds of appeal. I am not persuaded that the judge arguably conflated Articles 3 and 8 and he properly directed himself by reference to **EM (Lebanon)**. I was referred to be **EB (Ethiopia)** but that case, as Counsel acknowledged, was concerned with a different factual issue, the deprivation of nationality. The appellant is not being deprived of the benefits of citizenship.

32. As I have said, the judge had limited material before him which he carefully considered and was entitled to conclude as he did on the issue of sufficiency of protection and on the question of whether there would be a flagrant denial of the appellant's Article 8 rights.

33. The determination is not materially flawed in law. Accordingly this appeal is dismissed.

Signed Date 7 August 2014

Upper Tribunal Judge Warr