



**Upper Tribunal  
(Immigration and Asylum Chamber)**

LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 00073 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Field House  
on 6 - 8 August 2014**

**Determination promulgated**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON  
UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**LH & IP**

**and**

**Appellants**

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

**Respondent**

For the Appellants: Mr I Palmer and Ms S Pinder, instructed by Fadiga & Co, Solicitors  
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

- (1) *Having regard to the provisions of articles 365 and 365A of the Sri Lankan Penal Code, gay men in Sri Lanka constitute a particular social group.*
- (2) *'Gay men in civil partnerships' in Sri Lanka do not constitute a particular social group for the purposes of the Refugee Convention. The Sri Lankan authorities' failure to recognise alternative marital and quasi-marital statuses such as civil partnership or homosexual marriage which are available in other countries of the world does not, without more, amount to a flagrant breach of core human rights.*
- (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.*

## **DETERMINATION AND REASONS**

### *Anonymity*

1. An anonymity direction remains in place unless or until this Tribunal, or any other appropriate Court, directs otherwise. No report of these proceedings shall directly or indirectly identify the appellants. Failure to comply with this direction could amount to a contempt of court.

### *Background*

2. The appellants are citizens of Sri Lanka who entered the UK as students, LH on 2 February 2011 and IP on 17 December 2010. They first met here, and entered into a civil partnership on 29 November 2011. The respondent accepts that the appellants are gay and that they are civil partners, a status not recognised in Sri Lanka. On 2 February 2012 they applied for leave to remain in the UK, outside the requirements of the Immigration Rules, on the basis of their private and family life with each other pursuant to Article 8 ECHR. The respondent considered that removal of the appellants to Sri Lanka would not be a disproportionate interference with their private and family life and refused both applications by letters dated 12 April 2012. There are currently no removal directions.
3. The appellants have not made an asylum or humanitarian protection application at an Asylum Screening Unit, but in their grounds of appeal they included Refugee Convention and humanitarian protection grounds in addition to the principal Article 8 ECHR claim. The Refugee Convention reason relied upon by these appellants is membership of a particular social group, either as gay men, or as gay men in a civil partnership. The appellants in their appeals to the First-tier Tribunal also invoked the humanitarian protection provisions in the Immigration Rules at paragraph 339C. Again, that application was not made properly to the

Asylum Screening Unit but for clarity, we have nevertheless dealt with it in this determination.

#### *Procedural history*

4. First-tier Tribunal Judge Parkes dismissed the appellants' appeals in a determination promulgated on 20 July 2012. Upper Tribunal Judge Allen set that determination aside by a decision dated 30 November 2012, for inadequacy of reasoning regarding the risk to them on return to Sri Lanka.
5. The appeals were identified for possible country guidance on the risk to gay men in Sri Lanka, with particular reference to any difference arising out of civil partnership status. There is no current reported authority on the risk to gays or LGBT persons in Sri Lanka, or in relation to civil partnership. We have had regard to UNHCR guidance as to the best practice in referring to those with same-sex preferences given on 23 October 2012 in the *UNHCR Guidelines on International Protection No. 9 – Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. The *Guidelines* recommend the use of "LGBTI" [lesbian, gay, bisexual, transgender and intersex] and its component terms in preference to "homosexuals". Wherever possible in this determination we have followed that guidance.
6. We are obliged to both sides for their care and effort in presenting the case. There was no significant difference between them regarding the legal framework within which we have to reach our decision, and before the hearing, they had agreed a list of possible issues for the Upper Tribunal, pursuant to directions.
7. The determination which follows takes into account all of the evidence and submissions, including the country documents listed at Appendix A and summarised in Appendix B. We have both contributed to the determination. We are aware that since the hearing of these appeals, there have been elections in Sri Lanka and that former President Rajapakse and his family are no longer in power. However, it has not been suggested that there is any significant difference in the treatment of LGBT individuals as yet. Any future change would require further country guidance.

#### *The issues*

8. In all cases where 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 [*HJ and HT*] test applies, it is necessary to make a finding as to the relevant sexual orientation of the individual in question. In the present appeals, since the parties have entered into a civil partnership, the respondent does not dispute their homosexual orientation and we accept that they are two gay men who entered the United Kingdom as students. Both are Sinhalese citizens of Sri Lanka. The parties proposed that we formulate the country guidance issues as follows:

### **Refugee claim/humanitarian protection**

- (1) In the context of refugee claims of Sri Lankan nationals, do gay men constitute a particular social group for the purposes of the Convention?
- (2) In the context of refugee claims of Sri Lankan nationals, do gay men in civil partnerships constitute a particular social group for the purposes of the Convention?
- (3) Applying the test set out by Lord Rodger in the Supreme Court judgment in [*HJ and HT*] at paragraph 82:
  - (i) Does the background evidence demonstrate that a gay man who lives openly in Sri Lanka is liable to be persecuted?
  - (ii) Does the background evidence demonstrate that gay men in civil partnerships who live openly as couples in Sri Lanka are liable to be persecuted?
  - (iii) In the context of refugee claims of Sri Lankan gay men/gay men in civil partnerships, what form, if any, would the persecution take?
  - (iv) Would the appellants themselves live openly as gay men/as gay men in a civil partnership if they returned to Sri Lanka?
  - (v) Would they live as gay men/gay men in a civil partnership discreetly in order to avoid persecution?
  - (vi) If they would live discreetly, why would they do so?
- (4) In light of the conclusions to the issues listed above, if the appellants do not qualify for protection under the Refugee Convention do they qualify for a grant of humanitarian protection under paragraph 339C of the Immigration Rules?

### **Article 8 ECHR**

- (5) In light of the appellants' civil partnership, do they enjoy family life within the meaning of Article 8 ECHR?
  - (6) Would it be a flagrant breach of the appellants' right to respect for family life if removed to Sri Lanka in circumstances where it can be demonstrated that civil partnerships are not recognised in law and there exist other forms of societal and cultural discrimination against such partnerships?
9. The questions set by Lord Rodger in *HJ and HT* are mainly factual, with reference to the particular circumstances of individual appellants. We observe that the issues identified conflate the country guidance needed with the factual matrix in relation to these appellants and the remedy sought. Issues (3)(v) and (vi) appear to overlap. While the framing of the issues has been a useful exercise, when giving our guidance we have done so more concisely, reserving questions of fact and outcome to the consideration of the individual appeals.
10. The only one of the *HJ/HT* questions which is suitable for examination as country guidance is whether, on the available evidence, the Tribunal is satisfied that gay men, or if appropriate, other LGBTIQ individuals, living openly in Sri Lanka would be liable to persecution or serious harm and thus entitled to international protection. The remaining factual questions will be answered, in relation to these

appellants, by reference to the answer to that question. There is no significant distinction between family and private life in these appeals.

11. That is the basis on which we approached the evidence (written and oral) and the submissions before us.

*The legal framework*

12. The appellants invoke the protection of the Refugee Convention and also of the ECHR. The Refugee Convention definition, and those in Articles 3 and 8 ECHR are well known and we do not need to repeat them here.
13. In relation to humanitarian protection, the appellants rely on the Charter of Fundamental Rights of the European Union, and EU Council Directive 2004/83/EC (“the Qualification Directive”). Article 9(1)(a) of the Qualification Directive requires acts of persecution to be ‘sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2)’ of the ECHR, and Article 9(1)(b) includes ‘an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner’ as that in Article 9(1)(a).
14. The definition of persecution in the Qualification Directive at Article 9(2) is not exhaustive, but includes the following:

- “9(2) Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:
- (a) acts of physical or mental violence, including acts of sexual violence;
  - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory measure;
  - (c) prosecution or punishment which is disproportionate or discriminatory;
  - (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; ...
  - (f) acts of gender-specific or child-specific nature.”

*The criminal law in Sri Lanka*

15. Homosexual activity, or the procurement thereof, is illegal in Sri Lanka. The Penal Code of Sri Lanka provides at section 365:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be punished with fine and where the offence is committed by a person over 18 years of age in respect of any person under 16 years of age shall be punished with rigorous imprisonment for a term not less than 10 years and not exceeding 20 years and with fine and shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for injuries caused to such person.

And at s. 365A (introduced by the Penal Code (Amendment) Act (No. 22 of 1995):

Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished with imprisonment of either description, for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to such person.

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. The appellants argue that even without prosecution, the indirect consequences of these provisions may contribute to persecution or ill-treatment, and may be relevant also in the Article 8 ECHR assessment, if it can be shown that they impact on the ability of homosexual or LGBTI individuals, singly or in couples, to maintain their private and family life.
17. We begin by reviewing the country evidence before us, before proceeding to consider the individual situation of these appellants in that context. The country background evidence before the Upper Tribunal runs to almost 600 pages in two bundles, and is summarised, so far as relevant to the issues in these appeals and the position of LGBT individuals in Sri Lanka, at Appendix B below. A full list of all the documents before us appears in Appendix A. Even before the existence of civil partnerships, and now gay marriages, it was accepted that a same-sex relationship in appropriate circumstances would constitute family life under Article 8 ECHR, with or without the addition of the discrimination protection in Article 14 ECHR (see, for example, *Schalk & Kopf v Austria* (30141/04) (22 November 2010); *Vallianatos & Others v Greece* (29381/09 & 32684/09) (7 November 2013); and the judgment of Lord Justice Sedley in *Krasniqi v SSHD* [2006] EWCA Civ 391). The capability to register civil partnerships, and now to marry, puts the question beyond dispute. The respondent has not sought to suggest that the parties here do not have family life together.

*Particular social group*

18. We have considered the risk on return to Sri Lanka for gay men, and we are satisfied, having regard to the Supreme Court judgment in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 that it is correct to treat gay men in Sri Lanka as a particular social group. We shall also make some observations on the evidence concerning lesbians and transgender individuals in Sri Lanka which has been presented to us.
19. Following the judgment of the Supreme Court in *HJ and HT*, it is established that homosexuals are capable of being a particular social group within the meaning of the Refugee Convention. At paragraph 65 in the opinion of Lord Rodger in, he summarised the basis of protection for members of a particular social group under the Refugee Convention thus:

“65. ...so far as the social group of gay people is concerned the underlying rationale of the Convention is that they should be able to live freely and openly as gay men and lesbian women, without fearing that they may suffer harm of the requisite intensity or duration because they are gay or lesbian. Their home state should protect them and so enable them to live in that way. If it does not and they will be threatened with serious harm if they live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it.”

The *HJ and HT* analysis is reflected in issue (3) at paragraph 9 above.

