



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
HU/19680/2019

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at Field House  
on 09 November 2021**

**Decision & Reasons  
Promulgated  
on 09 May 2022**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**D A**

**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Anonymity**

Pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family are granted anonymity because the case potentially involves protection issues. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or his family members, without that individual's express consent. Failure to comply with this order could amount to a contempt of court.

**Representation:**

For the appellant: Dr Chelvan, instructed by Jein Solicitors

For the respondent: Ms Z. Ahmad, Senior Home Office Presenting  
Officer

## **DECISION AND REASONS**

### *Procedural history*

1. The appellant entered the UK on 21 November 2008 with entry clearance as a student. He made an in-time application to vary his leave to remain to that of a Tier 1 (Post-Study) Worker. He was granted further leave to remain on that basis until 26 April 2013.
2. It is said that the appellant entered into a same-sex civil partnership with an EEA national living in the UK in November 2012. On 15 April 2013, shortly before his leave to remain expired, he applied for an EEA residence card. On 10 June 2013 the respondent issued a residence card that was valid until 10 June 2018. The appellant's partner was deported from the UK on 01 July 2016 following his conviction for a criminal offence. The appellant remained in the UK without him. On 21 March 2018 the appellant issued a petition for the dissolution of the civil partnership.
3. The appellant applied for a residence card based on a retained right of residence on 06 June 2018, but the application was rejected on 14 June 2018 due to an issue relating to the payment of the fee. A further application was submitted on 18 June 2018, which was refused on 12 September 2018 with a right of appeal. It is said that the appellant lodged an appeal on 21 September 2018.
4. Only a few weeks later, on 15 October 2018, the appellant submitted an application for Indefinite Leave to Remain on the basis of 10 years continuous lawful residence in the UK. Unhelpfully, the Home Office bundles produced in support of the appeal contain documents relating to the EEA application rather than the relevant application made under the immigration rules. It is unclear what representations, if any, might have been made with the application. However, it is reasonable to infer from the content of the decision letter that nothing was said about the appellant's new partner. The decision letter stated: 'You have not told us about a partner.'. The decision letter acknowledged that the appellant had expressed a fear of return to Sri Lanka because of his sexual orientation, but stated that he should make a separate application for leave to remain on protection grounds. It is unclear to what extent protection issues were set out in the application. There are good reasons why the respondent does not consider protection issues raised in such circumstances because a protection claim requires anxious scrutiny and is usually assessed by way of a detailed interview in which an applicant sets out their reasons for fearing to return to their country.

5. The appellant's civil partnership was dissolved on 06 December 2019. On 10 April 2019 the appellant withdrew the outstanding appeal against the decision to refuse to issue a further residence card.
6. The respondent refused the human rights claim made by way of the application for Indefinite Leave to Remain on the basis of 10 years continuous lawful residence in a decision dated 14 November 2019. The decision is the subject of this appeal.
7. The grounds of appeal lodged by Campbell & Co. Solicitors behalf of the appellant argued that (i) the appellant met the requirements of paragraph 276B of the immigration rules; (ii) the appellant had established a strong private life in the UK; (iii) the respondent failed to take into account the fact that the appellant was in a same-sex relationship with a new partner, the grounds stated: 'Homosexuality is not accepted in Sri Lanka', which was not considered in assessing whether there were exceptional circumstances under Article 8; and (iv) a generalised assertion that it would be disproportionate to remove the appellant from the UK.
8. In February 2020 Jein Solicitor notified the First-tier Tribunal that they had been instructed. At a case management hearing that took place on 06 October 2020 it was noted that the appellant had not put forward any information relating to the new relationship with the application and that this was therefore a 'new matter' that required the respondent's consent with reference to section 85(5) of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002').
9. In correspondence dated 27 October 2020 the respondent refused to give consent for the issue of his relationship with his new partner to be considered. It is said that the letter noted that his partner also had a pending immigration appeal. It was also said that the appellant raised protection issues in the grounds of appeal and in his witness statement, which was also a new matter that could not be considered.
10. Section 85(5) is phrased in mandatory terms, that the Tribunal 'must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so'. The only way to challenge the decision to refuse to give consent for the Tribunal to consider a new matter would be by way of an application for judicial review. An application for permission to bring judicial review proceedings must be made promptly or at least within three months of the decision that the applicant seeks to challenge.
11. The case was listed for case management hearing on 28 January 2021. Jein Solicitors applied for an adjournment on the ground that the appellant wanted continuity of representation with counsel. No adjournment was sought to challenge the decision dated 27 October 2020. It was agreed by counsel at that hearing (who also appeared at the subsequent hearing) that the case should be set down for a substantive hearing.

