



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Appeal No: PA/04612/2017

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 12 June 2023**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**PG**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Dr S Chelvan, Counsel, instructed by Kesar and Co, Solicitors  
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

**Heard at Field House on 23 November 2021 & 6 December 2021**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant (and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified) is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. The appellant seeks international protection and identifying him might enhance the risk that he claims to fear.**

**DECISION AND REASONS**

1. The appellant is a citizen of Sri Lanka. He was born in January 1974. On 17 January 2017 the Secretary of State decided to make him the subject of a deportation order following Section 32(5) of the UK Borders Act 2007. This prompted the appellant to make a protection and human rights claim on 16 February 2017 which was refused on 3 May 2017. It is against that decision that the appellant appeals.

2. I have found Dr Chelvan's skeleton argument prepared for the hearings before me particularly helpful. I respectfully adopt his introductory paragraph where he says:

"The appellant, a gay man and national of Sri Lanka, born on 13 January 1974, is appealing the 2 May 2017 Deportation Order ('DO'), read with the 3 May 2017 Negative Protection Decision ('NPD') of the respondent on Article 3 ECHR protection grounds only, as the Section 72 certificate was not successfully rebutted in the Tribunal below, and Article 8 ECHR was not relied upon."

3. As is apparent from that introduction the appeal has previously been determined unsatisfactorily; the decision of the First-tier Tribunal was set aside and it was ordered that the appeal be redetermined in the Upper Tribunal.
4. Dr Chelvan began by summarising the reasons for deportation. I do not find it necessary to set out details of the offending which led to the deportation order. Suffice it to say that the appellant was convicted in February 2012 on an indictment alleging penetrative sexual activity with a male child under 16, four counts of sexual activity without penetration with a male child under 16 and further count of attempting penetrative sexual activity with a child under 16. He was sentenced to 4 years' imprisonment for these offences.
5. I make it plain at the outset that nobody is suggesting that the appellant's behaviour is other than deplorable but, however strong the public interest may be in his removal, he cannot be returned to Sri Lanka if there is a real risk of his being seriously ill-treated there and it is his case that there is such a risk.
6. The appellant asked for international protection when he was admitted to prison. He was refused asylum but he was given limited leave to remain. This decision was explained in a letter dated 3 August 2013 where the respondent said, at paragraph 15:

"It is accepted that you are a gay man which has become a common knowledge because of the nature of your offences. In the light of the objective evidence quoted above it is accepted that if you lived openly in Sri Lanka you would be exposed to a real risk of persecution and it would be unreasonable to expect you to live discreetly on your return to Sri Lanka particularly given that your wife's family are aware of your sexual orientation and threatened you because of it."

7. The point was reinforced at paragraph 28 where the letter says:

"However, it has been decided to exercise discretion in your favour and grant you limited leave to remain in the United Kingdom in accordance with the published Home Office Policy Instruction on Discretionary Leave because it is accepted that as a homosexual man it would be unreasonable to expect you to live discreetly in Sri Lanka to avoid inhuman or degrading treatment."

8. The appellant applied for further leave when his limited leave ran out and during the consideration of that claim the respondent decided to make the appellant the subject of a deportation order on 17 January 2017. That prompted a further protection claim which the respondent refused on 3 May 2017. The reasons for refusal letter dated 3 May 2017 did not refer directly to paragraph 15

or 28 of the letter of 3 August 2013 but did refer to guidance given in **LH and IP (gay men: risk) Sri Lanka CG** [2015] UKUT 00073 (IAC) which decided at judicial head note 3 that:

“Applying the test set out by Lord Rodger in the Supreme Court judgment in HJ (Iran) & HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31, in general the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm.”

9. The appellant appealed that decision on a range of grounds. The First-tier Tribunal agreed with the respondent that the appellant was disqualified from the protection of the Refugee Convention by reason of his having committed a particularly serious crime but the Judge allowed the appeal solely on the ground that removing the appellant to Sri Lanka would be contrary to the United Kingdom’s obligations under article 3 of the European Convention on Human Rights. The Secretary of State successfully appealed that decision. It was set aside and it was ordered to be redetermined in the Upper Tribunal. I am therefore solely concerned with an appeal on “article 3 grounds”. For the avoidance of doubt, before me the appellant is not entitled to rely on article 8 of the European Convention on Human Rights. The essence of the First-tier Tribunal’s error was failing to give adequate reasons for parting from country guidance.
10. It is, of course, for the appellant to prove his case but it is sufficient if he proves it to the “real risk” standard.
11. There is an abundance of written material before me. I decline to produce a schedule but although carefully prepared it has sometimes been overwhelming rather than helpful. I have taken too long but I believe that I have considered all of it although I have not found it necessary to comment on every item.
12. I record that the Respondent’s skeleton argument was prepared by Mr Willocks-Briscoe but Ms Isherwood made appropriate additional oral submissions.
13. Dr Chelvan’s first contention is that openly gay men do have a well-founded fear of persecution in Sri Lanka and the appellant would either be openly gay or, more realistically, discreet because he is frightened to be open and that is sufficient to qualify him for this protection.
14. Additionally it was his case that there is a further risk because the appellant is known to his family as a gay man and their decision to reject or shun him would lead to his being identified as a gay man by society at large.
15. Dr Chelvan emphasised it was his primary point that the appellant would be at risk because he is a gay man in Sri Lanka and that the conduct of the appellant’s family is not relied upon to establish his primary case although still, it was argued, a proper reason to allow the appeal.
16. It was Dr Chelvan’s contention that the Secretary of State has accepted that in the event of his return to Sri Lanka the appellant would exercise discretion about his sexuality because of fear of persecution. This point is made at paragraph 15 of skeleton argument and is based on the extracts from the 2013 decision set out above.
17. Additionally it was the appellant’s case that the reason for his deportation, namely his being convicted of sexual offences against male children, would be

known to the Sri Lankan authorities on return and that would create a risk for him.