20. In *X, Y and Z v Minister voor Immigratie en Asiel v Hoog Commissariaat van de Verenigde Naties voor de Vluchtelingen* [2013] EUECJ C-199/12, the Court of Justice of the European Union held that where a practice, such as homosexuality, was made illegal by the laws of a particular state, that criminalisation of itself would support a finding that the group whose actions were criminalised were a particular social group. Whether the particular social group so identified was at risk of persecution would depend first on whether the state in question enforced the legislation, and if not, would be a question of fact as to the risk from other non-State actors of persecution. The CJEU summarised its findings thus:

- “1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target gay men, supports the finding that those persons must be regarded as forming a particular social group.
2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts *per se* does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.
3. Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.”

*Are civil partners or persons in gay marriages a particular social group in Sri Lanka?*

21. Although civil partnerships and gay marriages are not recognised in the law of Sri Lanka, we are not persuaded that it is helpful further to narrow the proposed

particular social group beyond that of gay men, or where appropriate, LGBT individuals. There is no definition in the Refugee Convention of what is meant by particular social group, but Article 10 of the Qualification Directive seeks to define particular social group:

**"10. Reasons for Persecution**

1. Member States shall take the following elements into account when assessing the reasons for persecution:

...(d) a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article; ..."

22. However, the couple will be removed together and whether the failure of the Sri Lankan authorities to recognise civil partnerships itself engages Article 3 or Article 8 ECHR is doubtful. The evidence before us does not show that those who have entered abroad into gay marriages or civil partnerships have a distinct identity in Sri Lanka. Nor, arguably, is that status an unchangeable characteristic, though the parties of course intend it to be so. We have therefore asked ourselves whether the status, of itself, is 'so fundamental to identity and conscience that a person should not be forced to renounce it'. Again, the evidence before us is that the Sri Lankan state simply does not engage with the status of civil partner at all. Individuals in such relationships are not forced to renounce them: the status is ignored. There is no provision on official forms for it, but it continues to exist.

23. Extraterritorial Article 8 arguments must reach a high standard. In *EM (Lebanon) v SSHD* [2008] UKHL 64, the House of Lords considered the Article 8 rights of a mother who, if returned to Lebanon with her child, would be required to relinquish custody to its father, pursuant to Shari'a law. In his opinion, Lord Hope said that the breach feared must be flagrant, 'destroying or nullifying the family life that they have enjoyed together', with reference to the decision of the House of Lords in *N v Secretary of State for the Home Department* [2005] UKHL 31 and *D v United Kingdom* [1997] ECHR 25:

"7. It seems to me that the Strasbourg court's jurisprudence indicates that, in the absence of very exceptional circumstances, aliens cannot claim any entitlement under the Convention to remain here to escape from the discriminatory effects of the system of family law in their country of origin. ...



15. The guidance that is to be found in these decisions indicates that the Strasbourg court would be likely to hold that, except in wholly exceptional circumstances, aliens who are subject to expulsion cannot claim an entitlement to remain in the territory of a Contracting State in order to benefit from the equality of treatment as to respect for their family life that they would receive there which would be denied to them in the receiving state. ... On a purely pragmatic basis the Contracting States cannot be expected to return aliens only to a country whose family law is compatible with the principle of non-discrimination assumed by the Convention.

16. How then can one distinguish between those cases where a violation of articles 8 and 14 that results from applying Shari'a law will be flagrant, from those where it will not? ...[In this appeal] the complaint is about the effects of discriminatory family law on the relationship that exists between individuals. It has not been suggested in this case that there is a risk that the application of the Shari'a law would result in persecution of the appellant approaching the level prescribed by article 3. So that check as to whether a flagrant breach has been established cannot be relied on in the assessment.

17... [T]he key to identifying those cases where the breach of articles 8 and 14 will be flagrant lies in an assessment of the effects on both mother and child of destroying or nullifying the family life that they have shared together. The cases where that assessment shows that the violation will be flagrant will be very exceptional. But where the humanitarian grounds against their removal are compelling, it must follow that there is an obligation not to remove. The risk of adding one test to another is obvious. But in the absence of further guidance from Strasbourg as to how the flagrancy test is to be applied in article 8 cases, I would adopt that approach in this case."

24. There were similar facts in *SS (Malaysia) v SSHD* [2013] EWCA Civ 888, where the Malaysian appellant's main concern was that her son, born in 2006, should continue to be brought up as a Catholic and not, as his father wished, as a Muslim. It was most likely that in Malaysia he would be allowed to live with her until he was about 15, but she would not be allowed to bring him up as a nominal Christian. Relying heavily on *EM (Lebanon)*, Lord Justice Moore-Bick, with whom the other judges agreed, said this:

"17. The real complaint ... is that the courts of the appellant's own country resolve disagreements relating to the religious upbringing of children in a way which differs from our own and which she finds uncongenial. To return her and her son ... would not in my view amount to a flagrant denial of her Convention rights or those of her son; nor would it be contrary to his best interests."

25. For the purposes of these appeals, we are not satisfied on the evidence before us that the Sri Lankan state's failure to recognise the appellants' status as civil partners has been shown to be sufficiently flagrant of itself to destroy or nullify their family life: on the contrary, if removed they will be removed together and the status will continue to exist, albeit not recognised in Sri Lanka. We do not consider that individuals whose civil partner status or status as married homosexuals is not reflected in their legal status in their country of origin form a separate particular social group or that Article 8 ECHR is engaged by that aspect of the factual matrix alone.

## *Country evidence*

### *The Equal Ground reports*

26. Equal Ground is an organisation in Sri Lanka which supports LGBTI persons there. Its Executive Director is Ms Rosanna Flamer-Caldera. Ms Flamer-Caldera uses the abbreviation LGBT (lesbian, gay, bisexual and transgender) in her report, but in her oral evidence, she also used LGBTI and sometimes LGBTIQ. For the purpose of the individual appellants here, there is no relevant difference, since they are both gay men.
27. Equal Ground's reports are pivotal in this case, since they are accepted and referenced in the US State Department Report, FCO and UKBA evidence, as well as that of the Canadian IRB and the international NGOs. Ms Flamer-Caldera's evidence also overlaps significantly, if not entirely, with that of Mr Guruparan.
28. Several of Equal Ground's public reports appear in the bundle: an undated report entitled "Struggling against homophobic violence and hate crimes" based on interviews with 109 individuals in 13 districts of Sri Lanka during April-June 2011; a report dated 9 December 2012 entitled "Towards a lesbians, gays, bisexuals and transgendered (LGBT) stigma and discrimination index for Sri Lanka" (the 'Pilot Study'), based on interviews with 119 persons known to Equal Ground; a January 2013 situation analysis entitled "Strengthening of legal protection for LGBT in Sri Lanka: road to decriminalization" and a report for the UNHCR General Council in March 2014 entitled "Human rights violations against lesbian, gay, bisexual and transgender people in Sri Lanka: a shadow report".
29. The reports all set out the legal framework and the criminal penalties available for same-sex sexual activity in Sri Lanka. As they cover much of the same ground, the Equal Ground background evidence can be summarised together. The Equal Ground reports acknowledge that there have been no successful prosecutions and indeed, in 50 years of the Sri Lankan state, hardly anyone has been charged. Examples are given of repression of lesbian and bisexual women who were forced by their families to marry men; of pressure on Equal Ground's partner organisation when it tried to run a HIV/AIDS workshop; and of attacks on transgender individuals working in the sex industry or appearing in public dressed as a member of their new gender identity group. There was marginalisation and discrimination against LGBTIQ individuals at school with the result that many did not complete their education. The former President Rajapaksa had personally removed from his draft human rights action plan any mention of legalising homosexuality. The reports note that while there are Pride activities in Sri Lanka, there are no public marches.

### *Miss Rosanna Flamer-Caldera's evidence*

30. This witness is the executive director of Equal Ground. Ms Flamer-Caldera's November 2013 report for these appellants discusses the criminalisation of same sex behaviour in Sri Lanka; instances of police victimisation of gay men, including examples of rape by the police (derived from a report by an Equal Ground field officer); the government's intolerance of LGBT people, and its reluctance to establish non-discriminatory remedies; the hidden status of lesbian and bi-sexual women, who risk having their relationships thwarted and being forced into heterosexual marriages by their parents; blackmail, stigmatisation; discrimination in access to work, health services and education; impunity for crimes committed against LGBT individuals, who fear reporting to the police and are subject to further attacks if they do; incitement of homophobia in the media; and state harassment of LGBT human rights defenders, including CID pressure on field activities, amounting to a gagging order. In its final paragraph the report says:

Under the circumstances described above, it is our opinion that LGBT persons face insurmountable opposition from the government, media and law enforcement agencies. LGBT persons are being forced underground and into the closet, interventions on HIV/Aids and other health related issues for the LGBT community are being stopped or hampered and those who perpetrate crimes against LGBT persons go unpunished.

31. We turn now to consider the evidence prepared by Ms Flamer-Caldera in these appeals, and the oral evidence she gave. Her report is dated November 2013, and begins by summarising the relevant international Conventions and the criminalisation of same-sex activity in Sri Lanka. There had been an attempt to repeal the relevant provisions in 1995 but the effect was worse, not better, since the word 'males' in the original text was replaced by 'persons', thereby criminalising lesbian as well as homosexual sexual activity. The report states that there is no right to privacy in the Sri Lankan constitution. The report confirmed that there had been no prosecutions of gay men or lesbians under sections 365 and 365A, but its effect was to provide a tool for harassment of the LGBT community such that its members were afraid to report incidents of violence and other violations to the police, for fear of being further stigmatised and victimised by the police.

32. Ms Flamer-Caldera's report gave a number of examples of problems which had occurred in the writer's knowledge:

- (ii) in 2009, a homosexual member of Equal Ground had felt unable to report to the police the theft by his boyfriend of his Apple laptop;
- (iii) in 2010, the Equal Ground offices were burgled, but they did not report the burglary to the police for fear of 'systematic harassment' from the police once the office location was known;
- (iv) LGBTIQ individuals were unable to access proper health care for fear of disclosing their sexual orientation and/or gender identity. They feared that health care personnel would treat them indifferently, or

with disdain. An example was given of a female to male transsexual who, as reported in an Equal Ground Field Officer report in October 2013, had a pain in the night, apparently while in hospital, and vomited all over his bed. Nobody came when he cried out for help, and in the morning, a male head nurse and minor staff took off the sarong he was wearing “to examine my genitals”. Difficulty in interaction with hospital staff had led to an increase in HIV infections amongst gay men and bisexuals from 11% in 2011 to 15% in 2013;

- (v) At school, bullying, marginalisation and discrimination led many LGBTIQ individuals to drop out of education. An example was given, from the same Field Officer report of October 2013, of a female to male transsexual who had faced problems at school, in the workplace and in society, because she insisted on dressing and behaving as a boy.
- (vi) Another example, from an Equal Ground Field Officer report in August 2013, was of a bisexual male who, some time earlier when he was 16 years of age, had been raped by two senior students in his school toilets. No one was there to help him.

