Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02206/2015

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 21 April 2017 **On 10 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

NISHANTHA JAYASEKARA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Bayati, of Counsel, instructed by Polpitiya & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

The First-tier Tribunal did not make an anonymity direction. I have not been asked to make one and see no justification for an order being made, so none is made.

Introduction

1. The Appellant appeals against the decision of First-tier Tribunal Judge Mark Eldridge (hereafter “the Judge”) dismissing his appeal against a decision of the Secretary of State

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refusing his protection claim, but allowing his appeal contrary to Article 8 of the ECHR. The Respondent cross-appeals against the Judge's decision allowing the appeal on human rights grounds.

Background

2. The Appellant is a national of Sri Lanka born on 19 April 1975. He entered the UK on 5 April 2011 with entry clearance conferring leave to enter as a student. He claimed asylum on 19 May 2015 on the basis that, whilst he is married with children in Sri Lanka; he is in fact gay and had multiple gay encounters in Sri Lanka and in the UK. In 2008, he was forced into resigning from his employment in Sri Lanka as his colleagues were suspicious of his sexuality and he eventually came to the UK as his marriage was intolerable. At the end of January 2015, he met his current partner and they have lived together as gay partners since March 2015. The Appellant's wife and other people in Sri Lanka have come to know that he is gay. His wife (as well as others) have displayed threatening behaviour towards him because of his sexuality and she has prevented him from speaking to his children.

3. The appeal was first heard before First-tier Tribunal Judge Moxon on 15 February 2016; his decision dismissing the appeal was set aside by the Upper Tribunal and remitted to the First-tier Tribunal for rehearing - hence the route by which the matter came before the Judge.

Decision of the First-tier Tribunal

4. There was no dispute and the Judge accepted the Appellant is gay and living with his partner in the UK in a relationship akin to marriage or civil partnership. There was also no dispute that as a gay man he would live openly in Sri Lanka. The Judge also accepted that the Appellant resigned from his media career in Sri Lanka because of his perceived sexuality, and that, he may be well-known within media circles but not to the general public. The Judge further accepted that the Appellant's sexuality had become known to his wife and that she regarded him as either gay or bisexual, and was open about her displeasure. Given these factual findings the Judge identified that the issue before him was whether the Appellant could live openly as a gay man in Sri Lanka without risk, or whether his enforced removal would infringe his human rights contrary to Article 8 (ECHR).

5. The Judge then turned to consider the Upper Tribunal's extant country guidance namely *LH and IP (gay men: risk) Sri Lanka CG [*2015] UKUT 00073 (IAC), and the Respondent's Country Information and Guidance (CIG) on Sexual Orientation and Gender Identity in Sri Lanka (v 1.0) dated September 2015. In respect of the latter the Judge stated (at [45]):

   "That document reflects the country guidance decision in LH and IP and that there is often discrimination against LGBT persons-obviously including gay men – and that the State is generally unwilling to provide protection to those likely to be subject to serious harm or persecution on the grounds of the sexuality or gender identity" (sic)

6. In consequence of this analysis the Judge concluded the background evidence did not undermine the application of <u>LH and IP</u> where it was found that *"in general the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm."*

7. In his omnibus conclusion, the Judge stated thus (at [47]):

   "I find it instructive to read the decisions taken about the individual Appellant's in LH and IP. Whist I accept that the Appellant would wish to live as an openly gay man in his home country and to be able to enjoy a partnership on that basis, I do not find that the realistic consequences of him returning and doing so would give rise to a risk of persecution or serious harm. In reaching this conclusion I accept that the circumstances in this appeal are different from the Appellants in the country guidance decision, who preferred to live a discreet life whilst safe within the United Kingdom, and that his circumstances will not be respected by his wife and others who believe him to be gay. He will be placed a disadvantage including the inability for any relationship to be recognised legally, and he is also likely to face discrimination but, even having appropriate concern and regard for the lower standard of proof demanded of him, I conclude this will not be to the level that requires international protection."(sic)

