Neutral Citation Number: [2025] EWCA Civ 133

Case No: CA-2024-000768

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UTIAC
UT Judge Perkins
PA/04612/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 February 2025

Before:

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE JEREMY BAKER

- -

Between:

Secretary of State for the Home Department	**Appellant**
- and -	
PG	**Respondent**

- -
- -

Mr Michael Biggs (instructed by **the Treasury Solicitor**) for the **Appellant**
Dr S Chelvan and Mr Simon Ridding (instructed by **David Benson Solicitors**) for the **Respondent**

Hearing date: 5 February 2025

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Approved Judgment

This judgment was handed down remotely at 14.00 on Tuesday 18 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Jeremy Baker:

Introduction

1. The Secretary of State for the Home Department ("SSHD") appeals, with leave, against the decision of Upper Tribunal ("UT") Judge Perkins, dated 12 June 2023, whereby he allowed PG's appeal against the SSHD's decision to deport him to Sri Lanka, on the basis that it would breach his rights under Article 3 of the European Convention on Human Rights ("ECHR").

Background

2. PG is a 50-year-old Sri Lankan of Tamil ethnicity, having been born in Jaffna on 13 January 1974.

3. On 8 January 2008, PG was granted leave to enter the United Kingdom ("UK") as a student, which was valid until 30 April 2011.

4. On 21 January 2008, PG entered the UK in reliance on the student visa in order to study a 3-year BA (Hons) degree in Fashion Design and Marketing at London Reading College.

5. On 15 April 2009, PG was questioned on entry to the UK, and informed the Immigration Officer that he had gone to Sri Lanka to get married.

6. On 20 April 2011, PG applied for an extension of his stay as a student, which was rejected as being incomplete.

7. On 14 August 2011, PG was arrested in respect of a number of sexual offences, and he was served with form IS151A, confirming his status as an overstayer and informing him of his liability to be deported.

8. On 7 February 2012, PG was convicted following a trial on indictment of five offences of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003, and one offence of attempted rape, contrary to section 1(1) of the Criminal Attempts Act 1981 and section 1(1) of the Sexual Offences Act 2003.

9. The offences involved three different boys who were aged between 13 – 15, who PG met on a bus and thereafter followed on foot, on three separate occasions. The sexual offending included PG touching the 13-year-old boy's genitals outside his clothing, pulling the 14-year-old boy's trousers down and touching his penis, before PG performed oral sex on him and attempted to insert his penis into the boy's anus.

10. On 28 February 2012, the trial judge imposed a total sentence upon PG of 4 years' imprisonment in respect of those offences, and made a Sexual Offences Prevention Order, concerning his contact with persons under the age of 16 years, without limit of time.

11. During his induction at prison, PG claimed asylum and underwent a substantive interview on 19 March 2012.

12. On 2 April 2012, PG was notified of his liability to be deported as a foreign criminal under section 32(5) of the UK Borders Act 2007 ("UKBA 2007") and invited to provide reasons why he should not be deported, to which PG responded on 23 April 2012, stating that he was a gay man and that his life would be at risk if he were to be deported to Sri Lanka.

13. On 3 May 2012, PG was served with a letter explaining that, pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002, ("NIAA 2002"), he had committed a particularly serious crime and was presumed to be a danger to the community, such that if the presumption was not rebutted, PG would, pursuant to article 33(2) of the UN Convention on the Status of Refugees 1951 ("the 1951 Convention"), be excluded from protection from refoulment provided by article 33(1).

14. On 10 May 2012, PG, having been invited to make representations if he wished to seek to rebut the presumption that he was a danger to the community, did not do so, and instead responded by reiterating that his life would be in danger if he were to be returned to Sri Lanka.

