Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA079832015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd May 2016	**On 8th June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SASS
(ANONYMITY DIRECTION MAINTAINED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
Appellant: Mr S Chelvan, Counsel; Hackney Law Centre
Respondent: Ms A Fijiwala, Senior Presenting Officer

DECISION

Framework of Appeal

1. The Appellant appeals against the decision of the First-tier Tribunal (the "FtT") dismissing his appeal against the Respondent's decision of 1 May 2015 refusing to

grant asylum and to remove him by way of directions pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002.

2. Permission to appeal was granted in the following terms:

> "It is arguable that (the FtT Judge) may have erred in reaching (its) finding that the appellant was not at real risk of persecution as a gay person in Sri Lanka. All the grounds may be argued".

3. The permitted grounds of appeal may be summarised as follows:

(i) Arguable error of law in the FtT's finding on risk from state actors in Colombo.

(ii) Arguable error of law in failing to address the

(iii) Arguable error of law in the assessment of the forced marriage issue.

4. Pursuant to Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 and by the agreement of both parties, I admitted certain fresh evidence namely the US State Department Reports for 2013 and 2014 (hereinafter the "USD Reports") which, were not before the FtT. These reports provided source material for information contained within the Home Office's "Country Information and Guidance for Sri Lanka: Sexual Orientation and Gender Identity" of September 2015**.**

5. Mr Chelvan, on behalf of the Appellant, developed all three grounds of appeal. On behalf of the Secretary of State Ms Fijiwala, in summary, sought to uphold the decision of the FtT on the basis of the governing previous Country Guidance decision of *LH and IP (gay men: risk) Sri Lanka CG* [2015] UKUT 00073 (IAC) hereinafter "*LH & IP*"), contending further that the missing persons report was immaterial and the assessment of forced marriage was within the bounds of rationality.

Error of Law

6. At the close of submissions, I reserved my decision which I now give. I find that the decision of the FtT suffers from errors of law such that it must be set aside. My reasons for so finding are as follows.

7. In respect of the first ground in respect of the assessment of risk from state actors, the FtT stated at [107]:

> "I find that there is discrimination from state actors against gay people in Sri Lanka, and Colombo, on the basis of the evidence placed before me by the appellant, but I do not find it to be of such a level that it amounts to persecution…"

8. The FtT recorded the respondent's acceptance that the Appellant is homosexual and had been threatened by his brother on account of his sexual orientation. The evidence included the Home Office's "Country Information and Guidance for Sri Lanka: Sexual Orientation and Gender Identity" publication of September 2015 (hereinafter the "CIG"). This postdates the decision in *LH & IP*. The CIG documents state actors perpetrating acts that would be persecutory, specifically acts by the police, particularly in Colombo, of harassing and assaulting and demanding bribes from LGBTI persons (at 2.5.1).

9. This was important evidence upon which the Appellant relied. However, it is not assessed or weighed anywhere in the decision of the FtT. Given its obvious importance, the decision is untenable on this ground alone.

10. As regards the second ground, concerning the missing persons report, the FtT's failure to examine the risk arising out of the authorities stopping the Appellant at the airport was not in dispute. It was argued, however, that it would be open to the Appellant to prevaricate if questioned about the missing persons report. I consider this submission most unattractive. Furthermore, this species of argument was rejected by the Supreme Court in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596, at [21-22] especially (in support of *Hysi v Secretary of State for the Home Department* [2005] EWCA Civ 711, [2005] INLR 602).

11. I conclude that the FtT's aforementioned failure constitutes a free standing error of law of unmistakable materiality to me and I was not persuaded that a person could be expected to avoid risk to themselves by lying to the authorities when questioned as to the reason for fleeing Sri Lanka, or as to why they were reported as a missing person. The omission is one of concern and in conjunction with the first ground points to a material omission that renders the judge's conclusion unsound.

12. I turn to consider the third ground, concerning the issue of forced marriage. The FtT expressly accepted, at [105], that "forced marriage is persecutory". The finding which follows, namely that the marriage proposed for the Appellant was not forced, is irreconcilable with the preceding findings at [59] which include that the Appellant –

> "… feels great pressure to do as his father requires of him, which was to marry … He has fled his father's wrath by coming to the UK. It is easier for him being so far away from his father, but defy his father he has".

13. In that light, the finding that the marriage is arranged and not forced is unsustainable to the point of irrationality.

