



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

Appeal Numbers: AA/10823/2015
AA/10822/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 15 June 2016**

**Decision & Reasons Promulgated
On 4 July 2016**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**CYM
CSM
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pinder, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the

Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The Appellants are citizens of Sri Lanka. The first Appellant's date of birth is [] 1986. The second Appellant's date of birth is [] 1985. The first Appellant came here on 30 September 2010 with leave as a Tier 4 (General) Student. His leave was extended until 30 August 2015. The second Appellant came here on 6 August 2011 as a dependant of his wife who was a Tier 4 Student. Both Appellants claimed asylum on 27 February 2015. They are gay and in a relationship with each other and claimed to be as a result of this at risk on return. The application was refused on 22 July 2015 in relation to the first Appellant and on 27 July 2015 in relation to the second.
2. They appealed against the decisions and their appeals were dismissed by Judge of the First-tier Tribunal Eban in a decision of 7 December 2015, following a hearing at Hatton Cross on 24 November 2015. Upper Tribunal Judge Gleeson granted permission on 6 May 2016.

The Findings of the FtT

3. Judge Eban heard evidence from both Appellants. The first Appellant's evidence can be summarised. He was aged 16 when he formed an attraction to a male school friend. The friend rejected him. People gossiped which affected him and his family. He moved to Colombo in 2008 in order to study and it was there he started to work as a sex worker. In June 2010 there was an incident where he was caught by the police having sex with a client in a car. The police beat him up. He abandoned sex worker after this and he came to the UK in order to study on 30 September 2010. He met the second Appellant here in May 2012. He returned to Sri Lanka in 2014 because his father was unwell. In Sri Lanka his brother threatened him because of his sexuality. He has achieved NQF levels four, five and six since he has been here.
4. The second Appellant's evidence was that he realised that he was gay when he was about aged 15 and had had two same sex relationships in Sri Lanka. On one occasion when he was kissing another man in the park the police came and beat them up and he was hospitalised for four days. His parents arranged a marriage for him. This was not a happy marriage. He came to the UK with his wife and they lived in Newcastle where he met the first Appellant. His wife moved to London in order to study and the Appellants started a relationship together in May 2012. His wife is aware of the relationship and she returned to Sri Lanka in April 2014 and told her family and the Appellants' families. His parents told him that they have disowned him and that he should not return. He received a threatening telephone call from Sri Lanka from somebody who knew about his sexuality which he believes was instigated by his ex-wife.
5. The judge made findings as follows:
 - (1) The Appellants are Sri Lankans of Sinhalese ethnicity.

- (2) The Appellants are from the Kandy area.
 - (3) The Appellants are both gay.
 - (4) The Appellants are living together in a homosexual relationship.
 - (5) The Appellants' families know about their sexual orientation and do not approve.
 - (6) The Appellants both encountered police brutality arising from same sex relationships but neither has been charged with an offence.
6. The judge considered whether the Appellants would conceal aspects of their sexual identity on return to Sri Lanka and she stated as follows:
- “33. Even before the appellants came to the UK, when they were living discreetly in Sri Lanka, their families were either suspicious of or had discovered their sexual orientation. Since the second appellant's wife has returned to Sri Lanka she has told both appellants' families that they are in a homosexual relationship and that she has divorced the second appellant because he is gay. I find that, as a result, there are substantial grounds for thinking that both appellants will be identified as gay in their home area, however they act in public.
34. The appellants are 29 and 30 and live together as a couple. If they go back to Sri Lanka they would hope to continue living in an open same sex relationship, without pretending to be anything that they are not. There was no evidence that the appellants would go out of their way to seek to bring attention to themselves, as gay men, if they returned, wherever they lived.
35. I have considered whether the appellants face a serious risk of harm from their own families, acquaintances and strangers. Although the second appellant told me about threats made to him over the phone and that his ex-wife is connected to a politician in Kandy, there was no evidence about this relative or his influence. The appellants' evidence appears to be that they have both been disowned by their families, rather than targeted by them. There was no evidence that their families were anything other than ordinary hardworking middle class people, and there is no reason whatsoever to believe that as such their families would seek physically to harm the appellants, commit an illegal assault or even know how to organise such things. The appellants are not isolated and vulnerable; they have each other for support. There is absolutely no reason to suppose that their families would force them to separate. In the circumstances I find that there is no reasonable likelihood that the appellants would be at any real risk from their families or acquaintances.”
7. The judge went on to conclude as follows:
- “37. The appellant's encounter with the police took place in Colombo, when on his evidence he was in the middle of a sex act in a parked car. The second appellant was in his home area when he was kissing in a public place. Although the appellants were beaten up by the police, I do not consider that either of these encounters are any more than isolated instances, and do not indicate that the appellants are at risk of facing

persecution or serious harm at the hands of the authorities in the future.