18. It was argued that the appellant was particularly at risk in the aftermath of the COVID crisis because that had increased the likelihood of detention on arrival. This point, I find, has faded away with the passage of time. For reason that I explain below I accept that there is a real risk of the appellant being identified by the authorities as a criminal who sexually abused boys.
19. It was further argued that being a (now) 49 year old single man without children would be regarded as so unusual that it would cause people to suspect him of being gay unless he was able to prove himself “straight” which he could not do because he is not.
20. Dr Chelvan argued that in reality the only point that had to be established was that openly gay men have a well-founded fear of persecution in Sri Lanka.
21. The skeleton argument then considered country guidance.
22. It is a matter of record that the Tribunal decided in **LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073** that, broadly, gay men are not at risk in Sri Lanka. It is Dr Chelvan’s contention that **LH and IP** was decided without jurisdiction and should not be followed. Be that as it may, the decision in **LH and IP** remains on the list of country guidance that was last updated on 19 December 2022. It is the starting point in cases that raise similar factual issues. Dr Chelvan relied on an unreported decision of this Tribunal, DD (12 December 2016) (AA/12842/2015) where the judge (it happened to be the present writer) declined to follow a case on the Country Guidance list but that was at a time when the case, although still on the list, had been set aside by the Court of Appeal. It was removed from the list not long after my decision was promulgated.
23. Dr Chelvan argued that the Tribunal had no jurisdiction to determine **LH and IP** on asylum grounds because this was a “new matter” that was raised without consent. He returned to this point in his Reply to Ms Isherwood’s submissions. He says that the need for consent to a new matter arose when amendments to the Nationality, Immigration and Asylum Act 2002 came into force on 20 October 2014 which occurred whilst the Tribunal was considering its judgement. Given that the Secretary of State clearly engaged with the evidence there is no reason to think that the evaluation of the evidence was influenced by any issue relating to jurisdiction. I do not accept that it would be open to the Secretary of State to argue that she had to consent to the Tribunal deciding a “new matter” by reason of a provision that only came into effect after the arguments had been heard and I do not accept that it is open to the appellant to argue that the Tribunal had no jurisdiction to determine an appeal when the parties are not troubled with the issue.
24. In any event it is Dr Chelvan’s case that he can rely on further evidence to show that gay men are at risk in Sri Lanka.
25. Dr Chelvan then had much to say about a decision of the Supreme Court of Sri Lanka in **Galabada Pavagalaga Sanath Wimalasari and Others v Officer-in-Charge (SC) Appeal Number 32/11**. The judgment was given on 30 November 2016. I consider this point in more detail below.

26. The skeleton argument then reviewed background material particularly the CPIN Reports. Again I return to these below.
27. In extreme summary it is the appellant's argument that even if the risk of prosecution for gay sexual activity was not enough to amount to persecution, the way that people suspected of same sex activity were treated, including in the case of men, anal examination, carried the treatment of gay men by society generally through the persecution threshold.
28. There was some discussion at the start of the hearing about the appellant giving evidence. Ms Isherwood opposed the application but after discussion it emerged there was no need for the appellant to be called. The purpose of the evidence would be to say that the appellant would have to renew a passport and at some stage in that process he would be identified as a sex offender. The appellant would clearly have to identify himself to the Sri Lankan authorities before he could be returned and I accept that it was at least reasonably likely that the Sri Lankan authorities would question him about why he was going back and that truthful answers would likely prompt further questions that would lead to his history emerging. There is at least a real risk of him being identified as a sex offender who had abused boys. I have no direct evidence to support this conclusion and I am confident that the United Kingdom government would not volunteer the information (not least because the Secretary of State has given assurances on the point) but I cannot see how a person who has been out of Sri Lanka for many years does not face a real risk of being questioned about his reasons for returning, either when he applies for a passport or when he arrives at the border. In that event it would emerge that the appellant was being deported and then the reasons for his being deported would be revealed. In reaching this conclusion I acknowledge the guidance in **KS and RS (Sur place activities: risk) Sri Lanka CG** [2021] UKUT 130 (IAC) that people who are returned to Sri Lanka with proper documentation who are not on some kind of "stop list" are not normally interviewed on arrival. However the same decision refers to the checks made when a citizen of Sri Lanka seeks a temporary travel document. This appellant has not lived in Sri Lanka since 2008 and has not visited there since 2009. Even without direct evidence I find that there is a real risk of the appellant being questioned about his reason for returning to Sri Lanka at some stage in the process of return. The authorities will not want to know something about him, if only to make sure that he is not a Tamil separatist.
29. Dr Chelvan then made submissions.
30. He relied on his skeleton argument but his point was that openly gay men do face a well-founded fear of persecution in Sri Lanka without more. The appellant is gay. His offences would come to light and that of itself would encourage people to think that he was gay. He contended that internal relocation was not an option. Dr Chelvan accepted that it was for the appellant to prove his case and that included the appellant showing why internal relocation was not possible. His answer to that lay in the **Galabada** decision of the Supreme Court of Sri Lanka which, he said, showed persecution was present throughout the country because it was against the law to be gay.
31. I have a copy of the decision in **Galabada**. It is headed "In the District Court of the Democratic Socialist Republic of Sri Lanka". This may seem a little surprising to an English lawyer looking at a decision of the Supreme Court of Sri Lanka but it is quite plain that it is the decision of the Supreme Court. It has a Supreme Court

reference number and the decisions are written by and then endorsed by judges identified as “Judge of the Supreme Court”.

32. The main judgment is given by Aluwihare, PC.J.
33. The learned Supreme Court Judge explains how the appellant in that case was convicted after a trial before a Magistrates’ Court of taking part in an act of gross indecency between two persons and was sentenced to one year imprisonment. The appellant appealed to the High Court but was unsuccessful. The appellant was given permission to appeal to the Supreme Court. The grounds of appeal to the Supreme Court identified alleged failings on the part of the magistrate to deal with strands of evidence and alleged failings in handling a dock statement. Additionally it was contended that the sentence was excessive and “done without consideration of the provisions of Section 303(1) of the Criminal Procedure Code”.
34. The prosecution came about because a member of the public drew the attention of a patrolling police officer to two men taking part in an act of oral sex in a parked motor vehicle. The police officer detained the men involved. One of them was the appellant in **Galabada**. He was under the influence of drink and was not co-operative. There was some dispute about where in the vehicle the defendants were sitting. The prosecution called an additional witness but then applied for that witness to be considered hostile. The appellant made a dock statement identifying himself as a sub-inspector of police. He said he had left his place of work at around 7 pm in the evening and had consumed “a small quantity of alcohol at the police officers’ mess”. The appellant offered an innocent explanation for taking his co-accused into a motor car and denied the behaviour alleged.
35. The court noted that it was accepted that the car was parked in front of the Cinecity Cinema.
36. The court then found no material error in the analysis of the evidence and no reason to interfere with the finding of guilt.
37. The court then turned its mind to whether the sentence was excessive.
38. It noted that the conduct was consensual and also noted that a relevant section was part of the criminal jurisprudence of Sri Lanka dating from the 19<sup>th</sup> century. The court said near the end of the judgment (the paragraphs are not numbered):

“The contemporary thinking, that consensual sex between adults should not be policed by the state nor should it be grounds for criminalisation appears to have developed over the years and it may be the *rationale* that led to repealing of the offence of gross indecency and buggery in England.