14. It follows that the decision of the FtT must be set aside.

Remaking the Decision

15. I preserve the findings of fact of the FtT, save those contained in [105-115] that I have set aside. I remake the decision of the FtT allowing the Appellant's appeal for the reasons that follow.

16. The Appellant bears the burden of establishing that there is a real risk or reasonable likelihood of persecution for a Convention reason. In *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 (hereinafter "*HJ (Iran)*"), the Supreme Court considered the legal framework in relation to gay men claiming to be at risk of persecution because of their sexual orientation on return to their home country. Lord Rodger set out at [82] the approach to be followed, in such cases:

> "82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly". If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

17. All of the Supreme Court justices concurred in this approach: see Lord Hope at [35]; Lord Walker at [86]; Lord Collins at [100] and Lord Dyson at [108].

18. Thus a decision maker should consider the following questions and issues:

(1) Is it established that the individual is a gay man or would be perceived as gay in his own country?

(2) Is it established from the evidence that if a gay man lived openly he would be liable to persecution in his own country?

(3) Is it established that the individual would live openly and thereby be exposed to a real risk of persecution even if that could be avoided by living "discreetly"?

If so, the individual is a refugee.

(4) However, if the individual would live discreetly and so avoid persecution, the decision maker must ask why he would do so?

If he would choose to live discreetly simply because of social pressures or other factors not connected to persecution then the individual will not be a refugee. On the other hand, if a material reason for the individual living discreetly is his fear of persecution if he were to live openly as a gay man, then the individual has a well-founded fear of persecution and, all things being equal, is a refugee.

19. The question of discreet conduct was discussed in *HJ (Iran)* by Lord Hope at [11, 18], by Lord Roger at [82] (*ante*) and by Lord Dyson at [109-110]. The justices approved the Court of Appeal's unanimous decision in *Ahmed v Secretary of State for the Home Department* [1999] EWCA Civ 3003. See per Lord Hope's judgment at [18]:

> "18. In *Ahmed (Iftikhar) v Secretary of State for the Home Department*, [2000] INLR 1, 7-8 Simon Brown LJ said:
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> > "In all asylum claims there is ultimately a single question to be asked: is there a serious risk that on return the applicant will be persecuted for a Convention reason? … The critical question [is]: if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum."
>
> Nobody has suggested that there is anything wrong with these observations, as far as they go, and I would respectfully endorse them. They contain two propositions which the Secretary of State in this case accepts, and which I do not think can be disputed. The first is that attention must be focused on what the applicant will actually do if he is returned to his country of nationality. The second is that the fact that he could take action to avoid persecution does not disentitle him from asylum if in fact he will not act in such a way as to avoid it."

20. The decision in *HJ (Iran)* was considered recently by this Tribunal in *MSM (journalists; political opinion; risk) Somalia* [2015] UKUT 00413 (IAC) at [35-48] in particular. That decision contains a focussed and in-depth discussion of the concept

of 'forced modification' or 'discreet' behaviour of an asylum-seeker on return to their country. The Upper Tribunal considered that *Ahmed* was in harmony with the CJEU's decision in the joined cases of *C-199-201/12 X, Y and Z*, wherein the following was stated at [75]:

> "It follows that the person must be granted refugee status, in accordance with Article 13 of the Directive, where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution within the meaning of Article 9(1) thereof. The fact that he could avoid that risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect."

21. The Upper Tribunal stated as follows at [45]:

> "In short, the possibility of conduct entailing the avoidance of modification of certain types of behaviour related directly to the right engaged is irrelevant. Thus this possibility must be disregarded."

22. I give effect to the legal framework rehearsed above in the following way. I begin with the Respondent's acceptance that the Appellant is a person whose sexual identity is that of a gay or homosexual person. The Appellant did not previously wish to be an openly gay Muslim in Sri Lanka and so decided to leave the country and enrolled on a degree programme in France where he openly expressed his sexual identity and enjoyed a relationship with a bisexual male partner. The Appellant's marriage had been arranged for him when he returned to Sri Lanka to the daughter of a maternal uncle. The Appellant confessed his homosexuality to his mother. He did not wish to enter into the marriage as his father was pressuring him to do, and so he fled to the UK. The Appellant states that he cannot now return to Sri Lanka, either to live in Colombo or his village, because he has been outed as a gay man (see the previous findings at paragraph 83 of the First-tier Tribunal's determination).

