



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

Appeal Number: PA/01099/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 3 July and 25 September 2017**

**Decision & Reasons Promulgated
On 27 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**UY (SIR LANKA)
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Harris, Counsel instructed by Nag Law Solicitors
For the Respondent: Mr P Duffy (03.07.17) and Mr E. Tufan (25.09.17), Senior
Home Office Presenting Officers

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge O'Garro sitting at Hatton Cross on 5 April 2017) dismissing his appeal against the decision of the Secretary of State to refuse to recognise him as a refugee, or as otherwise requiring international or human rights protection, as a homosexual. The First-tier Tribunal made an anonymity direction in favour of the appellant, and I

consider that it is appropriate to maintain the direction for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The appellant is a national of Sri Lanka, whose date of birth is 12 July 1966. He came to the United Kingdom on a student visa issued to him on 12 August 2003. He successfully extended his leave as a student until November 2008, when he obtained leave to remain as a Tier 1 (Post-study) Work migrant. During the currency of his two-year post-study work visa, the appellant returned to Sri Lanka.
3. He claims that his problems in Sri Lanka started when he had a sexual encounter with a young man on Hikkaduwa Beach in January 2010. As summarised by Judge O'Garro, the appellant claimed that he met the man on the beach when he was visiting his aunt who lived not far from the beach. He said that this man, called Neil, agreed to meet him on the beach at 6pm later that day. While he and Neil on the beach were engaged in sexually intimate act, they were attacked by a group of people causing the appellant to sustain physical injury. He was taken to a police station where he was detained and mistreated during questioning. He said that he was released on bail the next day on condition that he continued to report to the police. He did so initially, until he decided to return to the United Kingdom on 20 March 2010, as he was afraid of what would happen to him if he went to Court.
4. He re-entered the UK on his post-study work visa, and on 3 September 2010 he applied for further limited leave to remain as a Tier 4 (General) Student migrant. But his application was refused, as were further applications for Tier 4 student visas. Eventually, he claimed asylum on 10 September 2015. His claim for asylum was based on his fear that if he returned to Sri Lanka he would face ill-treatment owing to his sexuality.
5. On 26 January 2016 the Secretary of State gave her reasons for refusing to recognise the appellant as a refugee. The account of what he had alleged had happened in Sri Lanka in 2010 was incoherent and internally inconsistent. He claimed that there was an outstanding arrest warrant issued by the police for his arrest, but when asked how he knew how an arrest warrant had been issued, he said that he did not know. He later claimed, in interview, that it was his aunt who had told him. He said that he did not know the details of the warrant. The US State Department's 2014 Country Report on Sri Lanka had made clear that the authorities very rarely enforced the criminal provisions on homosexuality.
6. The appellant's appeal against the refusal of his asylum claim came before Judge Maxwell sitting at Hatton Cross in the First-tier Tribunal on 15 July 2016. Judge Maxwell found the appellant to be credible in his claim to be a homosexual. But he rejected his account of being arrested in 2010 for engaging in sexual activity with another man.

7. The appellant relied on a letter from Mr Seneviratne, dated 28 June 2016, which he sent to Nag Law Solicitors. According to the letterhead, he was an Attorney at Law and a Notary Public in Colombo. He enclosed a practising certificate as an Attorney at Law which had been apparently issued to him in 1984. He said that the appellant had contacted him from the UK and instructed him to find out about his legal suit pending in the Magistrates' Court of Galle. He said that he had visited the Court and had perused the case record of the appellant, reference no. []/[]. The appellant had been arrested by the police and released on reporting conditions for indecent behaviour with another male. The appellant had breached reporting conditions and fled the country after his release. The police had informed the Court, and the Court had issued a warrant for the appellant's arrest. They also ordered the authority in charge of immigration to arrest the appellant and to produce him to the Court if he tried to re-enter the country.
8. Judge Maxwell gave a number of reasons as to why he was not satisfied that either the letter or the practising certificate had been proven to the lower standard to be either accurate or reliable evidence of interest expressed in him by the Sri Lankan authorities on account of homosexual activities. One of the reasons he gave was that while Mr Seneviratne might be an Attorney as claimed, he took judicial notice of the fact that the certificate which he had provided could be checked by the Sri Lankan High Commission in London for a very modest fee and at very short notice. But no such checks had been undertaken in this case.
9. In a decision promulgated on 15 September 2016, Upper Tribunal Judge McGeachy gave his reasons for setting aside the decision of Judge Maxwell. The first error of law which he identified was that the Judge, without notice to the parties, had stated that he did not accept the certificate from the Attorney at Law because there was no evidence from the Sri Lankan High Commission that he was qualified to act as an Attorney at Law. Judge McGeachy found that the Judge had erred in not referring to, and applying, the guidance given by the Court in **Tanveer Ahmed**. He remitted the appeal to the First-tier Tribunal for a *de novo* hearing, save that he preserved the finding of Judge Maxwell that the appellant was a gay man.