8. Accordingly, the appeal under the Refugee Convention failed.

9. The Judge went on to consider the Appellant's claim under Article 8 outside of the Immigration Rules ("the Rules") having found that the requirements of Appendix FM of the Rules could not be met. The Judge answered the first four <u>Razgar</u> ([2004] UKHL 27) questions in the affirmative and the issue thus boiled down to the question of proportionality. The Judge referred to section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and considered that the maintenance of effective immigration controls was in the public interest. The Judge found the Respondent had failed to serve a notice created to curtail the Appellant's leave, which led him to conclude that the asylum claim was lodged and the relationship commenced during a period of lawful leave, albeit the Judge recognised that his leave was precarious *"within the meaning of the 2002 Act"*. The Judge concluded that the Appellant's ability to speak English and his economic self-sufficiency through his partner were neutral factors and did not weigh in the interests of removal.

10. The Judge however concluded that there were *"insurmountable obstacles"* to family life continuing outside the UK. The Appellant's partner was a British citizen who had lived in the UK all his life. He was a pensioner with health concerns. He had no connections to Sri Lanka and he and the Appellant would face discrimination and harassment as a gay couple there.

11. Accordingly, the appeal succeeded on human rights grounds.

<u>Application for permission to appeal & Submissions</u>

12. Both parties applied for and were granted permission to appeal by the First-tier Tribunal on 9 March 2017. At the hearing both representatives made helpful submissions the sum of which can be summarised as follows.

On behalf of the Appellant

13. The Appellant's grounds contend that the Judge erred in not admitting an unreported decision of the Upper Tribunal containing information post-dating the country guidance case, which accepted inter alia, the evidence that the authorities continued to perpetrate unlawful and criminal behaviour towards LGBT persons with impunity. It was further argued the Judge erred in finding that the CIG reflected the country guidance and failed to address risk arising from threats received from the Appellant's wife and family members in Sri Lanka.

On behalf of the Respondent

14. The Respondent's grounds argued that the Judge was wrong to find the Appellant had extant leave when the relationship was formed as the curtailment notice had been effectively served on him. In the circumstances, the Appellant did not have leave and the Judge was bound, but failed to attach *"little weight"* to the relationship. Further, the Respondent argued the Judge failed to consider the possibility of the Appellant returning to Sri Lanka to apply for entry clearance to re-join his partner and that the reasons given for finding that family life could not continue outside the UK were inadequate.

15. In a Rule 24 Reply the Appellant opposed the Respondent's appeal and contended that the Respondent's grounds were a mere disagreement with the Judge's decision. It was also argued that the Judge was correct in holding the Appellant's leave had not been effectively curtailed by the Respondent.

<u>Discussion / Conclusions</u>

The Protection Claim

16. I am satisfied that the Judge erred in law in dismissing the protection claim on asylum grounds.

17. It is plain from the Judge's factual findings that on return to Sri Lanka the Appellant would live openly as a gay man in the face of threats particularly from his estranged wife and family who are aware of his sexuality. These were the essential ingredients of the factual premise upon which risk was to be assessed. Ms Bayati's complaint centres upon the Judge's conclusion that the Appellant was not at risk of serious harm and/or persecution and she criticises his approach to and his assessment of the background evidence.

18. Ms Bayati, who also represented the Appellant before the First-tier Tribunal, sought before the Judge to rely on an unreported decision of Deputy Upper Tribunal Judge Saini in which he departed from the country guidance. In her skeleton argument Ms Bayati prayed in aid paragraph 11 of the Tribunal's Practice Direction which applies when seeking to rely on an unreported decision. At the hearing, the Judge ruled in favour of the Appellant (it does not appear that there was any dissent from the Respondent's representative) and admitted the decision. However, during his deliberations, the Judge clearly changed his mind and excluded the decision citing Ms Bayati's failure with reference to the Practice Direction to *"(c) certify that the proposition*

is not to be found in any reported determination of the Tribunal, the IAT or the AIT and had not been superseded by the decision of a higher authority."