23. Although the judge mentions the complaint raised by the Appellant that his sexual identity would be known by congregants at the mosque in Colombo, the judge does not grapple with this issue other than to observe that it is unfortunate that the Appellant's faith is intolerant of his sexuality and that he could equally encounter intolerant persons at mosques in the UK. Consequently, there is no finding on this issue at §§98-103. To my mind, the judge was not averse to the proposition that the Appellant would be recognised by congregants at mosques in Colombo given the Appellant's village was only 110km from the capital and given that the community was small, the family was well to do, and the community was a small and close knit one. This in harmony with my view that as the Appellant has been outed to his family and the religious community, he would not be able to live openly in Colombo (or practice his faith freely) given that his sexual identity is no longer secret.

24. My finding on this issue is fortified by the Appellant's evidence in interview, and in the above context, I observe the questions put to the Appellant at Q164-166 if his Asylum Interview Record and his answer which read as follows:

> Q164: Could you not return to Sri Lanka and relocate to Colombo?
>
> *A164: No*
>
> Q165: Why?
>
> *A165: Because I cannot have a life, because I cannot continue my religious activities, who are going to see me.*
>
> Q166: So you can't relocate because you can't live openly as a homosexual?
>
> *A166: Yes – no way, and I don't want to do that again.*

25. Consequently, it is clear from the previous findings and my own findings concerning the Appellant's evidence, that the first limb of *HJ (Iran)*, namely, "*whether the individual is a gay man or would be perceived as gay in his own country*", is met.

26. In relation to the second limb and whether the Appellant could live openly without being liable to persecution in his own country I find that the Appellant could not do so. As noted by the First-tier Tribunal, the most recent Country Guidance decision of *LH and IP (gay men: risk) Sri Lanka CG* [2015] UKUT 00073 (IAC) makes clear in its third headnote that "*in general, the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm*".

27. Mr Chelvan highlights that *LH & IP* was promulgated on 18 February 2015 and that its annex revealed that the panel's assessment within that Country Guidance case was made on the basis of evidence which included the US State Department Report of 2013 (published on 27 February 2013) and importantly the material considered included at the latest, material up to 8 August 2014, which was the final possible date for evidence and/or submissions. Therefore, the Tribunal's decision is correct as at that date. However, as with all matters and the passage of time, country situations can and do change. Mr Chelvan points out that the evidence he relied upon before the First-tier Tribunal post-dated the 8 August 2014, and could not have been before the panel in *LH & IP*, nor considered by it. He also highlights that the "*Ravichandran* guidelines" (see *Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97) would apply to this scenario, namely that the appellate authority shall act on the up-to-date information about country conditions pertaining at the time of the appeal. Indeed this submission is in keeping with the Practice Directions of the First-tier and Upper Tribunal of this Chamber that I am bound by, in particular, paragraphs 12.1 and 12.2 which state as follows:

> 12.1 Reported determinations of the Tribunal, the AIT and the IAT which are "starred" shall be treated by the Tribunal as authoritative in respect of the matter to which the "starring" relates, unless inconsistent with other authority that is binding on the Tribunal.

> 12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:
> (a) relates to the country guidance issue in question; and
> (b) depends upon the same or similar evidence.

28. In light of the above Practice Directions, in the present scenario, whilst paragraph 12.2(a) is met, 12.2(b) is not as the appeal does not depend upon the "same or similar evidence" as the Appellant's contention is that the country situation has either moved on or is made clear to the extent that *LH & IP* is not the final word on this matter. This is further supported by the previous decision of the Tribunal in *SI (reported cases as evidence) Ethiopia* [2007] UKAIT 00012 which states *inter alia* as follows in its headnotes:

> Subject to one exception, country guidance cases continue to give authoritative guidance on the country guidance issue(s) identified for so long as they remain on the AIT website as CG cases.
> However, the AIT Practice Directions make clear that a country guidance case may be departed from by an immigration judge, albeit only in strictly limited circumstances relating to fresh evidence.