The offence however remains very much part of our law. There is nothing to say that the appellant has had previous convictions or a criminal history. Hence to visit the offence with a custodial term of imprisonment does not appear to be commensurate with the offence, considering the fact that the act was consensual, and absence of a criminal history on the part of the other accused as well. In my view this is a fit instance where the offenders should be afforded an opportunity to reform themselves”.
39. The court then reduced the sentence to one of two years’ imprisonment suspended for a period of five years. It was described as a sentence of two

years' "rigorous imprisonment". The suspension ran from the time when the appellant was resentenced.

40. Dr Chelvan has seized on these remarks and made some interesting submissions. It is his first contention that the assertion that the offences are "very much part of our law" emphasises that criminal prosecutions are going to continue in Sri Lanka. However I have not been given any expert evidence about the role of the Supreme Court in Sri Lanka either generally or in respect of this particular offence. I am wholly unpersuaded that the Supreme Court of Sri Lanka then, or ever, is concerned with determining the constitutional lawfulness of criminal offences. There are, I understand, countries where that is precisely what happens but I am not told that that is what this case was about. When I read it I gain the distinct impression that the judgement is an analysis of the rationality of a conviction and the Court's role was of a kind that would be wholly familiar to, for example, an English or Welsh lawyer challenging a magistrates' decision before the Administrative Court. The reasons for the appeal being before the Supreme Court are not clear except that it attracted their attention. It is not for me to speculate but it is certainly not clear to me that the decision was ever intended to be, or is, a case of constitutional significance.
41. In saying that "The offence however remains very much part of our law" I find that the Supreme Court was merely recognising the plain fact that the conduct is against the law of Sri Lanka. As I read it, it was just not the Court's duty to determine if that is what the law should be. I say again I was given no expert evidence to help me understand what the Supreme Court was tasked to do.
42. Second, Dr Chelvan said that the reference to the "offenders should be afforded an opportunity to reform themselves" is both offensive and worrying to gay people because it implies that they have some condition that must be shed and this is indicative of social attitudes in Sri Lanka and particularly the attitudes of the judicial system. Again I regard that as far from apparent. Clearly it was an element of the particular offence that conduct took place sufficiently indiscreetly to attract the attention of a passer-by. What is clear to me is that the court found that a case of consensual sexual activity between men, conducted indiscreetly so that it would be an affront to public morals, should, in the case of people of good character, be punished with a suspended sentence of imprisonment. I do not see the seamless link that was apparent to Dr Chelvan between the words "afforded an opportunity to reform themselves" and the suggestion that all gay people had something that they needed to give up. I accept that requiring gay people to change is absurd and offensive but the court did not order conversion therapy and imposed a sentence that was modest unless they were caught again engaging in conduct that is rarely prosecuted.
43. It is also part of Dr Chelvan's case that conversion therapy is widely practised in Sri Lanka. Here he referred to September 2020 CPIN which noted that conversion therapy is freely available to people because sexual activity (the CPIN refers to homosexuality) is illegal. The report goes on to say how many parents would take their child to behaviour therapists to undo their gay tendencies. This can lead to parents being encouraged to interfere with their children's friendships. There are also examples of private hospitals having psychiatrists who administer hypnotic and shock therapies to counter homosexuality.
44. I have considered that report. It verges on the sickening but it is about people who feel compelled to seek to re-order their gay identity. This appellant is a mature man. His parents are not going to be taking him to such therapists,

indeed there is no reason for him to have any contact with his family. It is, I find, a concerning report but not one of great assistance in the case that I have to decide. It does however add significant weight to the contention that Sri Lanka is not an easy place for gay people. There are constant suggestions that being gay is something that needs to be cured.

45. Dr Chelvan then drew attention to the CPIN Report being “unable to find any sources which state the conversion therapy is forced on individuals by the state”, he said, did not reflect the sinister tone of the “opportunity to reform” considered above.
46. Dr Chelvan then drew my attention to **SSHD v MKMR** (PA/08121/2018). This is an unreported decision of this Tribunal which, he said, “dismissed the respondent’s appeal to a positive determination of the First-tier Tribunal based on a unilateral challenge on the application of the **Galabada** judgment to show risk on return to those who are open.”
47. It is, as Dr Chelvan properly draws to my attention, an unreported decision. Nevertheless it is a decision of Upper Tribunal Judge Allen with Deputy Upper Tribunal Judge Latter who wrote the judgment. I think it is uncontroversial to say that it is the work of two very experienced judges. At paragraph 32 the Tribunal said

“The grounds argue that the judge was wrong not to follow the country guidance in LH and IP. We are satisfied that in the light of that judgment it was open to the judge to take the view that [the] judgment in Galabada was cogent evidence providing strong grounds for not following LH and IP and to find that there was a reasonable degree of likelihood that the appellant would be at risk of persecution on return. We also note that in LH and IP the Tribunal accepted that transgender individuals might be more at risk than other gay men and in the present case the appellant is seeking to transition to female.”

48. This may be summarised as an *example* of the argument urged by Dr Chelvan being accepted in the First-tier Tribunal and upheld as a permissible interpretation by the Upper Tribunal in an unreported decision in dealing with a person whose case was based on transition. I do not see that it is authoritative for anything.
49. Dr Chelvan was then very critical of observations by Upper Tribunal Judge Plimmer (as she then was) when she ruled that the First-tier Tribunal who had allowed the present appellant’s appeal had erred in law. She said at paragraph 15:

“Mr Smith (for the claimant) drew my attention to the regrettable failure on the part of the SSHD to engage with directions or to make clear submissions regarding the underlying Galabada judgment. Nonetheless, the FtT’s findings in this regard were simply not open to it. Indeed, the FtT’s conclusion is inconsistent with the country background evidence available to it to the effect that prosecutions are rare – see the October 2018 CPIN – Sri Lanka: sexual orientation and gender identity and expression (‘the CPIN’) AT 4.1.3 - 4.1.9. The CPIN was in the appellant’s bundle and presumably relied upon by the SSHD. The FtT has entirely failed to engage with the proposition contained in the CPIN that notwithstanding Galabada prosecutions remain rare”.



