IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005242
First-tier Tribunal No:
PA/54541/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 August 2024

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R A
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz , Senior Presenting Officer
For the Respondent: Mr Jafar of Counsel

Heard at (IAC) on 15 July 2024

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Caskie) promulgated on 20 April 2022. By its decision, the Tribunal allowed the appellant's appeal on protection grounds and on Article 8 of the ECHR, against the Secretary of State's decision dated 6 September 2021 to refuse his protection and human rights claim.

2. The FtTJ did make an anonymity order and no grounds were submitted during the hearing for such an order to be discharged. Anonymity is granted because the facts of the appeal involve a protection claim.

3. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

4. Although the appellant in these proceedings is the Secretary of State, for convenience I will refer to the Secretary of State for the Home Department as the respondent and to the appellant before the FtT as "the appellant," thus reflecting their positions before the First-tier Tribunal.

The background:

5. The factual background can be summarised as follows. The appellant is a national of Sri Lanka. The appellant had been admitted to the United Kingdom on 7 July 2011 on the basis of a student visa that had previously been issued to him. On 20 November 2012 he made an application to remain in the UK on the basis of his private life etc. but that was refused on 15 April 2013. On 25 September 2013 he applied for further leave as a student and that was granted until 6 July 2015. However, his Leave was curtailed on 30 October 2013, as the college he was studying at had its licence revoked. He appealed against that decision ,but his appeal was dismissed. Following his detention in respect of an allegation of working without permission he claimed asylum on 11 August 2016. That application was refused and his appeal against it dismissed in May 2019 with the appellant's appeal rights being exhausted on 22 March 2020. On 24 March 2020 the appellant made further submissions which were refused but recognised as a fresh claim and this is the appeal against that decision that came before FtTJ Caskie.

6. The basis of his claim is set out in the decision of the FtTJ at paragraphs 6 and 12, and on the basis of his sexual orientation as a gay man. There was no dispute that the appellant was a gay man, and this had been accepted by the earlier decision. He asserts that he may already be on the "stop list" that would mean he would be detained on arrival at the airport and would therefore be at risk of ill-treatment and persecution which would breach at least as article 3 rights. He further relies upon Article 5 and 8 of ECHR. It was noted in terms of HJ (Iran) the appellant could not be expected to conceal his sexuality in order to avoid persecution. Paragraphs 18 to 20 of the ASA quote from the psychiatric report produced for the appellant. It is clear the appellant suffers from significant mental health difficulties, and a risk of suicide and the deterioration in the appellant's mental health is identified as a real risk if he were to be returned to Sri Lanka in the context of the psychiatrist indicating that he did not think the appellant would be able to receive the correct medical treatment including proper counselling and therapy and antidepressant medication and monitoring.

7. Reference was made to the Country Guidance decision of LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC) where the Upper Tribunal held that in general the treatment of gay men in Sri Lanka does

not amount to persecution or serious harm (para 123 (3). However, the Upper Tribunal also found that '.....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.

8. The respondent refused his claim in a decision letter of 21 September 2021 for the reasons summarised at paragraphs 7-11 of FtTJ Caskie's decision.

9. The FtTJ set out his assessment and analysis between paragraphs 28-35. In summary FtTJ Caskie accepted the contents of the psychiatric report that had been prepared for the hearing alongside the other medical evidence that had been provided. The FtTJ concluded that this particular appellant was not a "mentally healthy and robust individual facing the type of harm described as those suffered by gay men in Sri Lanka" and that on return he would be subject to type and discrimination and harassment described in the country materials that for a mentally well individual would not reach the level of severity to constitute serious harm or persecutory harm but on the basis of this particular appellant's vulnerability in the context of his mental health condition, brought him within the category identified in the CG decision. He allowed the appeal.