*First-tier Tribunal decision*

12. The hearing took place on 25 March 2021 before First-tier Tribunal Judge J.C. Hamilton ('the judge'). The judge dismissed the appeal in a decision promulgated on 18 June 2021. The appellant was represented by Mr Hingora of counsel instructed by Jein Solicitors. The judge summarised the evidence contained in the appellant's bundle, which included (i) unsigned witness statements from the appellant and his partner; (ii) the respondent's Country Policy and Information Note (CPIN) dated September 2020 entitled 'Sri Lanka: Sexual orientation and gender identity and expression'; and (iii) various documents relating to the appellant's education, finances and accommodation.
13. In his decision, the judge noted the procedural history including the Secretary of State's refusal to consent to the Tribunal considering the new matters. The judge recorded that the respondent's representative confirmed again at the hearing that consent was not given for the Tribunal to consider the new matter of the appellant's relationship with a new partner or protection issues [22]-[24].
14. The appellant's representative applied for an adjournment to allow time to apply for judicial review of the respondent's decision to refuse consent. I note that, at the date of the hearing, the extended three month time limit for challenging the respondent's decision dated 27 October 2020 had already expired. It was argued that it would be artificial to determine a human rights claim under Article 8 without considering the new relationship [43]-[44].
15. The judge considered the arguments put forward on behalf of the appellant and took into account the principles outlined in *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418. There was no indication of how long the adjournment might be for and it appeared to be an open ended request. He considered that he was able to deal with the long residence issue and could take into account the appellant's sexual orientation in so far as it was relevant to the assessment of whether the appellant would face very significant obstacles to integration for the purpose of paragraph 276ADE(1)(vi) of the immigration rules relating to private life [45]-[46].
16. The appellant's representative accepted that time spent in the UK under European law technically did not meet the requirements for continuous lawful residence under paragraph 276A of the immigration rules. However, it was argued that it should have been taken into account and discretion should have been exercised when considering whether refusal of leave to remain was a proportionate interference with his Article 8 rights [47]-[48].
17. Having noted these arguments, but not yet having made findings on them, the judge moved on to consider the arguments put forward in relation to the private life requirements under paragraph 276ADE(1)(vi) of the

immigration rules. He directed himself to the relevant case of *Kamara v SSHD* [2016] EWCA Civ 813 [49]. He went on to consider whether the appellant would be able to support himself financially in Sri Lanka either through work or support from friends and family members. The judge took into account the fact that the appellant was born and brought up in Sri Lanka. At the date of the decision he had lived in the UK for a period of 12 years. The judge concluded that it was unlikely that the appellant had lost ties to Sri Lanka. He appeared to still be in contact with his parents, who visited him in the UK in January 2020 and gave him money. In light of this evidence, the judge concluded that the appellant's parents would be able to assist him to reintegrate into life in Sri Lanka [55]. In any event, he was an educated adult who would be capable of finding employment and accommodation for himself [56].