33. Equal Ground had submitted detailed reports regarding the situation of LGBT individuals in Sri Lanka to inform the UNHCR’s Universal Periodic Review (the UPR) in 2008 and 2012. The 2008 UPR had been disappointing, in that it failed to include any observations on the position of LGBT individuals. In 2012, Equal Ground submitted a further three reports to the UNHCR for the UPR, and in that year, Canada and Argentina supported calls for the decriminalisation of homosexuality in Sri Lanka. Equal Ground had been invited to attend meetings before and after the publication of the UPR. During those meetings, the Sri Lankan President’s Special Envoy to Geneva, the Honourable Mahinda Samarasinghe, and the Attorney General, and other civil society figures had told Equal Ground categorically that homosexuality would never be decriminalised in Sri Lanka. The Sri Lankan government’s current action plan on human rights contained no proposal for legalising homosexuality, the President having personally removed it from the draft.

34. Examples were given of repression of lesbian and bisexual women in Sri Lanka by their families: one woman was locked up and forced to marry a man eight years younger than she was, once her family knew of her orientation; another was refused permission to work and not allowed to use her mobile phone or contact her girlfriend; and a third, who had been living with her female partner and caring for her ailing mother, was forced after her mother’s death to marry a man, on pain of losing all the property bequeathed to her. The woman married as her brother insisted: her partner killed herself. There was an increased rate of self-harm by lesbian women, due to “internalised homophobia” and they were also vulnerable to blackmail.

35. Internalised homophobia and self-harm was an issue for LGBT individuals in general. All LGBT individuals suffered discrimination in access to work, health services and education.
36. Working from YouTube interviews, the report gave examples of treatment meted out to a graduate student working on a Masters' thesis on Safer Sex in Galle, in southern Sri Lanka, who was interviewing several men in a public place. He was accosted by police, and they were arrested and several of them beaten. The researcher was slapped and threatened with years in jail for 'promoting homosexuality'. He was thrown into a cell with such force that he fell and damaged his ankle. An effeminate man who was being interviewed by the researcher was anally raped with a wooden stick by three police officers in the same incident. Another YouTube interview recorded police harassing two homosexual men who were accused of having sex in a public lavatory in Colombo; the police arrested them, called them derogatory names, and demanded a bribe to release them.
37. The media was hostile to the LGBT community; an article in the July 2010 Sri Lankan Daily Mirror deplored moves to promote homosexuality and to treat heterosexuality as outdated. Unnamed public figures were accused of turning heterosexuals gay, and the article concluded that "the country can do well without these undesirable elements". A Sinhalese newspaper, The Rivera, had published a series of articles every weekend for a month (in context, it seems to have been September 2011) asserting that the LGBT community was "harming the cultural decencies and morality of Sri Lanka" and planning to open 24 homosexual centres in all districts of the island, with "the ulterior motive of harming the cultural decencies and morality of Sri Lanka". The articles related to the CoJ, warning parents to protect their sons, equating homosexuality with paedophilia. CoJ had subsequently closed down and no longer operated.
38. Pleas to decriminalise homosexuality continued to fall on deaf Government ears. Government controlled newspapers and blogs contained hate inciting and homophobic articles, including attacks on Radio Neth FM by clergymen in September 2013. On 17 August 2013, Lakbima (a Sinhalese newspaper) made an inflammatory criticism of a workshop held in Anuradhapura by a partner organisation of Equal Ground, which had been authorised by the Ministry of Health and which in reality, far from being an attempt to brainwash children to be homosexual, was a peer educator's workshop on MSM (men seeking men) and HIV/AIDS.
39. On 10 December 2012 and in early February 2013, the Women and Children's Bureau of the Sri Lankan police made presentations on the increasing problem with child abuse in Sri Lanka, which they stated was increasing because of the growing homosexual culture. The underlying suggestion was, again, that gay men are all paedophiles. Equal Ground was specifically identified, along with Ms Flamer-Caldera, as being responsible for spreading homosexuality in Sri Lanka, and by implication, promoting paedophilia.

40. Ms Flamer-Caldera gave evidence to us by video link from Australia. In examination-in-chief further to her report, she was questioned firstly about the closure in late 2011 of another LGBT organisation "Companions on a Journey" (CoJ). Ms Flamer-Caldera was unaware of the full details; her understanding was that the closure of CoJ was not directly persecutory but was related to the executive director being suspected of embezzlement of funds, as a result of which the Sri Lankan CID went to CoJ's office to investigate its finances. The incident was "blown out of proportion" by the press who made insinuations about sexual behaviour in the office and allegations of paedophilia, based on CoJ's office being situated next to a boys' school. The organisation closed its doors and the staff members were left with no resources. The director and his partner disappeared.
41. Ms Flamer-Caldera explained that Equal Ground's activities in the field in Sri Lanka are mainly centred on women's rights and HIV, but also related to commercial sex workers in the LGBT community. In one incident a field officer was visited by the CID and told not to hold workshops discussing homosexuality or the Penal Code. As a result, Equal Ground suspended those planned activities.
42. Over the last ten years, annual celebrations had been held in Sri Lanka by LGBTI persons in Sri Lanka ('Pride' events) which Equal Ground was instrumental in organising. Sri Lankan Pride events were not public street parades as in other countries: the organisation had to be careful about where to hold them. During the first few years, Pride events were held on public parts of the beach, but there was trouble in 2010 when a disruptive mob threw sand and stones. Since then the events have taken place on the private beach of a hotel where the management is very supportive. All events were held now in secure locations which could not be raided or targeted by extremist groups. Equal Ground was careful to make sure that friendly High Commissions and heterosexual persons took part in Pride events, so that any police raid would give rise to a lot of questions. During the last year, all Pride events except one were held at the German Cultural Institute, i.e. "on German soil". The other was held on the private beach of a hotel. Events in 2014 attracted about 2000 people. There were more events in 2013, including a drag fashion show attended by about 400-450 people.
43. The Secretary of State's assertion that gays were becoming more visible in Sri Lanka was put to Ms Flamer-Caldera for comment. She believed that to be so, mainly due to advocacy of LGBT rights, but with visibility came greater intimidation and violence. The risk to those who were openly gay in Sri Lanka was not always the same. For people with money, it did not matter very much. The majority, with modest or low income, suffered the most. All gays, regardless of their financial status, suffered some discrimination throughout life but the well-off were much better able to cope. Ms Flamer-Caldera's own position was highly visible, but she had not been detained or harassed. She could not fully explain why, but felt very fortunate. Although very vocal, she had excellent relations with Embassies and High Commissions of countries such as the UK,

Canada, USA and Norway. Ms Flamer-Caldera was from a prominent family. Nevertheless, she was nervous at times, particularly when travelling through the airport, where human rights defenders were often arrested.

44. Ms Flamer-Caldera was referred to a Pilot Study prepared by her organisation, entitled "Towards an LGBT stigma and discrimination index for Sri Lanka". She thought the number of respondents on which the study was based was about 130. As to the examples quoted in her report, the witness said that she used only cases which she could substantiate, by which she meant that if information had been obtained through a third party, it would be cited only if Equal Ground could contact the victim. Hearsay evidence was not included in the study. The sample group were people who were "out", at least to Equal Ground, though not necessarily to their families. The report showed 23 instances in that small group where non-heterosexuals were living together, that is to say, just over 30% of those in the study group. Ms Flamer-Caldera considered that the 30% would normally be two people living together under the guise of friendship, rather than openly. Her interpretation of the statistics was that it was possible for 2 gay men to live together, but only so long as they did not disclose their relationship. By non-disclosure she meant that their relationship would not be known to a landlord, who would be unlikely to want to rent to a homosexual couple. Asked about difficulties which gay men might have if they did disclose their sexuality, Ms Flamer-Caldera stated that she knew one person who was openly gay, who worked as an official in the Ministry of Foreign Affairs, and who had managed to get by without hiding his sexuality.
45. In cross-examination, Mr Whitwell put to Ms Flamer-Caldera an item in the Pilot Study stating that 84% of respondents said that in the past 2 years they had never been excluded from social gatherings on the basis of gender identity, gender expression or sexual orientation. Ms Flamer-Caldera agreed, but stated that there were no openly gay venues or events in Sri Lanka. Asked about the survey's report that 95% of respondents had never been physically abused during the two years before the survey was taken, Ms Flamer-Caldera acknowledged that finding. Her evidence was that the Pilot Study was the best which could currently be achieved but she recognised its limitations, since it was based on a very small sample, only 130 respondents. Ms Flamer-Caldera considered that many LGBTI persons who had been harassed would not have come forward, which would have affected the outcome of the survey.
46. Ms Flamer-Caldera's evidence was that it was difficult to generalise as to which groups among LGBTI were at most risk of persecution or harm in Sri Lanka. Some gay men were living on the margins of society, and cruising in known areas of Colombo, which increased the risk to them. Equal Ground had reports of the police picking up men from those areas in order to extort large sums or to extract sexual favours. The publication *Ceylon Today* in January 2012 had disclosed the known cruising spots in Colombo and its outskirts. Lesbians were even more "invisible" than gay men. They did not have the same freedom to leave the home and were very unlikely to make their relationships public. Where their sexual

preference was known, they were particularly marginalised by society and in their families. There were instances of their being forced into heterosexual marriages and physically violated. Transgendered people were also on the margins. However, Ms Flamer-Caldera considered that it was difficult to say that one section of the LGBTI community was worse off than others.