29. The Appellant highlights that the US State Department's Human Rights Report for Sri Lanka 2013 which was before *LH & IP* contains a solitary paragraph under section 6 (which deals with Discrimination, Societal abuses and Trafficking in Persons) which concerns abuse against gay persons at page 51 of the Report. That paragraph states as follows:

> **Societal Abuses, Discrimination, and Acts of Violence Based on Sexual Orientation and Gender Identity**
> Same-sex sexual activity is punishable by a prison sentence of up to 10 years, and there were no legal safeguards to prevent discrimination based on sexual orientation or gender identity. In practical terms the criminal provisions were very rarely enforced. In recent years human rights organizations reported that, while not actively arresting and prosecuting members of the LGBT community, police harassed and extorted money or sexual favors from LGBT individuals with impunity and assaulted gays and lesbians in Colombo and other areas. Crimes and harassment against LGBT individuals were a problem, although such incidents often went unreported. Social stigma against LGBT persons remained a problem. There were reports that persons undergoing gender-reassignment procedures had difficulty amending government documents to reflect those changes. A civil society group that worked to advance LGBT rights reported close monitoring by security and intelligence forces.

30. In light of that evidence it is clear why the Upper Tribunal did not consider this a sufficient level of abuse to amount to persecution and due to its analysis at [110, 115] of *LH & IP*.

31. The Appellant, before the First-tier Tribunal and before me, relies upon the subsequent US State Department's Human Rights Report for Sri Lanka 2014 (USSD Report) which was not before the panel in *LH & IP*. Pages 62-63 of that Report now contain a similar first paragraph to the previous year's edition, but also a further two paragraphs, which all state as follows:

> **Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity**
> Same-sex sexual activity is punishable by a prison sentence of up to 10 years, and there were no legal safeguards to prevent discrimination based on sexual orientation or gender identity. Authorities very rarely enforced the criminal provisions. In recent years human rights organizations reported that, while not actively arresting and prosecuting members of the LGBT community, police harassed and extorted money or sexual favors from LGBT individuals with impunity and assaulted gay men and lesbians in Colombo and other areas. Crimes and harassment against LGBT individuals were a problem, although such incidents often went unreported. Social stigma against LGBT persons remained a problem. There were reports that persons undergoing gender-reassignment procedures had difficulty amending government documents to reflect those changes. A civil society group that worked to advance LGBT rights reported close monitoring by security and intelligence forces.
>
> In a March report by the Women's Support Group, "Sri Lanka: Not Gonna Take it Lying Down," 13 of 33 LGBT persons interviewed in the country between 2010 and 2012 admitted to having been the victim of some kind of violence at the hands of state agents. Interviewees noted police often utilized existing laws, such as the 1842 Vagrants Ordinance, to detain any individual deemed to be "loitering," which generally led to detention and at times physical and sexual abuse. Interviewees also noted that police and antigay groups also used penal code sections on "gross indecency" and "cheating by personation" to brand LGBT persons as "perverts and criminals." There was also a general perception in the LGBT community that police officers used blackmail and violence against persons they perceived to be homosexual, bisexual, or transgender. The report concluded that incidents of physical violence, both in the public and private spheres, remained underreported and undocumented and that LGBT persons who experienced physical violence "rarely seek compensation, redress or even counselling." Members of the LGBT community, the study stressed, felt they had "no access to redress."
>
> In September the International Gay and Lesbian Human Rights Commission released a "shadow report" on the conditions confronting the country's LGBT community as part of the review of the application and implementation of the ICCPR in Sri Lanka conducted by the OHCHR's Human Rights Committee. The report was based upon the previously cited Women's Support Group interviews. On September 3, the government issued a written response to the Human Rights Committee that addressed the protection of the rights of the LGBT community in the country, noting the constitution "protects persons from stigmatization and discrimination on the basis of sexual

> orientation and gender identities." The Human Rights Committee pursued the issue and asked the government to clarify what it had done to amend the constitution to include explicit protections based on sexual orientation and gender identities. In response Bimba Jayasinghe Thilakeratne, additional solicitor general with the Attorney General's Department, observed that the constitution "ensures equality for sexual orientation and gender identity" and stated "laws discriminating on the grounds of sexual orientation and gender identity are unconstitutional."

32. The Appellant prayed in aid the second paragraph in particular, highlighting that state agents now use violence and other unrelated legislative powers, such as the Vagrants Ordinance (which is distinct from section 377 of Sri Lankan Penal Code concerning anti-sodomy legislation) to target and persecute LGBT persons including gays. It was also contended that the evidence showed that physical and sexual abuse of gay men by state agents occurred and that the penal code was used to level criminal charges for gross indecency and cheating by personation. It was also highlighted that state agents act with impunity and that there was no redress for LGBT persons, alongside inequality in law for gay persons due to section 377 of the Sri Lankan Penal Code. Consequently, the law was being used to blackmail and commit violence against gays. These submissions are uncontroversial and rehearse what the above material says, which is more than was previously known when the Upper Tribunal promulgated *LH & IP*. I accept those submissions as unvarnished extrapolations of the text to which I have referred.