I note that this CPIN post-dated the decision of the First-tier Tribunal, which gave rise to the Upper Tribunal's unreported decision (**MKMR PA/08121/2018**) upholding the First-tier Tribunal's decision that **Galabada** alone was sufficient to depart from the 2015 CG case. He said that Judge Plimmer was "plainly wrong" in relying on the approach she applied to the assessment of **MKMR**. I struggle with that submission. There was evidence before the Tribunal supporting in very clear terms the contention that, notwithstanding what was said in **Galabada**, prosecutions for gay sex were rare. This might be thought to illuminate the proper meaning of **Galabada** and undermine what might be thought of as a kingpin in Dr Chelvan's argument.

50. It is Dr Chelvan's case that there have been many examples in the First-tier Tribunal of appeals being allowed on the basis gay sexual activity is unlawful in Sri Lanka.
51. I think, in more elegant language that is enriched by citing authority, Dr Chelvan was asserting that the fact that people are not prosecuted does not mean they are not persecuted. The fact that people are prosecuted at all tends to suggest there is a lack of effective state protection and that, I find is a point well made.
52. Dr Chelvan then drew my attention to the post-September 2020 CPIN COI. He then drew my attention particularly to a Human Rights Watch Report dated 20 October 2020 entitled "Sri Lanka: forced anal exams in homosexuality prosecutions". This showed that since 2017 seven people had been forced to undergo physical examinations that were cruel, inhuman and degrading. There was a call for the Sri Lankan government to stop such examinations.
53. The same report referred to sixteen lesbian, gay, bisexual and transgender people being interviewed in the 2016 Human Rights Watch Report and sixteen had experienced physical or sexual assault including rape by the police. The report explained how the whole idea of anal examination as a source of evidence in cases involving homosexual activity was of limited or no value and was generally unethical. There was also reports of a person being whipped by the police after an anal examination and transgender people having other particular tests that are not strictly relevant here but indicative of what can happen in Sri Lanka.
54. Dr Chelvan drew attention to an unreported decision of the Tribunal in **MK [2013] UKAIT UR AA 00304 2013** which he says is judicial approval of the argument that anal examinations conducted by police officers is a form of state persecution.
55. He then drew attention to the "Police Performance Report of 2018 - Evidence of Prosecutions". He criticises the CPIN for not citing the 2018 police performance report.
56. The performance report "2018 Sri Lanka Police" appears in the consolidated bundle starting at page 101. It begins with an introduction from the Inspector General of police and broadly intends to be a report presenting the performance of the Sri Lankan police in 2018. Dr Chelvan was particularly interested in the part headed "Vice and Statutory Offences". It was made plain that the word "vice" was widely interpreted. There was a table "Table on Raids on Vice from 2016 to 2018" and this identified, amongst other things, an offence of "homosexuality". This shows there were seventeen cases reported in 2016, four in 2017 and five in 2018. Dr Chelvan then drew attention to an article entitled

“ground fuse” and subtitled “arrest and harassment of LGBTIQ persons”. This is plainly written from the perspective of people critical of Sri Lankan law and its treatment of gay people. That does not mean it is not reliable. It notes that Sri Lanka is one of 72 countries in the world that still criminalise consensual same sex activity between adults and then refers to section 365 and 365A of the Penal Code which are the items that criminalise same sex activity. It explains something of the extent of the legislation which seems to be interpreted very broadly and it is said it can include holding hands. Under the heading “arrests under 365 and 365A of the Penal Code” it says: “However, among all these challenges, perhaps one of the most concerning issues is the way the police wield these laws to persecute anyone who does not conform to the heteronormative standards”.

57. It referred to the prosecution of two men at Fort Magistrates’ Court and then to an arrest of three gay men in a hotel room in Colombo in 2019. It is said they were not engaging in sexual relations but they were prosecuted for same sex activities. The pinnacle of the evidence seemed to be that they had possession of condoms. It was said that this was not an isolated case and then it referred to the 2018 police report. It commented on abusive examinations which had little if any clinical value (see above). Dealing with difficulties that do not include prosecution the report also refers to a Human Rights Watch Report which revealed how a “significant number of LGBTIQ individuals in Sri Lanka, particularly transgender persons and gay men, have been detained without cause and suffered sexual and/or physical abuse by the police.”
58. It continues that local advocates of LGBTIQ rights are concerned because of repressive practices by police including the use of threat of arrest to intimidate LGBTIQ individuals and to solicit bribes.
59. Dr Chelvan then made strong criticisms of the CPIN and its failure to engage with a report that he had prepared. I noted then that they are relevant only when I consider the CPIN evidence. They have been noted.
60. At section 3 of the skeleton argument Dr Chelvan sets out his conclusions.
61. I have looked at **LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC)**. Under the heading “the criminal law in Sri Lanka” the Tribunal says at paragraph 16:
 

“It is common ground that these provisions have the effect of criminalising homosexual conduct; that s.365 dates from before Sri Lanka’s Independence in 1948; but that there have been no prosecutions since Independence.”
62. That was no doubt entirely justified on the material before the Tribunal and concessions made by the parties but I am satisfied that it is just wrong. There is abundant evidence that a small number of people are prosecuted for gay sexual acts.
63. That said, the possibility of prosecution does not prove a risk of persecution. Much more needs to be investigated but I have no hesitation in saying that I do not feel confident in the guidance given in **LH and IP** to the extent that it relies on their being no prosecutions because there have been prosecutions leading to a very small number of convictions.

64. The possibility of prosecution undoubtedly gives disreputable police officers a lever over potential offenders which can be a short route to persecutory behaviour.
65. Dr Chelvan referred in his skeleton argument to a decision of the Court of Appeal in **Jain v SSHD [1999] EWCA Civ 3009**. He referred to just one paragraph near the end of the judgment of Schiemann LJ who gave the leading judgment but I have decided to set out that paragraph and following paragraphs because I find them helpful and relevant. The learned Lord Justice said:

As it seems to me there is now a broad international consensus that everyone has a right of respect for his private life. A person's private life includes his sexual life, which thus deserves respect. Of course no person has a right to engage in interpersonal sexual activity. His right in this field is primarily not to be interfered with by the State in relation to what he does in private at home, and to an effort by the State to protect him from interference by others. That is the core right. There are permissible grounds for State interference with some persons' sexual life - eg those who most easily express their sexual desires in sexual activity with small children, or those who wish to engage in sexual activities in the unwilling presence of others. However, the position has now been reached that criminalisation of homosexual activity between consenting adults in private is not regarded by the international community at large as acceptable. If a person wishes to engage in such activity and lives in a State which enforces a criminal law prohibiting such activity, he may be able to bring himself within the definition of a refugee. That is one end of the continuum.