18. The judge went on to consider the evidence contained in the CPIN to assess whether the appellant's sexual orientation might create 'very significant obstacles' to his integration in Sri Lanka. The judge noted that the CPIN was the most up to date information and that he was referred to other evidence in the appellant's bundle [57]. I note that, in fact, much of the evidence entitled 'Articles on Gay' in the index of the appellant's main bundle before the First-tier Tribunal related to the situation in Mauritius, where the appellant's partner comes from.
19. The judge summarised some of the main points drawn from the CPIN. There were no reliable figures of the number of LGBTQI+ people in Sri Lanka but one survey suggested that it could be around 5% of the population. The CPIN noted that the Upper Tribunal in *LH and IP (gay men: risk) Sri Lanka* [2015] UKUT 00073 concluded that in general the treatment of gay men in Sri Lanka did not amount to persecution [58(1)].
20. The judge observed that the evidence contained in the CPIN showed that anti-LGBTQI+ sentiment was ingrained in Sri Lankan society, where conservative views were held about sexual orientation and gender identity. LGBTQI+ people 'face stigma, discrimination, harassment, emotional and verbal abuse and forced heterosexual marriage'. Most LGBTQI+ people do not live openly because of social stigma. He referred to 'a report published in 2020' stating that prejudice and discrimination often meant that LGBTQI+ people failed to find suitable employment. However, the CPIN concluded that in general the level of societal discrimination and abuse faced by LGBTQI+ people 'is not sufficiently serious by its nature and repetition to amount to persecution' [58(2)].
21. Having considered the evidence contained in the CPIN report the judge went on to consider whether the appellant would live openly as a gay man in Sri Lanka. He noted that the appellant had not come out to his family. They openly disapproved of gay people. In light of this evidence the judge concluded that it was likely that the appellant would not tell his parents or other family members about his sexual orientation. The judge said that 'the reason for this is likely to be because he does not wish to

jeopardise his relationship with them or put them in a position where they perceive the family as being disgraced.’ [59]. The judge accepted that the appellant lived openly as a gay man in the UK and that the CPIN showed that living openly in Sri Lanka ‘is difficult and risky’. However, he concluded that if he lived in Sri Lanka the ‘primary reason’ why he would not live openly as a gay man would be to keep his sexual orientation a secret from friends and relatives [60]. Having considered the evidence as a whole, the judge concluded that the appellant would not face very serious obstacles to integration in Sri Lanka for the purpose of paragraph 276ADE(1)(vi) of the immigration rules [66].

22. The judge went on to conduct a full balancing exercise under Article 8 of the European Convention. He accepted that removal would interfere with the appellant’s right to private life, but having failed to meet the requirements of the immigration rules, there were insufficient compelling circumstances to outweigh the public interest in maintaining an effective system of immigration control. He concluded that removal would not amount to a disproportionate interference with the appellant’s right to private life under Article 8 [76].

#### *Grounds of appeal*

23. The appellant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. The application was lodged by Jain Solicitors, the same firm that represented the appellant before the First-tier Tribunal. The grounds of appeal were drafted by Dr Chelvan of counsel, who did not represent the appellant before the First-tier Tribunal. The grounds argued that the First-tier Tribunal decision involved the making of an error of law on the following grounds.
  - (i) The First-tier Tribunal erred in failing to consider the guidance in *JA (human rights claim: serious ) Nigeria* [2021] UKUT 97 (IAC). The grounds argued that the Upper Tribunal made clear that ‘protection issues can be addressed through the portal of Article 8 and paragraph 276ADE(1)(vi)’.
  - (ii) In assessing the risk on return to an openly gay man the First-tier Tribunal erred in failing to assess the impact of criminalisation in light of the Sri Lankan Supreme Court judgment in *Galabada* (SC Appeal No: 32/11) (30 November 2016) [citation added as not included in the grounds]. The First-tier Tribunal noted that the law did not criminalise being gay, but laws relating to gross indecency and acts against nature have been interpreted as criminalising same sex acts. The judge noted at [58(5)] that there was little evidence to show that the law is implemented or that individuals are prosecuted for same sex acts. The country guidance decision in *LH and IP* considered the COI from August 2014 and concluded that there was no evidence to show that there had been any prosecutions.

The second ground went on to make general submissions relating to the assessment of persecution and argued that the Tribunal's findings in *LH and IP* were 'plainly wrong' in light of the subsequent judgment in *Galabada*. Paragraph 2.4.10 of the CPIN from September 2020 noted that the case of *Galabada* showed that a single prosecution under section 365(a) of the Sri Lankan penal code had occurred in recent times (17 years ago), but asserted that the evidence still pointed to the fact that prosecutions on the basis of same sex activity are 'very rare'.