47. When asked again about the circumstances of the closure of CoJ, Ms Flamer-Caldera was not sure whether it had been on sexual orientation grounds or was the result only of an enquiry into embezzlement.
48. Regarding the reference to a “gagging order” affecting Equal Ground, mentioned in her November 2013 report, Ms Flamer-Caldera explained that she did not mean an actual order against the organisation. She meant the attempt to restrict an Equal Ground workshop on HIV/AIDS which had been sanctioned by the Ministry of Health. Before it took place, a derogatory article published in a newspaper alleged that Equal Ground would try at that workshop to recruit persons, including children, to homosexuality. Ms Flamer-Caldera stated that a CID officer had visited the Equal Ground field officer running the workshop, to discuss the allegation and the proposed content of the workshop. The CID officer agreed to the Equal Ground field officer putting their discussion off to the evening, and the field officer avoided the discussion altogether by not arranging a further meeting. The Equal Ground field officer had then been able to proceed with the workshop, skirting around the parts of the proposed agenda dealing with sexuality and the law. No harm had come to him or anyone who attended.
49. Ms Flamer-Caldera was asked to explain a number of incidents mentioned in her report, and cited in identical terms in that of Mr Guruparan, based on YouTube clips. She explained that these clips were not footage of actual incidents but showed a victim, under a concealed identity, saying what had happened. The incidents mentioned in the reports were synopses of the YouTube items and were used because they came directly from victims: Equal Ground had not contacted the individuals directly. It was put to her that this contradicted her evidence about not relying on hearsay or third party information, but Ms Flamer-Caldera considered that as the YouTube clips were voiced by those affected, the Equal Ground report was not hearsay in relation to these incidents.
50. Ms Flamer-Caldera agreed that there was not much evidence in the Pilot Study or elsewhere regarding discrimination against LGBTI individuals in the provision of health care, but she said this was explained by the fact that most gays did not disclose their orientation when requesting health care. The Pilot Study did not reflect the true situation. Equal Ground dealt with reports from hundreds of people each month, which disclosed major discrimination. In one instance, a homosexual Equal Ground employee who had HIV died of a massive heart attack. An autopsy had not been carried out, as it should have been in the case of a sudden death. When his friends tried to obtain release of the body, the police referred to the deceased as a ‘faggot’. The funeral directors initially refused to



take the body and it was eventually released in a sealed casket just before the burial. It had not been possible to respect the deceased's wish to be cremated rather than buried.

51. Ms Flamer-Caldera was asked about the finding in the study that over 30% of respondents had been able to live together in a non-heterosexual relationship, many for over five years. The witness reiterated that they mostly did so as friends or room mates and their sexual orientation was not necessary known to family, friends or wider society, even when they were in long term relationships. The respondents in the survey had been able to make anonymous disclosure to Equal Ground, which was not evidence that they were otherwise open about their sexuality.
52. The problems reported to Equal Ground were mainly at the level of harassment and discrimination. There were few if any complaints of torture, but some reports of rape, including many instances of the police requesting sexual favours. It was not possible to produce figures on the scale of incidents reported to Equal Ground, due to lack of resources to compile such an analysis.
53. The panel asked Ms Flamer-Caldera to comment on the evidence from Professor Good that the lack of privacy in Sri Lanka was such that same sex couples could not live together without the nature of their relationship becoming known. Her evidence contradicted that of Professor Good: she stated that quite a few people were able to do so, since not everyone lived in thin-walled apartments, and many were in rented houses. Although Sri Lankans do want to know everyone's business, LGBTI people often did not tell the truth to protect their position, or in other words they were obliged to live a lie. They would describe their partner as 'my friend' to deflect enquiries. Landlords would not rent to openly homosexual or lesbian couples. It was easier for the better-off to make satisfactory living arrangements. Most of those who lived together were economically self sufficient, living at a distance from their parents in relatively good jobs. Less prosperous young people tended to live with their parents until marriage.
54. Finally, Ms Flamer-Caldera told us that Equal Ground has 14 staff at its office in Colombo and 5 field officers in the districts, all full-time staff. It is funded from a variety of sources, prominent among which are the US State Department and the Finnish and Canadian governments. (The evidence also mentions help from the German, Norwegian and UK governments.)

*Professor Anthony Good*

55. This witness is Professor Emeritus in Social Anthropology at the University of Edinburgh, and a recognised expert on Sri Lanka. He provided a report dated 8 July 2014. The background evidence on stigmatisation of homosexuality in Sri Lanka is surveyed. Professor Good considered that the continued existence of anti-sodomy laws was indicative of prevailing social attitudes, and that the stigma against homosexuality applied particularly to the receptive participant.

On the perception of homosexual men in society generally, Professor Good cited a report to UNHCR by Equal Ground, a Sri Lanka LGBTI organisation, and some further material. We will consider the Equal Ground report separately, since it is the principal source underlying most of the background materials before us, including some of those on which Professor Good has in turn relied. Professor Good's opinion was that while homosexual men might be able to move about relatively freely and conceal their homosexual relationship, fear of "... being revealed and condemned to death severely limits the ability of gay and bisexual men to engage in a loving relationship in accordance with their sexual orientation". The cases are mentioned are of two homosexual couples who have had to flee to seek asylum in the Czech Republic and in the UK. Few details were provided.

56. One of the agreed questions for Professor Good concerned the perception of homosexual couples living together. He found this question hard to answer, not having knowingly encountered such a situation. He accepted that there appeared to be evidence of a consensus among foreign same-sex couples travelling to Sri Lanka as tourists that no problems were experienced unless they engaged in public displays of affection. He noted that male friends holding hands in public was not normally construed as having a sexual connotation, but that might well be different if it were suspected that those concerned were gay men.
57. As to the understanding of the principle of same sex marriage in Sri Lanka, Professor Good cited a government source making it clear that the Sri Lankan authorities had no intention of legalising same sex marriage. He considered that the comments generated by that news "indicate the wide spectrum of attitudes towards same sex marriage among Sri Lankans".
58. Professor Good found it unsurprising that the appellants had sought to conceal their sexuality from their families and from all but their closest friends in the UK, given the stigma against homosexuality in Sri Lanka, the centrality of marriage to all social life there, and the expectation that all Sri Lankans will marry. It was his opinion that it would be virtually impossible for them to keep their relationship secret if they were to return. Sri Lanka is such an inquisitive society that the fact that they were in a formal relationship, even although not officially recognised in Sri Lanka, would soon become apparent to relatives and neighbours. They could reside together, but not as a couple. They would be expected to contribute towards the economic well being of their family. Marriage being perceived as a universal and universally desirable state, a wish not to marry "would be seen as highly deviant".
59. In examination-in-chief further to his report Professor Good explained that there was considerable confusion in the Sri Lankan press and public mind between homosexuality and paedophilia, in particular because of concern over growth in sex tourism, often seen as related to sex with children. He was aware of various administrative and government forms in Sri Lanka requiring the declaration of

marital status, and that a local government official is responsible for enumerating households and recording the population. Such forms generally asked for a statement of an individual's relationship to the head of household. However, Professor Good was not very familiar with the forms and could not offer any conclusions thereon.

60. In cross-examination, Professor Good said that he had no direct experience of working with the LGBTI community in Sri Lanka. Although he had written many reports on the country, this was the first in which a civil partnership was one of the features. Professor Good has written at least one report in which homosexuality was one of the issues. In Professor Good's opinion, some of the Sri Lankan population would be aware of the concept of a civil partnership. He could not speculate on the proportion. There was an expectation in Sri Lanka that everyone would wish to marry, and almost all adults did eventually marry, although again Professor Good had no statistics to support that assertion. Public hand holding between two men was not generally seen as sexual. Professor Good considered that a gay couple living together in Sri Lanka would eventually be recognised as such, but he could not say how quickly that would happen. There was simply much less privacy in Sri Lankan society than in the UK, with many people living in flats with paper thin walls, where everything would be heard. Sri Lankans were inquisitive and people knew a great deal more about each other. The speed of discovery of a relationship might well depend on the socio-economic status of the partners. Professor Good was reluctant to comment on the level of risk which might arise once a homosexual or lesbian relationship became known: he considered that for a Sinhalese same sex couple, there would be a high degree of stigmatisation. If there were difficulties, they would receive no assistance from the police, rather the reverse. It was his opinion that the risk of violence and extortion was highest for transgender individuals and commercial sex workers.

*Mr Kumaravadivel Guruparan*

61. Mr Guruparan is a lecturer in law at the University of Jaffna and a practising lawyer in Sri Lanka, presently on study leave at University College, London, and studying for his PhD in both universities. He provided a report dated 12 May 2014 in which he explained that section 365 provides both the substantive law and the punishment for homosexual acts, and that section 365A extends the scope of the criminal law to anyone party to commission of homosexual acts, potentially bringing persons such as a landlord or medical service provider within the scope of the criminal law. Although the amendment in 1995 was initially proposed with a view to liberalising the law, the eventual outcome was to the contrary, by introducing section 365A and by extending the provisions beyond male sexuality, so that lesbian acts are also criminalised. Although the Constitution provides the right to equality irrespective of sexual orientation, pre-existing law is stated not to be a contravention of that Constitutional provision.

62. Mr Guruparan's evidence was that while prosecutions have been rare, the law has been used "to carry out arbitrary arrests, detention and torture by the Sri Lankan police" and that it has led to "flagrant abuse" of powers of arrest and detention. Arrests lead not to charges but to "bribery, blackmail, extortion, violence or coerced sexual favours". He gives examples which he says have been "verified by the author of this report by cross-checking with multiple sources":

"In 2012 a lesbian was arrested and charged with vagrancy when the police found her walking back to her motor cycle on a beach near Colombo. The police commented on her masculine appearance and the fact that she was wearing pants, and she was heavily questioned for her decision to ride a motorcycle. The lesbian was detained for approximately 5 hours before the police released her.

In another case reported in 2013, a man from Kandy who travelled to Colombo to sit for an accounting exam. While staying in the area, he and a Belgian male friend shared a room just outside Colombo at a guest house known to be a place where gay men commonly stay. On evening, after the 2 men had returned from dinner, the police broke down the door of their room and arrested both men under section 365A. The police forced the Sri Lankan man's fingers onto unused condoms and planted the condoms at the scene before taking both men to the police lock up. To obtain release from the detention, the men were forced to agree to a settlement under which the Sri Lankan man had to agree to be identified as a state witness against his friend, and the Belgian man had to pay a fine.

Another example from 2013 involves 2 gay men who are arrested by police at a public rest room in Colombo and taken to a police station. At the station, the police officers explained their reason for the arrest using derogatory terminology for gay individuals and accused the 2 men of having sex in the rest room. The police then drove the 2 men to another location, where the men were forced to pay the police a bribe to be released."

63. The report goes on to detail the case of the former Foreign Minister Mr Samarawera, the only political figure who has been semi-open about his sexual orientation. After a burglary at his house in January 2014 the party in power twisted the case by identifying the burglar as the politician's gay partner and threatened him with charges of homosexuality. The report quotes Mr Samarawera's statement to the press. It is a bitter complaint of political victimisation. It includes the comment that the politician's private life "though private has never been a secret" and that his family and most of his parliamentary colleagues "... including my constituents ... have appreciated my honesty and for never allowing my private life to get in the way of public service". The report concludes that the appellants, if returned, faced a "substantive risk of being persecuted".