19. Ms Bayati, in her grounds and in her submissions before me, stated that she complied with (c) expressly before the Judge. There is no dispute that she did so. In my judgement, that was sufficient as the Practice Direction does not exclude the possibility of (c) being complied with expressly. Whilst I am thus satisfied that the Judge's reason for excluding the decision is procedurally flawed, the error, such as it is, is not material as he rightly recognised that this did not prevent the Appellant from relying on the CIG which he considered in any event.

20. Nevertheless, I am however satisfied that the Judge's consideration of the background evidence and the guidance in LH and IP is materially flawed, and that his assessment of risk was therefore inadequate.

21. In *LH and IP* the panel held, inter alia, at [123 (3) & (4)] that:

"Applying the test set out by Lord Rodger in the Supreme Court judgment in HJ and HT, in general the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm.

There is a significant population of homosexuals and other LGBT individuals in Sri Lanka, in particular in Colombo. 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."

22. The Appellant's case was that he fell outside the generality of such cases as there was a marked deterioration of the situation in Sri Lanka for an openly gay man who intended to live as such and, who had been outed and threatened by his wife and family. Reliance was placed on the CIG of September 2015, which I am told is the latest guidance, and relies on source materials that mostly post-dates the evidence considered by the panel in LH and IP. I accept Ms Bayati's submission that, generally, the evidence demonstrates that there has been a negative progression in the State's attitude towards LGBT persons in terms of abuse, arbitrary arrest, extortion and most significantly violence, and is not, as Mr Tufan submits, the same as the evidence before the panel in *LH and IP*.

23. The Judge's analysis of this evidence is stark and is dealt with in swift terms at [45] and rejected on the basis that the GIC reflects the guidance in *LH and IP,* in that, *"there is often discrimination against LGBT persons"*. In my view the Judge's analysis, such as it is, failed to properly engage with the evidence and was an inadequate assessment of the background evidence that was before him. That error is plainly material and is further compounded by the Judge's clear failure to assess risk in light of the Appellant's individual profile as an openly gay man, and to address the consequences that may befall him from his wife and family on account of his sexuality. To acknowledge as the

Judge did at [47] that the Appellant's *"circumstances will not be respected by his wife and others who believe him to be gay"*, did not sufficiently engage with and address the claimed risk posed to the Appellant.

24. It follows that the decision of the First-tier Tribunal under the Refugee Convention must be set aside.

25. In the event I reached that conclusion, Mr Tufan invited me to adjourn the hearing for the matter to be heard by a panel and made no further submissions on the individual merits of the appeal. Ms Bayati invited me to remake the decision on the evidence, which I consider is the appropriate course. I am not remaking the decision on any general point of principle. I thus see no reason why I should not remake the decision on the facts appertaining to this Appellant on the evidence before me.

Remaking the Decision

26. In remaking the decision, I have borne in mind that the burden is on the Appellant to show that there is a real risk of persecution and/or serious harm in the event of a return for a Convention reason. In LH and IP it was confirmed that *"gay men in Sri Lanka constitute a particular social group."* There is thus no dispute that the Refugee Convention is clearly engaged.

27. I see no reason why any of the Judge's factual findings are in any way undermined by the arguments before me. I summarise them as being acceptance that the Appellant is a Sinhalese gay man from Colombo who has engaged in multiple gay relationships in Sri Lanka and in the UK. He is living openly as a gay man in the UK and will do so in Sri Lanka where his sexuality is known to his wife and family who have threatened him and who will not be discreet about it.

28. These factual findings must be considered within the legal framework applicable in such cases as enunciated in *HJ (Iran) v Secretary of State for the Home Department [2011] 1 AC 596.* Lord Hope at [35] set out (in his own words concurring with Lord Roger at [82]) the approach to be followed in such cases:

> *"This brings me to the test that should be adopted by the fact-finding tribunals in this country. As Lord Walker points out in para 98, this involves what is essentially an individual and fact-specific inquiry. Lord Rodger has described the approach in para 82, but I would like to set it out in my own words. It is necessary to proceed in stages.*
>
> *(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.*
>
> *(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does.*

Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

(c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.

