



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA 03826 2013

THE IMMIGRATION ACTS

Heard at Field House

On 5 March 2014

Determination

Promulgated

On 18 June 2014

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

KAMINDA HARSHA KUMARA SEEKU-WELLAGE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Bagraz, Counsel instructed by Duncan Lewis Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This case came before me on 1 November 2013 when I found that the First-tier Tribunal had erred in law. On that occasion Ms J Smeeton of counsel represented the appellant and Ms E Martin represented the respondent. I gave my reasons for finding error of law and directions for the future conduct of the case in writing and these were sent to the parties on 10 February 2014. Miss Bagraz pointed out that I had made a mistake in paragraph 2 where I had added an adjective to the word “trafficking” at paragraph 2 of my reasons. This was simply a mistake which has been corrected in the version of the Reasons For Finding Error of Law that is set out below. Subject to slight alteration in an attempt to correct minor grammatical errors these reasons now form part of this decision.
2. Miss Bagraz also pointed out that I had omitted to make any decision in my reasons on the grounds alleging that there was a Trafficking Convention point to be considered. Arguably the decision was “not in accordance with the law”. Further enquiries show that this was not the startling omission that it first seemed. By the time the case came before

me in November an application had been made and considered and the respondent had now ruled that this is not a case where there are obligations under the Trafficking Convention. It follows that any error identified in the grounds for that reason was immaterial. By reason of intervening events the appellant would be in precisely the position that he is in now.

3. I now set out and incorporate the reasons for finding error of law identified above.

REASONS FOR FINDING ERROR OF LAW

1. The appellant is a citizen of Sri Lanka. He was born on 11 June 1974 and so is now 39 years old. He appeals the decision of the respondent on 4 April 2013 to remove him from the United Kingdom. It is his case that he is a refugee or otherwise entitled to international protection. His appeal was dismissed by First-tier Tribunal Judge Raymond in a determination promulgated on 17 July 2013.

2. Essentially there were two reasons for giving permission to appeal. It is arguable that the First-tier Tribunal should have found the decision complained of contrary to the law because it did not take account of the appellant's claim to be the victim of trafficking and secondly it was arguable that the appeal should have been allowed because the appellant is gay and cannot live a gay lifestyle in Sri Lanka without fear of persecution.

3. The First-tier Tribunal's decision was careful and thorough and I cannot consider the criticisms without spending sometime looking carefully at the determination and setting out exactly what the First-tier Tribunal said. Clearly the judge disbelieved much of the appellant's evidence.

4. It is the appellant's case that he entered the United Kingdom at Aberdeen Airport on 19 June 2010 and was given leave to enter. This appears to be so that he could join a ship as a merchant seaman because the respondent received a report showing that the appellant had deserted his vessel on 1 July 2010 and his details were circulated as an absconder. He was arrested on 15 December 2012 and detained. He claimed asylum on 20 December 2012.

5. The appellant identified himself as a Sri Lankan of Sinhalese ethnicity who followed the Buddhist religion.

6. The First-tier Tribunal summarised the reasons for refusal in the following terms at paragraph 2 of the determination:

"The essential basis for the refusal was that the asylum account of the appellant amounted to a confusing amalgam consisting of a vague and contradictory account lacking in detail of his life as a homosexual whilst growing up in Sri Lanka then as an adult whilst living in that country and working abroad as a seaman; whilst concomitantly claiming that he had been assaulted because of militating for a particular political party; and asserting that after an arrest by police for having been found having sex with a man he knew on the beach and his release by means of a bribe this placed him in peril from local villagers antipathetic to homosexuals; was such as to lack credibility. There is also the dimension of whether the appellant is fleeing circumstances of a debt which adds to the confusion."

7. The First-tier Tribunal summarised the documentary evidence before it. This included a letter apparently generated in response to the appellant reporting a crime to a police website called "Action Fraud" dated 18

December 2012. The appellant said that this related to abusive and inhuman working conditions he experienced whilst working on a fishing boat at Aberdeen

8 The First-tier Tribunal then considered with conspicuous care and certainly very thoroughly the appellant's account of his emerging sexuality having noted that the appellant had said during an interview on 17 December 2012 that he would return to Sri Lanka if he could be reimbursed for the money he had paid to get a job in Aberdeen. He later explained that he was ashamed to disclose his sexuality at the earlier interview because he was interviewed by a woman.

