Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08121/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 November 2018	**On 26 November 2018**

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MKMR
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms L Kenny, Home Office Presenting Officer
For the Respondent: Mr S Chelvan, counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by the applicant against the decision of 15 June 2018 refusing her application for asylum. In this determination we will refer to the parties as they

were before the First-tier Tribunal the applicant as the appellant and the Secretary of State as the respondent. The First-tier Tribunal judge recorded the appellant's wish to be referred to by the female pronoun and subject to occasional inadvertent lapses he did so in his decision. We will also refer to the appellant using the female pronoun, not only to respect her wishes but also in the light of the judge' s finding that the appellant considered herself to be a woman.

Background

2. The appellant is a citizen of Sri Lanka born on 6 January 1992, who entered the UK on 13 June 2012 with a student visa, extended to 30 December 2015. However, on 3 July 2014 she was arrested when working illegally. A decision was made to remove her, but this was challenged in judicial review proceedings and she applied for asylum on 6 November 2014. Her application was refused, an appeal to the First-tier Tribunal dismissed and permission to appeal further refused. On 25 May 2018 the appellant made further submissions, which were treated as a fresh claim.

3. The appellant claimed that she would be at risk on return to Sri Lanka by reason of her sexual identity. The respondent accepted that the appellant was a Sri Lankan national but it was not accepted that the appellant was a homosexual in a sexual relationship with her claimed partner and, in any event, the background information made it clear that in general the treatment of gay men in Sri Lanka did not amount to persecution or serious harm and the appellant had failed to show why she was unable to relocate internally to another part of the country if necessary. The respondent's detailed reasons for refusal are set out in Annex A of the decision letter of 15 June 2018.

The hearing before the First-tier Tribunal

4. In the appellant's skeleton argument before the First-tier Tribunal, it was submitted that in her asylum claim was based solely on her sexual identity as a gay man and gender identity and expression as a trans person. The judge summarised at [15] the core of the appellant's case: she was gay, she was likely to be persecuted in Sri Lanka, engaged to be married to her partner, a Pakistani national recognised as a homosexual and granted asylum in the UK and they could not live as a married couple in Sri Lanka or Pakistan.

5. The judge reminded himself of the guidelines set out by the Supreme Court in HJ (Iran) v Secretary of State [2010] UKSC 31 commenting that they had been endorsed and expanded upon in A (Advocate General's Opinion) [2014] EUECJ C148/2013 to the effect that an assessment of whether refugee status should be granted in a claim based on sexual orientation focus on whether an applicant is credible and that practices seeking to determine an individual's orientation should play no part in the assessment process. We would add that the Advocate General's opinion was to a large extent adopted by the CJEU Grand Chamber in A, B and C v Staatssecretaris van Veiligheid en Justitie, C-148/13, C-149/13 and 150/13, 2 December 2014.

6. Having considered the evidence, the judge found on what he described as overwhelming and cogent oral evidence that the appellant did consider herself to be a woman. A number of witnesses had given evidence on behalf of the appellant and he found those witnesses to be truthful [30]. He said that the company the appellant kept were members of the LGBT group largely and that it begged the question, if the appellant was not a member of that group, why he would seek their company [31]. He also accepted that the appellant lived with her partner in a sexual relationship [37].

7. He went on to consider whether the appellant would be at risk of serious harm on return to Sri Lanka. He referred to the country guidance in LH and IP (gay men : risk) [2015] UKUT 73 CG and in particular to the finding of the Upper Tribunal that gay men in civil partnerships in Sri Lanka did not constitute a particular social group for the purposes of the Refugee Convention and that the failure of the Sri Lankan government to take steps to recognise alternate and quasi-marriage statuses did not without more amount to a flagrant breach of core human rights. These passages relate primarily to a subsidiary argument being put forward on behalf of the appellant that his rights under article 8 would be breached on return to Sri Lanka as his partner would not be able to obtain to obtain leave to enter as his spouse.