64. In cross-examination, it was put to Mr Guruparan that while the legal framework regulating homosexual behaviour in Sri Lanka might be within his area of

expertise, he was not an expert regarding risk and vulnerability. He was asked what he meant specifically when he said in examination-in-chief that there was a risk of torture for gay men: he relied upon the examples given above. Mr Guruparan stated that he had cross-checked the accounts in his report with lawyers in Colombo and in Kandy. Regarding the incident involving a Sri Lankan and a Belgian, Mr Guruparan did not know the precise date of the offence but his sources had confirmed that it happened in 2013.

65. Mr Whitwell put to Mr Guruparan the text of the December 2013 Equal Ground report on human rights violations against LGBTI individuals in Sri Lanka, in which the same incidents were cited, in identical, or almost identical words. The item regarding a lesbian on the beach is repeated word for word. The item regarding a Sri Lankan and a Belgian was also identical save for Mr Guruparan's addition of the date of the incident, which Equal Ground sourced to an anonymous call to the Equal Ground hotline in 2008. The arrest of two homosexual men in a public rest room was sourced to a YouTube clip entitled "Colombo incident in 2006".
66. Notwithstanding the near-identity of the texts, Mr Guruparan maintained that his report was based on conversations with lawyers directly involved in the cases. He conceded after a few questions that he might have seen the Equal Ground report, but he said that he had not compiled his own report by "cutting and pasting" from it. He was unable to explain the changes of date or the near-identical text.
67. When asked about the references in his report to a risk of torture, Mr Guruparan stated that he meant psychological torture only. He had been unable to identify or verify any incident of physical torture. Mr Guruparan confirmed that no landlord or medical provider had been prosecuted, but considered nevertheless that the possibility of prosecution might operate as a deterrent. His conclusion that there was a risk of 'persecution' on return was not intended to be a reference to persecution as defined legally by the Refugee Convention.

*Further country evidence*

68. As well as the material in the bundles placed before us by both sides in advance, additional items were produced in course of the hearing.
69. A letter from the British High Commission Colombo to the respondent dated 13 January 2014 is in reply to a request for comment on the position of LGBT individuals in Sri Lanka and on the role of Equal Ground. The letter says that it is difficult to ascertain an official government position. The President has said nothing. It is rare for anyone else to speak openly. Calls for decriminalisation have been rejected. Lack of prosecution demonstrates a general tolerance. The issue is of a low priority. Opinions are much divided. Public events are held, and Equal Ground say that you do not get much resistance to Pride, but the reason is

that the events are hosted as “private yet very public functions that do not require prior approval so there is little opportunity for interference”. Equal Ground is the main LGBT organisation, established for nearly 10 years. It has had some impact but changing attitudes and society is a long process.

70. A report from the publication *Ceylon Today* dated 19 November 2013 had been mentioned by Ms Flamer-Caldera. It is entitled, “Are we ready” and begins:

“Homosexuality has always been a contentious issue in Sri Lanka with passionate advocates of equal rights walking hand in hand, while the most vociferous of critics of such equality, literally shunning the very thought of people from the same gender being intimate with each other.”

It goes on to quote the views of a cross-section of people, some hostile to equal rights for LGBTI, others sympathetic.

71. Finally, we were provided with a bundle of forms from various Sri Lankan government departments such as applications for a residence visa, citizenship, a travel document, a police clearance certificate, national identity card, and a driving licence. Some would not apply to the appellants, but others would. The forms generally ask about civil status: single, married, widowed, or divorced. They do not include an option such as “civil partner”. (The absence is unsurprising, there being no such status under Sri Lankan law.)

### *The individual appellants*

#### *LH's evidence*

72. LH adopted and relied upon his witness statements of 28 June 2012 and 13 May 2014, in which he described the formation of his relationship with IP in the UK, before which he did not know that he was homosexual. They had got to know each other while both living in accommodation in Watford. LH had studied hotel and tourism in Sri Lanka and wished to improve his English. They became attracted to each other: LH found that emotionally distressing since previously he had thought himself to be heterosexual. He came from a Buddhist Sinhalese family in Sri Lanka and was concerned about his parents’ reaction, since he considered them unlikely to tolerate any form of same sex relationship. Finally, they both accepted that they belonged together, and made arrangements to register as civil partners on 29 November 2011.

73. The couple had kept their United Kingdom civil ceremony very low key, due to what LH described as “the stigma surrounding homosexuality among Sri Lankans”. They were very happy together: IP had been very supportive when LH’s father died in 2012. LH noted that Sri Lanka is a predominantly Buddhist country where no same sex relationship is ever condoned, and homosexuality is a criminal offence. No-one expresses such feelings in the public domain. If they did, the public would “take the law into their own hands and mete out the

necessary punishment". It was his understanding that, despite rumours about certain high profile persons in Sri Lanka, politician or other high profile person had ever openly voiced their sexual orientation. "The respondent fails to appreciate that [we] are two young men who wish to live our lives freely in an open society. By returning to Sri Lanka, we would be denied this basic right".

74. In his 2014 statement, LH noted that the parties were now living together in a property in Hampshire, where a close mutual friend had provided them with accommodation. Their close friends knew of the relationship and that they had entered into a civil partnership. He was still in contact with his family, who knew that he had an immigration appeal pending, but not the details. He had not told them of his sexuality or of the relationship with IP. He had two sisters in Negombo, one of whom was married. The other was a daughter and was currently supporting his widowed mother.
75. LP considered that if removed to Sri Lanka, his mother and sisters would insist that he returned to Negombo to work and support the family, and that he enter into an arranged marriage with a woman. They would never allow the couple to continue in an openly homosexual relationship. The relationship would have to be carried out in secret otherwise they would be subjected to torture and humiliation; they would not even be able to kiss in public. He pleaded with the Tribunal to allow the couple to continue to live in the United Kingdom.
76. After adopting his witness statements, the appellant was tendered for cross-examination. LP disclosed (with evident reluctance) that although his course ended after about one year and 2 months and he has been in the UK for 3½ years, he has carried on receiving money from his family, at least until the last 3 months or so, on the basis that he is a student. He did not want to go on taking their money, because he did not wish to continue making misrepresentations to them. His evidence was that the couple were living discreetly in the United Kingdom and that only two or three close friends here knew of his sexual orientation. He acknowledged that to be known as homosexual would not present any problem here, even with members of the Sri Lankan community, but "... if by any chance we have to go back, this message could go to my family". It was put to LP that his primary concern was family disapproval, and he replied, "That's how it is - our family members would not like this".
77. LP knew there was a law against homosexual activity and thought that if caught he could get a 20 year prison sentence. When pressed on what he feared from the legal system, he said "We can't go to the police station and make a complaint". He had heard of a "gay marriage" at which both parties had been arrested by the police. He did not know what happened thereafter. When LP was asked why he and his partner could not live together in Sri Lanka in the same way as they do in the United Kingdom, he replied, "You can stay together, but if the family comes to know, they will ask me to marry a woman. We won't be able to stay together, because of that". It was put to him that this was an acknowledgement that he and his partner could live together, although they would be under pressure to marry.

He said, "There is no freedom in Sri Lanka and we cannot go about anywhere, we would be like prisoners". On it being put to him again that he and his partner could live together in Colombo or in Kandy, he replied "We cannot live like that because I am male, at some time I will have to care for my parents, that is the Sri Lankan culture". Asked finally to explain his fears of return, the appellant said, "My family won't like it, the community won't like it, and the law won't like it".

78. In response to the panel's questions LH said that in the last few months his friends have helped to provide food and that he could get money again from his family if necessary. He was asked to explain the circumstances under which he might have to make a complaint at a police station. He replied in terms of the community's curiosity about two men living together, and the need to name the head of the family when complying with the requirement to register for elections. He had heard that there were some gay events in Sri Lanka.

*IP's evidence*

79. IP adopted his witness statements of 26 June 2012 and 13 May 2014, and was tendered for cross-examination. His 2012 statement was along similar lines to that of LH. He had completed accountancy studies in Sri Lanka and come to the United Kingdom to improve his English and enhance his career prospects in Sri Lanka. He already knew that he was homosexual. The English as a Foreign Language course he was pursuing began on 4 January 2011 but he attended only until August 2011. He had met LH in their accommodation in February 2012, the relationship developing gradually. They were both aware that their families would be totally disappointed and would disown them if they ever came to know about the relationship. He found LH to be an extremely caring and loveable person: this was the first person with whom IP had been sincerely in love.
80. His evidence was that apart from their families disowning them, there would be general public hostility to same sex relationships and many lived in fear, suppressing their sexuality. Although there were rumours about certain leading politicians and artists, they had never been publicly 'outed' and were the subject of 'rumours and gossips' rather than certainty as to their orientation. There had, to his knowledge, been high profile attempts to change the law which had failed. The respondent was wrong in stating that Sri Lanka had a sizeable homosexual population, or that homosexuals were more visible in couture, politics and local sidewalk cafes. He and LH would not have the protection which being a high profile person gave. They would not be able to live "a life more akin to normality" if returned to Sri Lanka.
81. In his 2014 statement, IP stated that their close friends were aware of the relationship; that he had parents, a brother and a sister in Sri Lanka who were aware of an immigration appeal being pending, but not of the details; and that his family were completely unaware of the relationship he had with LH, or of his sexuality. The family home was in Kurunegala, a major city in central Sri Lanka with a population over 28,000, mainly Sinhalese. If he were returned, his family



would expect him to live close to home in Kurunegala and to marry a woman. LH and IP would have to continue their relationship in secret, due to the risk of ridicule, harassment, blackmail or other persecutory treatment. Their families, friends and neighbours would ostracise, ridicule and harm them. Normal family life for them would be impossible in Sri Lanka. IP asked the Tribunal to allow the couple to remain in the United Kingdom where they were free to continue a normal family life together.