The second ground went on to argue that in light of the judgment in *Galabada*, the First-tier Tribunal had 'very cogent reasons' for departing from the country guidance case in *LH and IP*. The ground went on to make further general submissions on the effect of the Supreme Court's decision in so far as it disclosed the attitude towards so called 'conversion therapy' with reference to evidence contained in para 4.1.1 of the CPIN dated September 2020.

Included in the second ground was an application under rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 ('the UT Procedure Rules') to adduce a Sri Lankan Police Performance Report for 2018, which suggested that there had been 33 'prosecutions for homosexuality' in that year alone.

In light of this evidence it was argued that (a) the First-tier Tribunal's finding that there was no implementation of the law was 'wholly inaccurate'; (b) even if the law is not implemented then following the reasoning in *B and C v Switzerland* [2020] ECHR 812 (20 November 2020) [citation added as not included in the grounds] there was still abuse by state officials which indicated a lack of effective state protection, the Tribunal was still obliged to determine risk under Articles 3 and 8; and (c) the respondent's Asylum Policy Instruction on Sexual Orientation in the Asylum Claim (August 2016) provided a list of triggers (to what is unclear). It was argued that the First-tier Tribunal's failure to consider the Sri Lankan Supreme Court decision was a material error of law.

(iii) In finding that the 'primary reason' why the appellant would not live openly as a gay man, having recognised that living openly is 'difficult and risky', the First-tier Tribunal failed to consider whether at least one reason why the appellant might be discrete on return would be because of a fear of persecution.

24. First-tier Tribunal Judge Boyes granted permission to appeal to the Upper Tribunal in an order dated 22 July 2021, but gave no reasons for doing so save for a bare statement that the grounds were 'arguable'.
25. The respondent filed and served a rule 24 response dated 13 September 2021. It argued that the findings were open to the First-tier Tribunal to

make. Although the judge did not refer directly to *Galabada*, his finding that there was little evidence to show implementation of the law was at least consistent given that *Galabada* was evidence of a single prosecution. The judge was not referred to the decision in *JA (Nigeria)*. The appellant did not make a protection claim. The judge considered the evidence relating to the treatment of gay men in Sri Lanka. The appellant was legally represented and had failed to explain why the further evidence referred to in the grounds was not put before the First-tier Tribunal judge to consider.

26. In addition to the original grounds of appeal, which already ran to 15 pages, a reply was filed and served under rule 25 of the UT Procedure Rules, which ran to 17 pages. At [9] the reply inferred that permission was granted on all three grounds 'including the rule 15A application'. While the grant of permission was not restricted, it is a matter for the Upper Tribunal hearing the appeal to make a decision as to whether further evidence should be admitted pursuant to an application made under rule 15A of the UT Procedure Rules. It is not reasonable to infer from the grant of permission that the application to adduce further evidence that was not before the First-tier Tribunal had been granted.
27. The rule 25 reply did not make a formal application to amend the grounds, but attempted to lever in an additional point relating to the 'jurisdiction of the Upper Tribunal to rely on 2015 CG case of *LH and IP* following *Hydar*'. Even after oral argument at the hearing, the point was somewhat incoherent. It did not appear to relate to the jurisdiction of the Upper Tribunal hearing this appeal, but to the jurisdiction of the Upper Tribunal that heard *LH and IP*. Dr Chelvan argued that the appellants in *LH and IP* did not make protection claims through the proper process. The decision in *Hydar (s.120 response; s.85 'new matter'; Birch)* [2021] UKUT 176 (IAC) made clear that section 85 of the NIAA 2002 also applies to the Upper Tribunal. It was argued that the Upper Tribunal in *LH and IP* therefore did not have 'jurisdiction' (by this I infer that this means the consent of the Secretary of State) to determine the protection ground. Extrapolating from that argument, it was argued that the Upper Tribunal hearing this appeal 'cannot rely' on the country guidance in *LH and IP* because it was 'wrongly decided'.
28. The rule 25 reply went on to make six pages of submissions in response to the respondent's rule 24 response. Another rule 15(2A) application was made to admit further evidence in the form of an 'NASF - Equality Forum Paper' dated March 2021, which was written by Dr Chelvan. The reply stated that the paper was submitted to the Home Office National Asylum Stakeholder's Forum Equality Sub-group and was therefore a document that was already available to the respondent and did not cause any prejudice. No explanation was provided as to why this document was not included in the original rule 15(2A) application. Nor was any consideration apparently given to Dr Chelvan's professional duties in seeking to appear before the Upper Tribunal relying on evidence that he had prepared in another capacity.