10. Following the hearing the respondent sought permission to appeal which was granted by FtTJ Parkes.

11. The appeal came before the Upper Tribunal. The Secretary of State was represented by Mr Diwnycz, Senior Presenting Officer and the appellant by Counsel Mr Jafar. He had made a request for the hearing to take place as a hybrid hearing, and he appeared before the tribunal by way of video hearing and Mr Diwnycz was present at the hearing centre. There were no difficulties encountered in hearing the submissions made by each of the advocates.

12. By way of a preliminary issue, neither myself or Mr Diwnycz had a copy of the response filed on behalf of the appellant and a copy was made available and time was given for to digest its contents.

13. Mr Diwnycz relied upon the written grounds of challenge. They are as follows:

14. Paragraph 1: At paragraph 32 of the determination the Tribunal found that the appellant was not on a "stop list" and will not face adverse attention from the authorities because his claimed (untrue) activities in Sri Lanka. However, at paragraph 33 the Tribunal found that the appellant would face persecution because he was gay, and he had particular mental health difficulties. It is submitted that this finding is contradictory and unsustainable.

15. Paragraph 2: It is not disputed that the appellant is gay but even the Tribunal accepted that the worst treatment the appellant faced for this on return to Sri Lanka was discrimination. The determinative issue appears to be the appellant's additional mental health problems. However, it is

submitted that it is unclear whether the appellant fits into any particular social group. It is submitted that gay men with mental health problems do not demonstrate an immutable characteristic. If the appellant does not fit into a particular social group, he does not have a Convention reason. Therefore the decision on his refugee status cannot stand.

16. Paragraph 3. It is submitted that the Tribunal's approach to the medical evidence was flawed and unsustainable. The Appellant provided only GP records for four weeks from 17/02/2020. He provided a letter from Talking Changes dated 14/07/2020 to show he completed his treatment with them and that they discharged him. He provided a psychiatrist report dated 7/12/2021. It is submitted that based on the available evidence, the Appellant could receive treatment for his mental health in Columbo, the CPIN on Sri Lanka, Medical Treatment and Healthcare (July 2020) at 8.1 states that there is a National Institute of Mental Health in Columbo, it is a state-run hospital dedicated to mental health. Part 8 of this CPIN was referenced extensively in the refusal letter. However, the Tribunal disregarded this. If the Tribunal had considered the full range of evidence it had, it may well have reached a different finding on the availability of treatment.

17. Paragraph 4: It is submitted that the Tribunal's approach to the psychiatrist report was particularly problematic as it failed to apply sufficient scrutiny to the medical evidence. The psychiatrist took what the Appellant had to say at face value and wrote his report without seeing a complete set of GP records. The psychiatrist report in this case was the one severely criticised in HA (expert evidence; mental health) Sri Lanka [2002] UKUT 00111 (IAC). However, the Tribunal appears to have either disregarded HA or failed to invite submissions on it. It is submitted that, given the significance of the psychiatrist's report in reaching the conclusion, the Tribunal's omission is fatal to the outcome.

18. Paragraph 5: It is submitted that the Tribunal's conclusions are flawed and inadequately explained. It is also submitted that they are not based on the appropriate legal tests. With regard to the human rights assessment the Tribunal appears to have had no regard to the high threshold of AM Zimbabwe. He has not shown that there would be a serious, rapid and irreversible decline in their state of health resulting in intense suffering or a significant reduction in life expectancy. It is submitted that the Appellant has not demonstrated that there is an absence of medical treatment or a lack of access to treatment in Sri Lanka.

19. In his oral submissions Mr Diwnycz referred to the decision in HA and that the report in that case had similar wording as in the report for the present appeal. He submitted that at the date the judge had heard the appeal, the decision in HA had been promulgated on 25 March 2022 therefore was a reported decision and should have been brought to the FtTJ's attention and that FtTJ Caskie should have been aware of it as it concerned the same medical professional. He referred to the written grounds and the absence of the GP records beyond those referred to. He went through the other documents, showing that the appellant did not have any suicidal

thoughts in February 2020 and that he had completed treatment in July 2020. He submitted that the issue was the acceptance of the report of the psychiatrist.

