



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: PA/02789/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 18 January 2017

Decision and Reasons Promulgated on 30
On: 9 June 2017

Before

Deputy Upper Tribunal Judge Mailer

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R A

ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms S Jegarajah, counsel instructed by MTC Co, Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the secretary of state and to RA as “the claimant.” The claimant is a national of Sri Lanka, born on [] 1991.
2. The appeal before First-tier Tribunal Judge J. C. Hamilton on 16 August 2016, proceeded on the basis that there were two appellants before him, namely, RA and TJRB. However, the latter had been referred to as ‘other dependent’ (sic) in the secretary of state’s decision dated 9 March 2016, in which she refused the claimant’s

application for asylum. No separate application was made by TJRB, nor was there a separate decision made with regard to TJRB. Although RA and TJRB were cited and dealt with as first and second 'appellants' by the first Tier Tribunal Judge, there was no separate decision against which TJRB could appeal.

3. The secretary of state appeals against the decision of the First-tier Tribunal allowing the appeals of both the claimant and her dependant under the Refugee Convention. A fee award was made in respect of each "appellant".
4. The claimant asserted that she feared persecution on return to Sri Lanka on the basis that she was in a same sex relationship with her partner, TJRB. They are both nationals of Sri Lanka. They married in the UK on 20 January 2016.
5. The claimant came to the UK on a student visa in March 2012. Her leave was extended until 14 August 2014. Her application made on 13 August 2014 for further leave to remain as a student was refused.
6. On 12 March 2015 she was served with an IS 151A form as an overstayer. On 9 September 2015 she applied for asylum on the basis that she was in a same sex relationship with her partner and that they would be persecuted in Sri Lanka on account of their sexual orientation if they had to return there.
7. The secretary of state accepted the claimant's identity, nationality and sexual orientation. It was not accepted that her family had threatened to kill her when they discovered her sexual orientation. She claimed that her parents stopped her from attending school when they discovered her sexual orientation and her relationship with another female pupil referred to as "A". The claimant claimed that she was arrested when the police discovered her relationship with A. She was not charged with any offences despite the fact that same sex relationships are illegal in Sri Lanka. That inconsistency was asserted to have undermined the reliability of her account.
8. The secretary of state contended that even if she were at risk in her local area, she was educated and had extensive work experience and would be able to live and work in a different area of Sri Lanka such as Kandy. She had shown her ability to live independently in the UK.
9. The First-tier Judge had regard to the evidence, including the documentary evidence that was provided. Evidence was also given by her partner, TJRB.
10. In his discussion and findings, Judge Hamilton did not find the criticisms of her account in the decision letter and those put in cross examination to be sufficiently cogent to

undermine the fact that she was able to maintain a consistent account over time. He did not find it “incredible” that she would be arrested and abused by the police as claimed¹.

11. He found that her account was also consistent with the background evidence relating to the mistreatment of LGBT individuals in Sri Lanka and the routine abuse of power perpetrated by security forces and the police. Her account was also consistent with the medical evidence produced. He took into account her apparent lack of knowledge or interest in the LGBT community in Sri Lanka. Given her age, that was not considered to be a significant inconsistency - [64].
12. He considered the circumstances including her account of psychiatric assessment.
13. He accepted her account of being detained and seriously abused by the police. He also accepted that her family was now hostile towards her [67]. In that respect he stated that “the threats they are said to have made may well be hyperbole but the underlying fact is that they are unlikely to support or accept her if she lives openly as a lesbian in Sri Lanka.” There was no sufficiently cogent evidence to suggest that she had fabricated her account.
14. The Judge referred to paragraph 339K of the Rules. The fact that she had been arrested and mistreated on one occasion did not mean that were she to return to Sri Lanka she would be at any greater risk than any other young gay woman [69].
15. He had regard at [70] to the secretary of state’s assertion that the claimant and her partner would be able to live in Sri Lanka as a same sex couple without being at any real risk of mistreatment.
16. He referred to the claimant’s assertion that female same sex couples could not live openly and safely in Sri Lanka. It had been conceded on behalf of the claimant that the Upper Tribunal in LH and IP held that while homosexual men in Sri Lanka did constitute a particular social group they are not in general at risk of persecution.
17. However, it was contended that this finding was not applicable when considering the claimant’s case as the decision did not specifically address the issue of lesbians in Sri Lanka nor whether it was possible to live openly as a homosexual in Sri Lanka given that the decision in LH and IP accepted at paragraph 112, that LGBT individuals were at risk of being arbitrarily arrested, detained and harassed by the police and that when this happened they would not be able to avail themselves of state protection - [72].

¹ The claimant contended that she had been raped by the police whilst in detention in Sri Lanka. She had been in a same sex relationship in Sri Lanka which the authorities found out. After her arrest and detention she was released without charge.