The Hearing Before, and the Decision of, the First-tier Tribunal

10. At the re-hearing of the appellant's appeal before Judge O'Garro, both parties were legally represented. The appellant's solicitors compiled a supplementary bundle of documents which contained a letter from Mr Seneviratne dated 14 March 2017, and what he characterised as certified copies of the appellant's Court proceedings in Sri Lanka. These comprised a police report dated 8 June 2010 and a warrant for the appellant's arrest issued by the Magistrates' Court in Galle on the same date. On the police report, the Officer in Charge ("OIC") said that the suspect had been released on a bail bond and required to report to the Crime Division of Hikkaduwa Police every Monday. He was released on 26 March (sic) at

about 4pm. His fingerprints were also taken. The suspect last reported on 15 March 2010 (sic). But on enquiry from the villagers and the suspect's family, they found out that the suspect had fled Sri Lanka. Accordingly, he had breached his bail conditions and this was an offence punishable under sections 365 and 365A of the Penal Code. He continued: *"This is a case where there is a lot of public interest and the failure on the part of the prosecution would be a wrong [precedent] and would lead to arouse the general public resulting they try to take the law into their hands."*

11. According to the arrest warrant, the particulars of the alleged offence and reasons for the issue of the warrant were gross indecency between males and breach of bail condition.
12. In her subsequent findings, the Judge began by acknowledging that there was a preserved finding of Judge Maxwell that the appellant was a homosexual. She then referred to **LH and IP (Gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC)**, where it was held that in general the treatment of gay men in Sri Lanka did not reach the standard of persecution or serious harm.
13. The Judge noted the submission of Ms Harris, who appeared for the appellant below, that her client's case could be distinguished from **LH and IP** because the appellant had an arrest warrant outstanding against him. So, Ms Harris submitted, if he was returned to Sri Lanka, he would be arrested and detained, leading to mistreatment.
14. The Judge went on to consider the contents of the Country of Origin Information Report on Sri Lanka dated September 2015. In recent years, human rights organisations reported that, although not actively arresting and prosecuting members of the LGBT community, police harassed and extorted money on sexual favours from LGBT individuals with impunity, and assaulted gay men and lesbians in Colombo and other areas. Although arrested, LGBT individuals had thus far not been charged or prosecuted. But there had been reports of subsequent blackmail, extortion, violence or coerced sexual acts on individuals by police officers.
15. The Judge addressed the evidence of Mr Seneviratne and the documents which he had produced at paragraphs [37]-[42]. At paragraph [38], she noted the objective evidence which said that the authorities very rarely enforced the criminal provisions, *"and although arrested, LGBT individuals have thus far not been charged or prosecuted."* In the light of their evidence, she found that the documents the appellant was relying on were *"questionable"*.
16. At paragraph [39], she noted that the claimed warrant of arrest had no date next to the signature. For this reason, she was not prepared to give the arrest warrant any evidential weight.
17. At paragraph [40], she noted that the police report had no date on the document. In addition, in the body of the document it was recorded that

the suspect was released on 26 March 2010. However, according to the appellant's evidence, he was arrested on 25 January 2010 and released on 26 January 2010. In the light of this discrepancy, she said that was also giving no evidential weight to the police report.

18. At paragraph [41], she said that in the light of the doubts raised about the documents on which the appellant relied, and since those documents had been obtained through the lawyer whose letter the appellant also relied on, she was not going to give any evidential weight to the lawyer's letter.

The Application for Permission to Appeal

19. Ms Harris settled the application for permission to appeal to the Upper Tribunal. Ground 1 was that the Judge had erred in her assessment of the objective evidence. She submitted that there was no basis on which it was open to the Judge to find on the objective evidence that the documents being relied upon by the appellant were "*questionable*".
20. Ground 2 was that the Judge had materially erred in her assessment of the arrest warrant and the police report. The Judge was wrong to find that there was no date on the arrest warrant. The Judge was also wrong to find that there was no date on the police report. Although the police report made reference to the suspect being released on 26 March 2010, this was clearly a typographical error. This was plain, because further on, within the police report, it confirmed that the appellant had last reported on 15 March 2010.