20. He further submitted that there was material in the CPIN to show that there would be medical treatment available, in particular the medication that the appellant took. He submitted that the conclusions reached were flawed and that the medical condition was not sufficiently serious to cross the threshold of article 3 serious harm.

21. It is right to record that he accepted later in the hearing that the decision HA was not published until after the decision of FtTJ Caskie was promulgated when the dates were later checked on the tribunal website.

22. Mr Jafar relied upon the Rule 24 response that had been submitted prior to the hearing.

23. In his oral submissions, Mr Jafar submitted that there is no error of law in deeming that the psychiatrist was an expert and that by reference to HA this was made to specific deviations whereas here the psychiatrist had reports and letters from different agencies which he took into account in reaching his diagnosis. He pointed to the entry in the GP records that whilst in February 2020 there was no suicidal thoughts, that was different from the next entry on 16 March 2020 although there was no intent. The psychiatrist had undertaken an actual examination of the appellant and took into account the records and counselling letters that were before him, and this was a report that was based on his own examination and diagnosis based on the application of the DSM criteria. He submitted that there had been no contradiction between the GP records and the report of psychiatrist but that he had identified a deterioration in his condition since the GP records and counselling.

24. He further submitted that the judge did not have HA and there was no challenge to the report and the respondent should have made the point if they believed it undermined the report. He further submitted that HA was not a country guidance decision, and it could not be an error of law to not refer to a reported decision and that it was a matter for the respondent to put to the judge what material was relied upon, and that the respondent did not seek to undermine the report of the psychiatrist. He referred to paragraph 9 of the rule 24 response, and this is a case where both parties were legally represented.

25. Mr Jafar referred to an unreported decision at paragraph 6 where the tribunal held that the judge erred in dismissing the report of the same psychiatrist. He submitted that the psychiatrist was an appropriate expert and if the respondent wanted to reject the report he would have to raise those criticisms.

26. Mr Jafar took the tribunal through the medical records and the other material relevant to the appellant's mental health and by reference to the report of the psychiatrist identifying that there had been a change of deterioration in his condition as noted by the psychiatrist. He further

submitted that the decision of FtTJ Caskie was not reliant on the risk of suicide, but that it concerned the appellant's mental health taken together and for the reasons that he set out between paragraphs 30 – 31. At paragraph 34, FtTJ Caskie applied the country guidance case that it was a question of fact whether a particular individual would reach the risk necessary for international protection. He had before him the relevant CPIN which had been set out in the decision letter and where it was noted at 2.4.33 that whilst there was societal discrimination and abuse it was necessary to consider whether there were particular factors relevant to a person which would make the threats serious by its nature. In this case the appellant had a vulnerability which was relevant which FtTJ Caskie was entitled to take into account. Mr Jafar referred to the relevant paragraphs of the CPIN to demonstrate the type of harassment, discrimination and abuse and persecution that had been demonstrated, both in society and by the authorities- facing discrimination in accessing employment, housing and health (see paragraphs 2.4.13-2.4.14, 2.4.15, 2.4.27, 2.4.20,). Reference was made to law enforcement and the culture of arbitrary arrest and detention (4.2.5) and at 4.26 the human rights watch report and NGO and the medical examinations that were described in that paragraph; 4.2.7 referred to the detention and mistreatment of 6 men. Further references were made to a large number of paragraphs within the report including corrective treatment.

27. Mr Jafar submitted that the appellant had a severe mental health problem and in the light of discrimination being unabated others may not be affected who were not mentally unwell, but this was the determining factor in the case.

28. Mr Jafar returned to his rule 24 response and in particular the authorities set out at paragraphs 7, 8, 9 and 10, 11 and 12 and that in giving reasons the FtTJ was required to resolve the issues which he did and that the grounds did not show any error of law, but the respondent was seeking to reargue the claim. He submitted that FtTJ Caskie was entitled reach the conclusion that he did.