## **Decision and reasons**

29. The first point to note is that this is an appeal against a decision made after the changes to Part 5 of the NIAA 2002 made by the Immigration Act 2014 ('IA 2014'). Because the appellant did not make a protection claim, the right of appeal was against the decision to refuse a human rights claim under section 82(1)(b) NIAA 2002. Section 84(2) states that an appeal under section 82(1)(b) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998: see *JA (Nigeria)*.
30. The second point to note about the presentation of this appeal is the shifting sands of argument and evidence. The original application for leave to remain was an application made on grounds of long residence. No mention was made in the original application of the appellant's relationship with a new partner nor is there any evidence to show that a protection claim was clearly particularised albeit the appellant may have expressed concerns about returning to Sri Lanka. When the application was refused, the grounds of appeal to the First-tier Tribunal only mentioned those issues in an oblique way in the context of submissions relating to 'exceptional circumstances' under Article 8. Although there might have been some force to the submission that there was little point in determining an Article 8 claim without considering salient factors such as the appellant's relationship with a new partner, the appellant's representatives failed to take the opportunity to challenge the respondent's decision to refuse consent for the First-tier Tribunal to consider those issues by way of an application for judicial review. By the time the appellant's representative applied for an adjournment to do so, the relevant time limits to challenge the decision dated 27 October 2020 had expired.
31. The third point to note is that none of the arguments now put in the grounds of appeal to the Upper Tribunal were argued before the First-tier Tribunal nor were the various pieces of evidence that are now the subject of applications under rule 15(2A) put before the First-tier Tribunal. Both the Police Performance Report 2018 and possibly the NASF - Equality Forum Paper (March 2021) could have been produced for the First-tier Tribunal hearing on 25 March 2021. No explanation has been given as to why those documents were not included in the evidence before the First-tier Tribunal if they were thought to be relevant. The way in which this case has been presented has not assisted the Upper Tribunal in determining the appeal. The arguments were put in such a way as to obscure rather than illuminate a case for the appellant. The overall tone was that counsel was seeking to reformulate the case before the Upper Tribunal that he thought should have been argued before the First-tier Tribunal, but was not.
32. For the reasons explained in more detail below, the convoluted argument relating to 'jurisdiction' was not the subject of an application to amend the grounds and appeared to be an attempt to undermine country guidance

based on weak and inappropriate arguments. Arguments of this kind fail to comply with the primary duty of legal representatives to assist the court or tribunal. It has taken a disproportionate amount of court time to untangle and address these arguments, leading to an unfortunate delay in producing this decision.