18. Moreover, the 2015 guidance showed that the situation had now changed and the LGBT community in Sri Lanka did now face a real risk of persecution. The Judge had regard to paragraph 4.1.1 of the 2015 Guidance to the effect that in recent years, human rights organisations reported that '...police harassed and extorted money or sexual favours from LGBT individuals with impunity and assaulted gay men and lesbians in Colombo and other areas'.
19. It was argued that this finding was not applicable when considering the claimant's case for reasons set out at [72]. He identified various other paragraphs relating to LGBT at paragraph [72](3)(b) to (k).
20. It was contended before Judge Hamilton at [73] that the information in the 2015 guidance amounted to credible new evidence showing that the situation had changed to such an extent that pursuant to the Practice Direction, it was permissible to depart from country guidance in LH and IP.
21. He referred to an unreported decision of Deputy Upper Tribunal Judge Saini in SASS vSSHD (AA/07983/2015, highlighting the difference between the 2013 US State Department report that was before the Upper Tribunal in LH and IP and the 2014 US State Department report that formed the basis of much of the information contained in the 2015 guidance.
22. Judge Hamilton referred at [75] to that decision where the more up-to-date information in the 2015 guidance and the US State Department report showed that "...the authorities, having demonstrated a worrying high percentage of violent and other criminal acts against gay men due to their sexual orientation, confirmed by two independent sources and relied upon by the respondent in her own [Guidance]".
23. Judge Hamilton stated at [77], that even if not bound by the unreported decision of Judge Saini, he agreed with his reasoning and analysis.
24. He noted at [78] that the secretary of state accepted that the claimant and her partner are living in the UK as an openly same sex couple. It is therefore likely that they would wish to live in Sri Lanka in the same way. On the evidence before him it was likely that the only reason that they would not do so would be because they were frightened about reprisals - [78].
25. From those findings, he concluded that the claimant and her partner have shown that they are at risk of persecution in Sri Lanka. They would want to live openly as a same sex couple and the current background evidence showed that there would be a clear risk of significant mistreatment if they did this - [79].
26. He did not find the fact that both claimed to have been disowned by their families or the fact that the claimant had suffered serious mistreatment at the hands of the authorities

adds any significant weight to their claim. These facts are consistent with the attitude towards homosexuals reported in the background evidence [79].

27. On 12 December 2016, First-tier Tribunal Judge Grimmett granted the secretary of state permission to appeal. It had been contended that there was a fundamental misunderstanding of the secretary of state's position made by the Judge in concluding that the secretary of state had accepted that the claimant and her partner were living openly in a same sex relationship in the UK when the secretary of state only accepted that the claimant is a lesbian. The reasons for refusal did not accept the openness of the relationship and it was therefore arguable that there was an error on the part of the Judge.

The appeal

28. Mr Clarke noted that in the claimant's partner's decision, she was advised that as a dependant she did not have a right of appeal. That was only of practical relevance as the claimant made her asylum claim with the partner as a dependant on her claim.
29. He accepted that this was "of only practical relevance".
30. Her partner was also notified that she did not have to leave the UK during the period in which the claimant can appeal. If there is an appeal she did not need to leave the UK.
31. He submitted that the Tribunal did not set out any other reasons for refusal letter save for the decision in respect of the claimant. On that basis he has erred in treating the dependant as a second appellant.
32. Mr Clarke submitted that the secretary of state had accepted in the reasons for refusal the claimant's identity, nationality, ethnicity and sexuality. However, contrary to that limited concession, the Judge in his discussion and findings at [78] stated that 'as he understood it', the secretary of state accepts that the claimant is living in the UK in an openly same sex couple.
33. However, such a concession is not contained in the reasons for refusal which is limited to sexual orientation. He referred to the "material facts consideration" in the reasons for refusal at paragraph 23. With regard to "sexual orientation", the secretary of state noted that the claimant claimed to be a lesbian. She was asked a number of questions relating to her claim that she is a lesbian. Her answers given during an interview are set out. In the light of those questions posed to her during her interview, the secretary of state considered that she was able to give an internally consistent account regarding her realisation of her sexual identity.