33. Furthermore, it is the fact that these excerpts are relied upon by the Respondent in her latest Country Information and Guidance for Sri Lanka on Sexual Orientation and Gender Identity of September 2015, that the Appellant submits places the background and objective material beyond question and firmly in the Appellant's favour. I am persuaded by this submission for the following reasons.

34. Whilst there is no complaint that the Respondent failed to consider the content of her Country Information and Guidance on the specific topic of Sexual Orientation and Gender Identity within her refusal letter, it is clear that the content of that guidance should be a matter of some bearing for both the decision-maker and an independent Tribunal on appeal, when considering the very topic that the guidance seeks to discuss. This is trite in view of *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12, wherein Lord Dyson stated as follows at [35]:

> "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute...".

35. This is supported by the guidance of the Court of Appeal in *ZH (Bangladesh v Secretary of State for the Home Department [2009] EWCA Civ 8* at [33] where Sedley, LJ reiterated "the legal obligation of government not to act inconsistently with its own

policy unless there is some good reason for doing so: see *British Oxygen v Board of Trade* [1971] AC 610".

36. The status of the Respondent's Country of Origin Information Guidance and Reports were the subject of comment coincidentally within *MSM (journalists; political opinion; risk) Somalia* [2015] UKUT 00413 (IAC) wherein the Presidential panel stated *inter alia* as follows at headnote 4 and [23] of that reported decision:

> "We consider that documents such as the CIG[1], the COI[2] and kindred reports should not be forensically construed by the kind of exercise more appropriate a contract, deed or other legal instrument. Reports of this kind are written by laymen, in layman's language, to be read and understood by laymen. Thus courts and tribunals must beware an overly formal or legalistic approach in construing them. Furthermore, reports of this type must be evaluated and construed in their full context, which – as in this case – includes previous and related reports upon which the text in question draws. Thus, in construing the relevant passages of this particular report, we must consider also the COI report..., the USSD report reproduced in part in the COI report and the other information sources identified…. These are all strands of the same web. We also take into account that reports of this kind, dealing as they do with matters of life and death and rights under Articles 2 and 3 ECHR, are generally prepared with care and couched in carefully selected terms. Approached in this way, we construe the Secretary of State's decision letter as acknowledging that journalists as a group in Somalia are, at present, at risk of persecution and/or treatment infringing Articles 2 and 3 ECHR".

37. In that context, it is interesting to note that the Country Information and Guidance on Sexual Orientation and Gender Identity (CIG) in the instant appeal also contains the above-mentioned excerpt from the USSD Report for 2014, which is telling of the importance given by the Respondent to that independent evidence from the USSD and that passage is presumably also "generally prepared with care and couched in carefully selected terms".

38. With that in mind, I remind myself that the panel in *LH & IP* stated in Appendix B at paragraphs 40-41 that the only documents issued by the Respondent that they possessed were her 2013 and July 2014 Operational Guidance Notes, which summarised the Respondent's position concerning risk emanating in Sri Lanka at that time. That is in stark contrast to her position today where she has discovered up-to-date evidence concerning the risk to LGBT persons in Sri Lanka and has taken the voluntary and correct position of explicitly adopting that evidence by inclusion at paragraph 2.4.2 of her CIG. That is a distinction that should not be taken lightly given the difference between OGNs and Country Information material, as noted by a panel of the Upper Tribunal in *MD (Women) Ivory Coast* CG [2010] UKUT 215 (IAC) at [264] wherein the following was stated *inter alia*:

[1] (Country Information and Guidance)
[2] (Country of Origin Report)

> "…The Country Information and Policy Unit of the Home Office last prepared an Assessment in October 2001. These were followed by a series of Bulletins, the last of which was published in June 2005. Since then, the Home Office's own material has been in the form of Operational Guidance Notes. These OGNs are not produced by the Country of Information Service. The current COIS reports are a selection of background material provided from sources other than the Home Office and without comment or analysis. Whilst the editorial selection of the passages is a matter of choice for the editor of the Report, (and therefore potentially liable to subjectivity), he comes from a part of the Home Office, RDS, that is independent of policymakers and caseworkers. The Research, Development, Statistics section of the Home Office describes itself as made up of specialist staff, communication professionals and scientists. The selection of material is subject to peer review and the overall scrutiny of the Chief Inspector of the Border Agency acting through the Independent Advisory Group on Country Information, formerly the Secretary of State's Advisory Panel on Country Information, (APCI). "