38. Whilst I do not consider that the appellants would be at risk from their families, they may well prefer to live away from them, in Colombo or some other city.
40. I take it from this background evidence that the appellants could live together as an openly gay couple, and that they would not be at real risk of ill-treatment or harm requiring international protection for reasons of their sexual orientation. The appellants in this case are not in a dissimilar position to the appellants in LH and IP, where the UTT decided that the appellants in that case could set up and maintain a household together, and that their stated concerns about the state, the police, and other government officials, medical professionals, landlords and the general public, were of no real substance [132-133]."

The Grounds of Appeal and Submissions

8. At the hearing before me I asked Ms Pinder to clarify the grounds of appeal which are insufficiently particularised. Ms Pinder helpfully clarified that in relation to ground 1, the Appellants were not relying on paragraph 14(a). However 14(b) was maintained. The thrust of 14 (b) is that the judge erred in concluding that the incidents of police abuse were isolated incidents. Ms Pinder relied on and 14(c), (d) and (e). The thrust of these paragraphs is that the First-tier Tribunal erred in failing to consider that the past incidents of abuse were indicative of future incidents and that the fact that they had been beaten up by the police is a significant issue that impacts on sufficiency of protection. In addition the judge erred in failing to engage with the first Appellant's evidence that he would have no choice but to return to work as a sex worker if he is removed to Sri Lanka and given that his sexuality would then be public knowledge this would put him at risk.
9. Ms Pinder accepted there is significant overlap between grounds 1 and 2 but she relied on ground 2 paragraphs 15 (a), (b) (as an extension of ground 1) in relation to the police brutality and the judge's findings that the police abuse were isolated incidents. Ms Pinder accepted that there was no substance in the grounds insofar as the risk from the Appellants' respective families is concerned and therefore the Appellants were not relying on paragraph 15(c) and (d).
10. Ground 2 15(e), (f) and (g) were still relied upon. The judge erred in concluding that the Appellants would not go out of their way to seek attention (see [34]) because this is an irrelevant consideration. The judge failed to grapple with the evidence that the Appellants would be returning to Sri Lanka and living openly as a gay couple for the first time. It was submitted that the decision is not in accordance with the guidance in LP and IP [16], [29] (gay men: risk) Sri Lanka CG [2015] UKUT 00073.
11. Ms Pinder referred me to the judge's findings in relation to the incidents of police brutality and submitted that there were no reasons given for the

judge's finding at [37]. She referred me to page 507 of the Appellant's bundle and the first Appellant's witness statement and made specific reference to [25] which reads as follows:

"I told Isanka about my problems in Kandy and he invited me to work as a sex worker. I decided to accept his offer and this way I could practice as a homosexual. Isanka introduced me to his clients and I would work at hotels such as Thilanka or Munt-Lavinia. I would sometimes take the client to a park. I would get paid about 2,000 to 3,000 rupees from a client and sometimes I would be paid more and would be receiving gifts such as clothes."

She also referred me to [26] of the same statement which reads as follows:

"26. It was whilst I was working as a sex worker, that I was abused by the police. It was in the first week of June 2010 when the incident happened in Havelock Town. I would normally go to this place if a client could not afford to go to a hotel and that was the case with the client Azeeka. It was about 11pm and we had sex in his car. It was so dark that he had switched on the parking light. We heard a vehicle stop next to the car and then the door was tapped. It was the police, they had opened the door and saw that I did not have any clothes on. The police took us out of the vehicle and started using abusive language, they believed that people such as us were destroying the country.

27. The police slapped me on my face and hit my head with a baton and also used it to simulate anal sex. After they hit me on the head, I felt dizzy. I remember before I fainted, Azeeka was trying to bribe the policemen and pay them 6,000 rupees to let us go.

28. When I regained consciousness, I found myself at Colombo Hospital and was being treated for injury to my head. After this incident, I stopped having any contact with Isanka as I was scared of the police."

12. Ms Pinder referred me to the guidance in LH and IP which indicates at [4] of the headnote that there is more risk for sex workers in the cities. Ms Pinder indicated that the first Appellant had been in Colombo since 2008 and it was two months after his arrival that he had begun to work as a sex worker. The judge was wrong to conclude that the incident with the police was isolated. The judge failed to engage with his evidence that he would have to return to sex work should he return to Sri Lanka and she referred me to [55] of his witness statement where he stated that he will suffer hardship given that he would have to work as a sex worker because he would not be able to work elsewhere due to his sexuality.