15. On 29 June 2012, a decision was made not to pursue PG's deportation at that time.

16. On 3 August 2013, the SSHD notified PG that his claim for asylum had been refused, as he had not rebutted the presumption that he was a danger to the community. However, PG was informed that had it not been for the presumption, he would otherwise have been entitled to asylum on the basis that,

> *"....It is accepted that you are a gay man which has become common knowledge because of the nature of your offences. In the light of the objective evidence quoted above it is accepted that 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."*

    As a result of these matters, PG was informed that, in accordance with the Home Office Policy Instruction on Discretionary Leave, it had been decided to exercise discretion in his favour and grant him limited leave to remain in the UK,

> *"....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."*

17. On 11 October 2013, PG was informed that he had been granted six months' discretionary leave to remain in the UK until 11 April 2014. However, at the same time he was informed that he may not be given leave to remain after this date, and that when considering any further application for leave to remain, the circumstances would be assessed at the time as to whether further leave would be granted.

18. On 11 April 2014, PG's solicitors applied for PG to be granted further leave to remain, in reliance on his claim for asylum and Article 3 ECHR.

19. On 19 January 2017, PG was informed that a decision had been made to maintain the section 72 NIAA 2002 presumption and that a decision had been made to deport him, pursuant to section 32(5) UKBA 2007. However, he was also informed that not only could he seek to challenge the decision to deport him on human rights grounds, but that any such challenge together with his outstanding application for further leave to remain would be considered together, as the SSHD had delayed consideration of his application for leave to remain, on that basis that,

> *"....consideration is currently being given to whether the situation in Sri Lanka has improved sufficiently to enable you to return, in light of recent objective country information."*

20. On 16 February 2017, PG's solicitors made representations on his behalf seeking to resist his deportation on asylum and Article 3 ECHR grounds. It was submitted that, despite his convictions, PG was not a danger to the community in the UK, and that his deportation to Sri Lanka as a gay man, would involve a breach of his Article 3 ECHR rights.

SSHD decision

21. On 3 May 2017, PG was informed that his application for leave to remain had been refused, and that the decision to deport him to Sri Lanka had been maintained, on the basis that PG had not rebutted the presumption of dangerousness, and that his deportation would not involve a breach of his Article 3 ECHR rights.

22. In the decision letter, reference was made to the country guidance case of *LH & IP (gay men: risk) Sri Lanka CG* [2015] UKUT 00073 (IAC) ("*LH & IP*") which had held that,

> *"...in general the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm."*

The SSHD acknowledged that the unreported UT decision, *SASS v SSHD* (8 June 2016) ("*SASS*"), had not followed that guidance, and that in January 2017, the Sri Lankan legislature declined to repeal the anti-homosexuality laws, which had been on the statute books since 1883. However, there had been other developments in Sri Lanka since 2015, including a report in the media that the Health Minister had issued a statement that, "*the government is against homosexuality, but we will not prosecute anyone for practising it.*" Moreover, that the government of Sri Lanka was preparing a new National Action Plan for the Protection and Promotion of Human Rights in order to fulfil its obligations to protect human rights in Sri Lanka, "*with an addendum that bans discrimination against someone based on his or her sexual orientation.*"

FTT decision

23. On 12 May 2017, PG sought to appeal against the order for his deportation pursuant to section 82(1) of the NIAA 2002. This was heard by First-Tier Tribunal ("FTT")

Judge Cockrill on 2 December 2019, who allowed PG's appeal in a decision promulgated on 10 December 2019, on the basis that whilst PG had not rebutted the presumption of dangerousness, indeed it was noted that following his conviction by the Dorset Magistrates' Court for breach of the Sexual Harm Prevention Order he had been made the subject of a Community Order on 23 July 2018, his deportation would be contrary to his Article 3 ECHR rights.

24. In the course of the hearing, FTT Judge Cockrill was referred to the country guidance case of *LH & IP*, together with other material which postdated that decision concerning the treatment of gay men in Sri Lanka, including a decision of the Sri Lankan Supreme Court, *Galabada Wimalasiri v Officer in Charge, Police Station, Maradana and Honourable Attorney General* SC Appeal 32/11, 30 November 2016, ("*Galabada*"), which concerned two men who had engaged in oral sex inside a motor vehicle whilst it was parked on a public road, and had been convicted of an offence of gross indecency, contrary to section 365A of the Sri Lankan Penal Code.

