



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: AA/05683/2015**

Appeal

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons

On 4 January 2016

Promulgated

On 18 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

**H E R D
(ANONYMITY ORDER MADE)**

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D. Revill, Counsel, instructed by Hanson Young Solicitors

For the Respondent: Mr L. Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Mr H.E.R.D, a citizen of Sri Lanka, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his application for asylum and to remove him from the UK.

2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order.

Background

3. The appellant was born on 27 July 1990. He entered the United Kingdom on 24 March 2011 on a Tier 4 (General) Student visa. The appellant claimed asylum in July 2014. The respondent refused the appellant's asylum claim on 31 December 2014.
4. The appeal against that decision came before First-tier Tribunal Judge Rose on 10 September 2015. The judge, in a decision promulgated on 23 September 2015, dismissed the appellant's appeal on all grounds.
5. Permission to appeal to the Upper Tribunal was sought on the following grounds: 1. The judge accepted that the appellant and his partner had in the past been arrested because of a public display of affection and had been subject to serious sexual abuse by police officers. It was argued that there should logically have been a finding that there was a real risk that there would be further public displays which would in turn lead to a real risk of persecutory ill treatment; and 2. The judge erred in his assessment of paragraph 276ADE(1)(vi) and whether there would be very significant obstacles to the appellant's integration in Sri Lanka.
6. The hearing came before me. At the end of the hearing I reserved my decision which I now give.

Ground 1

7. Ms Revill sought to distinguish the appellant's case from the country guidance case of LH & IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC).
8. For completeness I set out the headnote in LH & IP:

'(1) Having regard to the provisions of articles 365 and 365A of the Sri Lankan Penal Code, gay men in Sri Lanka constitute a particular social group.

(2) 'Gay men in civil partnerships' in Sri Lanka do not constitute a particular social group for the purposes of the Refugee Convention. The Sri Lankan authorities' failure to recognise alternative marital and quasi-marital statuses such as civil partnership or homosexual marriage which are available in other countries of the world does not, without more, amount to a flagrant breach of core human rights.

(3) Applying the test set out by Lord Rodger in the Supreme Court judgment in HJ (Iran) & HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31, in general the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm.

(4) There is a significant population of homosexuals and other LGBT individuals in Sri Lanka, in particular in Colombo. While there is more risk for lesbian and bisexual women in rural areas, because of the control exercised by families on unmarried women, and for transgender individuals and sex workers in the cities, it will be a question of fact whether for a particular individual the risk reaches the international protection standard, and in particular, whether it extends beyond their home area.

(5) Where a risk of persecution or serious harm exists in an appellant's home area, there may be an internal relocation option, particularly for individuals returning via Colombo from the United Kingdom.'

9. It was Ms Revill's contention that, unlike in that case, the appellant and his partner in this case had been subjected to ill-treatment in Sri Lanka in the past. Although she conceded that the judge did consider this, it was her contention that he failed to correctly distinguish the country guidance. Ms Revill indicated that although the country guidance found that in general there was no risk in Sri Lanka due to being a gay man, she submitted that this was in the context where gay people would generally keep their relationships secret. Ms Revill referred me to paragraph 108 of the country guidance:

'It seems tolerably clear from the evidence before us that for male sex workers and transgender individuals there is a risk of harassment, blackmail, and, on occasion, serious harm capable of amounting to persecution, by reason of the public nature of their sexuality. Also, given the cultural constraints on the position of women in rural areas, lesbian and bisexual women may be at risk of persecution or serious harm there. It is unclear whether that risk continues for those who live away from their families in larger cities, and specifically in Colombo.'

10. Ms Revill argued that the risk appears to be by virtue of the public nature of these individuals' sexuality and that the judge had failed to adequately consider that the appellant had publicly displayed his sexuality and as a result had been targeted and detained. It was her view that the fact that this happened in the past would create a risk in the future.

11. Ms Revill's central point in relation to the country guidance was that its tenor was that homosexuality is tolerated if you keep it to yourself and that the country guidance does not say anything about publicly flaunting sexuality as most people in Sri Lanka do not. However I am satisfied that the judge clearly addressed this argument, which was also made by Ms Revill before the First-tier Tribunal. At paragraph [22] the judge recorded the country guidance finding that 'in general the treatment of gay men does not reach the standard of persecution or serious harm.' The judge went on to consider the country guidance findings in some detail and to apply those findings to

the appellant's case, at paragraphs [24] through to [39] of his determination.