9. At paragraph 112 of the determination the First-tier Tribunal dealt with the complaint to the police. The appellant said in his witness statement:

In December 2012 I reported George Maskame to Action Fraud, I informed them that I was a victim of fraud. However, I should have made the report on trafficking instead of fraud. I received a letter from them with regards to the report I made. I also made a complaint against George Maskame to the Glasgow Police, informed them that he is trafficks' [(sic) - this was presumably drafted by the solicitors and means "trafficking people"] I also informed the police that I am a victim of trafficking. I made this complaint so that what happened to me would not happen to anyone else. The police did not do anything about my complaint."

10. The determination explains how the appellant came to the attention of the authorities when he was arrested in December 2012 after being in the company of a friend at a night club when he was noticed by the police.

11. The First-tier Tribunal then asked itself if the appellant had adopted a gay lifestyle in the United Kingdom. Judge Raymond said:

"Has the appellant lived as a gay man in the UK?"

122. Asked in first interview if whilst in the UK he has had any relationships; he replied - *"No, I was scared here. I did not have any relationships at all"* (AIR 1/Q73); he had never been to any gay clubs in the UK (AIR 1/Q127 - presumably the night club where he was arrested by the police at Q122 was not such). But asked why in a country where his sexuality is accepted he had not formed any such relationship; he replied - *"I did not have(?) the relationship with anyone - I was not looking to meet anyone"* (AIR 1/Q126). He was not openly gay in the UK, and has not told any of his friends of his sexuality (AIR 1/Qs118 - 119).

123. However, in second interview whilst confirming that he was not openly gay in the UK; when asked if he had any relationships in the UK he replied - *"I have been socialising with some gay people all from LKA"*; asked whether "yes or no" he had any relationships he replied - *"no"*; asked why not he replied - *"I would like to establish a relationship but because of the impact and reaction of neighbours and insult by the police in LKA I am still in fear - I was arrested in this country and detained for two months"*(AIR 2/Qs328 - 331). Earlier when asked in the context of his saying he had been too scared to claim asylum before his arrest whether having clearly lived amongst the Sri Lankan community in the UK he had not discussed his sexuality with them insulted by; he replied - *"I did not want to talk about my sexual organisation (sic) or being gay to Sri Lanka and in fear of being insulted by them."*(AIR 2/Qs85 - 87)."

12. The First-tier Tribunal Judge noted many inconsistencies in the appellant's account which was a major reason for his overall adverse

credibility finding but he was nevertheless satisfied that the appellant is gay. He noted at paragraph 311 that the appellant “denied having had a life within the gay community in the UK” and he said later in that paragraph:

“I find it very likely that the appellant has led a gay life both in Sri Lanka and in the UK, but in a discreet manner which has not brought him into conflict with the authorities so far as Sri Lanka is concerned so as to be targeted by them. He could continue to do this upon his return to Sri Lanka. As such, and taking into account the core asylum narrative of the appellant has been found to be a fiction in all fundamental respects, I find that he does not come within the guidance of **HJ Iran** as a gay man, particularly as the objective evidence, given in particular the lack of prosecution under the relevant criminal legislation in Sri Lanka, and the evidence of the offer of a proposed dialogue with the gay community emanating from the Prime Minister, even if followed through, does not establish that openly gay persons are targeted as a result of a concerted government policy and societal morays.”

13. The Judge also directed himself in paragraph 311 that a person would not be entitled to refugee status if he were gay in a country where gays risked persecution but chose to conduct himself discreetly for reasons other than a fear of persecution.

14. Before finishing his determination Judge Raymond noted that the appellant had complained through his solicitor that he had been trafficked for the purposes of cheap labour and drew her attention to her duties as explained in the case of **EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania [2013] UKUT 00313 (IAC)**.

15. There is at paragraph 311 of the determination an impeccable self-direction where the judge reminds himself that a gay person will only be entitled to protection if he is going to conduct himself in a way that attracts attention or if he is discreet because he fears the consequences. Undoubtedly *some* people prefer to conduct their sexual activity with great discretion and some people prefer to talk about their “private life” not because they are euphemistic but because they really do not think it is anyone else’s business to comment on or know how they express their sexuality. It is very easy to conclude that a person who expresses his sexuality discreetly in the United Kingdom, where there is increasing tolerance of the gay sex, cannot be expected to want to express his sexuality openly in a country where it would not be tolerated.