25. The Judge concluded that the more recent material was such that a gay man, "*…faces, upon return to Sri Lanka, what is in my judgment a situation that has deteriorated since that country guidance was issued*." In particular, that *Galabada*, "*…shows that there are prosecutions [against gay men] actively pursued*", and that in these circumstances, "*…it is open to me to depart from that guidance.*" The judge went on to conclude that it was not safe for PG to return to Sri Lanka, and therefore allowed the appeal.

UT Judge Plimmer's decision

26. The SSHD was granted permission to appeal to the UT, which was heard by UT Judge Plimmer on 1 October 2020. In a decision promulgated on 9 October 2020, she allowed the appeal and set aside FTT Judge Cockrill's decision. The UT did so on the basis that FTT Judge Cockrill's decision was undermined by a material error of law, namely that the FTT Judge had not provided sufficient reasons to explain why the postdated material provided, the necessary "*cogent evidence giving very strong grounds*" to depart from the country guidance case of *LH & IP*, as required by *SG(Iraq) v SSHD* [2012] EWCA Civ 940, ("*SG(Iraq)*").

27. Accordingly, the appeal was allowed, and it was ordered that the re-hearing would be maintained in the UT.

28. In the course of her judgment, UT Judge Plimmer observed that a departure from a country guidance case is not warranted merely by a deterioration of conditions in the country, and that whilst *Galabada*, "*…confirms that homosexual consensual sex is illegal in Sri Lanka and that a prosecution in that particular case was actively and successfully pursued, it does not support the proposition that the prosecutions against gay men are or have been in general actively pursued*."

29. In this regard, it was pointed out that the FTT's conclusion was inconsistent both with the Country Policy and Information Notes, ("CPIN"), Sri Lanka: Sexual orientation and gender identity and expression, 2018, and the United States State

Department, ("USSD"), Country Report on Human Rights Practices, 2018, to the effect that although such prosecutions take place, their occurrence is rare.

30. Moreover, that although the FTT was also entitled to have regard to the extent to which state officials used the threat of prosecution to persecute gay men, "*The FTT was however obliged to consider the nature and extent of the evidence on this issue available to the panel in the 2015 CG case, before it could properly determine that there were the requisite very strong grounds required to depart from it*."

UT Judge Perkin's decision

31. The re-hearing of the appeal came before UT Judge Perkins on 23 November 2021 and 6 December 2021. In a decision promulgated on 12 June 2023, he allowed PG's appeal against the SSHD's decision to deport PG to Sri Lanka, on the basis that it would breach his rights under Article 3 ECHR.

32. In the course of the hearing, UT Judge Perkins, like the FTT Judge before, was provided with material which postdated the country guidance case of *LH & IP*, including, *Galabada*, upon which those representing PG placed considerable reliance, and,

i. *"Police Performance Report of 2018 – Evidence of Prosecutions,"* which contained a "*Table on Raids on Vice from 2016 – 2018*" which stated that 48 gay men had been charged and prosecuted for apparent "*homosexuality*."
ii. An article entitled, "*Groundviews: arrest and harassment of LGBTIQ persons*", which referred to the prosecution of two men at Fort Magistrates' Court, and to an arrest of three men in a hotel room in Colombo in 2019, who were not engaging in sexual relations but were prosecuted for same sex activities.
iii. CPIN dated 2020, which stated that conversion therapy is freely available to people in Sri Lanka as homosexuality is illegal.
iv. A Human Rights Watch Report dated 20 October 2020, entitled, "*Sri Lanka: forced anal exams in homosexuality prosecutions*", which stated that since 2017 seven people had been forced to undergo physical examinations that were cruel, inhuman and degrading. Moreover, that sixteen lesbian, gay, bisexual and transgender people being interviewed in 2016 had experienced physical or sexual assault including rape by the police.

33. Between [61] – [64], UT Judge Perkins stated that,

> *"61.I have looked at LH & 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 s365 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 & 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."*

34. UT Judge Perkins, having considered what was said by this court in *Jain v SSHD* [1999] EWCA Crim 3009, ("*Jain*"), about what may amount to "*persecution*" for these purposes, went on to state, between [67] – [69],

> *"67…..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 & IP. It must be the 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 the 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 the likely sentence would be a discharge or some inconsequential penalty. I do not find 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 their being a climate of disapproval prevalent in Sri Lankan society."