The Grant of Permission to Appeal

21. On 9 June 2017, First-tier Tribunal Judge Grant Hutchison granted the appellant permission to appeal because in her view all the points advanced by Ms Harris on his behalf were arguable.

Reasons for finding an Error of law

22. I consider that it was open to the Judge to find that the documents from Sri Lanka were "*questionable*". As she highlighted, the background evidence was to the effect that, although arrested from time to time, LGBT individuals had thus far not been charged or prosecuted. While there was ostensibly the aggravating factor of the appellant having breached his bail conditions, his arrest was also reportedly being sought in connection with a criminal charge of engaging in an act of gross indecency with another male. Moreover, arguably the implication of the police report is that the police were proposing to charge the appellant with gross indecency in any event in order to placate the local populace and prevent them from taking the law into their own hands. So, *prima facie*, the treatment that the appellant was ostensibly receiving at the hands of the police, even before he jumped bail, was at variance with the background information as to how the police normally behave towards members of the gay community in Sri Lanka.

23. However, I accept that the Judge erred on the issue of the dating of the documents. Both the arrest warrant and the police report are dated. It was open to the Judge to attach less evidential weight to the police report because at one point it stated that the suspect was released on 26 March 2010, which did not fit with the appellant's chronology. However, the Judge erred in law in holding that she thereby gave the document no evidential weight. The same applies to the Judge's wholesale rejection of the arrest warrant, in respect of which she mistakenly found that there was no date next to the judicial signature.
24. At paragraphs [42] and [43] of her decision, the Judge gave additional reasons for disbelieving the core claim. But she did not bring these reasons to bear when assessing the probative value of (a) letter from the Sri Lankan lawyer, (b) the police report and (c) the arrest warrant. In short, she unfortunately repeated the error of Judge Maxwell, which was to fail to consider the documentary evidence in the round in accordance with the guidance given by the Tribunal in **Tanveer Ahmed**.
25. Accordingly, I find that the decision of the Tribunal dismissing the appellant's protection claim is unsafe and it is vitiated by a material error of law, such that it must be set aside and re-made. However, I do not consider that this is an appropriate case for remittal to the First-tier Tribunal. The finding of Judge Maxwell that the appellant is gay remains a preserved finding. There is also no challenge to the finding by Judge O'Garro that the appellant had been living in a relationship akin to marriage with his partner 'G' in the United Kingdom, but that (absent a successful protection claim) there are not any compelling circumstances that render his removal to Sri Lanka disproportionate on family or private life grounds. The issue in this appeal is whether the appellant faces a real risk of persecution or serious harm on return to Sri Lanka on account of there being an outstanding warrant for his arrest. The evidence bearing on the resolution of this issue is not extensive, and I am not satisfied that the nature or extent of the judicial fact-finding which is necessary for the decision to be re-made is such that, having regard to the overriding objective, it is appropriate to remit this case to the First-tier Tribunal rather than to retain it in the Upper Tribunal.
26. I am also not satisfied that the effect of the Judge's error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal.

The Resumed Hearing on 25 September 2017

27. At the resumed hearing, the appellant was called as a witness and he adopted as his evidence in chief his witness statement signed by him on 11 July 2016. He was asked supplementary questions by Ms Harris, and he was cross-examined by Mr Tufan. He also answered questions for clarification purposes from me.

Discussion and Findings on Remaking

28. In evaluating the appellant's protection claim, I bear in mind that the standard of proof is that of real risk or reasonable degree of likelihood. I also bear in mind the paragraphs from the Rules set out below.
29. Under Paragraph 339K, the fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or serious harm, will be regarded as a serious indicator of the person's well-founded fear of persecution or serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. _
30. Paragraph 339L of the Immigration Rules provides that it is the duty of the person to substantiate his claim. Where aspects of his claim are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:
- (i) The person has made a genuine effort to substantiate his claim;
 - (ii) All material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given;
 - (iii) The person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;
 - (iv) The person has made his claim at the earliest possible time, unless the person can demonstrate good reasons for not doing so;
 - (v) The general credibility of the person is established.
31. On the topic of whether the appellant's account runs counter to "general information", I accept that there is some force in Ms Harris' submission that a potential distinguishing feature in this case is that the appellant was - on his account - caught having sex in a public place, and so the police had sufficient evidence from eye witnesses to bring a prosecution, whereas normally such evidence would not exist. Thus, while in general prosecutions for consensual same sex activity in Sri Lanka are rare, a declaration of intent by the police to prosecute the appellant for the offence of committing an act of gross indecency with another male is plausible in the particular circumstances.
32. The "available specific information" relevant to the appellant's case is thus crucial. I consider that the contemporaneous medical evidence which he has produced undermines, rather than supports, his account. Most notably, he is recorded as having told his GP and/or physiotherapist in the UK on or about 25 March 2010 that he had sustained an injury to his knee on 29 January 2010. This is not consistent with his account of sustaining the injury on 25 January 2010 when trying unsuccessfully to run away from