The other end of the continuum is the person who lives in a State in which such activity is not subjected to any degree of social disapprobation and he is free to engage in it as he is to breathe.

In most States, however, the position is somewhere between those two extremes. Those who wish to engage in homosexual activity are subjected to various pressures to discourage them from so doing. Some pressures may come from the State - eg State subsidised advertising or teaching to discourage them from their lifestyle. Other pressures may come from other members of the Community, without those members being subjected to effective sanctions by the State to discourage them. Some pressures are there all the time. Others are merely spasmodic. An occasional interference with the exercise of a human right is not necessarily a persecution. The problem which increasingly faces decision-takers is when to ascribe the word "persecution" to those pressures on the continuum. In this context Mr Shaw, who appeared for the Secretary of State, reminded us of the references in Shah & Islam to the concept of serious harm and the comment of Staughton LJ in *Sandralingum & Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97 at page 114, where the Lord Justice stated:

"Persecution must at least be persistent and serious ill-treatment without just cause ..."

I note that it has not been suggested that the appellant and the partner which he had at the time of the hearing, from whom I understand he has now separated, or indeed anyone else wish together to travel to India if he were sent back there. In those circumstances it seems to me that what the

appellant can be taken to have shown is no more than it will not be easy for him to find a homosexual partner in India, that if he did there would be some expression of disapproval by significant sections of the public and that he would be expected by many to enter into a heterosexual marriage. Those are the basic facts as found by the Tribunal on the evidence adduced by the parties. In my judgment, on those facts the Tribunal were entitled to find that there was no reasonable likelihood of persecution. They made no error of law and dealt adequately with the main points made by the applicant.

For my part, I am conscious of decisions such as *Modinos v Cyprus* 16 EHHR 492, where the court held that a policy of not prosecuting provides no guarantee that this policy will continue. Moreover, I appreciate that the very existence of a legal prohibition can continuously and directly affect a person's private life. It may be that in some not greatly dissimilar circumstances facts could be shown from which a Tribunal would be entitled to infer that a particular individual had a justified fear of persecution. I would not like generalise. However, I am satisfied that in the present case the Tribunal neither erred in its legal approach nor reached a conclusion which was not open to them on the facts as they found. I am also satisfied that it expressed its reasons with sufficient clarity.

66. It was against this background that Dr Chelvan asked for the appeal to be allowed and the country guidance taken down.
67. Dr Chelvan is nothing if not thorough but, with respect, some of his submissions were unnecessarily laboured. I accept that prosecution for private sexual acts is likely to be persecutory. I accept too that the evidence before me shows conclusively that, unlike the evidence before the Tribunal in the country guidance case, there have been prosecutions of gay men for sexual acts. It is also right to say there have not been many recorded.
68. It is going too far to say that I should not “follow” **LH and IP**. It must be a starting point. It appears on the list of country guidance cases but there is additional evidence before me that requires me to look at things again and that evidence is that some people are prosecuted for homosexual activity. The evidence is that not many people are prosecuted. The numbers are in single figures for the most recent year known. It is also impossible on the material before me to have a clear indication of just what the people convicted were doing. For immediate purposes I completely accept Dr Chelvan’s point that it is just wrong to say men are not prosecuted because some clearly are.
69. Dr Chelvan also made much of the risk of conversion therapy. It was his argument that the judgment of the Supreme Court, in substituting a suspended sentence of imprisonment for an immediate sentence of imprisonment was somehow prescribing a kind of conversion therapy because it gave the defendants an opportunity to change their behaviour. With respect this is gilding the lily. If there is a real risk of prosecution just for carrying out homosexual acts there is persecution. It is not suggested that a likely sentence would be a discharge or some inconsequential penalty. I do not find that the “conversion therapy” argument adds anything to the mix. It will not have any application unless a person is prosecuted and the prosecution I find is itself persecution. However, and importantly, the availability of conversion therapy does add some weight to the evidence of there being a climate of disapproval prevalent in Sri Lankan society.

70. Dr Chelvan then relied on the decision in **RM and BB (homosexuals) Iran CG [2005] UKIAT 00117** at paragraph 124 that the observation that discreet conduct may well be the result of a fear of persecution rather than it being a reflection of how he would conduct himself if unhindered by social pressures and convention. I regard it as self-evident in the state of the law as it is now (we have come on some way since 2005) but there is no presumption that discretion is voluntarily rather than an effort to avoid persecution and that such discretion might itself be indicative of persecution.
71. Dr Chelvan took me through the evidence relating to invasion of private homes and residences and anal examination all of which, he said, indicated there was generally a real risk in the country of Sri Lanka.
72. He also reminded me that gay people can easily be victims of blackmail in a country where prosecutions remain an option.
73. Dr Chelvan then said that the decision in **MKMR** PA/08121/2018 that the Upper Tribunal rejected the idea that the case of **Galabada** was a “public sex” offence. That is going too far. The Tribunal (Deputy Upper Tribunal Judge Latter and Upper Tribunal Judge Allen) said at paragraph 30 that “the fact remains the law used covered actions committed in private or public”. That is fact but it does not tell us very much about the underlying reasons for prosecution in **Galabada**.
74. In **MKMR** the Upper Tribunal upheld the decision of the First-tier Tribunal to allow an appeal on asylum grounds.
75. Dr Chelvan’s primary case is that the appellant could not be returned safely to Sri Lanka. However as a fallback position he argued that the claimant could not be returned to Sri Lanka in an expectation of him finding a safe place which is suggested in the refusal letter. He said this was not available. Even if it was safe (contrary to his case) it would involve undue harshness. He said the facts were that moves to decriminalise homosexual activity had failed which meant that there was a risk of confrontation with the law wherever in Sri Lanka. The claimant could only function by living discretely which in his case meant contrary to his wishes.
76. Ms Isherwood began her submissions by saying I should dismiss the appeal in its entirety.
77. Her first point was that the appellant had not rebutted the “Section 72 presumption”. That is reference to Section 72 of the Nationality, Immigration and Asylum Act 2002 which provides, in broad terms, that a person convicted of an offence in the United Kingdom and sentenced to a term of at least two years’ imprisonment which this appellant has) shall be presumed to have been convicted of a particularly serious crime and to constitute a danger to the community of the United Kingdom. Such a person, although entitled to protection under the European Convention on Human Rights, is not entitled to protection under the Refugee Convention. He may be a refugee but he is excluded from protection. I think this is uncontroversial.
78. Ms Isherwood also pointed out that the evidence had not been tested and so it was difficult to rely on anything the appellant said if it were controversial. That is right but of course Dr Chelvan’s main arguments were not based on what the appellant said but on the background evidence.