35. In the event, UT Judge Perkins, having considered the material before him, made the following findings between [110] – [122],

"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 & 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 & IP suggested otherwise it is wrong. This is important. In my judgment the reasoning in LH & 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 the 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-year-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 people 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 a 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 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 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 the 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."*

36. On this basis, UT Judge Perkins stated that he allowed PG's appeal on article 3 grounds.

37. Although permission to appeal against the decision was refused by UT Judge Perkins, it was granted by Arnold LJ on 28 June 2024.

Submissions

38. On behalf of the SSHD, Mr Biggs, submits that the UT failed to identify and apply the correct legal principles when considering whether PG's deportation would breach Article 3 ECHR, and/or failed to provide legally adequate reasons as to the application of those principles.

39. Furthermore, the UT failed to provide legally adequate reasons for departing from and/or not giving substantial weight to the country guidance provided in *LH & IP*.

40. On behalf of PG, Dr Chelvan, seeks to uphold the decision of UT Judge Perkins, submitting that the judge followed *LH & IP*, but found that PG's personal circumstances entitled him to determine that he would be subject to inhuman and degrading treatment if he returned to Sri Lanka.

41. He points out that in 2013 the SSHD accepted that, as a gay man whose wife's family had already threatened him because of his sexuality, it would be unreasonable to expect PG to live discreetly in Sri Lanka to avoid inhuman and degrading treatment, and that the situation had not altered.

42. It is submitted that the effect of *MI v Switzerland*, Application no. 56390/21, 12 November 2024, ("*MI v Switzerland*"), at [50], is to overrule what Lord Rodger said in *HJ (Iran) v SSHD* [2010] UKSC 31, ("*HJ (Iran)*"), and that if a gay man chooses to live discreetly for whatever reason in a country which persecutes gay men, then his Article 3 ECHR rights have been violated.

43. In any event, it is submitted that what was said in, *SB (Sri Lanka) v SSHD* [2019] EWCA Civ 160, ("*SB (Sri Lanka*)"), *at* [75], suggests that the categories of those who are at risk of persecution on return to Sri Lanka are not closed, and that as a man convicted of sexual offences against young boys, PG would be a risk of persecution on this basis if he returned to Sri Lanka, and therefore cannot be deported.

Discussion

44. It is common ground that for the purposes of section 32 of the UKBA 2007, PG is a foreign criminal, and that subject to the application of one of the exceptions in section 33, PG is liable to be deported to Sri Lanka under section 32(5).

45. The exception which is in issue in the present case is that provided for by section 33(2), namely that his removal to Sri Lanka would breach either his ECHR rights, or the UK's obligations under the 1951 Convention; albeit PG's reliance on the latter is precluded by reason of his status as serious criminal, who has not rebutted the presumption that he is a danger to the community of the UK.

46. Thus the focus of enquiry in the present case has been upon PG's Article 3 ECHR rights, namely that "*No one shall be subjected to torture or to inhuman or degrading*

treatment or punishment", and in particular the decision by UT Judge Perkins that PG's deportation would amount to a breach of his right not to be subjected to degrading treatment by reason of his sexuality on return to Sri Lanka.

47. In regard to alleged breaches of Article 3 rights, the court's approach has been described in *Khasanov & Rakhmanov v Russia (GC)* (2022) Applications nos. 28492/15 and 49975/15, ("*Khasanov & Rakhmanov v Russia*"), at [93], as requiring an assessment of whether,

> *"…substantial grounds have been shown for believing that the person in question would face a real risk of being subjected to treatment contrary to Article 3 in the destination country."*

48. Moreover, at [95], that the risk assessment must focus,

> *"..on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there, and of his or her personal circumstances…"*

and that,

> *"It must be considered whether, having regard to all the circumstances of the case, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention."*