16. At paragraph 311 the judge records the appellant’s evidence and explains how he has lived a gay life in a discreet manner which has not brought him to the attention of the authorities. He then says: “he can continue to do so upon his return to Sri Lanka”. This may very well be right but the judge does not ask himself why the appellant would continue to be discreet. I cannot be satisfied from the determination, notwithstanding Ms Martin’s determined efforts, that the judge has actually applied the crucial test and therefore I have to set aside the determination.

17. I see no reason why any of the findings of historic events are in any way undermined by the arguments before me. I summarise them as being acceptance that the appellant is gay and that he has been involved in gay activity in the United Kingdom and in Sri Lanka but has conducted himself with discretion. I also find it established that the appellant would not do that in the event of his return to Sri Lanka. There has to be another hearing so I can answer the question “why?”

18. I have tarried somewhat in reaching this conclusion because I wanted to give the determination thorough reading. It is somewhat puzzling that the First-tier Tribunal Judge could identify the test so accurately but then fail to apply it and if he has applied it he has not explained his decision in a way that I can follow and therefore I have made the decision that I have.

19. As there is only one remaining issue to be decided I think it better that the appeal remains before me in the Upper Tribunal.

4. I then gave directions for the hearing before me.
5. It is for the appellant to prove that there is a real risk of his being persecuted in the event of his return to Sri Lanka or of his rights under the European Convention on Human Rights being breached. This is not a case that can succeed under Article 8 of the European Convention on Human Rights.
6. The appellant made a statement dated 28 February 2014. He explained that when he was aged about 12 years he saw contemporaries being humiliated and hurt because they were suspected of being gay. He saw people throw stones at gay children and punch or slap them. Such children were ostracised by other children whose parents would not allow them any contact and on one occasion he saw a child abandoned by his family because he was gay. Gay activity was seen as sinful and shameful.
7. He heard of an incident about a boy being expelled from school because he was gay. He said that villagers made a "big issue" of the child's sexuality so that a child could not go to school.
8. He was advised by a distant uncle not to disclose his sexuality to anyone because of the problems that would follow.
9. He related one incident where he was arrested by the police who took him to his home so that they knew where he lived. The villagers found out the reasons for the police involvement and started to stone his house. His father arranged for his release by bribing the police and an officer advised him to leave the country because he would only have more trouble.
10. He then explained how when he was working for a Greek shipping line a Sri Lankan colleague found out about his sexuality and bullied him. For example if he tried to talk to the ship's captain about his work he was subject to suggestions that he was having a secret relationship with the captain. He was excluded from team activities and occasionally overtly humiliated.
11. Most of his friends in the United Kingdom are Sri Lankan but only two know that he is gay. He dare not tell them.
12. His bad memories kept him awake at night.
13. He would not disclose his sexuality in Sri Lanka because of past experiences and the fact that his conduct is contrary to the law.
14. He said that if he returned to his own community he would be known to be gay and he had already had trouble with the police there. He found the need to suppress his sexuality oppressive. For example he had an inclination to touch the hands of someone to whom he was speaking.

15. He did not feel able to be overtly gay in the United Kingdom because he still depended on the goodwill of the Sri Lankan community for his maintenance and accommodation.
16. He adopted this evidence before me. He was cross-examined.
17. Mr Wilding asked him to explain why he had not said on an earlier occasion how he had been ostracised whilst working for the Greek shipping line. He replied that he had not been asked. He also said that he had pushed the problem out of his mind because he was living in fear. He explained that the person concerned had been a close colleague and he wrongly thought that the colleague may have been gay. He made overtures that were not appreciated.
18. He was asked if the two friends in the United Kingdom who knew that he gay were the two friends who had provided witness statements for him in the course of proceedings. This was a straightforward question that the appellant seemed to find extraordinarily difficult to answer. He eventually decided that one of them knew that he was gay. It also emerged in cross-examination that there was some uncertainty about where the appellant actually lived. He had given an address in the statement which was different from the address originally given to the Tribunal. There is nothing inherently wrong or even suspicious in a person changing addresses and I was left with the distinct impression that the appellant, for some reason, was not being entirely frank about his circumstances. It may be that he had a succession of short-term addresses but it was all rather unsatisfactory.
19. The appellant had also produced additional background material. I was particularly assisted by a Kaleidoscope Trust article entitled "Speaking Out" dated 10 November 2013. The Kaleidoscope Trust is particularly concerned with the rights of LGBTI people in Sri Lanka. It might for that reason be thought to be partial in the sense that it is more than usually interested in the rights of and difficulties facing gay people. However, I am satisfied it is also an organisation intent on cultivating a reputation for reliability and fair reporting and I give weight to what it says. This is partly because its conclusions are wholly in line with the material before me.
20. In summary this report explains that homosexual acts are punishable by up to ten years' imprisonment. The law is rarely enforced but, significantly, it is said the illegality of gay activity is used to threaten and harass LGBTI people. It quoted a study by the Human Rights Organisation "Equal Ground" but found that "90% of trans people and 65% of gay men reported experiencing police violence based on their sexuality and/or gender identity".
21. This is supported by the COIR Report of March 2012 which, I am told, is the most recent COIR Report on Sri Lanka. It quotes a report of the NGO Shadow Report to the Committee on the Elimination of all Forms of Discrimination against Women dated January 2011. This too makes the point that although there have been no convictions (I assume of women) of same sex activity offenses:

"The criminalisation paves the way for the police and anti-gay groups to brand all lesbians, bi-sexual, transgendered persons as 'perverts' and criminals. The fear of being apprehended and identified as a person of non-

normative sexual behaviour or practice leads to a cycle of silence by members of the LBT community, by their families and friends and by society as a whole and makes them vulnerable to a range of abuses including extortion, intimidation, unlawful arrest and detention, harassment and torture.”

22. The COIR Report then quotes the USSD 2010 Report to the effect that “police harassed and extorted money or sexual favours from those persons and assaulted gays and lesbians in Colombo and other areas.” The report also suggested that many incidents of crimes against members of the LGBT community were unreported.
23. The “Gay Times Gay Guide, Sri Lanka” entry on the Gay Times website on 1 February 2012 acknowledges that there is a “sizeable gay population” in Sri Lanka and it says there is “no gay scene in the western sense” and many gay people cannot come to terms with themselves because of family pressure and cultural restraint and expectation. A Sri Lankan gay organisation “Woman’s Support Group” in June 2011 said how LGBT people are at risk of blackmail and ostracisation by their family or loss of career or home so that it is difficult for “members of the LGBT community to live their lives fully and openly. Around you there are many people who hide their sexual gender identity from those around them due to the fear of what may happen to them if their identity is known.”
24. Putting everything together I am entirely satisfied that it is very difficult for a gay person to “come out” in Sri Lanka. If the Equal Ground report is correct the clear majority of gay men experience violent ill-treatment at the hands of the police. That is a staggering statistic and I would like to know more about the research methods used by Equal Ground but in the absence of any evidence to discredit it I give it some weight. It is certainly wholly consistent with the picture created by other sources of gay people being apprehensive of ill-treatment either by the authorities or in circumstances where the authorities would do nothing to help.
25. Mr Wilding, properly and helpfully urged me to read again the decision in **HJ (Iran) v SSHD [2010] UKSC 31**. With that urging in mind I set out a long quotation from the judgment of Lord Rodger in that case. He said:

“61. A fear of persecution is by no means the only reason why an applicant might behave discreetly if he were returned to his country of nationality. For example, he might not wish to upset his parents or his straight friends and colleagues by revealing that he is gay; in particular, he might worry that, if the fact that he was gay was known, he would become isolated from his friends and relatives, be the butt of jokes or unkind comments from colleagues or suffer other discrimination. Indeed, in a society where gay men are persecuted, it is quite likely that the prevailing culture will be such that some of an applicant’s friends, relatives and colleagues would react negatively if they discovered that he was gay. In these circumstances it is at least possible that the only real reason for an applicant behaving discreetly would be his perfectly natural wish to avoid harming his relationships with his family, friends and colleagues. The Convention does not afford protection against these social pressures, however, and so an applicant cannot claim asylum in order to avoid them. So if, having considered the facts of any individual case, the Secretary of State or a tribunal concluded that the applicant would choose to behave discreetly on his return simply to avoid the social pressures, his application for asylum

would fall to be rejected. He would not be a refugee within the terms of article 1A(2) of the Convention because, by choosing to behave discreetly in order to avoid these social pressures, the applicant would simultaneously choose to live a life in which he would have no well-founded fear of being persecuted for reasons for his homosexuality. A similar point arose, in the context of religion, in *NABD of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs (2005) 79 ALJR 1142*, discussed at para 70 below.-