39. As is stated in the preamble to most CIGs, the guidance makes clear that the Respondent has vetted the source information contained within and "(c)onsideration has been given to the relevance, reliability, accuracy, objectivity, currency, transparency and traceability of the information and wherever possible attempts have been made to corroborate the information used across independent sources, to ensure accuracy".

40. The passages of direct relevance within the guidance to the instant appeal given the preserved findings and my own above appear to be as follows:

> 2.2 Do LGBTI persons from Sri Lanka constitute a particular social group (PSG)?
> 2.2.1 The Upper Tribunal (UT) in LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC) (18 February 2015), having regarded the provisions of articles 365 and 365A of the Sri Lankan Penal Code, recognised that gay men in Sri Lanka do constitute a particular social group (PSG) within the meaning of the Refugee Convention (para 123 (1)).
>
> 2.2.2 Whilst LH and IP found specifically that gay men constitute a PSG, all LGBTI persons in Sri Lanka should be regarded as forming a PSG because they share a common characteristic that cannot be changed and have a distinct identity in Sri Lanka which is perceived as being different by the surrounding society.
>
> 2.2.3 Although LGBTI persons in Sri Lanka form a PSG, this does not mean that establishing such membership will be sufficient to make out a case to be recognised as a refugee. The question to be addressed in each case will be whether the particular person will face a real risk of persecution on account of their membership of such a group.
>
> 2.3 Are LGBTI persons at risk of persecution or serious harm in Sri Lanka?
> 2.3.1 Although same-sex sexual activity is criminalised in Sri Lanka there have been no successful prosecutions and very few charges during the 50 years of the Sri Lankan state.

2.3.2 In general the level of discrimination and abuse faced by LGBTI persons in Sri Lanka is not such that it will reach the level of being persecutory or otherwise inhuman or degrading treatment. This was confirmed for gay men in the country guidance case of LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC) where the Upper Tribunal found that in general the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm (para 123(3)).

2.3.3 The Upper Tribunal in LH and IP found that there is a 'significant population of homosexuals and other LGBT individuals in Sri Lanka, in particular in Colombo' and that 'While there is more risk for lesbian and bisexual women in rural areas, because of the control exercised by families on unmarried women, and for transgender individuals and sex workers in the cities, it will be a question of fact whether for a particular individual the risk reaches the international protection standard, and in particular, whether it extends beyond their home area.'(Para 123(4))

2.3.6 There are reports that some LGBTI Sri Lankans can suffer sexual violence, emotional violence and physical violence at home and in public spaces. Examples of such incidents include: death threats, sexual assault, rape, physical attacks, kidnappings, as well as emotional and psychological abuse by public and private actors including, verbal humiliation, threats of family abandonment and being forced to end same-sex relationships (see Societal attitudes).

2.5 Are those at risk able to seek effective protection?
2.5.1 **There are no legal safeguards to prevent discrimination based on sexual orientation or gender identity**. Incidents of homophobia go unreported due to individuals wanting to protect their identities. **Police often misinterpret the laws on the basis of a person's appearance or behaviour and there have been reports of police assaulting, harassing and extorting money or sexual favours from LGBTI individuals with impunity, particularly in Colombo as well as other areas** (See Attitudes of state officials, Societal attitudes and State protection).

2.5.2 The lack of anti-discrimination legislation to protect the rights of LGBTI individuals has meant that they have no recourse to a remedy when particular laws are used against LGBTI persons in a discriminatory manner. Such discrimination is further enabled and promoted by the continued criminalisation, and therefore stigmatisation, of LGBTI persons. LGBTI individuals who are the victims of violence or hate crimes cannot report these crimes to the police without fear that their sexual orientation or gender identity will be exposed or highlighted, leading to further discrimination and marginalization and, potentially, in theory, to prosecution under articles 365 and 365A of the Constitution. LBGTI people who experience physical violence rarely seek compensation, redress or counselling from service providers who work with women who have experienced violence (See State protection).