### *Ground 1*

33. The first ground fails to identify a material error of law in the First-tier Tribunal decision.
34. First, there is no evidence to show that the appellant's representatives put forward a case before the First-tier Tribunal to suggest that the appellant would be at risk of serious harm if returned to Sri Lanka let alone particularised any argument with reference to Article 3 of the European Convention. The original grounds of appeal only argued that 'homosexuality is not accepted in Sri Lanka'. Nothing in the appellant's witness statement suggested that he feared ill-treatment that would amount to serious harm. His statement repeated the assertion that 'homosexuality is not widely accepted in Sri Lanka'. The appellant said that he did not feel able to express his sexuality freely 'due to the cultural restrictions'. He asserted that living together in a same sex relationship was illegal in Sri Lanka. Although he mentioned that if he booked a hotel with a partner he might be declared a terrorist and be killed, there was little explanation as why this might happen nor any reference to evidence that might support such an assertion. Broadly speaking, the appellant's witness statement described legal inequalities and societal discrimination against LGBTQI+ people, which was consistent with the background evidence. However, it did not particularise a claim beyond those concerns.
35. Second, there is no evidence to suggest that the appellant's representative argued the case with reference to anything other than Article 8. It appears that no skeleton argument was prepared. Nothing on the face of the decision indicates that anything other than Article 8 was argued. Nor does anything in the judge's note of the proceedings suggest that anything other than Article 8 was argued.
36. Third, the First-tier Tribunal was not referred to the decision in *JA (Nigeria)*. The first ground fails to particularise how or why the case would have made any material difference to the approach taken by the First-tier Tribunal. The Upper Tribunal in *JA (Nigeria)* pointed out that within the context of an appeal brought against a human rights decision on the ground that removal would be unlawful under section 6 of the Human Rights Act 1998 the Tribunal would potentially have jurisdiction to consider whether there might be a breach of Article 3 or whether a risk of serious harm might be relevant to an assessment under Article 8.
37. It is difficult to see how the case of *JA (Nigeria)* would have made any material difference to the outcome of this appeal when no case was

argued with reference to a risk of serious harm under Article 3 or even appears to be now. It is clear from the decision that the judge considered the limited background evidence produced in support of the appeal and the relevant country guidance decision in the context of his assessment under paragraph 276ADE(1)(vi). In other words, he assessed what limited arguments were put forward relating to risk on return in the context of Article 8.

## Ground 2

38. The second ground of appeal is 10 pages long, makes lengthy submissions on the case of *Galabada*, and refers to background evidence that was not before the First-tier Tribunal. Although the decision in *Galabada* was mentioned in the CPIN there is nothing in the documents before the Upper Tribunal to suggest that the arguments now made in the second ground of appeal were put to the First-tier Tribunal. The second ground is an attempt to make a post-hearing case that was not put at the time.
39. Even if the judge had been referred to *Galabada* in more detail, the case showed that there had been a single conviction for gross indecency in a magistrates court in Sri Lanka for which the defendant was sentenced to one year imprisonment and a fine. The facts of the case involved the defendant conducting a consensual sexual act with a same sex partner in a vehicle parked in a public place. The Supreme Court noted that laws against 'gross indecency and buggery' were repealed in England and that contemporary thinking behind that repeal was that consensual sex between adults should not be criminalised. However, the Supreme Court made clear that 'the offence remains very much part of our law'. Nevertheless, the Supreme Court concluded that it was not appropriate to impose a custodial sentence in Mr Galabada's case because the act had been consensual and had taken place 13 years before (circa 2003). The sentence of imprisonment was nominally increased but replaced with a suspended sentence.
40. Even if the judge had considered the decision in *Galabada* in more detail of his own motion, which I consider he was not obliged to do if the argument was not put forward by the appellant's legal representative, it is highly unlikely that it would have made any material difference to his finding at [58(5)] of the decision. At highest *Galabada* showed that there had been single conviction for an offence of gross indecency, which in the end the Sri Lankan courts dealt with by way of a suspended sentence. The public nature of the act, and not the fact that it was a same sex encounter, was one that could risk prosecution even under UK law. For these reasons, it is not arguable that the limited evidence before the First-tier Tribunal at the date of the hearing was sufficiently cogent to depart from the overall findings in the country guidance decision of *LH and IP*. The difference between no known evidence of convictions and evidence of a single conviction with a suspended sentence is *de minimus*.

41. Dr Chelvan applied to rely on a Sri Lankan Police Performance Report for 2018 as evidence to show that there may have been a number of other convictions for same sex acts in Sri Lanka. The report was not before the First-tier Tribunal. No explanation has been provided as to why it was not produced at the time. Other evidence that was not before the First-tier Tribunal was also squeezed into a supplementary bundle for the hearing before the Upper Tribunal. Further evidence cannot be used to make a retroactive case that the First-tier Tribunal decision involved an error of law. If it is thought that further evidence is sufficiently cogent, the appropriate procedure for considering it at this stage is to make a fresh claim to the Secretary of State: see *Akter (appellate jurisdiction; E and R challenges)* [2021] UKUT 00272 (IAC).
42. For these reasons, I conclude that the second ground does not disclose an error of law in the First-tier Tribunal decision.