12. At [35] the judge considered that the Upper Tribunal found that the appellants in LH and IP were a particularly discreet couple. The judge went on at [36] to find that the appellant and his partner are not as discreet. However, the judge was of the view [37] that the fact that the appellants in LH and IP were particularly discreet was not:
'in itself the decisive factor in their appeal. The country guidance given by the Upper Tribunal does not indicate that if their inclination had been to be less discreet their appeals would necessarily have succeeded. It was found that in general the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm, although some categories, such as transgender individuals and sex workers in the cities are at greater risk. Accordingly, it does not follow that because the Appellant and his partner might wish to be less discreet than the appellants in LH and IP (Sri Lanka), they should be regarded as being at real risk of persecution.'
13. Judge Rose went on to find at [38] that:
'It is apparent from the consideration of the evidence by the Upper Tribunal that it is common in Sri Lanka for a homosexual couple to conceal their sexual orientation and live together under the guise of friendship. However it is not part of the country guidance that a couple who do not choose to do so would suffer a real risk of persecution, unless there are other factors which increase their risk.'
14. Those were findings open to the judge and Ms Revill was unable to point to any finding in the country guidance which might contradict this.
15. Ms Revill relied on paragraph 339K of the Immigration Rules:
'The fact that a person has already been subject to persecution or serious harm, or to direct threats of such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.'
16. Judge Rose found, at [40] that he was satisfied that the appellant's account of the attack and subsequent ill-treatment by the police 'may be true, and I consider the possibility of persecution on that basis'.
17. The Judge also directed himself appropriately at [27]:
'In principle, past persecution means that future persecution is more likely, and the fear of it more likely to be well founded, unless there has been a significant change of circumstances.'
18. The judge went on to find (again at [27]):

‘However, the appellant’s account does not indicate that the ill-treatment that he and his partner suffered, on one occasion, occurred because they were targeted as individuals by people who knew them. Whilst their past experience may make them more apprehensive, in my judgement it does not lead to the conclusion that they are victims of systematic hostility, or that in the future they would be at greater risk than LH and IP (Sri Lanka) would indicate.’

19. Although Ms Revill disagreed with this finding, I am satisfied that it is no more than that; the judge in referring to the appellant and his partner not being at risk of systematic hostility was clearly guided by [111] of LH and IP which indicated that: ‘the appellants have not been able to point to more than a few specific instances at or near the level of persecution. These appear to arise from opportunism and exploitation not from systematic hostility’.
20. The judge, in accepting that the appellant’s account of the attack and subsequent ill-treatment by the police may be true, had accepted that the appellant and his partner were apprehended after a trip to the cinema where they displayed affection, by men who had seen them kissing. They were subsequently arrested by the police and beaten and forced to perform sex acts while being filmed. It was open to the judge on these facts to make the findings that he did that they were not victims of systematic hostility. It was implicit in his findings that the judge considered this incident as one that arose from ‘opportunism and exploitation’ as set out in the country guidance.
21. The judge clearly considered future risk and he considered this in light of the principles in HJ (Iran) v Secretary of State for the Home Department [2010]UKSC 31 which the judge considered at [10], [21] and [39] of his decision. At [21] the judge correctly summarised those principles as follows:
‘In HJ (Iran), the Supreme Court analysed the circumstances in which a gay person will be found to have a well-founded fear of persecution in the country of his or her nationality based on membership of a particular social group. Essentially, if gay people who live openly are liable to persecution in the applicant’s country of nationality, the applicant will be entitled to asylum either if he would in fact live openly or if he would live discretely but only in order to avoid the risk of persecution. If he would choose to live discretely simply because that was how he himself would wish to live, or because of social pressures, for example, not wanting to distress his parents or embarrass his friends, then his application should be rejected.’
22. As noted above, the judge at [38] made a reasoned and sustainable finding (in relation to gay couples living discretely) that ‘it is not part of the country guidance that a couple who do not choose to do so would suffer a real risk of persecution’, and LH and IP also finds that there is public debate in Sri Lanka around the subject of gay rights, that gay pride events occur regularly, albeit in secure, but not secret,

conditions. It is also discussed that an LGBTI support organisation is able to carry on its activities without major problems from the authorities.