2.5.3 **There is a general perception in the LGBTI community that police officers used blackmail and violence against persons they perceived to be homosexual, bisexual, or transgender**. **If the person's fear is of serious harm/persecution at the hands of the state, it is unreasonable to consider they would be able to avail themselves of the protection of the authorities**.

(My emphases supplied in bold)

41. In light of the above emphases, in my view it is clear that the evidence points to the authorities having demonstrated unlawful and criminal behaviour towards LGBTI individuals with impunity, most troubling of all being violence. The Report does not suggest that these acts are for any reason other than the sexual identity of the individuals harmed. In particular, I am troubled by the stance that there is an insufficiency of state protection for an LGBTI person whom fears persecution from the authorities. To my mind, that potential risk must flow to those who share that fear as a future risk of persecution or due to previous instances of persecution.

42. The guidance goes further and discusses the Attitudes of the state at section 4. The passages of direct relevance appear to be the following:

> 4.1.1 The US State Department's 2014 Country Report on Human Rights Practices (USSD Report 2014), Sri Lanka, published on 25 June 2015, noted that, 'Authorities very rarely enforced the criminal provisions. In recent years human rights organizations reported that, while not actively arresting and prosecuting members of the LGBT community, police harassed and extorted money or sexual favors from LGBT individuals with impunity and assaulted gay men and lesbians in Colombo and other areas. … '.
>
> 4.1.2 The same source further noted that:
> **'A civil society group that worked to advance LGBT rights reported close monitoring by security and intelligence forces. In a March report by the Women's Support Group, "Sri Lanka: Not Gonna Take it Lying Down," 13 of 33 LGBT persons interviewed in the country between 2010 and 2012 admitted to having been the victim of some kind of violence at the hands of state agents. Interviewees noted police often utilized existing laws, such as the 1842 Vagrants Ordinance, to detain any individual deemed to be "loitering," which generally led to detention and at times physical and sexual abuse. Interviewees also noted that police and antigay groups also used penal code sections on "gross indecency" and "cheating by personation" to brand LGBT persons as "perverts and criminals." There was also a general perception in the LGBT community that police officers used blackmail and violence against persons they perceived to be homosexual, bisexual, or transgender.'**
>
> 4.1.3 A report by the Kaleidoscope trust, Speaking Out, The rights of LGBTI citizens from across the Commonwealth, 2014, stated that, 'Although the law is rarely enforced it continues to be used to threaten and harass LGBTI people. A recent study by human rights organisation EQUAL GROUND found that 90 [percent] of trans people and **65 [percent] of gay men reported experiencing police violence based on their sexuality and/or gender identity**. The law still retains widespread support amongst lawyers and the police.'
>
> 4.1.4 A Shadow Report to the UN Human Rights Committee regarding Sri Lanka's protection of the Rights of LGBTI Persons (Response to List of Issues) Compiled by the Kaleidoscope Human Rights Foundation with the assistance of DLA Piper International LLP and Sri Lankan LGBTI Advocacy Groups, dated September 2014, stated:

> '**There have been reports of arbitrary arrests and detention by law enforcement officials and violent and abusive police behaviour. Although arrested LGBTI individuals have thus far not been charged or prosecuted, there have been reports of subsequent blackmail, extortion, violence or coerced sexual acts of individuals by police officers**. For example, in one reported cases two gay men were arrested by police in a public restroom in Colombo and taken to a police station. At the station, the police officers used derogatory terminology and accused the two men of having sex in the restroom. The police then drove the men to another location where the men were forced to pay a bribe to the police before being released. The transgender nachchi community is especially vulnerable to such victimisation, abuse and exploitation. The awareness that most LGBTI individuals will be unwilling and fearful to report such incidents and the subsequent lack of action by the State gives police officers the license to continue such practices.'
>
> (My emphases supplied in bold)

43. Paragraph 4.1.1 represents the same information that was before the Upper Tribunal in *LH & IP*, whereas paragraphs 4.1.2 confirms the content of the most recent USSD Report of 2014.

44. More troubling still is the statistic within 4.1.3 that 65% of gay men surveyed had reported police violence *based on their sexuality/gender identity* and the UNHRC findings of arbitrary arrests and detention, blackmail, extortion, violence and coerced sexual acts.

45. Again, in light of the above emphases and my observations, it is clear that the evidence points to the authorities having demonstrated a worryingly high percentage of violence and other criminal acts against gay men due to their sexual identity, confirmed by two independent sources, and relied upon by the Respondent in her own CIG.