Decision on error of law:

29. The core of the respondent's grounds and the oral submissions made relate to the FtTJ's approach to the psychiatric report dated 17 December 2021. The written grounds at paragraph 4 submit that the FtTJ failed to apply sufficient scrutiny to the medical evidence. It is stated that the psychiatrist took what the appellant had to say at face value and without seeing a complete set of GP records. The grounds further refer to the author of report as being severely criticised in the decision of HA(expert evidence: mental health) Sri Lanka [2002] UKUT 00111 (IAC) (" HA") and that the FtTJ's approach appeared to either disregarded HA or failed to invite submissions upon it. Either way it is submitted that the FtTJ's omission "is fatal to the outcome". Paragraph 3 also refers to the psychiatric report and the GP records and this was referenced on the same basis as set out at paragraph 4 of the grounds as relevant to the decision in HA.

30. In oral submissions, Mr Diwnycz made a number of points whereby he contrasted the medical report referred to in the decision of HA with the report in the present appeal. He submitted that this was a reported decision of a Presidential panel and therefore should have been brought to the tribunal's attention and that FtTJ Caskie should have been aware of it.

31. There is no error of law in the FtTJ's approach based on those submissions. Whilst HA was promulgated on 25 March 2022 it was not published and therefore available to FtTJ Caskie until the publication date of 21 April 2022 which was the date after the decision of FtTJ Caskie had already been promulgated. Contrary to paragraph 4 of the grounds, FtTJ Caskie did not disregard the decision as the chronology demonstrates that it was not published therefore it was not available to the judge. Furthermore in those circumstances there can be no criticism of FtTJ Caskie as the grounds set out for failing to invite submissions on this decision. The decision was plainly not available to the judge as it was published after he had promulgated his decision. In fairness to Mr Diwnycz, he accepted that the publication date was later when this was ventilated at the hearing. Nonetheless the grounds advanced on behalf of the respondent do not demonstrate that the FtTJ erred in law on that basis.

32. As to the further points raised in the grounds and oral submissions, it is submitted that the FtTJ's approach was flawed because the psychiatrist took what the appellant had to say at face value, and he had not seen a complete set of GP records (grounds 3 and 4 together). Mr Jafar in his rule 24 response and oral submissions relied on the point made that the respondent was aware of the contents of the psychiatric report and raised no objection to it either before the hearing or during the hearing.

33. In this respect there has been no evidence provided by the respondent as to what criticisms had been made as to the substance of the report to FtTJ Caskie or what challenges had been brought in respect of the report. Mr Diwnycz did not seek to rely on any outline of any challenge to the report which had been advanced before the FtTJ either via a transcript or note of evidence. In the absence of any note or transcript of the evidence, this matter can only be considered by the documents that were before the FtTJ and the decision of the FtTJ as they are the only sources available. FtTJ Caskie recited the contents of the ASA at paragraph 12 of his decision which expressly referenced the contents of the psychiatric report and cited the relevant parts. The FtTJ also referred to the contents of the medical report at paragraph 14 where he stated, "I have read and considered it in full." The FtTJ also set out the position of the respondent in the respondent's review at paragraph 13. There is no reference to the psychiatric report, or any challenge or criticism raised in that review. Notably the decision letter dated 6 September 2021, although it was written before the psychiatric report, accepted and acknowledged that the appellant was suffering from a mental health condition. When undertaking his analysis and conclusions on the evidence the FtTJ set out the respondent's position at paragraph 28 that the "appellant's credibility is at the heart of this appeal". The FtTJ stated in response, "I do not agree" and set out why, in his judgement, the more relevant evidence related to the

appellant's mental health and that it was not possible to "leave that aside" when determining the case. FtTJ Caskie must have meant when determining risk of harm on return (see paragraph 29) and then between paragraphs 30 – 33 he set out his reasoning why the appellant's mental health condition had established his entitlement to international protection "by a relatively small margin."