local villagers. In March 2010 the events of late January 2010 would have still been very fresh in his mind, and it is not credible that he would have been out by four days on the date when the injury was sustained, as it was allegedly sustained on the same day that he was dragged by the villagers to the police station. The later date of 29 January 2010 is also consistent with the appellant's first consultation with Dr Edirisinghe, Consultant Orthopaedic Surgeon at the Teaching Hospital in Kandy, on 2 February 2010. It was at this appointment that the medial ligament injury was diagnosed.

33. Although the appellant says he was beaten on the face and back by the villagers, and also beaten by the police while in detention from 25 to 26 January 2010, he did not seek any medical treatment for any injuries sustained as a result of these alleged assaults, and there is no documentary evidence of the appellant purchasing creams or pain-killers from a pharmacy for self-administration. The account which he gave to the doctor was that he had hurt his knee in a fall. The appellant says that he did not tell the truth, as the doctor was the family doctor and he was embarrassed. However, it is not credible that Dr Edirisinghe was the family doctor as he signed all the medical certificates as a consultant orthopaedic surgeon, not as a general practitioner.
34. On the appellant's account, he had returned to Sri Lanka in January 2010 before the expiry of his visa as he could not find a job in the UK and he had decided to re-establish himself in Sri Lanka. He further stated in his oral evidence that he had gone with his wife and two children to his aunt's house five miles from Hikkaduwa Beach for a family holiday. Against this background, and against the background of the alleged arrest, it is not credible that the appellant sought from the doctor on 8 February 2010, and again on 22 February 2010, a signed letter certifying on 8 February 2010 that he needed a minimum of 4-6 weeks to recover; and on 22 February 2010 that he needed 6 weeks of exclusive physiotherapy, followed by a further 6 weeks of "light duties". This is much more consistent with the appellant having had plans to resume employment in the UK, and needing to produce a sick note to explain his absence. For it is not suggested that the appellant had already found new employment in Sri Lanka.
35. The distinguishing feature of **PJ (Sri Lanka) [2014] EWCA Civ 1011** is that in that case it was not reasonably contestable that the court documents relied on by the claimant had been genuinely extracted from a file held at the relevant Magistrate's Court in Sri Lanka. Given this starting point, it was inherently implausible that the court documents were forgeries, as in order to be forgeries, the claimant would have needed to infiltrate forged material into court records genuinely held at the Magistrate's Court in question.
36. **PJ (Sri Lanka)** is not authority for the proposition that whenever the Tribunal is presented with a set of court and police documents which have been certified as authentic by a Sri Lankan Attorney, the Tribunal must

treat such documents as being reliable, unless the respondent can establish the contrary. As was held by Lord Justice David Richards in **MR (Sri Lanka) -v- Secretary of State for the Home Department [2016] EWCA Civ 763** at paragraph [8], in the course of his judgment in **PJ (Sri Lanka)** Fulford J stressed that documents should not be viewed in isolation and that the evidence needs to be considered in its entirety.