46. Against that evidence she approves of, the Respondent would clearly need to show good reason why the Tribunal should not place weight upon the Respondent's own researched and carefully drafted CIG. Ms Fijiwala was unable to make any submission in this regard but instead stated that the evidence within the CIG was similar to that before the panel in *LH & IP* and was insufficient to cause departure from the position that the authorities actions did not amount to persecution. Ms Fijiwala further highlighted that in *LH & IP* the panel considered acts by the police but found that they fell short of persecution. She submitted that even if the Appellant was outed and others were aware of his sexual identity, he would not necessarily face persecution because there was a large gay community in Colombo, although she also accepted that this large community were not openly gay.

47. I am unable to accept Ms Fijiwala's submissions in reply. Ms Fijiwala gave no reason why the fresh evidence should not carry weight other than the suggestion that it was the same as that before the panel in *LH & IP*. That submission is wholly untenable. That much is obvious from a bald comparison of the passage before the panel in *LH & IP* and the evidence before me as carefully excerpted above. A closer analysis reveals that the tone and content of the Country Information from the Respondent has changed given that she has published a CIG which discusses in detail the reliable and verifiable material available to her which, on that evidence, points to acts of violence by the police against gay men, and to a 65% history of violence by a survey of gay men as well as coerced sexual acts, which are synonymous with rape and sexual violence. Whilst there is continued mention of harassment and extortion, that is of insignificance on its own, but combined with the aforementioned difficulties represents a growing trend in hostility towards the gay community. It is further noteworthy that the panel in *LH & IP* did not accept the evidence before it of harassment of gay men (see [115] of that decision) whereas the Respondent has since accepted and referred to that evidence herself in her own CIG.

48. Returning to the instant appeal, in the context of this appellant who has been outed to his family and the community, the second question in *HJ (Iran)*, namely, if a gay man lived openly would he be liable to persecution in his own country, has been answered in the affirmative owing to the above background evidence.

49. I am conscious of the fact that the evidence is partly-based upon statistical analysis, however, even on that basis, whether it be 13 out of 33 people as stated in the USSD Report or 65% of persons as mentioned in the Kaleidoscope Trust Report, those figures far outstrip the 1 in 10 chance concept espoused by Lord Roger in *HJ (Iran)* at [91-92] based upon the judgment of Sedley, LJ in *Batayav v Secretary of State for the Home Department* [2003] EWCA Civ 1489 at [38].

50. Turning to the remaining questions of *HJ (Iran)*, Mr Chelvan argued that if the first two limbs of *HJ (Iran)* were met, then in light of *MSM*, the Tribunal would not need to consider the remaining questions of *HJ (Iran)*.

51. Whilst this submission appears correct, in light of the binding nature of CJEU jurisprudence in the form of *X, Y and Z*, which the Presidential panel stated in MSM, however should I prove wrong in this approach (given that *MSM* is under appeal to the Court of Appeal I am told), I shall go on to consider the remaining questions of *HJ (Iran)*.

52. As to the question of whether it has been established that the appellant would live openly and thereby be exposed to a real risk of persecution even if that could be avoided by living "discreetly"; in my view, the answer to this question is clearly in

the affirmative given that the Appellant gave credible evidence and stated as early as his interview (referred to above) that he would not go back to living in secrecy anymore when this concept was put to him. Furthermore, to my mind, the Appellant would be unable to do so given that it was accepted that he has been outed.

53. Consequently, the question of discreetness being answered in the Appellant's favour alongside the previous two questions under *HJ (Iran)*, I find that there is a real risk or reasonable likelihood of persecution on return to Sri Lanka due to the Appellant's sexual identity as a gay man.

54. I do not propose to deal with the remaining issues and evidence raised by the Appellant given my decision above.

Decision

55. The appeal to the Upper Tribunal is allowed.

56. The decision of the First-tier Tribunal to dismiss the Appellant's appeal on asylum grounds and human rights grounds, under Article 3 of the ECHR involved the making of an error of law. That decision is set aside.

57. I remake the decision allowing the Appellant's appeal under the Refugee Convention and, because it follows, Article 3 of the ECHR.

Anonymity

58. The First-tier Tribunal made an anonymity order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which I maintain.

Signed Date 01/06/2016

Deputy Upper Tribunal Judge Saini