79. She said that whatever view I took of it **LH and IP** was at least prima facie binding country guidance and she wanted to go through it.
80. I set out paragraphs 3, 4 and 5 of the headnote:
- (3) Applying the test set out by Lord Rodger in the Supreme Court judgment in HJ (Iran) & HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31, in general the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm.
- (4) 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.
- (5) Where a risk of persecution or serious harm exists in an appellant's home area, there may be an internal relocation option, particularly for individuals returning via Colombo from the United Kingdom.
81. Ms Isherwood drew my attention at paragraph 31 of **LH and IP** where a gay rights activist and commentator made a very good impression on the Tribunal. Her report confirmed that there were no prosecutions of gay men or lesbians. The same report also makes the point that the existence of the crime provided a tool for harassment so the people would be afraid to look to the law for help. At paragraph 53 it is recorded that the same witness was asked to comment on the suggestion that there was no privacy in Sri Lanka because of cohesive social norms, typified by the fact that many people lived in thin walled apartments. The answer was that LGBTI people would refer to their partners as their friends and divert attention away from the true nature of their relationship. The Tribunal described this as living a lie. Paragraph 62 recognised there had been prosecutions although they were rare but also said how the law had been used to "carry out arbitrary arrests, detention and torture by the Sri Lankan police" and that this had led to "flagrant abuse" of powers of arrest and detention.
82. A particularly concerning example is given from 2013 of two men who were sharing a room at a guesthouse in Colombo that was known to be a place where gay men commonly stayed. After they returned from dinner the police broke into the room they were using and arrested them under Section 365A. It was their case that the police forced them to handle unused condoms so that they provided evidence of same sex sexual activity. It was of course wholly dishonest evidence but to obtain release from detention the men were forced to get involved in a settlement in which the Sri Lankan man agreed to be a state witness against his friend a Belgian man who had to pay a fine.
83. However some context for these disturbing stories is given at paragraph 109. I have seen evidence that since that decision was written the population of Sri Lanka rose to about 23 million but I do not think anything turns on that. the Tribunal said:
- "The population of Sri Lanka is about 20 million people, of whom nearly 5 million live in the Colombo area. The evidence before us indicates there are large numbers of homosexuals in Sri Lanka, in particular in Colombo. In 2010, the Collective for Economic Social and Cultural rights estimated that there were 24,000-37,000 men who have sex with men (MSMs) in Sri Lanka.

In 2011, the Sri Lankan health authorities estimated that there were 30,000 homosexuals in Sri Lanka. Unpublished data referred to by Ceylon today in 2014 was unable to reconcile estimates of 8,000-35,000 for the number of MSMs in Sri Lanka. We suspect, under the country's circumstances we have described that even the higher of these figures may be underestimated."

84. The evidence of ill-treatment, including extortion, gave no basis for thinking the practice was widespread.

85. Nevertheless the Tribunal rejected the idea of state protection being available. The general position was the state was indifferent and that there was no basis for thinking that the authorities would show much interest in protecting a person who was gay or who had been abused for being gay. The Tribunal noted that many people including politicians (therefore leaders of society) regarded same sex orientation as unacceptable and there were expressions of homophobia in the media and that expressions of disapproval coming close to hate speech were widespread. As was the conflation of homosexuality with paedophilia. At paragraph 180 the Tribunal said:

"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 underreporting, we are unable to agree that the incidents involving gay men are of the 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."

86. The Tribunal rejected the idea there was any real risk of people being forced into heterosexual marriage. The particular appellants before the Tribunal were in a civil partnership but they did not have a history of gay activism and were discreet in the United Kingdom where they had no fear. The Tribunal found that the appellants would:

"live discreetly in Sri Lanka in the same way as they do in the UK in accordance with their preferences, not in order to avoid persecution."

87. The fourth supplementary bundle includes a ministerial statement on 23 November 2021 which raises concerns about the human rights situation generally in Sri Lanka. There were thought to be early warning signs for general deterioration and security forces increasing surveillance and intimidation of human rights activists under the Prevention of Terrorism Act with a number of arbitrary arrests. This is noted but does not read to me as being indicative of anything of particular concern to persecution of people for being gay. Also included is the Sri Lanka 2020 Human Rights Report and this draws attention to "acts of violence, criminalisation and other abuses based on sexual orientation and gender identity." This makes the point that the law criminalises same sex sexual conduct between adults and those engaging in same sex sexual activity in private as well as public risk prison sentence of ten years. However it also says that prosecutions are rare but there were reports of the police using threats of arrest to extort money. Also reports of forced physical examinations and whipping (page 66 fourth supplementary bundle). I have also read attached to that bundle the document "LGBTQ rights: Sri Lanka still undecided, says

government in response to homophobic police video". This is a report dated 3 August 2021 and the report referred to an audience of police officers listening to a teaching against the union of same sex couples and an acknowledgement from a cabinet press briefing that the matter was under review. It was just a promise of discussion.