62. Having examined the relevant evidence, the Secretary of State or the Tribunal may conclude, however, that the applicant would act discreetly partly to avoid upsetting his parents, partly to avoid trouble with his friends and colleagues, and partly due to a well-founded fear of being persecuted by the state authorities. In other words the need to avoid the threat of persecution would be a material reason, among a number of complementary reasons, why the applicant would act discreetly. Would the existence of these other reasons make a crucial difference? In my view not at all. A Jew would not lose the protection of the Convention because, in addition to suffering state persecution, he might also be subject to casual, social anti-semitism. Similarly, a gay man who was not only persecuted by the state, but also made the butt of casual jokes at work, would not lose the protection of the Convention. It follows that the question can be further refined: is an applicant to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, in addition to any other reasons for behaving discreetly, he would have to behave discreetly in order to avoid persecution because of being gay?

63. It is convenient to use a phrase such as 'acting' or 'behaving' 'discreetly' to describe what the applicant would do to avoid persecution. But in truth he could do various things. To take a few examples. At the most extreme, the applicant might live a life of complete celibacy. Alternatively, he might form relationships only within a circle of acquaintances whom he could trust not to reveal to others that he had gay relationships. Or, he might have a gay partner, but never live with him or have him to stay overnight or indulge in any display of affection in public. Or the applicant might have only fleeting anonymous sexual contacts, as a safe opportunity presented itself. The gradations are infinite.

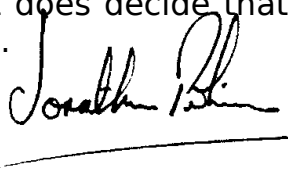
64. Suppose the Secretary of State or the Tribunal were satisfied that, if the applicant took some such precautions, he would be unlikely to suffer any actual harm. Would the applicant then have no well-founded fear of persecution by reason of being gay and so be unable to claim asylum under the Convention?

65. Surely not. As already explained in paragraph 53 above, so far as the social group of gay people is concerned, the underlying rationale of the Convention is that they should be able to live freely and openly as gay men and lesbian women, without fearing that they may suffer harm of the requisite intensity or duration because they are gay or lesbian. Their home state should protect them and so enable them to live that way. If it does not and they will be threatened with serious harm if they live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it. But the applicant's country of nationality does not meet the standard of protection from persecution which the Convention envisages simply because conditions in the country are such that he would be able to take, and would in fact take, steps to avoid persecution by concealing the fact that he is gay. On the contrary, the fact that he would

feel obliged to take these steps to avoid persecution is, prima facie, an indication that there is indeed a threat of persecution to gay people who live openly. His country of nationality is therefore not affording him the necessary level of protection. So the receiving country should.”

26. Mr Wilding drew my attention to the decision of this Tribunal in **MD (same-sex oriented males: risk) India CG [2014] UKUT 615**. As is apparent from the title the case is about the persecution of gay people in India. Mr Wilding was not suggest that India is the same as Sri Lanka but he did suggest that the case is a useful guidance on the correct approach to take to the persecution of gay people in a country where gay activity is illegal and prosecutions are rare and where extortion, harassment and discrimination by the police and the general population does take place.
27. Certainly the case illustrates how a person might face discrimination without facing persecution. However, it was integral to the Tribunal’s findings in **MD** that there is within India a “large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities”. Although occasionally subject to direct persecution itself the support networks are able to act overtly and to help members.
28. There was no evidence before me that any comparable support network exists in Sri Lanka.
29. Notwithstanding my concerns about the appellant’s evidence concerning his address I am entirely satisfied that the applicant has lived discreetly as a gay man in a large part because of the fear of social rejection if he was overt about his sexuality. I am also satisfied that gay people are persecuted in Sri Lanka. I am satisfied that a lot of men experience violence at the hands of the police and that for many the degree of isolation they experience extends beyond unwelcome comments or teasing and bullying but rather becomes a degree of opposition and pressure that they cannot reasonably be expected to tolerate.
30. I am quite satisfied that there is a real risk that the appellant would face not merely discrimination and hostility but persecution if he were open about his sexuality in Sri Lanka.
31. I am also satisfied that this is not the only reason but it is an important reason for his not being open and in the circumstances he has proved his case.
32. It follows therefore that I allow this appeal.
33. I do not for a moment suggest that this decision is intended to be guidance about gay people in Sri Lanka generally. I have based it on the limited evidence before me and the findings of fact that bound me before I made the decision. This case does not decide that gay people generally are at risk in Sri Lanka. It does decide that this appellant has proved his case and I allow his appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 13 June 2014