49. This stepped approach was further explained at [99] and [100], as follows,

> *"99. The first step of this assessment should be the examination of whether the existence of a group systematically exposed to ill-treatment, falling under the 'general situation' part of the risk assessment, has been established. Applicants belonging to an allegedly targeted vulnerable group should not describe the general situation, but the existence of a practice or of a heightened risk of ill-treatment for the group of which they claim to be members. As a next step, they should establish their individual membership of the group concerned, without having to demonstrate any further individual circumstances or distinguishing features (see JK & Others v Sweeden [GC], no 59166/12, 103-05, 23 August 2016).*
>
> *100. In cases where – despite a possible well-founded fear of persecution in relation to certain risk-enhancing circumstances – it cannot be established that a group is systematically exposed to ill-treatment, the applicants are under an obligation to demonstrate the existence of further special distinguishing features which would place them at a real risk of ill-treatment. Failure to demonstrate such individual circumstances would lead the Court to find no violation of Article 3 of the convention…."*

50. As was accepted in *JK & Others v Sweden* (GC) (2016) Application no. 59166/12, at [80], it is not only the risk of ill-treatment directly by the State which will be of relevance to the determination of these issues, but also the State's response to the risk of ill-treatment by non-State actors. However, in those circumstances not only must it be shown that the risk of ill-treatment by non-State actors is real, "…*but that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection*…"

51. Moreover, although the possibility of an individual obviating any such risks by internal relocation within the receiving State will be relevant to the assessment as to whether an individual's return will amount to a breach of Article 3, the court made it clear, at [80] that,

> *"…as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise…."*

52. In relation to the issue as to whether the risk of ill-treatment, as being a gay man in a gay intolerant State, may be obviated by the individual living there discreetly, Lord Rodger described the approach to be followed by tribunals, albeit in relation to a claim for asylum, in *HJ (Iran),* at, [82],

> *"82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.*
>
> *If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.*
>
> *If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.*
>
> *If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".*
>
> *If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.*
>
> *If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to*

> *persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.*
>
> *If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."*

53. In the present case the UT had provided country guidance concerning the treatment of gay men in Sri Lanka, in *LH & IP*, the relevant parts of which stated that,

> *"(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."*

54. The significance of country guidance cases and the court's approach to them was considered by this court in *R(SG (Iraq)) v SSHD* [2012] EWCA Civ 940, ("*R(SG)Iraq)*") at [46] and [47], where Lord Justice Stanley Burnton explained that,

> *"46. The system of country guidance determinations enables appropriate resources, in terms of representations of the parties*

> *to the country guidance appeal, expert and factual evidence and the personnel and time of the tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the country guidance appeal to, the country in question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination.*
>
> *47.It is for these reasons, as well as the desirability of consistency, that decision-makers and tribunal judges are required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."*

55. In *SB (Sri Lanka)*, Lord Justice Green, having noted what had been said in *R(SG (Iraq)) v SSHD*, endorsed that approach, adding at [75] that, "*The guidance is by its nature incapable of covering every conceivable possible scenario that might arise and which might place a person at jeopardy if returned. It is, though, a very important starting point, is to be taken into account, and carries great weight*."

56. It is within the framework of these legal principles and approach, that UT Judge Perkins was required to consider the documentary material before him and the particular circumstances relating to PG. In this regard, there was no issue but that PG was a gay man, and that unless his return amounted to a breach of his Article 3 ECHR rights, the SSHD was required to deport him to Sri Lanka.

57. The starting point for any consideration of whether PG's deportation, as a gay man to Sri Lanka, would be contrary to his Article 3 ECHR rights, was for the UT to ask itself whether it was satisfied on the available evidence that gay people who lived openly in Sri Lanka would be liable to persecution. Furthermore, in considering this question the UT was required to take the country guidance case of *LH & IP* into account, and to follow it unless "*very strong grounds supported by cogent evidence, are adduced justifying their not doing so*."

58. In relation to this latter issue, not only was the UT required to consider the further evidence which had been placed before it, but it was also necessary for the UT to carry out a careful analysis of the evidence which had been considered by the UT in *LH & IP*, in order to be in a position to decide whether there were very strong grounds supported by cogent evidence for not following the country guidance in that case.