88. Ms Isherwood drew attention to **KK and RS (sur place activities: risk) Sri Lanka CG [2021] UKUT 00130 (IAC)**. This was concerned with the risk on return of people who have been involved in sur place activities. The point the Tribunal is making at paragraph 507 is that there was not normally a risk at the airport with people who had been involved in sur place activities because the government is only interested at that point in establishing identity. It would be aware from its own records if a person identified was known to them either because of things done in Sri Lanka or things done elsewhere. But the mere fact of being questioned at the airport which was described as assumed to happen was not a risk in itself. I do not see the significance in this paragraph. All the Tribunal was saying is there is not an added risk. Ms Isherwood submitted that there would have been long standing concerns about the situation in Sri Lanka. The government's statement in 2021 simply recognised the situation was being monitored. It did not elevate the risk for gay people.
89. Ms Isherwood rightly, urged that I should be careful to read the background material in a balanced way. For example in the fourth supplementary bundle at page 19 there was a report from the Foreign Commonwealth and Development Office entitled "Human Rights and Democracy" which dealt particularly with Sri Lanka. Whilst noting there were general deterioration in human rights conditions also noted the government delivered apparently free and peaceful parliamentary elections. There was concern about anti-Muslim hate speech but there at page 31 we read:
- "Through the Conflict, Stability and Security Fund (CSSF) programme and during the COVID 19 pandemic, the UK supported victims of sexual and gender based violence who were particularly affected by lockdowns and stay at home measures. The UK also helped to build media capacity to highlight the impact of COVID 19 on marginalised communities. In October, media reports allege that junior medical officers and police had conducted invasive intimate examinations of LGBT+ persons without their consent, following which the Justice Minister Ali Sabry gave instructions to halt and investigate the practice."
90. She recognised, as is plainly the case, that there are concerns and Ms Isherwood too recognised as significant the report of a councillor making homophobic remarks to police officers.
91. It was also plain from the report there were mechanisms of raising concerns with the government and the government was, whilst undecided, at least listening. Activist groups were both able and willing to petition the government. She referred me to a CPIN Report which drew attention to the decision in **LH and IP** but that is of limited value because Dr Chelvan, as he is entitled to do is arguing that it is wrong. The same report emphasised, following the Galabada decision, that it was "unclear" what the court meant when it gave the offenders an opportunity to reform but there was nothing in there that supported any suggestion that the people convicted in Galabada were required to undergo conversion therapy.



92. Paragraph 2.4.16 of the September 2020 report is particularly pertinent and I set it out below:

“If a person does not openly express their sexual orientation or gender identity, consideration must be given to the reasons why they do not. If it is concluded that a material reason for the person living discreetly on their return would be a fear of persecution which would follow if they were to live openly, then, other things being equal, their application should be accepted. Each case must be considered on its facts with the onus on the person to demonstrate that they would be at a real risk on return.”

93. My attention is particularly drawn to an article in the Sri Lankan Daily Mirror. This says that “ten civil society activists have filed a writ petition in the Court of Appeal challenging the ever rising abuse, harassment and discrimination against individuals of the Lesbian, Gay, Bisexual, Transgender, Intersects and Questioning (LGBTIQ) community, at the hands of police. The article continues:

“the petitioners state that it is now common knowledge that members of the LGBTIQ community face grievous prejudice in their daily lives, and, most concerning, that they even find themselves in situations that pose a direct threat to their lives and wellbeing, at the hands of other individuals and public authorities. The petitioners further state that as per the Police Performance Report 2018, 48 gay men were charged and prosecuted for apparent “homosexuality” from 2016 to 2018 in the Vice Squad raids.”

94. This article possibly illustrates well the difficulty I have in resolving the case. It is quite plain that some people are persecuted for being gay in Sri Lanka. It is also quite plain that only a very small number of gay people are prosecuted and gay activists are willing to turn to the courts for help.

95. There was concern about improving the lot of gay people and I note President Rajapaksa’s “tweet” on 1 March 2021 described as “zero discrimination day” that everybody in Sri Lanka had a right to a dignified life irrespective of gender and sexual orientation and other matters.

96. However, the CPIN Report of November 2021 emphasises at 2.4.34 and 35 that anti LGB sentiment is deeply ingrained in Sri Lankan culture and that LGB people face “face stigma, discrimination, harassment, emotional and verbal abuse and pressure and coercion into heterosexual marriage”. The situation is easier generally for people who are better educated and richer. There are no public spaces for gay people to socialise such as gay restaurants but there is a Facebook community. 2.4.40 the CPIN asserts that:

“In general, the level of societal discrimination and abuse faced by LGB persons in Sri Lanka is not sufficiently serious by its nature and repetition as to amount to persecution or serious harm.”

97. The CPIN shows at 4.1.8 that in 2019, 710 cases of “Unnatural offences / Grave sexual abuse” were recorded and were pending at the year’s end. In 2020 the number was 677 reported and 665 pending at the year’s end. That is 710 cases reported, 699 pending at the year’s end for 2019 and 677 reported and 665 pending at the year’s end for 2020. These figures are not split down into categories to be understood better. Then at 4.1.18 there is a further reference to the November 2021 Sri Lankan Daily Mirror report of ten civil society activists filing a writ petition challenging the ever-rising abuse, harassment and

discrimination against individuals of the LGBTIQ community at the hands of the police. At 4.2.7 there is reference to the October 2020 Gay Star News website recording that a lawyer had defended six men in the previous twelve months accused of gay sex and that the maximum sentence could be ten years' imprisonment. The reported noted that:

"The men say the authorities whipped them with wires before making them have anal probe tests. The court ordered three of the men to also have HIV tests without their consent."

98. My attention was particularly draw to paragraph 4.6.2 which I set out below:

"In July 2016, delegates from a UK Home Office Fact Finding Mission to Sri Lanka (the 2016 UK FFM) met with a representative from Equal Ground (EG), a non-profit organisation seeking human and political rights for LGBT community of Sri Lanka. The UK FFM delegates asked Equal Ground whether the government, police or judiciary provided LGBTI persons with security and justice, but were told:

'No they do not. But during the 2016 Pride celebration there were a lot of threats from Sinhala Buddhist nationalists particularly towards a public event Equal Ground (EG) was planning to hold to publicise Colombo Pride 2016. EG made a complaint to a police station about the threats, and plain clothes police officers were sent to protect them. The police took no action against the Buddhist nationalists. The Buddhist nationalists never turned up, but all threats are taken seriously... On an individual basis police do not protect. In fact, they are the main perpetrators of violence and discrimination against LGBTI persons."

99. More detail that is given in the Home Office's fact-finding mission trip to Sri Lanka which appears in the bundle at the beginning at page 564. It refers to a meeting with a LGBTI activist group Equal Ground which provides "psychosocial support and has a counselling line and counselling services". It recognised how police from the United Kingdom were involved in retraining officers in Sri Lanka but there were still credible accounts of significant persecution by police officers. One account was given in some detail of how officers effectively blackmailed a prisoner and stole his money warning that he would be exposed to his family if he did not cooperate. Sexual abuse of LGBT people who are detained was expected. Perhaps importantly the section under "16 Meeting with Equal Ground (e.g.), 22 July 2016" begins with an answer to the question "Are LGBTI persons able to live openly and freely?" To which the answer was: "Not everybody". It depends who they are and where they are. In urban settings some people might chose to live openly but they are actually few and far between."