(e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in Januzi v Secretary of State for the Home Department [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum."

29. In view of the facts as found the Appellant is gay and that is known to his estranged wife and others in Sri Lanka. The issue of living "discreetly" does not necessarily arise in this case as there is also no dispute the Appellant would live openly as a gay man in Sri Lanka. In any event, as the Tribunal held in *MSM (journalists; political opinion; risk) Somalia [2015] UKUT 00413 (IAC)*, *"forced modification"* or *"discreet"* behaviour is a possibility that must be disregarded.

30. The next and crucial question that I must consider is how others will react to the Appellant living openly as a gay man and whether from the nature of any reaction he would be liable to persecution. The Respondent's position is, that the Appellant can live openly without being liable to persecution. For the reasons set out below I find that the Appellant could not do so.

31. My starting point is the panel's assessment and conclusions in *LH and IP*.

32. At [107] the panel noted that *"the question whether there is a risk of persecution in the HJ and HT sense is one of fact, having regard to the evidence of what actually happens in Sri Lanka."*

33. In answering that question the panel based its assessment on background evidence depicting the events on the ground from 2002 to August 2014 (see Appendix A). Following consideration of that evidence the panel stated as follows:

"110. *The risk for gay men is not, we consider, at the level of persecution or serious harm in Sri Lanka as a whole. The legal potential of sanctions underlies the instances of the police arresting homosexual men and subjecting them to abuse, sometimes violent, and to*

extortion. ***Although the examples to which we have been referred appear to us to be generally credible, they are few, they date back over a period of up to 8 years, and the same ones are cited repeatedly in the various reports. The level of abuse in the reports generally falls short of the level of persecution.*** *The main exception is the allegation that the police sometimes rape gay men in custody. That allegation was not established by specific instances, save for the transgender individual in the student research example, which tends to support the drawing of a distinction between the treatment of transgender individuals and that of gay men in general. The evidence suggests that such risks as there are apply more to some homosexual men than for others. The examples cited and the general opinion of the experts centre on transgender persons, commercial sex workers, and visitors to cruising areas or other homosexual pick up venues.*

111. The state has little or no interest in recording such matters. There are no official statistics. Numerous members of the LGBTI community confide in Equal Ground, but it is a relatively small organisation in a country with a large population. We conclude that instances of abuse of members of the LGBTI community are underreported. ***Taking that into account, and accepting that there are some incidents at the serious end of the scale, including rape, the appellants have not been able to point to more than a few specific instances at or near the level of persecution.*** *These appear to arise from opportunism and exploitation, not from systematic hostility.*

112. We find force in the argument that in such cases as are recorded there is a failure of state protection. The perpetrators named in most if not all of the instances cited to us are police officers. There is no evidence that such abuse is ordered from a high level, but nor is there any evidence that the state does anything to stop it. On the contrary, the perpetrators, as far as we can see, enjoy complete immunity.

………….

115. We do not accept the submission for the appellants that LGBTI groups, due to their nature, are from time to time the subject of harassment or raids by the Sri Lankan authorities. As the circumstances of the closure of CoJ ("Companions on a Journey") emerged in evidence, this attracted homophobic publicity, but we find from Ms Flamer-Caldera's evidence that the closure was more closely related to an inquiry into allegations of embezzlement, rather than being a homophobic crackdown by the authorities. Pride events are arranged and staged with great care, but they happen regularly, under secure conditions but not in secret.

………….

118. ***The evidence of general persecution of gay men thus amounted to a low number of serious incidents.*** *Equal Ground is the immediate or underlying source for almost all of that information.* ***While we have accepted that there is under-reporting, we are unable to agree that the incidents involving gay men are of a scale, frequency or pattern to constitute a general risk of persecution. Although there is a lack of state protection, there is no evidence of serious harm except in those isolated instances. There may be a few members of the wider LGBTI community who suffer difficulties at the level of persecution, but the evidence is not there to indicate that it is only because they are gay men."***

(Emphasis added.)