34. In this context the decision of TUI UK Ltd v Griffiths [2023] UKSC 48 sets out guidance at [70] as follows:

"(i) The general rule in civil cases...is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.
(ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.
(iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.
(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.
(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.
(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.
(vii) The rule should not be applied rigidly...Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial...
(viii) There are also circumstances in which the rule may not apply..."

35. It is reasonable to assume that if there had been any detailed criticism of the report that would have been apparent from the analysis of the evidence. Drawing those matters together, it has not been established by the respondent what criticisms were made of the report at the hearing. As Mr Jafar submits the respondent had the opportunity to challenge the report but does not appear to have done so or in the alternative it has not been demonstrated the basis upon which the challenge was made and FtTJ Caskie cannot be at fault for the respondent failing to put their case before him. He was entitled to give weight to the report as he considered was appropriate.

36. In response to the submissions made on behalf the respondent Mr Jafar took the tribunal through the medical report and the other medical

evidence available alongside the GP records. In doing so he was able to demonstrate that contrary to the submissions made by the respondent in the grounds, that the psychiatrist had reached his diagnosis and opinion by reference to the history of his previous medical condition which had been evidenced on the documents from at least November 2019. The psychiatrist undertook his examination of the appellant on 1 December 2021 and referred to seeing the counselling letters and the "medical records" (see page 5). He undertook his assessment of the appellant by taking a history (see page 8) and that "he had been suffering from depression anxiety due to his situation. He experiences feelings of hopelessness, helplessness and suicidal ideation. He is unable to sleep and waking up in the middle of the night. He experiences ongoing suicidal thoughts that life is pointless, and that he is scared to live, and that he is unable to bear his past experiences. He is trying to control himself, but he just feels lost, does not know how to get out of it. He has been under medication for depression and anxiety". The psychiatrist also recorded his presentation at the appointment at page 8 and that the appellant had explained his symptoms to him; "he is forgetful and unable to remember things and has been suffering with memory impairment. He is getting persisting in distressing flashbacks and intense reliving/prospects of the abuse he endured in Sri Lanka. He experiences feelings of hopelessness, helplessness and suicidal ideation." The report was based on his examination and took into account the DSM (IV) criteria (see page 9).

37. In reaching his diagnosis the psychiatrist did take account of the evidence from other medical professionals who had engaged with the appellant and his mental health condition. The psychiatrist referred to the medical records where it had been recorded by the GP that he was suffering from a depressive disorder (see page 8). As Mr Jafar pointed out, the medical records the 2020, albeit not full records, referred to the appellant having a "history of depressive disorder" which was set out both in the record of 7 February 2020 and 6 March 2020. Therefore the condition had been treated prior to 2020 and this is supported by the counselling letter from November 2019 where it was recorded that he had completed an initial assessment and that it had been planned for him to attend the depression workshop managed by 2 practitioners and consisting of cognitive behavioural therapy. The other treatment/counselling referred to by the psychiatrist was also evidenced by the letters in the appellant's bundle from talking changes and letter from the hospital. The psychiatrist also compares his clinical assessment with that of the other professionals noting at paragraph 9 that he is assessment of being so fearful of a return as to cause severe depression anxiety and/or this has been caused by what trauma happened to him there also appears to be shared by the NHS mental health and primary care services that he has been in contact with and the NHS appears to concur that that the appellant was suffering from severe depression anxiety to the extent of requiring him to be prescribed antidepressants and being referred counselling. Whilst Mr Diwnycz relied on the grounds where it was said that the letter of 14 July 2020 stated he had completed treatment, I accept the submission of Mr Jafar that this ignores the contents of the psychiatric report which was completed much later in December 2021 who formed the opinion that the appellant had