100. It is right to acknowledge the same report which gives evidence of a significant change in conditions where people generally felt more confident about their liberties in a changing society. Nevertheless at 16.1.33 it was recorded that the government thinks of LGBTI people as "a pain, or a community that can be easily bullied or marginalised."

101. At 4.6.6 in the November CPIN there is reference to police protection of LGBTI individuals at public events improving. There was evidence of more people being "encouraged" to submit to conversion treatment. There was no direct evidence of conversion therapy being forced on individuals by the state and the CPIN

shows that there were many agencies offering “conversion therapy” which included “correctional rape”. The Sri Lankan College of Psychiatrists continues to remain opposed to many aspects of trans rights. The point is that this indicates a society that is not at ease with gay activity.

102. Ms Isherwood drew attention to the evidence at 8.1.4 that LGBTI activists’ community is being “increasingly assertive”. Her point was the background evidence clearly indicates some gay people are persecuted but not so many that simply being gay creates a risk. There has to be more than that. She said there was no evidence that the authorities would be interested in tracking the appellant even if they knew about the reasons for his deportation.
103. Her short point was that the Appellant is a Sri Lankan national and he can go and live in Sri Lanka.
104. Dr Chelvan’s reply was extensive.
105. Dr Chelvan made much of the decision in **KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 00130 (IAC)**. This decision raised particular concerns about the regime in Sri Lanka and its authoritarian nature and how the old ways had returned with a change of government. However, these reports were primarily concerned with people whose claims were based on sur place activities.
106. Of much more relevance is the contention in the CPIN Report that over 75% of gay people led double lives. Dr Chelvan asked rhetorically “why?”. The Supreme Court, at the very least, had confirmed that offences involving gay sex were prosecutable in Sri Lanka. He submitted it was quite wrong to say there was no prospect of prosecution.
107. Dr Chelvan continued in his contention that the **Galabada** judgement encouraged gay conversion therapy and that an opportunity to reform was clear invitation that a person should give up being gay. This was just not in any way indicative of a fundamental change of attitude at the high levels of society. He repeated that there is evidence of raids on gay clubs and there is evidence of people being prosecuted for gay sex.
108. However, in this case, it was accepted that the appellant was at risk in 2013. It was for the Secretary of State to show he was not a risk now. He asked if Ms Isherwood would be able to show how internal relation could be organised. He submitted that it could not. He submitted that the Secretary of State could not rely on internal relocation without fleshing it out and showing how it could be done. He reminded me of the evidence of prosecution and forced anal examination. These were things that happened and they might happen to the appellant.
109. Again he emphasised that it is a key point in his case that the appellant would have to be discreet and he would have to be discreet because he would be persecuted if he was not and that, he said, was enough to make out his case. I should not follow with **LH and IP**.
110. I must make findings.
111. I do not agree that the decision of the Supreme Court of Sri Lanka in Galabada completely undermines the conclusions in **LH and IP**. It confirms that gay sexual

activity is contrary to the law of Sri Lanka and can be prosecuted. It is, however, very clear evidence that people are prosecuted and convicted of same sex offences in Sri Lanka and, although the evidence is that such prosecutions are rare, they do happen and sometimes lead to convictions and the extent that **LH and IP** suggested otherwise it is wrong. This is important. In my judgement the reasoning in **LH and IP** depends on there having been no successful prosecutions for same sex activity for many years but, although the numbers are few, there have clearly been some examples of the people being convicted and the Supreme Court has emphasised that same sex activity is contrary to the criminal law of Sri Lanka. The court did not give any guidance about the circumstances where such conduct should be prosecuted.

112. Whilst accepting that the Appellant is a 49 years old man who is estranged from his family there is nothing in the evidence here that persuades me that relocation away from his family would, of itself, create a risk to his rights that are protected by article 3 of the ECHR.
113. Although there is a strong “gay” community in Sri Lanka and gay people are becoming more organised and vocal in advancing their cause there is strong societal disapproval. This can make people reluctant to seek police support if they are being ill treated.
114. The Appellant will be at some risk of being identified as a gay person because he would adopt a solitary lifestyle and that, I accept, would cause some to suspect him of being gay, which he is.
115. Some gay people are seriously ill treated in Sri Lanka. Some gay people have been bribed and threatened with arrest. Others have been abused after arrest although I accept the evidence that anal examinations have now been banned.
116. I have a lurking concern that the authorities will know of his criminal convictions in the United Kingdom and will “mark his card”. It is possible that a dishonest police officer will know about that and use it as a reason to bribe him or otherwise ill use him. I see no basis for elevating this possibility to the level of there being a real risk of it happening.
117. It follows that the appellant has not satisfied me that there is real risk of his being overtly ill-treated just by reason of returning to Sri Lanka.
118. However I must also decide if being in Sri Lanka as a gay man is so oppressive for this appellant because he will not be able to express his sexuality openly that he cannot be returned.
119. When the Secretary of State considered this in 2013 she said unequivocally that “it would be unreasonable to expect you to live discreetly in Sri Lanka to avoid inhuman or degrading treatment” and he was entitled to leave for the reason given in the Home Office Policy Instruction on Discretionary Leave.
120. Dr Chelvan had little to say about this except that the point had been decided in the appellant’s favour and not redetermined. I do not agree. The decision in 2013 (obviously) predated the guidance given in **LH & IP** in 2014 and that guidance was that gay men in Sri Lanka do not generally risk ill treatment that reaches the standard of persecution or serious harm. Although it is now clear that **LH & IP** was wrong to decide that there people have not been prosecuted for acts of gay sex it is still a rare occurrence, so rare that there is no basis of identifying

particular risk factors although public exhibition was certainly a feature of the most explained offence that was before me.

121. Nevertheless the background evidence satisfies me that a gay person may well so fear societal disapproval that he will deny his sexuality by the way he lives his life and that constant public hypocrisy, needed to ensure safety, is more than this appellant should be asked to bear.
122. The respondent was right when she decided this in 2013 and, properly understood, it is not undermined by **LH & IP**.

**Notice of Decision**

123. I allow the appeal on article 3 grounds.

**Jonathan Perkins**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**12 June 2023**