34. The secretary of state also referred to her claim that she is currently in a relationship with the dependant on her claim. She was able to give a coherent and internally consistent account regarding her relationship with her dependant. In addition she had stated that she has married her in the UK and submitted a certified copy of an entry of marriage from the London Borough of Croydon. The secretary stated: It was therefore accepted that “you are a lesbian.”
35. Further, the Judge noted from the oral evidence at [50–51] that the claimant’s friends in the UK currently support her and were unaware that she was in a relationship with her partner, the dependant to the appeal, let alone that she and her dependant were married. The claimant had no involvement with the LGBT community in the UK.
36. He accordingly submitted that the First-tier Judge erred in misunderstanding the nature of the secretary of state’s position and in particular, whether the claimant would be discreet in her sexuality on return to Sri Lanka. He submitted that there were no reasons given “driving that discretion” without which any assessment is incomplete.
37. He also relied on the secretary of state’s grounds that the Judge erred by failing to make a finding whether there was ‘cogent’ evidence to depart from the ‘extant CG’. Whilst it is correct that the country guidance looking at the issue of gay men in Sri Lanka does not specifically address the position of lesbians, “the headnote is intuitive”. There it was stated that there is a significant population of homosexuals “and other LGBT individuals” in Sri Lanka, in particular in Colombo. Whilst 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 would 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.
38. He submitted that the claimant was from Colombo, which is not a rural area. She had managed to live without any problems from the authorities in Kandy [35] and on the findings of the Judge would not have to worry about her family’s involvement, having categorised their threats as potentially “hyperbole” [67]. The Judge had accordingly erred in failing to make a proper finding in that respect.
39. Mr Clarke referred to the 2015 guidance set out by the Judge to show how the situation had changed and that the LGBT community in Sri Lanka did now face a real risk of persecution. The guidance was not sufficient to trump the country guidance case. It was not sufficient to show that there would be a risk per se for the claimant. In any event, that case dealt with the position of a gay man who had been threatened by family. There had been a clear distinction in the country guidance case between urban and rural areas. Given that no concession had been made as to how they would live, it was vital to look at how they would be identifiable. The risk category is related to a public profile.

40. He submitted that the decision should be set aside and re-made on the basis that the country guidance case is still good law and that the profile of the claimant would not put her in any risk category. There was no evidence to show that there would be risk in a city such as Kandy.
41. On behalf of the claimant, Ms Jegarajah submitted that it is wrong for the secretary of state to submit that the decision of Judge Saini, which had not been appealed, should not have been considered.
42. Moreover, there had been no challenge to the positive credibility findings at [67] regarding the claimant's assertions including her claims of detention and abuse. The Judge considered the evidence in detail before setting out his conclusions from paragraph [57]. He took into account that the secretary of state had not accepted that the appellant had been arrested and raped by the police in Sri Lanka. It had also not been accepted that her family had rejected her and had posed a risk as she claimed.
43. He found that the "criticisms" of her account in the decision letter which were put to her in cross examination were not sufficiently cogent to undermine the fact that she was able to maintain a consistent account over time - [61].
44. He also took into account their apparent lack of knowledge and interest in the LGBT community in Sri Lanka. That was not a significant inconsistency given their ages when they lived in Sri Lanka, and their particular circumstances.
45. He noted that the claimant had effectively given her account on four separate occasions. Whilst agreeing that there are potentially some implausible and possibly inconsistent aspects to her account, he appropriately directed himself as to how he should assess her actions. He considered whether her ability to remain consistent might be because she is an accomplished liar and intelligent enough to stick to a carefully researched, fabricated account. However, he applied the lower standard of proof and did not find that the suggestion that she had fabricated her account was cogent enough to undermine her credibility - [66].
46. Accordingly Ms Jegarajah submitted that there had been overall a positive assessment which had not been challenged by the secretary of state.
47. She also submitted that what made this appeal unique is the fact that they married in the UK. In LH and IP the country guidance noted with respect to gay men in civil relationships that in Sri Lanka this did not constitute a particular social group for the purpose of the Refugee Convention. The Sri Lankan authorities' failure to recognise alternative marital and quasi-marital statuses such as civil partnerships or same sex marriage which are available in other countries of the world does not, without more, amount to a flagrant breach of core human rights.

48. Here, however, they have got married. In those circumstances there would be a risk of self identification if they were asked in an official context whether they are married. This therefore gives rise to a risk of their identification as a gay couple.
49. The Judge also properly noted that there was no evidence of any official record made of the claimant's detention or her homosexuality. In the circumstances, he found it unlikely that the authorities would have done this. Given that she has been arrested and mistreated on one occasion did not mean that were she to return to Sri Lanka she would be at any greater risk than any other young woman of her sexual orientation.
50. Ms Jegarajah submitted that in 2015 the guidance was official Home Office policy. Accordingly, the secretary of state's current assertion with regard to SASS is misconceived.
51. In reply, Mr Clarke submitted that the reasoning in SASS was inadequate. Nor is it particularly helpful to the claimant. In SASS the appellant had been outed through his family and the community; accordingly, the second question in HJ (Iran), namely, if a gay man lived openly, would he be liable to persecution in his own country, has been answered in the affirmative owing to the background evidence.
52. SASS was moreover fact specific. There the appellant would live openly. The appellant gave credible evidence and stated early at interview in that case that he would not go back to living in secrecy any more. Accordingly, the question of discreetness was answered in the appellant's favour in that case.