suffered a deterioration in his mental health suggesting that he was "significantly psychiatrically ill and required urgent treatment." The psychiatrist's opinion was that he had developed a very serious mental illness and had mental psychiatric scarring in the form of clinical depression. He was also very concerned about his suicidality has expressed at the consultation (see page 9). The doctors opinion reflected on the past care/intervention and in his opinion that this may partly explain the inadequate treatment and the enduring and worsening nature of his mental health. This led to his overall opinion set out at page 9 and his diagnosis of a serious psychiatric disorder including major depression. Thus the report did consider the treating clinicians and there were no apparent contradictions in the report to that set out in the GPs records, but that he had found a change or deterioration in the appellant's condition due to the lack of treatment he considered the appellant required.

38. FtTJ Caskie referenced the contents of the report at paragraphs 12 and 14 as a document that he had read and "considered in full". Alongside the reference to the report he also referred to the other relevant evidence of the appellant's accessing medical treatment in the UK. His assessment of the report in the context of the appeal is at paragraphs 29 – 33 of his decision. It was reasonably open to FtTJ Caskie to accept the contents of the report and ascribe weight to it. He did not consider the report in isolation but considered it in the context of the other medical evidence (see paragraph 29). The summary of the medical evidence at paragraphs 29 and 31 was balanced and took account of the progress that the appellant had made with the social care intervention which had alleviated his condition and also that he was being prescribed with the standard drugs for serious depression. At paragraphs 31 and 33 FtTJ Caskie referred to the improvements made in his condition in 2020 but on the evidence found that his condition had deteriorated "so that the level of concern expressed by this psychiatrist reliant upon his professional expertise represents the most up-to-date assessment of the appellant's mental health and I accept what is said by the psychiatrist" (see paragraph 33).

39. For those reasons, the grounds do not establish that the FtTJ adopted a flawed approach to the medical evidence.

40. Insofar as it has been argued that the FtTJ disregarded material set out in the respondent's CPIN : Sri Lanka, medical treatment and healthcare (July 2020), the FtTJ expressly considered the issue of medical treatment, not just the availability of it but on the basis of whether the type of medical treatment necessary to the appellant was available (see paragraph 31 for his reasoning). The FtTJ referred to the evidence and that whilst he accepted there had been improvements in his mental health that it was "relatively unlikely the appellant will be to continue with that type of support if he returned to Sri Lanka as there is no evidence it is available. Where the Secretary of State refers to what she knows about the availability of care for those mental health problems including PTSD does not refer to the type of support the appellant benefited from in the UK I consider I am entitled to conclude it is not available. I do not consider the

Secretary of State would provide partial information… I note that the description provided the treatment that he has received involves not just been treated but also teaching him techniques that he would be able to continue to use even in Sri Lanka."

41. FtTJ Caskie had accepted that treatment would be available which is consistent with paragraph 8.5.2 of the CPIN, but he did not accept that the particular type of support that the appellant needed would be so available. Whilst the grounds challenge the reasoning, it should not be assumed too readily that a judge erred in law just because not every step in the reasoning is fully set out.