34. It is perhaps not surprising given the extent of the evidence before the panel that it concluded, inter alia, that whilst there was a failure of state protection in cases of

recorded abuse, *"in general the treatment of gay men in Sri lanka does not reach the standard of persecution or serious harm."* However, the panel also recognised that *"it will be a question of fact whether for a particular individual the risk reaches the international protection standard."*

35. It is that very issue that I am invited to assess in the instant appeal.

36. I assess the Appellant's appeal as at the date of hearing applying, as I am bound to do, any extant country guidance. In this regard, the Practice Directions for the First-tier and Upper Tribunal (IAC) 2011 states:

"12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters CG shall be treated as authoritative finding on the country guidance issue identified in the determination, based on the evidence before the members of Tribunal 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"

37. Ms Bayati submits the country guidance is not determinative of the Appellant's appeal and reliance is placed on 12(b) not being met. She contends that the CIG is set on evidence that post-dates that assessed by the panel in *LH and IP* and demonstrates that for an individual with his accepted characteristics and profile, that he will be liable to persecution because of his sexual identity.

38. The passages relied upon by Ms Bayati as being of direct application are as follows:

"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)) 2.3.4 LGBTI persons frequently face discrimination in accessing employment, housing and health services. Sexual harassment at work and hate speech and vilification of LGBTI communities by media and public officials is reported to be common (see Attitudes of the state).

2.3.5 Male-to-female transgender women and masculine-looking women of lower economic status report that police used the Vagrants Ordinance of the Sri Lanka Penal Code that

prohibits loitering in public to detain them (see Legislation and Implementation of legislation and Attitudes of the state).

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.

2.5.4 If the person's fear is of serious harm/persecution at the hands of non-state agents or rogue state agents then effective state protection is unlikely to be available. The evidence is that the state is unwilling to provide protection to those subject to serious harm/persecution on grounds that they are LGBTI. Decision makers need to consider each case on its facts. The onus is on the person to demonstrate why they would not be able to seek and obtain state protection.

39. The guidance further states the following regarding the attitude of the Sri Lankan authorities towards LGBT persons:

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.

4.1.5 As noted in the International Gay & Lesbian Human Rights Commission (IGLHRC) shadow report of October 2014: 'Section 365A of the Penal Code Amendment Act No 22 of 1995 prohibits "any act of gross indecency" in public or in private. The law is used to criminalize adult consensual same-sex relations. Section 399 of the Penal Code penalizes "cheating by personation" and is used to criminalize transgender men and women, masculine-appearing lesbians, and individuals who cross-dress. The Vagrancy Ordinance of 1842 that prohibits loitering in public is used to detain transgender women and men because they look different… 'The State grants police officers broad authority to interpret and enforce these laws, often leading to discriminatory application and often also wrongful application on the basis of a person's appearance or behavior. Masculine-looking lesbians reported being targeted by police under Section 399 of the Sri Lanka Penal Code for

"cheating by personation." Several misrepresentation cases have been brought to court because women were "discovered to be disguised as men" and their "true" sexual identity was exposed to the public. Male-to-female transgender women and masculine looking women of lower economic status also reported that police used the Vagrants Ordinance of the Sri Lanka Penal Code to detain them. Detention and release was often conditional on paying a bribe. Same-sex couples in Sri Lanka spoke of difficulties obtaining pension schemes and bank loans on the basis of shared income with their same-sex partners.'"

40. While the representatives agreed that paragraph 4.1.1 of the CIG represents the same information that was before the panel in LH and IP, and paragraph 4.1.2 confirms the content of the US State Department Report of 2014, I accept Ms Bayati's assessment that the CIG demonstrates that there has been a negative progression in terms of the evidence of abuse (physical and sexual), arbitrary arrest, extortion and violence against LGBT persons including gay men by state agents. The evidence further highlights that the penal code is used to level criminal charges for gross indecency, and that state agents acted with impunity with no redress for LGBT persons, in a climate where the rule of law bred inequality for gay persons and was used to commit violence against such persons.