8. It would be helpful to note at this point that the Tribunal in LH and IP when considering the risk to individuals based on sexual and gender identity found that there was a significant population of homosexuals and other LGBT individuals in Sri Lanka, in particular in Colombia, and whilst there was 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 a particular individual's risk breached the international protection standard and whether it extended beyond their home area.

9. The judge, however, had evidence before him which had not been before the Tribunal in LH and IP: a judgment of the Supreme Court of Sri Lanka in Galabada Wimalasiri v Officer in Charge, Police Station, Maradana and Honourable Attorney General SC Appeal 32/11, 30 November 2016, ("Galabada"). The Sri Lankan Supreme Court dismissed an appeal by the appellant against a conviction for an offence of gross indecency under s.365A of the Sri Lankan Penal Code. The appellant had been sentenced to a one year term of imprisonment but this was set aside and replaced a sentence of two years rigorous imprisonment suspended for five years on the basis that the offenders should have an opportunity of reforming themselves.

10. The judge held that the judgement in Galabada was fundamentally at odds with the decision in LH and IP. The Sri Lankan Supreme Court had endorsed a conviction of two men of homosexuality and increased the sentence of imprisonment of one year to two years but suspended to give the appellants the opportunity to reform [40]. He commented that the respondent had not challenged the authenticity or the veracity of the judgment in Galabada and the judge said that he had to accept it and act on it.

He found, in the light of the judgment, that the appellant was at risk of being imprisoned on the grounds of sexuality and offered the opportunity of reform and would not be able to live openly as a homosexual [41].

11. He went on to say that if he was wrong about the correctness of relying on Galabada, in the context of whether the appellant and her partner could enjoy family life in Sri Lanka, although the respondent had not provided any evidence that the appellant's partner was likely to secure entry clearance to enter Sri Lanka as her spouse, the appellant bore the legal burden of proving every element of her case and he had failed to do so [42].

12. In the light of his findings, the judge allowed the appeal on asylum grounds, humanitarian protection grounds and under articles 2 and 3 of the Human Rights Convention. He also declined to make a costs order because the evidence relied on was markedly different from that presented to the respondent in support of the appellant's further submissions and he was not satisfied that Galabada had been included with those submissions and, if it had, the respondent may well have come to a different decision

The Grounds of Appeal

13. In the respondent's grounds of appeal, it is submitted firstly that the judge was wrong to rely on the judgment of the Sri Lankan Supreme Court and to regard it as determinative when assessing the appeal and that this was a piece of legislation based on its own facts relating to a criminal conviction for a criminal activity. The case was not a precedent on country conditions and did not seek to provide an objective overview of the country conditions in Sri Lanka but the judge had treated it as just that and it is submitted that this was wrong.

14. It is submitted secondly that the judge had not considered the case in any wider context. Sri Lanka had a large population of gay men and there was no evidence before the Tribunal that Galabada was a precedent that was used by the authorities to prosecute or persecute gay men.

15. Thirdly, it is submitted that the judge's approach to the findings in this case are syllogistic: just because two gay men indulged in an incident that breached public order and were prosecuted, it did not mean that all gay men in Sri Lanka would receive the same treatment. This was not an HJ (Iran) breach: if a similar offence had occurred in the UK it would most likely have led to criminal prosecution and such a prosecution did not mean that the UK authorities were persecutory to gay men. If a heterosexual couple behaved in a similar way, they too would face similar treatment. There was no evidence to show that the terms of the conviction were disproportionate. Finally, it is submitted there was no reason for the judge to deviate from the country guidance and that he should have applied LH and IP. Had he done so, he would have dismissed the appeal.

Further Applications

16. The appellant's representatives made an application to the First-tier Tribunal for permission to cross-appeal the decision but as the procedure rules made no provision for such applications and there was no authority on the issue, they requested that this point of procedure be decided by the Upper Tribunal.

17. UTJ Gill gave directions ton 12 October 2018 that the parties should be prepared not only to deal with this issue but also all other issues in the case including whether the First-tier decision should be set aside in whole or in part and to address the Tribunal on re-making the decision unless the Tribunal decided to adjourn part-heard to a resumed hearing on a later date.