82. In cross-examination, IP was asked to clarify why he could not continue living with his partner in Sri Lanka as he did in the United Kingdom. He said this was not possible because “we cannot go to the police station or to the hospital together and do anything”. Asked to clarify, he said that if they had to go to the police station enquiries would be made as to whether they were married or not, and a marriage such as theirs was wrong in Sri Lanka. It was put to IP that as he did not tell his parents about his relationship he was hardly likely to tell the police. IP said he was unable to tell his parents. Asked again to explain why they would be unable to live together in Sri Lanka, he said, “Firstly there would be problems with my family. Secondly, my parents expect me to take care of them. The other problem is from the community, because it will be against the law”.
83. IP confirmed that he was aware that there have been no prosecutions, but he asked who would be answerable if a problem did arise, and said that perhaps there had not been one in the last 64 years because no-one had previously been in a civil partnership. He was asked how it might become known that he entered into a civil partnership in another country. He replied, “By registration law, when you fill in a form you will have to say that you are married”. Various forms require disclosure of marital status, such as applications for a passport, a driving licence or a job.
84. Questioned by the panel about how problems might arise in relation to a hospital, the appellant said that if he and his partner went together to hospital when one fell ill, they would be asked who is the next of kin. When she married, his sister was likely to move out of the family house. In time, he and his brother would be expected to arrange the care of their parents, financial and personal. He was willing to help his parents, but not to marry a woman. As to what difference it made in this respect whether he lived in Sri Lanka or in the United Kingdom, and whether or not his parents knew of his orientation, he replied, “The problem is that I have to live with my partner. When that happens, I don’t know if that will be a problem for my family. They won’t like it”.

#### *Submissions for Respondent*

85. For the respondent, Mr Whitwell in his skeleton argument argued that gay men in a civil partnership in Sri Lanka were not a particular social group. That question was too narrow and sterile. Notwithstanding the illegality of homosexual conduct in Sri Lanka, there was general tolerance in practice. The Sri Lankan government did not have an official position on homosexuality:

decriminalisation was spoken about in society, although opinions on the subject were much divided. Homosexuality was more visible than ever before, including public events such as the Pride celebrations. Sri Lankan society was predominantly Buddhist, and Buddhism regarded homosexuality as essentially a question of private morality.

86. Mr Whitwell asked us to put little weight on the evidence of Mr Guruparan: he was a lawyer, and that was his area of expertise, not the general treatment of LGBTI individuals. The examples he cited were not reliably sourced and indeed, it was unclear whether he himself had verified them. Mr Guruparan's report elided the distinction between discrimination and persecution and was of little assistance to the Tribunal. There was no evidence of systematic state persecution. There was opportunistic targeting, social hostility and discrimination which might in an individual case reach the threshold for Article 3, but that had to be decided on a case by case basis.
87. The respondent accepted that, as civil partners, the appellants had family life together: however, that family life could be continued in Sri Lanka. The background evidence did not show nullification or destruction of the very essence of the rights guaranteed by Article 8 and did not come close to the threshold required. The present appellants maintained a very low profile in terms of their sexuality in the UK. Only a very few close friends are aware. In Sri Lanka they would also choose to live discreetly because that is what they prefer and due to social pressure, such as not wishing to distress their parents or embarrass their friends. Social pressure of that nature does not call for Refugee Convention protection.
88. In oral submissions, Mr Whitwell submitted that the oral evidence of the appellants indicated that their prime concern was the reaction of their families. He pointed to the difference between the evidence of Professor Good and Ms Flamer-Caldera over whether the relationship between the appellants would inevitably become known by their living together. Mr Guruparan had effectively conceded in oral evidence that he was qualified to comment only on the legal position, not on general risk on return. The examples on which he purported to do so turned out to be not based on his own enquiries but on incidents reported in 2006 and 2008 and misleadingly updated. That called into doubt the alleged validation of the information by the witness.
89. The Equal Ground Pilot Study suggested that reports of physical harassment were rare. While the issue by its nature was difficult to subject to statistical analysis, the evidence could not yield a finding that there was anything reaching the level required by the Qualification Directive or Article 3. The study found that a large proportion of respondents managed to live with their partners and did not report any denial of medical treatment or adverse response from employers.

90. The respondent relied on information in the public domain relating to foreign travellers, which although not directly relevant was indicative of the general social environment. Holidays are openly and freely marketed on a gay-friendly basis. The case fell at the second hurdle of *HJ and HT*. Alternatively, it should be found that the appellants would behave discreetly on return, simply as reflecting their nature, which even in the United Kingdom, where they were undoubtedly safe and were civil partners, was very discreet.
91. Mr Whitwell acknowledged that the evidence from Equal Ground should be given some weight. Although Ms Flamer-Caldera is an activist, her organisation was supported by the United Kingdom Foreign and Commonwealth Office and by the US State Department. However, the results of the Pilot Study did not sit well with Ms Flamer-Caldera's conclusions in the report prepared for this case. The case studies produced by Equal Ground showed that although difficulties were encountered, gay couples and even lesbian couples did succeed in living together, sometimes with family knowledge of their relationship, and for extended periods. Although Professor Good said that it was extremely rare for Sri Lankans not to marry, the figures in the Pilot Study suggested well over half of respondents had elected not to marry.
92. Mr Whitwell submitted that the core of the appellants' reluctance to return was a preference for the quality of life they found here as a homosexual couple, and that they had not established that it would be unlawful either under the Refugee Convention or on humanitarian protection or human rights grounds for them to return to Sri Lanka.

#### *Submissions for Appellants*

93. For the appellants, Mr Palmer's skeleton argument argued that (i) "gay men and gay men in civil partnerships" constituted a particular social group, as established by authority, by UNHCR guidance and as found in the First-tier Tribunal; (ii) the background evidence demonstrated a real risk of a homosexual man suffering persecution, a risk enhanced in the case of homosexual men in civil partnerships; (iii) individual homosexual men and, in particular, gay men in United Kingdom civil partnerships, enjoyed private and family life under Article 8; and that (iv) "whereas current human rights jurisprudence does not give a right to marry to same sex couples, the effect of removal ... would entail a flagrant denial of the right to family life ... as a gay couple but also as individual gay men", reaching the high threshold set by *EM (Lebanon)*.
94. Mr Palmer maintained that the background evidence established a real risk of intimidation, harassment, discrimination, arrests and violence on a scale and of a frequency such as to reach the persecution threshold. There was a sustained and systemic failure of state protection, there being no evidence to support any contention that the Sri Lankan authorities offer protection. Rather, the state was complicit. There is no LGBTI support network in existence: rather, LGBTI groups

had been and continued to be subject to harassment, raids and surveillance by the authorities. The Equal Ground Pilot Study had been drawn upon in the Secretary of State's own Operational Guidance Note and Country of Origin Information Report, and the organisation was presented with a cheque by the British High Commission in Colombo marking International Day Against Homophobia. The Upper Tribunal should give significant weight to that study, and to the other Equal Ground evidence. The appellants invited the Tribunal to find that Mr Guruparan was qualified to comment on the issues, noting that Professor Good, an expert whose status could not reasonably be doubted, had deferred to him on matters of law in his oral evidence. The first, second and third questions in *HJ and HT* should be answered in favour of the appellants.

95. The appellants' evidence in their witness statements was conclusive of the fact that they would not live openly as homosexual men or as a homosexual couple in Sri Lanka. Their credibility had not been doubted in the First-tier Tribunal and their evidence had not changed. As to the fourth question, their evidence was that they would live discreetly both for cultural and social reasons and for fear of persecution. The appellants enjoyed both private and family life together. They had a right to remain together as a couple "without enforced self repression of their civil partnership and their sexual identity, without fear of serious harm and discrimination and without the psychological stress and suffering that would undoubtedly flow from being unable to remain as a couple and/or to freely express their sexuality". If returned, they would be forced to act discreetly to avoid "state and non state persecution, extreme societal and cultural discrimination and stigma". They credibly asserted that there was no possibility of being able to remain as a couple but they would be "forced to live separately and to agree to their families' demands and to enter into arranged marriages with women". The appellants submitted that to be forced by their families and society into marriage with women, or into keeping their relationship and sexual orientation secret would be a flagrant violation of their right to respect for private and family life.
96. In his oral submissions Mr Palmer contended that the evidence was sufficient to establish a risk of persecution if the appellants were to be returned to Sri Lanka. In *HJ and HT*, the appellant HJ, from Iran, had faced gross and manifest persecution. Cameroon was a country where prosecutions were rare and the circumstances (apart from the existence of any level of prosecution) were similar to those in Sri Lanka. HT's case had also succeeded. The Sri Lankan Government position was not unclear. The former President has made extreme remarks against lesbians in particular, occasioned by the Norwegian Ambassador having a same-sex partner. There had been other vicious anti-gay remarks by members of the government. Contrary to the submission that the state engaged in benign collaboration with Equal Ground, the evidence from Ms Flamer-Caldera was that the dissemination of information was controlled and that effectively the organisation had been subject to a gagging order.

97. Although the Secretary of State made much of the existence of Pride events, these could be held only because a safe, secure venue had been found. Equal Ground was not a highly visible group in Sri Lankan society. Ms Flamer-Caldera significantly pointed out that with greater visibility there came greater intimidation and violence.
98. Although the Penal Code was not used to prosecute gay men, their landlords or medical providers, and was not a direct means of persecution, it was the tool by which openly homosexual men could readily be targeted, as Equal Ground demonstrated in its reports. The Tribunal should find that there was plainly significant under-reporting of such incidents. The written reports by Equal Ground cited only specific and verified cases, but it was significant that Ms Flamer-Caldera in oral evidence explained that many further instances went unrecorded. Her evidence should be given significant weight in establishing general risk. The lack of more detailed and specific evidence was due to the fear which existed throughout the community, which arose from the existence of the legislation. Not only the state, through legislation, but society in general took an adverse view of the LGBTI community. There were numerous examples of homophobic publications. Equal Ground's evidence in its Pilot Study was carefully qualified. Although some same sex couples live together, Ms Flamer-Caldera made it clear that most do not, and that even those are living together do not disclose their orientation publicly, due to fear.
99. Mr Palmer accepted that there was a significant difference between the evidence from Professor Good and from Ms Flamer-Caldera about the practicality of living together. He submitted that the description given by either expert amounted to persecution, although in somewhat different forms. The evidence was overwhelming that homosexual men living openly together would be at risk of persecution. To live as civil partners would enhance that risk, because it was less easy to hide sexuality. It was accepted that these appellants would not engage in highly risky behaviours such as visiting cruising areas. They would have to live in absolute secrecy due to the family reaction and the treatment they might encounter from both state and non state agents in a deeply homophobic society. Mr Palmer said that a finding that homosexual men in a civil partnership constituted a particular social group in Sri Lanka would be justified. There could be little doubt that members of that particular sub-group would be at enhanced risk.
100. Turning to Article 8, Mr Palmer accepted that family life between the appellants would continue in Sri Lanka, notwithstanding non-recognition of their civil partnership. The determining question was not whether any interference would go to family life or to private life, but the level at which it would occur. For the appellants to be required to deny their formal relationship amounted to a denial of their right to be together. He asked that the appellants would not in fact be able to live with each other in Sri Lanka but would be forced to separate and,

at the insistence of their family, required to enter into heterosexual relationships. That would amount to a complete nullification of their existing family life.