41. Ms Bayati placed emphasis on paragraph 4.1.3 in particular, which reports that 65% of gay men surveyed had reported police violence based on their sexual identity and the UNHCR findings of arbitrary arrests and detention, blackmail, extortion, violence and coerced sexual acts. I agree that this is a high percentage of violence and other criminal acts against gay men because of their sexual identity. The question is whether that high percentage constitutes a real risk. Ms Bayati draws from the analysis of Lord Roger in *HJ Iran* at [91] citing Sedley LJ in *Batayav v Secretary of State for the Home Department [2003] EWCA Civ 1489, [2004] INLR 126 at [38]*:

"If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening."

Getting away from metaphor, I suppose that it may be debatable whether a gay man would be at real risk of persecution (in the Convention sense) if, on returning to his own country, he would face a one in ten risk of being prosecuted and made to pay a fine, or sent to prison for a month. But if he would face a one in ten risk of being prosecuted and sentenced to death by public hanging from a crane there could be only one answer."

42. Adopting a quantitative analysis Ms Bayati submits that the figure of 65% exceeds the 1 in 10 chance espoused by Lord Roger in *HJ(Iran).* I agree.

43. In my judgement, the evidence points to the authorities having demonstrated unlawful and criminal behaviour and violence towards LGBT persons with impunity. The evidence does not suggest that these acts are for any reasons other than the sexual identity of the individual harmed. There is a recognised lack of state protection for such individuals. This potential risk and lack of protection must apply to persons such as the Appellant who hold a subjective risk of persecution.

44. I am satisfied that I can attach weight to the CIG given that such reports are *"generally prepared with care and couched in carefully selected terms"* - see MSM (supra) at [23]. Despite the care in which the terms of the CIG are couched and the importance given to that evidence by the Respondent by its very inclusion, she has not considered it in her refusal. Ms Bayati makes no formal complaint about that, but rightly points out, that the Respondent should have done so. Nevertheless, the failure does not prevent me from considering the guidance on appeal.

45. The background material that forms the foundation of the applicable paragraphs of the CIG that I cited earlier are taken from the following reports - US Department of State, Country Reports on Human Rights Practices for 2014 published on 27 February 2015; Kaleidoscope trust, Speaking Out, The rights of LGBTI citizens from across the Commonwealth, 2014; Kaleidoscope, 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, September 2014 and the International Gay & Lesbian Human Rights Commission (IGLHRC), Violence Against Lesbians, Bisexual Women and Transgender Persons in Sri Lanka, Presented to the 112th Session of The Human Rights Committee of the United Nations International Covenant on Civil and Political Rights (ICCPR), October 2014.

46. The Respondent's evidence before me thus contrasts considerably with that before the panel in *LH and IP* who had the Respondent's 2013 and 2014 Operational Guidance Notes (OGN) respectively, which summarised the Respondent's position at that time. As noted by a panel of the Upper Tribunal in *MD (Women Ivory Coast CG [2010] UKUT 215 (IAC*) the distinction between the Respondent's CIG and her OGNs are not without a difference. The fact that the Respondent has incorporated up-to-date evidence which she has vetted and researched (see page 2 of the CIG) into her guidance is a matter of some import. The Respondent puts forth no good reason why the Tribunal should not place weight upon the Respondent's researched and vetted CIG and as I indicated earlier I do so.

47. In the context of the Appellant's case, he is a Sinhalese man returning to Sri Lanka as an openly gay individual, who intends to live as such, and whose estranged wife and family have threatened him should he return. On that basis, in view of the evidence relied upon by the Respondent, which portrays a high percentage of violence and other criminal acts being committed against gay men because they are gay and, in part on a quantitative analysis, leads me to conclude that there is a real risk of persecution on return to Sri Lanka because of the Appellant's sexual identity as a gay man. Accordingly, I find that the Appellant is entitled to asylum.

48. I emphasise that this decision is not intended to be guidance about gay men in Sri Lanka generally. It decides that the Appellant has proved his case on his individual profile and the accepted facts in light of up-dated country evidence.