59. The documentary evidence considered by the UT in *LH & IP* had been helpfully summarised in *Appendix B* to the judgment, and whilst this included reference to a lack of prosecutions under section 365 of the Penal Code, as noted at [16] of the judgment, other evidence referred to in [62], suggested that while prosecutions were rare, the law had been used to carry out arbitrary arrests and detention by the Sri Lankan police, which had led to "*bribery, blackmail, extortion, violence or coerced sexual favours*."

60. On my reading of his judgment, beyond a rehearsal of the evidence which had been placed before him on behalf of PG, I am unable to discern, that, apart from the

reference to the previous lack of prosecutions under the Penal Code, UT Judge Perkins sufficiently analysed the evidence which had been considered by the UT in *LH & IP*, in order to be in a position to properly determine whether the further evidence which had been placed before him on behalf of PG, did provide sufficiently strong grounds for departing from the country guidance in that case.

61. In this regard, although, like the FTT judge before him, UT Judge Perkins was entitled to take into account that, contrary to what had been said in *LH & IP* at [16], the decision of the Sri Lankan Supreme Court in *Galabada* showed that there had been a prosecution and indeed a conviction for an offence relating to homosexuality, under the Sri Lankan Penal Code, I do not consider that UT Judge Perkins was correct to conclude at [111] of his decision, that, "…*the reasoning in LH & IP depends on there having been no successful prosecutions for same sex activity for many years*…" Not only was there other evidence which suggested that whilst rare, such prosecutions may have taken place, but there was a substantial body of other evidence upon which the UT in *LH & IP* had based its reasoning which required to be considered.

62. Moreover, it was of relevance that the circumstances which had given rise to the prosecution in *Galabada*, namely sexual activity in public, rather than in private, was equally capable of giving rise to a prosecution in this country, regardless of the sexual orientation of those involved. Indeed, as Schiemann LJ observed in *Jain,* whilst a person is entitled to protection from interference with what he does in private at home, "*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*."

63. Although, there have been departures from the guidance in *LH & IP* in two other unreported UT cases, namely *SASS* and *MKMR*, not only is it necessary to observe that all such cases rely upon their own facts, but to the extent that in *MKMR* the UT determined that *Galabada* by itself provided "*cogent evidence providing strong grounds for not following LH & IP and to find that there was a reasonable degree of likelihood that the appellant would be at risk of persecution on return*", I would respectfully disagree for the reasons I have already sought to explain.

64. In any event, it was clearly necessary for UT Judge Perkins to provide reasons as to why he considered that there were substantial grounds for believing that if PG returned to Sri Lanka, he would, as a gay man, face a real risk of persecution. Once again, I regret to observe that, beyond the rehearsal of the evidence which was provided to him, the judge does not appear to have provided any reasoned analysis of the evidence which he considered may have justified such a conclusion, whether that was as a gay man simpliciter or as a result of his personal circumstances.

65. In relation to PG's personal circumstances, it is correct that there was evidence that his wife's family, who lived in Colombo, had threatened him, and of course PG has convictions for sexually abusing boys whilst in the UK.

66. However, in relation to the first of these issues, UT Judge Perkins found at [112] that, "…*there is nothing in the evidence here that persuades me that relocation*

away from his family would, or itself, create a risk to his rights that are protected by article 3 of the ECHR." Whilst in relation to the second of these issues, although at [28] of the decision, UT Judge Perkins had accepted that there was, "…*at least a real risk of [PG] being identified as a sex offender who had abused boys.*" He went on to find at [116] that although, "*It is possible that a dishonest police office 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",* and concluded at [117] that, "*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*."

67. Moreover, in relation to the more generalised treatment of gay men in Sri Lanka, not only did the judge refer, at [118], to oppression, rather than persecution, but to the extent that he found that the latter existed, at [121], there was as I have already pointed out no reasoned analysis of the evidence which he considered may have justified such a conclusion. Indeed to the extent that he appears to have relied upon the SSHD's decision to grant PG limited leave to remain in the UK in 2013, as the SSHD pointed out at the time, this was made on the basis of the situation in Sri Lanka in 2013, prior to the provision of country guidance in *LH & IP* in 2015, and that the situation would need to be reassessed when it arose.