### *Discussion*

101. We began by considering what weight we could place on the evidence of the country experts. Ms Flamer-Caldera is an internationally acknowledged expert on the circumstances of LGBT persons (and indeed LGBTIQ, although that is not relevant on the facts of this appeal). We were glad to have her assistance in these appeals and we have had careful regard to her evidence, which in general we found very helpful. Mr Whitwell was right to point out that Ms Flamer-Caldera is committed to a cause, but he did not ask us to disregard her evidence. She did not seek to disguise her campaigning agenda, but it is difficult to imagine that there could have been a better informed witness on the subject. We found her to be fair and careful in her oral evidence, speaking to what is very much her area of special knowledge, and willing to qualify her conclusions where appropriate.
102. The case examples cited by Equal Ground include several gay and lesbian couples living together whose families know about their relationship. It is not surprising that known instances are few, given prevailing general social reticence, but the evidence is that some gay and lesbian couples are able to live together at least semi-openly. The statistics and the very useful tables provided in the Pilot Study indicated that a significant number of the respondents were in long-term relationships, 31% of which had lasted for more than four years. 71% had never been excluded from a social gathering or activity on the basis of their gender identity or sexual orientation; 87% had never been excluded from religious places or activities in the preceding two years and 78% had never faced exclusion from family activities in that period. 80% had experienced no physical abuse or serious harassment in the preceding two years, though 62% had experienced verbal abuse on at least one occasion and most people felt gossiped about. The overwhelming majority of those who did experience discrimination suffered it from families and friends, although sometimes also from neighbours. 76% had not experienced any problems with housing or inability to rent accommodation, and 75% had not lost their jobs in the previous two years, with 88% reporting that they had not been refused promotion nor had their jobs altered for that reason.
103. Of the smaller group who had experienced difficulties, in almost all of the statistical analyses most of those who had difficulty did so at least partly on the basis of their gender identity. Only very small numbers were affected on the basis of sexual orientation alone. Ms Flamer-Caldera's executive summary of the Pilot Study evidence indicated that there were high levels of abuse and harm, without differentiating between gender identity and sexual orientation. In oral evidence she acknowledged significant difficulties in the statistical significance and data analysis in all three of the background reports produced. Her statements in the summary of the Pilot Study, in particular, are reflected in the international materials as indicating high levels of difficulty, whereas the statistics

will not bear that interpretation. That has tended to distort not just the Equal Ground reports but also some of the international reports.

104. Professor Good is not and did not purport to be a specialist about LGBTI in Sri Lanka: this was his first expert report on the topic for the Upper Tribunal. We noted also that Professor Good has not lived in Sri Lanka for some considerable time. Both Professor Good and Ms Flamer-Caldera said that most landlords preferred to avoid gay tenants, but there was no evidence of this going to the length of active enquiries by landlords as to their tenants' sexuality. In relation to the conflict between Professor Good's evidence and that of Ms Flamer-Caldera as to the living conditions and the possibility of living privately in Sri Lankan cities, we have preferred the evidence of Ms Flamer-Caldera that it is indeed possible to do so and that discovery of a relationship between two persons of the same sex would not necessarily occur just because the walls were too thin or the properties too closely serried for private activity to be unheard and unobserved. We note that both witnesses agreed that such a relationship would be likely to be passed off as two friends sharing accommodation. Based on Ms Flamer-Caldera's oral evidence and on the statistics in the Equal Ground Pilot Study (and accepting that depended on a small and not wholly representative sample) we are unpersuaded that remaining unmarried in cities such as Colombo is as rare, or perceived to be as socially deviant, as Professor Good thought.
105. We have considered what weight we can give to the evidence of Mr Guruparan. We have concluded that his evidence did not add anything useful. The examples he gave came from other sources and we consider it more likely than not that the examples he gave were simply lifted verbatim from the Equal Ground Pilot Study examples. He was unable to explain satisfactorily how he had verified the information so as to give it any greater force.
106. We remind ourselves, applying the decision of the Court of Justice of the European Union in *X, Y and Z* that while the existence of laws criminalising homosexual activity supports a finding that homosexuals form a particular social group, such laws do not by themselves constitute persecution, unless the criminal sanctions are actually applied. The CJEU held that when assessing an application for refugee status the competent authorities cannot reasonably expect an asylum applicant to conceal his homosexuality, nor to exercise reserve in the expression of his sexual orientation, in order to avoid the risk of persecution if one exists. The *X, Y and Z* judgment is in line with the decision of the United Kingdom Supreme Court in *HJ and HT* in the latter respect and puts the question of the existence of a particular social group beyond challenge in countries where homosexuality remains a criminal offence.
107. Sections 365 and 365A of the Sri Lankan Penal Code therefore create a particular social group of homosexuals, lesbians, and others who have a same-sex sexual identity. There have been few if any prosecutions and no convictions, so there is no presumption of persecution. The question whether there is a risk of persecution in the *HJ and HT* sense is one of fact, having regard to the evidence of

what actually happens in Sri Lanka. We have not found it necessary to further refine the particular social group to introduce a sub-group of those who have entered into civil partnerships or have acquired a same-sex marital or quasi-marital status in another country.

108. It seems tolerably clear from the evidence before us that for male sex workers and transgender individuals there is a risk of harassment, blackmail, and, on occasion, serious harm capable of amounting to persecution, by reason of the public nature of their sexuality. Also, given the cultural constraints on the position of women in rural areas, lesbian and bisexual women may be at risk of persecution or serious harm there. It is unclear whether that risk continues for those who live away from their families in larger cities, and specifically in Colombo.
109. 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 that 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 circumstances we have described, that even the higher of these figures may be underestimated.
110. The risk for gay men is not, we consider, at the level of persecution or serious harm in Sri Lanka as a whole. The legal potential of sanctions underlies the instances of the police arresting homosexual men and subjecting them to abuse, sometimes violent, and to extortion. Although the examples to which we have been referred appear to us to be generally credible, they are few, they date back over a period of up to 8 years, and the same ones are cited repeatedly in the various reports. The level of abuse in the reports generally falls short of the level of persecution. The main exception is the allegation that the police sometimes rape gay men in custody. That allegation was not established by specific instances, save for the transgender individual in the student research example, which tends to support the drawing of a distinction between the treatment of transgender individuals and that of gay men in general. The evidence suggests that such risks as there are apply more to some homosexual men than for others. The examples cited and the general opinion of the experts centre on transgender persons, commercial sex workers, and visitors to cruising areas or other homosexual pick up venues.
111. The state has little or no interest in recording such matters. There are no official statistics. Numerous members of the LGBTI community confide in Equal Ground, but it is a relatively small organisation in a country with a large population. We conclude that instances of abuse of members of the LGBTI community are underreported. Taking that into account, and accepting that there



are some incidents at the serious end of the scale, including rape, the appellants have not been able to point to more than a few specific instances at or near the level of persecution. These appear to arise from opportunism and exploitation, not from systematic hostility.

112. We find force in the argument that in such cases as are recorded there is a failure of state protection. The perpetrators named in most if not all of the instances cited to us are police officers. There is no evidence that such abuse is ordered from a high level, but nor is there any evidence that the state does anything to stop it. On the contrary, the perpetrators, as far as we can see, enjoy complete immunity.
113. As to the climate of public opinion, politicians, including the former President, make homophobic statements. Mr Palmer drew our attention to reports that in June 2013 President Rajapaksa said he would refuse entry to Sri Lanka of the same-sex partner of the Norwegian ambassador. The outcome, if the matter came to anything, was not followed up in evidence. There are homophobic publications, but there is also evidence of a public debate about gay rights in which both sides are heard, and of known homosexual persons being able to get on with their lives without major difficulty. It is right that the homophobic side of the debate is vigorously expressed and that, at least in some of the blog posts we have seen, it approaches the level of hate speech and often conflates homosexuality and paedophilia. Same-sex orientation is seen by many people, including some politicians, as unacceptable; but while there are expressions of homophobia in the media there is also open debate in which tolerant voices are heard.
114. The former Foreign Minister who declared his sexual orientation was out of government when we heard these appeals. He spoke about the issue in public only because he had to, but we thought it a significant detail that he has been at least semi-open about his orientation and that his family, most of his parliamentary colleagues, and his constituents (i.e., the wider public) had not previously given him any difficulty.
115. We do not accept the submission for the appellants that LGBTI groups, due to their nature, are from time to time the subject of harassment or raids by the Sri Lankan authorities. As the circumstances of the closure of CoJ (“Companions on a Journey”) emerged in evidence, this attracted homophobic publicity, but we find from Ms Flamer-Caldera’s evidence that the closure was more closely related to an inquiry into allegations of embezzlement, rather than being a homophobic crackdown by the authorities. Pride events are arranged and staged with great care, but they happen regularly, under secure conditions but not in secret.
116. The only significant ongoing LGBTI support organisation, Equal Ground, is able to carry on its activities without major problems from the authorities. There may be an element of surveillance, but again as the circumstances of the “gagging

order” developed in evidence a different picture emerged, indicating some exaggeration: there was in fact no gagging order but a degree of negotiation after a visit by the authorities, and Equal Ground was able to avoid that problem relatively easily, without any further repercussions.