18. At the hearing before us Mr Chelvan relied on his written submissions dated 10 October 2018 covering the application for permission to appeal out of time, an application to submit further evidence in his cross-appeal under article 8, his Rule 24 on the protection appeal and a request for reported guidance on gender identity and expression.

19. We took the view that the most sensible way to proceed would be to consider first whether the First-tier Tribunal had erred in law and, if so, then to consider as necessary or appropriate, the other issues raised in Mr Chelvan's written submissions.

Consideration of Whether the First-tier Tribunal Erred in law.

20. Ms Kenny adopted the respondent's grounds and submitted that nothing had changed so far as the country guidance was concerned as a result of the Sri Lankan Supreme Court judgment in Galabada which, she argued, had no direct relevance to the appellant's circumstances. In Galabada the accused had been convicted of what was in substance a public order offence and it was one isolated incident. Each case, she submitted, needed to be looked at on its own individual merits and the judge had failed to carry out this exercise.

21. The Rule 24 reply submits that the Sri Lankan legislation considered by the Sri Lankan Supreme Court sought to penalise any person who in a public or private place committed any act of gross indecency. The Sri Lankan courts had affirmed in Galabada that this law remained very much part of Sri Lankan law and indicated that anti-sodomy and gross indecency laws were enforced and enforceable in Sri Lanka and that even for a consensual offence which was a first offence committed some time ago, a sentence of two years rigorous imprisonment was considered appropriate and, more significantly, this was to give an opportunity to the accused to reform which, arguably, was equivalent to requiring gay cure therapy. This was, therefore, not a case where there was unenforced legislation on the statute book. There was no error, let alone any material error in the First-tier Tribunal decision.

We indicated that we did not need to hear further from Mr Chelvan on the error of law issue.

22. The issue before us is whether the First-tier Tribunal erred in law such that the decision should be set aside. The country guidance case dealing with the risk to gay men in Sri Lanka is LH and IP was published in 2015. By para 12.2 of the Senior President's Practice Direction that decision is authoritative on the issues identified based on the evidence before that Tribunal and Tribunals are required to follow them unless very strong grounds supported by cogent evidence are adduced which justify not doing so. We must therefore consider whether there was cogent evidence justifying such a course.

23. The country guidance in LH and IP confirmed that it will be a question of fact in each individual case whether the risk based on a claim of sexual identity reaches the international protection standard. It was aware of the fact that homosexual activity was illegal under the penal code of Sri Lanka but at [16] noted that there had been no prosecution since independence and in [106] the Tribunal reminded itself, applying the decision of the CJEU in X,Y and Z that, while the existence of laws criminalising homosexual activity supported a finding that homosexuals formed a particular social group, such laws did not by themselves constitute persecution, unless criminal sanctions were actually applied.

24. At [110] the tribunal said the risk for gay men was not at the level of persecution or serious harm in Sri Lanka as a whole and that the evidence suggested that such risks as there were applied more to some homosexual men than to others. The examples cited in the general opinion of the experts centred on transgender persons, commercial sex workers, and visitors to cruising areas or other homosexual pickup venues.

25. The country guidance in LH and IP as set out in the italicised headnote is as follows;

> (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.

26. The judge had to consider the impact on this guidance of Sri Lankan Supreme Court decision in Galabada upholding a conviction under para 365A of the Sri Lankan Penal Code which reads as follows:

> Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished with imprisonment of either description, for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to such person.

27. The Sri Lankan Supreme Court concluded its judgment by saying:

> "The contemporary thinking, that consensual sex between adults should not be policed by the state nor should it be grounds for criminalisation appears to have developed over the years and may be the rationale that led to the repealing of the offence of gross indecency and buggery in England.
>
> The offence however remains very much part of our law. There is nothing to say that the appellant has had previous convictions or a criminal history. Hence to visit the offence with a custodial term of imprisonment does not appear to be commensurate with the offence, considering the fact that the act was consensual, and absence of criminal history on the part of the other accused as well. In my view this is a fit instance where the offenders should be afforded an opportunity to reform themselves.
>
> In view of the above I am of the view that imposing a custodial sentence is not warranted in the instant case. Furthermore, the incident had taken place more than 13 years ago.
>
> Considering the above I set aside the sentence of the one year term of imprisonment and substitute the same with the sentence of two years rigorous imprisonment and acting under section 303 (1) of the Code of Criminal Procedure Act, suspend the operation of the term of imprisonment for a period of five years effective from the date the sentence is pronounced by the learned Magistrate."