49. I therefore allow the appeal under the Refugee Convention.

The Human Rights Claim

50. In light of my findings that the Appellant is a refugee the argument that any enforced removal will infringe his human rights is academic, so I shall consider the Judge's decision on the hypothetical basis that he is not a refugee.

51. While the Judge's decision could have been clearer and more focused, I am not satisfied that he materially erred in law. The Judge's decision must be read in the following context. He found that there was family life between the Appellant and his partner - they had a close relationship and were living together since March 2015 in a relationship akin to a marriage or civil partnership. I set out earlier (at [9] and [10]) the Judge's reasons for concluding the question of proportionality fell in the Appellant's favour. An essential ingredient to the assessment was that both the Appellant and his partner would face discrimination living as a gay couple in Sri Lanka albeit not at a level crossing the threshold of persecution [47] & [63].

52. The Respondent's challenge (as pleaded in the grounds) to the Judge's decision centres around three issues. First, he was wrong in finding that the Appellant's leave had not been curtailed by the Respondent; second, that his reasoning was inadequate by his failure to consider the possibility of the Appellant returning to Sri Lanka to apply for entry clearance and third, that inadequate reasons were given for finding that it was unreasonable for the Appellant's partner to relocate to Sri Lanka.

53. These challenges to the Judge's decision are in my view without merit.

54. The Respondent's case before the Judge was that the relationship commenced at a time when the Appellant had no leave to remain in the UK. Thus it was argued the Appellant had no legitimate expectation that he would be able to continue the relationship in the UK [57]. In response to that argument the Judge noted that *"the Appellant was able through his solicitors to produce extracts from the Respondent's own records following an application for disclosure of the relevant file……..It is apparent from those records that the Appellant's leave was curtailed on 10 July 2014 but that the notice to him was "served to file". The records go on to state at the "time of embarking the subject did have substantive leave."* [57]

55. He continued at [58]:

    "I understand this to mean that the Respondent now accepts that while she created a notice to him about the curtailment of his leave, for whatever reason, this was never served upo.dn him and that she accepts that he continued to have substantive leave until 3 July 2015 (see page 6 of the decision letter). This has to mean in turn that he commenced his relationship with [his partner] whilst he was legally in the United Kingdom and, indeed, he claimed asylum while he still had that status, I so find. This is relevant for the assessment of considerations under section 117B."

56. The Respondent in her grounds argues that this is plainly wrong because the notice of curtailment was deemed to be served because she had no record of the Appellant's address. Reliance is placed on *"Article 8ZA(4) of the Immigration (Leave to Enter and Remain) Order 2000"*, but the applicable provisions are not set out therein. Helpfully, Ms Bayati does set them out in her detailed Rule 24 Reply. It is not necessary to set them out here as there is no dispute about them. Essentially, if the notice cannot be served on the Appellant or the service of such notice has failed then it is deemed to have been given.

57. The Appellant's case before the Judge was that the notice had never been served upon him. His address was known to the Respondent and to the college he was studying at before its licence was revoked. Ms Bayati reproduced the evidence that was before the Judge which fully supports his findings at [57] & [58]. The Respondent's bald assertion in the grounds that she did not have the details of the Appellant's last address does not sit comfortably with that evidence and no error of law can thereby be discerned. I am thus inclined to agree with Ms Bayati that the Respondent's challenge is misleading. Mr Tufan, whilst not conceding the issue, was unable to surmount a response. That is not surprising in view of the evidence produced by the Appellant. I am satisfied that the Judge was entitled to conclude that there had been no effective service of the notice of curtailment and so the relationship commenced whilst the Appellant was here lawfully. This challenge is plainly not made out.