13. I asked Ms Pinder whether there was a skeleton argument before the First-tier Tribunal and she stated that Mr Burrett of Counsel represented the Appellants at the hearing and he relied on a skeleton argument. (She was not personally aware of this and had not seen it, but her instructing the solicitor was in court and confirmed this. However, he was unable to provide a copy of it).

14. Ms Pinder submitted that the judge had made an error in concluding that the Appellants were in a similar position to the Appellants in LH and IP and she referred me to [132] and [133] of the Country Guidance case, with particular reference to [132] where the Upper Tribunal concluded that the Appellants fell into the category described by Ms Flamer-Caldera as a same sex couple in a long term relationship who could set up and maintain a household together. The panel went on to recognise the caveat in Ms Flamer-Caldera's evidence about the use of discretion but concluded that it was the Appellants' preference even in the United Kingdom where they are not at risk and have a wide range of choices. In Ms Pinder's submission this was an error by Judge Eban because the Appellants in LH and IP were found to behave discreetly in the UK and it was found that they would return and behave discreetly in Sri Lanka whereas the Appellants in this case would live openly as a gay couple (see [34]).

Conclusions

15. The Appellants would be returning as gay men living together in the same household (like the Appellants in LH and IP). The judge concluded that they would not go out of their way to seek to bring attention to themselves. It is in this context that the judge correctly drew an analysis between these Appellants and those in LH and IP, and in my view, this is a fair comparison. The focus on the words discrete or open can be misleading in this context. There are clear similarities. The judge understood the evidence before her and made clear findings about how the Appellants would behave on return.
16. It is worth noting that there was no evidence before the judge about any behaviour or expression of sexuality which the Appellants would engage in that would bring attention to themselves. It was for the Appellants to produce evidence about how they are likely to behave on return to Sri Lanka. The findings that the judge made are grounded in the evidence that was before her and adequately reasoned. There was no suggestion by the judge or expectation that the Appellants would have to conceal their behaviour on return to Sri Lanka.
17. What is significant is that the Upper Tribunal did not find in LH and IP that couples who were openly gay would be at risk on return to Sri Lanka. I refer specifically to the judgement at [119] where the Tribunal found that there was little evidence to support persecution for gay men particularly if they choose to exercise an internal relocation option to the more gay friendly cities such as Colombo and that internal relocation would normally be sufficient to enable an individual to avoid risk since risks are usually from family, friends or neighbours.
18. In relation to whether or not the first Appellant would be returning to Sri Lanka as a sex worker, whilst the judge did not engage with this aspect of the evidence, it is not clear to me whether the case was ever advanced on

this basis. I have not seen the skeleton argument which apparently was before the judge (there is no reference to this in the decision and I have not been provided with a copy of it). However, I note the evidence at [55] of his witness statement. There was no evidence before the First-tier Tribunal that as a gay man he would not be able to find employment in Sri Lanka. In any event, he had ceased working as a sex worker when the incident occurred and had spent a number of months in Colombo presumably having sought alternative means of income. I am not satisfied that the case was properly advanced on the basis that the first Appellant would be returning to Colombo as a sex worker. Paragraph 55 of the witness statement is lacking in detail. In any event, there was insufficient evidence before the judge that the first Appellant would be compelled to do this. He would be returning together with his partner and they have both gained qualifications here. There is no material error arising from the failure to engage with this issue.

19. The Appellants experienced one incident each with the police. Both incidents are historic and one more so than the other. The most recent relates to the first Appellant and occurred four months before he came to the UK and when he was working as a sex worker. It was unarguably open to the judge to conclude that they were isolated incidents. The reasons for this finding can be reasonably inferred from the facts. They are, by any account historic and in relation to each Appellant one off incidents. This ground is related to whether or not the first Appellant would be returning as a sex worker and I refer to paragraph 19 (above). The judge was entitled to conclude on the evidence before her that they were isolated incidents.
20. There was before the FtT insufficient evidence to establish that these Appellants would be at risk on return. The findings of the judge are grounded in the evidence and adequately reasoned. There is no error of law and the decision is maintained.

The Decision

21. There is no error of law and the decision to dismiss the appeal is maintained.

Signed Joanna McWilliam

Date 1 July 2016

Upper Tribunal Judge McWilliam

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Signed Joanna McWilliam

Date 1 July 2016

Upper Tribunal Judge McWilliam