23. I am satisfied that the judge's findings, read holistically, indicate that he considered the past ill-treatment and the fact that the appellant and his partner 'might wish to be less discrete than the appellants in LH and IP'. He took into account all the factors including in light of the country guidance and that this was an isolated, opportunistic incident, which might make them 'more apprehensive' on return but would not lead to them being at greater risk than set out in the country guidance. It was implicit in these findings therefore that the judge was satisfied that there were good reasons (namely the isolated and opportunistic nature of the harm) for considering that the past persecution would not be repeated. That is in line with the findings in LH and IP which at paragraph 112, whilst finding that perpetrators of such abuse enjoy complete immunity with no evidence that the state does anything to stop it, also found that there was 'no evidence that such abuse is ordered from a high level'.
24. Although Ms Revill expanded on her argument including that the appellant had been filmed and she submitted that this increased his likelihood of being detained and ill-treated again, she rightly accepted that this was speculative. The judge in reaching his finding that the appellant's past experience did not lead to a finding that they were victims of systematic hostility, was aware as set out in the appellant's witness statement that the incident in question occurred in April 2010. The appellant did not leave Sri Lanka until March 2011 (albeit that he stated that his family tried to keep him apart from his partner and the appellant stated he did not know where his partner was) and there was no evidence of any further difficulties or any targeting of the appellant.
25. It was open to the judge in light of the evidence and his findings to be satisfied as he was at [27] that the appellant's previous ill-treatment taken together with his finding at [36] that they are 'not as discreet' (in effect that they may repeat the behaviour that led to the incident in April 2010) did not mean that 'if he and his partner are returned to Sri Lanka there is a reasonable likelihood that they will face persecution as a consequence of their homosexuality or their marriage in the UK' [40].
26. The judge also made alternate findings, which I am satisfied would make any claimed error immaterial, that the appellants could relocate to a city such as Colombo [28] and these findings were made in light of his finding that the one incident of ill treatment was isolated with no evidence that 'in the future they would be at greater risk than LH and IP (Sri Lanka) would indicate' [27]. The possible option of internal relocation is also set out in LH and IP and again there is nothing in the country guidance to suggest that such an option is not available in a situation such as the appellant's where ill-treatment has occurred.
27. In conclusion there is no merit in Ground 1.

Ground 2

28. The judge's findings in relation to 276ADE(1)(vi) were clearly reasoned and the grounds amount to no more than a disagreement with the weight placed by the judge that the appellant has cultural ties with Sri Lanka, notwithstanding that he states he has been disowned by his family, that he might experience discrimination and prejudice but the judge was not satisfied that this would constitute very significant obstacles to his integration. Although the judge made a reference to 'similar difficulties' potentially being faced by a gay couple who had not left Sri Lanka this does not mean, as Ms Revill, suggested that the judge did not have in mind the particular situation faced by the appellant, which he had set out and considered in some detail in the context of the asylum claim. It was open to the judge to take into account the wider situation faced by gay couples in Sri Lanka in finding that there were no significant obstacles.
29. There is also no merit in the argument, not put with any force, that the judge applied the wrong test, given that at [43] the judge discussed the amendments to paragraph 276ADE91)(vi) and stated that the explanatory memorandum indicated that the Statement of Changes 'do not represent any substantive change to the policies reflected in the Statement of Changes HC 194 which came into force on 9 July 2012'.
30. The judge went on however, at [44] to consider Ms Revill's arguments including in relation to the respondent's guidance on 'very significant obstacles' and to discuss and make findings as to the claimed very significant obstacles at [44] to [46]. I am satisfied that these findings make clear that the judge had the correct test in mind and there was no misdirection.
31. Ms Revill's arguments on this ground were no more than a disagreement with the judge's findings.

Decision:

32. The appeal is dismissed. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and shall stand.

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

Signed:

Dated: 11 January 2016

Deputy Upper Tribunal Judge Hutchinson