58. As for the second ground, viz. the Judge's failure to adequately deal with the possibility of the Appellant returning to Sri Lanka and making a valid application for entry clearance, while I acknowledge that the Judge did not deal with the issue, in fairness, this was not a matter that was raised by the Respondent either in the refusal or at the hearing. Mr Tufan submits that this is nevertheless a material misdirection in law and reliance is placed on *R (on the application of Chen) v SSHD (Appendix FM- Chikwamba- temporary separation-proportionality) IJR [2015] UKUT 00189 (IAC).*

59. This ground is misconceived. It was never the Respondent's case that this was a Chikwamba situation since it has always been accepted that he failed to meet the requirements of the Rules, and could not hope to do so in an application for entry clearance. The reasoning in the decision was in no way predicated on a Chikwamba type logic, since there were no prospects of success upon an application for entry clearance. The whole point was that if the Appellant returned to Sri Lanka, there would be an effective severance of family life, unless the partner travelled with him. Further, as recognised in *Chen* a strong evidence-backed case may demonstrate good reason for departing from the general requirement of prior entry clearance. In my judgement, there were good reasons in this case on account of the Judge's conclusion that the Appellant and his partner would face discrimination on return. Even if, therefore, the Judge had considered the issue of entry clearance, it is unlikely given his findings that he would have reached a different conclusion.

60. This leads to the third ground and the complaint that the reasons given for the Appellant's partner being unable to relocate to Sri Lanka were inadequate. No particulars are given in the grounds as to why that is so. It is clear to any reader of this decision why the Judge concluded the Appellant's partner could not reasonably be expected to relocate at [62]-[63]. Those reasons, which I shall not repeat again here, were clear and adequately reasoned.

61. While Mr Tufan relied on the grounds he did not amplify them in any detail in his submissions. He submitted that the issue of whether the Appellant's leave was lawful or not when the relationship commenced was something of a red herring as the Judge was bound to consider the Appellant's precarious status. This submission is plainly wrong. The Judge was aware that the Appellant's leave was *"precarious within the terms of the 2002 Act"* and took that into account [62]. The Judge was clearly referring to section 117B of the 2002 Act - see [56] & [58] – and had regard to it. While the Judge did not spell it out, in view of his legitimate conclusion that there was family life, and that the relationship commenced at a time when the Appellant had lawful leave, the provisions of section 117(4) & (5) did not apply to him.

62. In his submissions Mr Tufan raised two further issues. First, that the Judge was wrong to apply an *"insurmountable obstacles"* test at [62] and further, was wrong to conclude that the Appellant was financially independent within the meaning of section 117B (3) given his financial dependency on his partner [59]. While Ms Bayati did not raise the issue, these are not matters upon which permission to appeal was granted, but as the representatives addressed the issues I shall deal with them.

63. While the use of the phrase *"insurmountable obstacles"* at [62] is unfortunate - it does not apply to a proportionality assessment outside of the Rules - it is clear in my view on a holistic reading of the decision that this does not undermine his conclusion that the Appellant's partner could not be expected to reasonably relocate to Sri Lanka. That conclusion was reached taking full account of and the weight to be attached to the public interest.

64. While I accept the Judge was wrong to conclude that the Appellant's economic self-sufficiency did not weigh in the interests of removal [59], it is apparent that even if the Judge had factored this into his assessment, it would not have made a material difference to the outcome; there being no evidence the Appellant was likely to be a burden on the State. It is sufficiently clear from the way that the decision is framed that the Judge did not in reality simply consider that section 117B was a sufficient answer to the issue of proportionality. In the context of the decision as a whole it is evident that the Judge did consider the other factors and simply considered that the public interest in maintaining immigration control had been outweighed. In an otherwise balanced consideration I find the error is not material.

65. I am thus satisfied that on a holistic reading of the Judge's decision that any errors, such as they are, are not material. The Judge came to a rational conclusion that was clearly open to him on the evidence. The Judge's decision in this respect shall stand.

Notice of Decision

I set aside the decision of the First-tier Tribunal dismissing the appeal on asylum grounds. I substitute a decision allowing the appeal under the Refugee Convention.

The decision of the First-tier Tribunal allowing the appeal on human rights grounds shall stand.

Signed Date 25 June 2017

Deputy Upper Tribunal Judge Bagral

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date 25 June 2017

Deputy Upper Tribunal Judge Bagral