### Ground 3

43. The third ground argues that, having found that the 'primary reason' why the appellant would act discreetly if returned to Sri Lanka would be to avoid the disapproval of his friends and family, the judge should have considered whether at least one reason for the appellant acting discreetly might have been a fear of treatment amounting to serious harm or persecution.
44. The case was not argued on protection grounds nor did the scope of appeal allow for protection grounds to be determined. I accept that in so far as the judge touched on relevant principles drawn from the case of *HJ (Iran) v SSHD* [2010] UKSC 31; [2011] 1 AC 596 a person might be discreet for a range of reasons. As long as one of them is because the person fears serious harm or persecution as a result of living openly, then the Refugee Convention would be engaged. It would matter not if it is a primary or secondary reason.
45. I have set out the the limited case put forward by the appellant's legal representatives and the muted nature of the evidence given in his witness statement at [34] above. It is difficult to see how the third ground can succeed when the evidence before the First-tier Tribunal did not suggest that one of the reasons why the appellant might act discreetly was a fear of ill-treatment that was sufficiently serious to amount to serious harm or persecution. The appellant described societal disapproval and prejudice. The highest his evidence went was an unsubstantiated assertion that he might be accused of being a terrorist and killed, but that statement was limited in nature. The judge does not appear to have been referred to any such incidents relating to LGBTQI+ people in the background evidence which might support such an assertion. In the circumstances, I find that even if the judge failed to consider whether there were other reasons why the appellant might act discreetly it would not have made any material difference to the outcome of the appeal.

*'Jurisdiction' point*

46. In my assessment there are a number of problems with the argument that was raised for the first time in the rule 25 reply.
47. First, the point was raised late. No application was made to amend the grounds of appeal. Permission has not been granted to argue it.
48. Second, Dr Chelvan's broad assertion that the Upper Tribunal can consider an issue relating to jurisdiction at any point is correct: see *Virk & Ors v SSHD* [2013] EWCA Civ 652. However, when properly analysed the argument made in the rule 25 reply does not raise a proper point relating to the jurisdiction of this tribunal. At best it discloses a lack of understanding of the legal meaning of the term 'jurisdiction' and at worst is an attempt to lever in a late point through an improper argument.
49. The jurisdiction of a court of tribunal relates to the proper ambit of its powers. In the context of the First-tier Tribunal and the Upper Tribunal the jurisdiction is determined by statute. The scope of appeals before those tribunals, and therefore the jurisdiction in a particular case, is primarily drawn from the statutory scheme contained in Part 5 of the NIAA 2002 albeit there are some exceptions covered by alternative statutes and statutory instruments e.g. deprivation of nationality and EEA appeals. The statutory jurisdiction of the Upper Tribunal is also set out in The Tribunals, Courts and Enforcement Act 2007.
50. The key argument put forward in the rule 25 reply appears to be an assertion that the Upper Tribunal in *LH and IP* did not have jurisdiction to determine protection claims because no formal claim had been made. Somehow it was extrapolated from that argument that the country guidance was 'wrongly decided' and that the findings relating to the situation in Sri Lanka could not be relied upon. This is not the kind of jurisdictional argument that can be raised at a late stage without permission.
51. Nothing in the rule 25 reply identifies any jurisdictional point relating to this appeal, which is the only point that could be considered by the Upper Tribunal at such a late stage and without permission. As I have already noted at [29] above the decision that is the subject of the appeal is a decision to refuse a human rights claim. An appeal against such a decision is brought under section 82(1)(b) NIAA 2002 on the ground contained in section 84(2), that the decision is unlawful under section 6 of the Human Rights Act 1998. The respondent refused to consent to the First-tier Tribunal considering the new matters of (i) the relationship with a new partner; and (ii) protection issues in the absence of a formal claim. The appellant's legal representatives did not seek to challenge the decision to refuse consent by way of judicial review when they had the opportunity to do so. By operation of section 85(5) the scope of the appeal before the First-tier Tribunal was limited to human rights grounds. The First-tier Tribunal determined the

appeal on that basis. There is no basis to argue that the appeal was determined outwith the First-tier Tribunal's jurisdiction. The argument relating to the jurisdiction of the Upper Tribunal in *LH and IP* has nothing to do with the jurisdiction of the Tribunal in this appeal