37. The reliability of Mr Seneviratne is called into question by an inconsistency between his two letters. In his first letter of 28 June 2016 he said that he had been instructed by the appellant from the UK to find out about "*his legal suit*" pending in the Magistrate's Court in Galle. He said that he had visited the Court and inspected the file. But he did not claim to have taken copies of the documents on the court file. In his second letter of 14 May 2017 he said he was aware of "*the circumstances*" which the appellant had undergone, "*[s]ince I was his lawyer*". However, he was not the appellant's lawyer in 2010: the appellant does not claim to have instructed him in 2010, and the message of the attorney's first letter was that his first contact with the appellant was in 2016 when he instructed him to find out about the case pending in Galle. However, the appellant did not know that he had a case pending against him in Galle. All he knew, allegedly, was that the police had visited his aunt with a warrant for his arrest, which is not credible as the police knew that he did not reside with his aunt. In addition, having allegedly taken the trouble to travel from Colombo to Galle to peruse the court file in 2016, it is not credible that the attorney would not have obtained copies at that juncture.
38. On the appellant's account, Neil (whose full name was known to the police, according to the police report) was also brought to the police station. Since he and Neil had, on his account, been caught in the act of having sex in a public place, and he had admitted having sex with Neil to the police, there is a fundamental implausibility and contradiction in the police's alleged behavior. On the one hand, by the time of the appellant's alleged release on 26 January 2006, the police had all the evidence they required to charge the appellant and Neil with an offence of gross indecency and to mount a successful prosecution. Moreover, according to the report, they had a very strong incentive to make a public example of the appellant and Neil, which was to prevent outraged local people from taking the law into their own hands. However, on the other hand, rather than charging the appellant, they let him go, without - according to the appellant in his oral evidence - even requiring him to give a bail bond or equivalent (although the OIC said that he had given a bail bond). In his oral evidence the appellant suggested that he was charged at the police station, but he was vague about this and he was not charged at the time according to the police report. Since the local police were not charging the appellant, there was no good reason to require him to report to their local police station once a week, and it is not credible that they would have imposed such a condition. For instead of the appellant remaining safely far away in Kandy (both from his own perspective and from the perspective of him not posing a continuing moral threat in the district over which the local police had jurisdiction), the effect of the condition was to require him

to travel a considerable distance to and from Kandy every week, and to increase hugely the risk allegedly apprehended by the OIC of local people taking the law into their own hands.

39. The police report presents as contrived. Firstly, it presents as being designed for a different audience than a local magistrate. The justification given for prosecuting the appellant – but not apparently Neil – is that the behaviour of the two adult males was not only illegal but *“intolerable in the culture of this country”*. Secondly, no explanation is given as to why the police have not charged Neil with the same offence of gross indecency, even though he is on the face of it no less culpable than the appellant. The implication of the report is that Neil has been let off, which is inconsistent with the alleged public outcry. Thirdly, it is suggested that the reason for the delay in charging the appellant was that the police were investigating whether there were any other gays in the area who had operated in connivance with him. However, the police would have established very early on that the appellant had only recently returned from the UK, and had only just come on a visit from Kandy a few days previously, so this line of enquiry is not credible.
40. The appellant’s account is internally inconsistent and also inconsistent with the police report. The clear implication of the letter of clarification dated 11 January 2016 was that Neil was already his boyfriend, and that when they met on the beach early in the morning on 25 January 2010 Neil asked him for help in going to Europe as he knew the appellant had returned from the UK. The appellant initially took the same line in his oral evidence – that Neil had approached him on the beach because he knew that he had returned from the UK. But when questioned as to how Neil would have known that, he reverted to the alternative version of events put forward in his witness statement, which was that he had never met Neil before, and that the question from Neil arose at a later stage of their initial encounter on the beach, which the appellant initiated.
41. According to the appellant, he was on the beach with his wife and children, and they were staying at his aunt’s house, as he was. But according to the police report, before they released the appellant, they visited his aunt’s house and took a statement from his aunt; and police officers went to Kandy to take a statement from his wife. If his wife was staying with his aunt, the police would have been able to interview her there, and they would not have gone to Kandy to get a statement from her in Kandy. The plain implication of the police report is that the appellant had separated from his wife before the incident, and they were not living together.
42. For the above reasons, I find that the appellant has not discharged the burden of proving, even to the lower standard of proof, that the core of his disputed claim is true. There are not substantial grounds for believing that the appellant was arrested and detained for having sex in a public place in January 2010; or, if he was, that he was released on condition that he report to the local police station every Monday, as opposed to being released unconditionally; and there are not substantial grounds for

believing that a warrant was issued for his arrest following his failure to continue to report; or that a warrant for his arrest remains outstanding. Accordingly, following the country guidance authority cited at [12] above, the appellant does not qualify as a refugee simply on account of his accepted sexual orientation. By the same token, there is not a real risk of the appellant suffering ill-treatment on return to his home country of such severity as to cross the threshold of Article 3 ECHR.

Notice of Decision

43. The decision of the First-tier Tribunal on the appellant's protection claim, and his parallel human rights claim under Article 3 ECHR, contained an error of law and accordingly the decision of the First-tier Tribunal is set aside and the following decision is substituted: the appellant's appeal against the refusal of his protection and human rights claims is dismissed.

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

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

Signed

Date 26 September 2017

Judge Monson

Deputy Upper Tribunal Judge