Assessment

53. The First-tier Tribunal Judge stated that in this appeal, "as I understand it" the secretary of state accepted that the appellants are living in the UK as an openly same sex couple. He found in the circumstances that it was likely that they would wish to live in Sri Lanka as an openly same sex couple.
54. In the reasons for refusal, which dealt with "sexual orientation" of the claimant, it was accepted that she was a lesbian. It was accepted that she was in a current relationship with her dependant - paragraphs 23-24.
55. The secretary of state also noted at paragraph 42 that the claimant wished to live openly with her partner 'as a lesbian'. The secretary of state did not however assert in her reasons for refusal that they would not want to live openly in Sri Lanka on return. She stated that they would be allowed to live openly in cities such as Colombo or Kandy.
56. In her grounds of appeal before the First-tier Tribunal the claimant relied on the secretary's 2015 Guidance which confirmed that homosexuals were victimised by their

families [23]. She was a Tamil which led the authorities to scrutinise her; as a result her sexual orientation came to light and this contributed to her arrest. It was also asserted by the claimant that they would not be able to live an independent life in Sri Lanka. They would be discriminated against in the workplace and would be excluded by landlords from their properties. The decision in LH and IP was thus not directly applicable.

57. The Judge found it likely that they would wish to live in Sri Lanka as an openly same sex couple. He concluded that on the evidence before him, it was likely that the only reason that they would not do this would be because they were frightened about reprisals.
58. In her decision the secretary of state noted that the claimant claimed to be in a relationship with her dependent partner. She has been asked questions about how they met and how they entered into the relationship with each other – Questions 109–123. The secretary of state accepted that she was able to give a coherent and internally consistent account regarding their relationship. In addition she had produced evidence of their marriage.
59. The secretary of state did not at any stage contend that they had not lived openly in the UK.
60. When considering the risk on return however, she noted that the claimant 'claimed that she and her partner wish to live openly as a lesbian'. However, it was considered in line with the case law and background evidence - which included the CIG of September 2015 that there are able to live openly as a lesbians in cities such as Colombo and Kandy.
61. I have also considered the evidence given by the claimant before the First-tier Tribunal. In her asylum interview she was asked at Q 124 how she had been expressing her sexuality in the UK. She replied that they can go wherever they want and be free. They can hold each other's hands or when they are on the train they have kissed each other. Society in the UK is free.
62. In her witness statement she stated (paragraph 23) with regard to the Equal Ground investigation that LGBTIQ individuals are denied access to health services, education and employment and the ability to participate in social and public life - UN 3 April 2008, para 12). Members lose their jobs and are kicked out of their homes and have difficulty accessing healthcare, housing education and justice - Equal Ground 7 December 2011.
63. She contended that it was thus implausible to assume that a lesbian couple would be able to maintain their relationship and continue their lives without harassment or interference.
64. It was also expressly asserted in the skeleton argument before the First-tier Tribunal that if returned to Sri Lanka they would wish to live openly as a lesbian couple. Any

decision not to do so would be founded on their fear of persecution rather than mere societal disapproval.

65. In her evidence, her partner stated that their friends, whom they met in the UK, were helping them. If they went to Sri Lanka, she did not think that her friends there would support them if they found out that they were in a relationship and married.
66. The secretary of state was represented at the hearing before the tribunal. It is not contended that the evidence as to their living openly in the UK was challenged. I have had regard to Judge Hamilton's record of the submissions before him. The submissions related to her claim of having been arrested and detained in Sri Lanka. There was reliance on the country guidance authority. The Judge was referred by the claimant's counsel to the skeleton argument that was produced and relied on before the Tribunal. In the skeleton there was specific reference to her replies at interview, namely, Questions 124 and 133 to which I have referred.
67. I find from the evidence as a whole that was before Judge Hamilton that he did not err by concluding that the secretary of state accepted that the claimants had been living in the UK as an openly same sex couple.
68. Further, there was a proper evidential basis for his findings at [78] and [79] that it is likely that they would wish to live in Sri Lanka as an openly same sex couple. On the evidence before him he found that the only reason they would not do this would be because they were frightened about reprisals. They would thus be at risk because they want to live as a same sex couple and the current background evidence shows that there would be a clear risk of significant mistreatment if they did this [79].

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and shall accordingly stand.

For reasons already given however the dependant TJRB was wrongly awarded a fee of £140. An award in the sum of £140 is payable to the claimant alone.

Anonymity direction

I make an anonymity direction. This direction is to remain in place unless and until this Tribunal or any other appropriate court, directs otherwise. As such, no report of these proceedings shall directly or indirectly identify the claimant or any member of her family, including TJRB. Failure to comply with this direction could amount to a contempt of Court.

Signed

Date 30 January 2017

Deputy Upper Tribunal Judge Mailer