68. In relation to the two discrete issues which Dr Chelvan sought to raise on behalf of PG, arising from *MI v Switzerland* and *SB (Sri Lanka)*, in the light of the findings made by UT Judge Perkins in this case, the former does not require further consideration. Moreover, as was pointed out during the course of the hearing, even if this court considered that there was any inconsistency between what was said by Lord Rodger in *HJ (Iran)* at [82], and *MI v Switzerland* at [50], then absent wholly exceptional circumstances, it would not be open to this court, or indeed a tribunal, not to follow the decision of the Supreme Court, (see: *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311, at [64]).

69. In relation to *SB (Sri Lanka),* it is submitted that what was said at [75], as set out above, suggests that the categories of those who are at risk of persecution on return to Sri Lanka are not closed, and that as a man convicted of sexual offences against young boys, PG would be a risk of persecution on this basis if he returned to Sri Lanka, and therefore cannot be deported.

70. However, it is apparent that what was being discussed in *SB (Sri Lanka)* at [75] was the issue of whether what had been said in *KK (Application of GJ) Sri Lanka* [2013] UKUT 512 (IAC), suggested that country guidance had to be followed in every case regardless of the facts of the instant case. As I have already set out, this was stated not to be the approach, and that because guidance is incapable of covering every conceivable scenario that might arise and which might place a person in jeopardy if returned, it was instead to be regarded as a very important starting point which carries significant weight.

71. In my judgment, this is entirely consistent with the stepped approach set out in *Khasanov & Rakhmanov v Russia*, as to first considering the general situation in the country of destination, before going on to consider the individual's personal circumstances. Moreover, it is a far cry from suggesting that as a man convicted of

sexual offences against young boys, PG would be at risk of persecution on this basis if he returned to Sri Lanka, and therefore cannot be deported. Indeed, this was not the basis of his case before the UT, and to the extent that it was submitted that his convictions were of relevance, UT Judge Perkins dealt with the issue at [116].

Conclusion

72. In the light of these matters, I consider that the SSHD's grounds of appeal are made out, in that to the extent that the judge sought to depart from the country guidance case of *LH & IP*, I consider that there was insufficient analysis of the evidence to enable the judge to be in a position to be able to determine whether there were sufficiently strong grounds for not following the guidance. Moreover, I consider that insufficient reasons were provided as to whether PG, as a gay man, would face persecution on return to Sri Lanka either as a result of the treatment of gay men in that country *per se*, or in combination with his personal circumstances.

73. It was submitted on behalf of PG that in the event that the appeal was allowed, this court had the evidence necessary to redetermine the Article 3 ECHR issue in favour of PG, and should do so. I do not consider that is an appropriate course of action, as the factual analysis which has been identified as being necessary in this case, is one best carried out by the UT which has specialist experience of these matters. In these circumstances, I consider that although the decision of UT Judge Perkins cannot stand, it will be appropriate for the decision to be remitted for a further hearing by the UT.

74. Before leaving this case, I would like to acknowledge that UT Judge Perkins is highly experienced in this field, and note that the time which he took in promulgating his decision, some 18 months from the hearing, whilst too long, may also reflect the approach which was taken on behalf of PG in presenting the evidence to him. In this regard, we were asked to admit almost 1000 pages of unagreed further evidence, which we refused as it was clearly not of relevance for the purposes of this appeal.

75. As was pointed out earlier in the judgment, where it is proposed to seek to depart from country guidance, it is necessary for a careful analysis of what evidence exists, beyond that which had already been considered by the UT when giving the guidance, and it is only that evidence which it is likely to be necessary to be provided to the tribunal to enable it to determine whether the it provides sufficiently strong grounds for not following the guidance. Although to date this has not been the approach adopted on behalf of PG, it is one which should now be adopted.

Lady Justice Asplin: I agree.

Lord Justice Bean: I also agree.