42. As to grounds 1 and 2, I accept the submission made by Mr Jafar that FtTJ Caskie was clear in how he assessed risk and the Convention reason. There was no dispute as to the appellant's sexual orientation as this was a preserved finding from the earlier decision. The FtTJ did not depart from the early findings of fact (see paragraph 32) where he expressly referred to there being no basis upon which he could interfere with those earlier findings. Therefore he did not accept that the appellant was on a "stop list" or that there would be any recorded history with the authorities. Contrary to the grounds the FtTJ was plainly aware of the country guidance decision in LH and IP(gay men: risk) Sri Lanka CG [2015] UKUT 00073 ("LH and IP") which he recited a paragraph 7 and also when setting out the issues raised in the ASA at paragraph 12. The part relied upon by the FtTJ was that " 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." In his analysis at paragraph 28, the FtTJ reasoned that leaving aside the appellant's mental health, even if his account was accepted, he would not succeed on the basis of the background evidence. However in his ensuing analysis the FtTJ concluded that a mentally healthy and robust individual facing the type of harm suffered by gay men in Sri Lanka would not be at risk of suffering treatment sufficient to meet the level of severity, but that on his assessment of this particular appellant on the evidence available he did not fall into that category due to his vulnerability by reason of his mental health condition and that as such he would be someone who "would be subject to the type of discrimination and harm previously described that for a mentally well individual would not be persecution or be in breach of his protected rights" (see paragraph 33). The FtTJ therefore concluded that the appellant would suffer persecutory harm or serious harm "as a result of the conduct of the authorities towards gay men generally in the context of this appellant specific mental health difficulties" and it was this which led to him allowing the appeal (see the last 2 sentences of paragraph 33). This is further explained paragraph 34 that on the facts as found and supported by the psychiatric report on the other material he concluded that if he returned to Sri Lanka he would face a sufficiently high risk to meet the international protection standard, that is the minimum level of severity. In his submissions Mr Jafar outlined the relevant background material found in the respondent's CPIN which postdated the CG decision and which the FtTJ had regard to at paragraphs 29, 33 and 34. Those paragraphs included references of 2.4.27, 2.4.30, 4.25, 4.2.7, 4.2.6, 4.6.6

to demonstrate the social conditions in Sri Lanka and the treatment. Mr Jafar also sought to rely upon an unreported decision of the Upper Tribunal (PA/04612/2017) where it was found there would be a real risk upon return relying on post CG evidence. That decision does not assist in determining this appeal, as each case depends on its own factual context.

43. I accept the submission made by Mr Jafar that whilst the country guidance decision held that in general the treatment of gay men in Sri Lanka does not amount to persecution or serious harm, it is a question of fact for the FtTJ whether for a particular individual it would reach the minimum level of severity, or what the FtTJ referred to as the international protection standard, and that it was reasonably open to the FtTJ to find that the general discrimination and harm faced by gay men as evidenced in the more up-to-date evidence when seen in the context of this particular appellant's vulnerability was the issue (see rule 24 response at paragraph 3 and the reference to Katrinak[2001] EWCA Civ 832). Mr Jafar referred to the CPIN in detail and at paragraph 5.1.7 where it was set out that there was significant social exclusion for being LGBTQI which had been perpetuated by social stigma, cultural traditions and attitudes. The FtTJ found that the appellant's medical condition was linked to his background which included his sexuality.

44. Having considered the decision the FtTJ was required to consider the evidence that was before the First-tier Tribunal as a whole, and he did so, giving adequate reasons for his decision on the material evidence available. The grounds of challenge amount to no more than a disagreement with the decision. The authorities in Mr Jafar's written response make it clear that the appellate court should not rush to find an error of law in the Judge's decision merely because the Upper Tribunal might have reached a different conclusion on the facts or expressed it differently. Where a relevant point is not expressly mentioned, it does not necessarily mean that it has been disregarded altogether. It should not be assumed too readily that a judge erred in law just because not every step in the reasoning is fully set out. Experienced judges in this specialised field are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically. In summary, I remind myself of the need for appropriate restraint before interfering with the decision of the FTT, particularly where the judge below has heard and assessed a range of evidential sources relating to an account. Not every evidential issue need be specifically addressed and there is no requirement to provide reasons for reasons. The FtTJ had regard to the evidence before him and gave adequate reasons for his decision . The decision reached by FtTJ Caskie might not have been a decision that every judge would have reached, in the words of Lady Hale "Appellate courts should not rush to find such misdirection's simply because they might have reached a different conclusion on the facts or expressed themselves differently" but the issue is whether this judge erred on the basis of the evidence before him.

45. Consequently the decision of the FtTJ did not involve the making of an error on a point of law, and the decision shall stand.

Notice of decision:

The decision of the FtTJ did not involve the making of an error on a point of law; the decision of the FtTJ shall stand.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

12 August 2024