28. The respondent's grounds argue that Galabada is not a precedent on country conditions and does not seek to provide an objective overview of the country conditions in Sri Lanka. This misses the point: it does not purport to do either.

Neither is it a piece of legislation based on its own facts. It is a case dealing with a prosecution under the Sri Lankan Penal Code. It shows at the very least that contrary to the basis on which the Tribunal proceeded in LH and IP at [16] that the criminal law has been used in Sri Lanka, if only once but nonetheless recently and in a judgment of the Sri Lankan Supreme Court.

29. It is argued that the judge did not consider Galabada in any wider context and that there was no evidence that it was a precedent to be used by the authorities to prosecute or persecute gay men. But the fact remains that this was the prosecution of two men engaging in same sex activities treated as gross indecency and leading to an immediate prison sentence varied on appeal to a longer sentence but suspended to give an opportunity to reform.

30. The grounds further argue that such behaviour in public would most likely have led to criminal prosecution in the UK. This may well be the case, but the fact remains that the law used covered actions committed in private or in public. The prosecution was not of a public order offence but of a sexual offence.

31. The argument in the grounds that the judge approached the case on a syllogistic basis, that just because two gay men indulged in an incident that breached public order, it did not mean that all gay men in Sri Lanka will receive the same treatment does not stand up to analysis. This is not what the judge said. He considered whether the appellant would be at risk and found that he would.

32. The grounds argue that the judge was wrong not to follow the country guidance in LH and IP. We are satisfied that in the light of that judgment it was open to the judge to take the view that judgment in Galabada was cogent evidence providing strong grounds for not following LH and IP and to find that there was a reasonable degree of likelihood that the appellant would be at risk of persecution on return. We also note that in LH and IP the Tribunal accepted that transgender individuals might be more at risk than other gay men and in the present case the appellant is seeking to transition to female.

33. It is not for us to speculate on how other judges might have decided the appeal. The issue for us is whether this judge erred on the basis of the evidence before him. We are satisfied that on the basis of that evidence, the judge did not err in law and he reached a decision properly open to him.

34. In these circumstances we need deal no further with the issues raised by Mr Chelvan. He sought a ruling on whether there was a provision for cross appeals. The position seems to us to be clear. By s.11(2) of the Tribunals, Courts and Enforcement Act 2007, any party to a case has a right of appeal and there is no reason to exclude cross appeals. However, we have not full argument and this issue can be resolved in a case in which it has a bearing on the outcome. Mr Chelvan's concern in this appeal related to the judge's findings in relation to article 8 at [42] on whether the family life of the appellant and his partner would be affected if his partner is unable to enter Sri

Lanka as his spouse. However, as the appeal has been allowed on asylum grounds and under article 3 this issue is academic as it has no bearing on the practical outcome of this appeal.

35. Mr Chelvan also raised the issue of whether this case should be reported but this is a matter for the Tribunal not the parties. He also sought guidance on cases involving gender identity and expression, but that kind of guidance should be given on the basis of full argument in a case in which it directly arises.

36. Finally, we do note that there are some errors in the judge's decision in that he allowed the appeal on humanitarian protection grounds when he was not entitled to do as the appeal had been allowed on asylum grounds. We also set aside the Fee Award decision as no fee had been paid as this is an asylum appeal.

Decision

37. The First-tier Tribunal did not err in law save that for the reasons we have given the decision to allow the appeal on humanitarian protection grounds was erroneous in law. The decision to allow the appeal on asylum and article 2 and 3 grounds stands.

38. The Fee Award decision is set aside.

39. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed: H J E Latter Dated: 21 November 2018

Deputy Upper Tribunal Judge Latter