52. Third, in any event the substance of the argument is flawed. Similar to this case, the appellants in *LH and IP* applied for leave to remain on human rights grounds and had not made formal asylum claims. The applications were refused on 21 April 2012 giving rise to a right of appeal under section 82 NIAA 2002, which at that time gave a right of appeal arising from different types of 'immigration decisions'. Once an appeal right was engaged it could be brought on any of a range of grounds under section 84, including Refugee Convention and Human Rights grounds. This formed part of what used to be known as the 'one-stop appeal' process in which appellants were encouraged to raise all issues relevant to their immigration status to be determined in a single appeal.
53. At the date when the First-tier Tribunal appeal in *LH and IP* was lodged section 85 NIAA 2002 stated that the Tribunal could consider any matter it thought relevant to the substance of the decision including evidence which concerned a matter arising after the decision. Those provisions were subject to exceptions set out in section 85A, which limited the temporal scope of evidence in cases involving applications for entry clearance (date of decision) and the Points Based System (date of application). On the face of it neither of the exceptions contained in section 85A applied to the appellants in *LH and IP*. At the date when the appeals were heard in the First-tier Tribunal in 2012 there was no statutory bar to the Tribunal considering new evidence relating to the grounds already considered by the Secretary of State or new grounds of appeal, including the ground that removal in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention. The First-tier Tribunal decision was set aside by the Upper Tribunal on 30 November 2012, but it seems that there was a lengthy delay before the cases were heard in August 2014 for the decision to be remade, and a further delay before the country guidance decision was finalised in January 2015. On the face of the statutory scheme in place at the time of the relevant immigration decisions, and when the appeals were heard, there was no statutory bar to the Upper Tribunal in *LH and IP* considering Refugee Convention grounds even if the appellants had not made a formal asylum claim.
54. Section 85A was repealed and section 85 amended in major changes to the appeals regime introduced through the IA 2014, which swept away the one-stop appeal process. The right of appeal is no longer determined by the type of immigration decision e.g. entry clearance, refusal of leave to enter, refusal to vary leave etc. Instead, appeal rights are triggered by the substance of a limited number of decisions e.g. refusal of a protection or human rights claim. The new wording of section 85 introduced a system whereby one of the parties to an appeal (the Secretary of State) could determine the scope of the appeal by giving or refusing consent for the

Tribunal to consider a 'new matter'. The wording was commenced on 20 October 2014, after the Upper Tribunal had heard the appeal in *LH and IP*. On the face of the statutory scheme in place at the date the Upper Tribunal heard the country guidance case, there was no requirement for the Secretary of State to consent to the Refugee Convention ground being considered.

55. It has taken the Upper Tribunal a disproportionate amount of time to address the 'jurisdiction' point and to explain why it is unfounded by tracing the statutory scheme in place at the date the Upper Tribunal heard *LH and IP*. The prolix and sometimes incoherent grounds fail to comply with the duty to put properly arguable points to the court in a succinct manner. Those representing the appellant failed to concentrate on the task at hand, which was to analyse whether the First-tier Tribunal decision involved the making of an error of law on the evidence that was before it. I am driven to the conclusion that the comprehensive new arguments and evidence raised in the Upper Tribunal were designed to put a retroactive case that could and should have been argued in the First-tier Tribunal, but was not. For the reasons given above the 'jurisdiction' point is misconceived as a matter of law. An attempt to undermine country guidance decisions based on unfounded technical arguments such as this is also inappropriate. Normally country guidance is only superceded by cogent and compelling new evidence or a new country guidance decision.
56. For the reasons given above, I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

## DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

Signed M. Canavan                      Date 09 May 2022  
Upper Tribunal Judge Canavan

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).**

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

**5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

**6. The date when the decision is “sent” is that appearing on the covering letter or covering email**