117. The appellants in their statements said that Buddhism, the main religion in Sri Lanka, is one of the sources of hostility to same-sex sexual activity. This proposition was not given any real significance in submissions and we were not referred to anything specific in the background evidence, so we limit ourselves to observing that the tenor of such evidence as was before us is that while open to various interpretations on the subject, Buddhism is not generally considered to foster hostility to same-sex sexual activity. We note, in particular, that the child in the ‘gay marriage’ case went to a Buddhist monastery and became a novice monk.
118. The evidence of general persecution of gay men thus amounted to a low number of serious incidents. Equal Ground is the immediate or underlying source for almost all of that information. While we have accepted that there is under-reporting, we are unable to agree that the incidents involving gay men are of a scale, frequency or pattern to constitute a general risk of persecution. Although there is a lack of state protection, there is no evidence of serious harm except in those isolated instances. There may be a few members of the wider LGBTI community who suffer difficulties at the level of persecution, but the evidence is not there to indicate that it is only because they are gay men.
119. The appellants alleged that they might be forced contrary to their orientation into a heterosexual marriage. If that were the case, it would certainly be capable of amounting to persecution, but the evidence before us did not support their statements. There was some evidence of rural lesbians and bisexual women being forced into same-sex marriage, but little or no evidence to support such a risk for gay men, particularly if they chose to exercise an internal relocation option to the more gay-friendly cities such as Colombo. It was not suggested in submissions for the appellants that they came from powerful families whose reach might be nationwide. If a risk exists, we find that internal relocation would normally be sufficient to enable an individual to avoid the risk, since risks are usually from family, friends or neighbours. Colombo would perhaps be the obvious choice for internal relocation, and was mentioned in a number of the press reports as having many LGBT individuals living there, but the principal distinction made in the country materials is between rural and city environments, suggesting that internal relocation options may exist to other Sri Lankan cities also.
120. We do not consider that the Sri Lankan state’s failure to recognise the status of civil partnership is sufficient on its own to engage Article 8 ECHR. We accept that ordinary life in Sri Lanka involves completing government forms, forms for potential or actual employers, and so on, many of which in the ordinary way ask for a person’s marital status. The civil partnership between the appellants carries

no recognition in Sri Lanka, so the correct answer as a matter of law on such forms will be “single”.

121. There is a wide international variation in marital or quasi-marital status available to same-sex partners, and in recognition of those statuses. Neither the United Kingdom’s civil partnership contracts, nor the gay marriage status now available both in the United Kingdom and in most parts of the United States, are recognised in Sri Lanka. The same is true of the French PACS status, which is a contractual arrangement short of marriage available to same-sex and opposite sex partners, but which is not recognised outside France.
122. In the debate over the successive introduction of heterosexual civil partnership, same-sex civil partnership and same-sex marriage in the UK, the complaint was commonly heard of inability to have an official expression of a deeply felt relationship. No doubt that was and is a genuine grievance. However, we think it would go too far to hold that non-recognition elsewhere of such unions confers entitlement to international protection. It is a grievance well short of the standard explained in cases such as *EM (Lebanon)* and *SS (Malaysia)*, that of a flagrant breach of a core human right.

#### *Country guidance*

123. We have considered the questions identified by the parties in these appeals, although not all of those are relevant for the purposes of country guidance. The following guidance is given:
- (1) *Having regard to the provisions of articles 365 and 365A of the Sri Lankan Penal Code, gay men in Sri Lanka are a particular social group.*
  - (2) *‘Gay men in civil partnerships’ in Sri Lanka do not constitute a particular social group for the purposes of the Refugee Convention. The Sri Lankan authorities’ failure to recognise alternative marital and quasi-marital statuses such as civil partnership or homosexual marriage which are available in other countries of the world does not, without more, amount to a flagrant breach of core human rights.*
  - (3) *Applying the test set out by Lord Rodger in the Supreme Court judgment in HJ and HT, in general the treatment of gay men in Sri Lanka does not reach the standard of persecution or serious harm.*
  - (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.*
- (6) *The lack of recognition of alternative marital and quasi-marital statuses such as civil partnership or homosexual marriage which are available in other countries of the world is not of itself capable of amounting to a flagrant breach of the appellants' right to respect for family life on return to Sri Lanka.*

*The individual appellants*

124. These appellants are gay. They are in a civil partnership. One of them did not know he was gay before leaving Sri Lanka; the other has not given evidence of any serious difficulties experienced while living there. In the United Kingdom, where they are not at risk, their lifestyle is particularly discreet: very few people know of their sexual orientation and they do not make use of the freedom to go out and express their sexual orientation in public.
125. *HJ and HT* established that there was no test of reasonable tolerability, but nor is there a clear dividing line between those who would prefer to live openly and those who would prefer to live discreetly, because everyone's circumstances are different. We have considered the facts in *HJ and HT*, as Mr Palmer invited us to do but we do not consider them to be on all fours with the situation in Sri Lanka.
126. The present case is essentially an individual and fact-specific inquiry, not involving a guarantee of the human rights standards that are applied by the receiving country within its own territory and concentrating on what is actually likely to happen in the receiving country, "often ... a difficult task since much of the relevant evidence will come from the claimant, who has a strong personal interest in its outcome". The reasons for the choice of discretion are at the heart of the issue. The appellants of course would prefer their status to be regarded as it is in the UK, but that is not the law in Sri Lanka.
127. To forecast future behaviour is difficult, even for the persons concerned, under circumstances which they do not wish to contemplate. These appellants are a particularly discreet couple, even in the United Kingdom, where there is no need for discretion. They mostly stay at home and just enjoy each other's company. If the appellants are removed together, they continue as a matter of United Kingdom law to be each others' civil partners, and the evidence suggests that they will be able to live together in a city in Sri Lanka, probably Colombo. The private way in which they live in the United Kingdom could be replicated there.
128. We do not think the appellants were dishonest witnesses, but we did find them unwilling to face up realistically to their future, wherever they are to spend it. Their answers to questions about their possible return were defensive,

unforthcoming and rehearsed. They were quick to say that they would have problems with the police, with health services, and with official forms; but when asked to explain what the problems might be, they could envisage no clear scenario of difficulties with police officers, medical providers, or officialdom.

129. The reality of the appellants' concerns was vividly apparent while each of them gave evidence. The appellants dropped out of their English studies when they met, but have continued to receive money from family members in Sri Lanka, without explaining their present circumstances. They have not told their parents that they are gay, or that they live together, or that they have stopped studying. They do not wish to contemplate their families becoming aware of their orientation and relationship. They both maintain relations with their families and we think they both intend to continue to do so, wherever they live. Those issues will have to be dealt with on return and are likely to cause difficulty in their families for a time.

130. The appellants are likely to be expected to help to care for their parents when they are older and both indicated that in principle they would not object to doing so, subject to their families respecting their sexual orientation and their partnership. More likely than not, their families will be told or will recognise the reality that they are gay at some point in the medium to long-term future. That can be a difficult stage of life in countries with no legal barriers to same-sex relationships. International protection is neither a legal entitlement nor a practical means of avoiding it.

131. We were invited to find that on return the appellants could not continue with their relationship but would be coerced into heterosexual marriages. The evidence of families forcing gay men (as opposed to lesbians and bisexual women) to marry against their wishes was sparse in the materials before us, nor have we seen any evidence that these particular families are likely to apply pressure so intense as to force these appellants into doing so. The appellants appeared to us to be at least normally resilient young men who have lived abroad and looked after each other for a period of some years. We find it much more likely than not that in Sri Lanka the appellants would elect to continue their life together rather than returning to live with their families of origin. We also find that they would both be willing to help those families if and when the need arises. Neither of them will be providing a daughter-in-law to assist, but that is another reality to be faced up to sooner or later, wherever the appellants live.

132. The appellants may not come from the richest backgrounds in Sri Lanka but both wider families are of reasonably substantial means, able to provide for the appellants in the United Kingdom, where living costs are much higher, over a period of three and a half years. The appellants are quite well-educated and used to living away from their families. We see no reason why they would not fall into the category described by Ms Flamer-Caldera of a same-sex couple in a long-term relationship who could set up and maintain a household together. We recognise

her caveat about the use of discretion, but that is the appellants' preference even in the United Kingdom, where they are not at risk and have a wide range of choices.

133. The appellants have stated concerns about the state, the police, other government officials, medical professionals, landlords and the general public, but we do not think any of those are of real substance either in their own minds or in the environment in which they would have to live. By far their greatest concern is "coming out" to their families. They would be able to live together in Sri Lanka according to their personal inclinations in much the same way as they do in the UK. There would be some disadvantages in their living circumstances, including absence of legal recognition of their relationship, but none of the realistically likely consequences of their return approaches the level of a risk of persecution, and there would be no disproportionate interference with their rights to private and family life.

134. We have tried to proceed from the general to the particular and in so doing have necessarily departed from the format of the issues agreed by the parties, which run those aspects together, and some of which do not accommodate a "yes or no" answer. We summarise our principal findings as follows. We accept that gay men in Sri Lanka constitute a particular social group for Refugee Convention purposes. Their status as civil partners does not bring them within a narrower particular social group, because the status has not been shown to enhance risk. Only the wider definition is justified. We find that these 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. The alternative of humanitarian protection does not arise: these appeals stand or fall on the Refugee Convention issue since there is no differential fact set engaging only humanitarian protection.

135. Article 8 ECHR is engaged because the appellants enjoy family and private life together. However, any difficulties they would encounter in Sri Lanka including social, cultural and legal discrimination are not, on these facts, at a level which could or would amount to a flagrant breach of their core human rights so as to render their removal disproportionate, if removal directions were set again.

#### *Disposal*

136. On 12 April 2012 the appellants were served with decisions to vary leave to remain and with decisions to remove. In light of *Adamally & Jaferi* [2012] UKUT 00414, such decisions could not properly be made at the same time. (The position has since changed, by amendment of s.47 of the 2006 Act on 8 May 2013.) In these proceedings, the removal decisions were withdrawn by the respondent. The matter makes no difference to the substance of our decision.

137. The decision of the First-tier Tribunal has been set aside. We remake the decision as follows: the appeals, as originally brought to the First-tier Tribunal, are dismissed on all grounds.

A handwritten signature in black ink that reads "Hugh Maclemon". The signature is written in a cursive style with a large, stylized initial 'H'.

28 January 2015  
Judge of the Upper Tribunal

## APPENDIX A

### Documents before the Upper Tribunal

<u>Date</u>	<u>Author</u>	<u>Title</u>
<u>2002</u>		
Undated	<i>Victor C de Munck Ph.D, Robert T Francoeur, with comments by Patricia Weerakoon Ph.D</i>	Sri Lanka
<u>2005</u>		
17 February	<i>Sydney Star Observer, Australia</i>	Gay rights are human rights
<u>2008</u>		
17 January	<i>Canadian Immigration and Refugee Board</i>	Sri Lanka: Laws proscribing homosexual acts and whether they are applied in practice: treatment of homosexuals by authorities, by society at large and by Muslim community
<u>2009</u>		
July 27	<i>Interpress Service News Agency</i>	Rights, Sri Lanka: Gay community takes heart in Indian court ruling
<u>2010</u>		
Undated	<i>Andrea Nichols, University of Missouri-St Louis, St Louis County</i>	Dance Ponnaya, Dance! Police abuses against transgender sex workers in Sri Lanka
27 April	<i>UNHCR Human Rights Council</i>	Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover (late submission)
5 July	<i>Lakbima News</i>	"We are all human" says gay rights activist
10 September	<i>Collective for Economic, Social and Cultural Rights in Sri Lanka</i>	Implementation of the International Covenant on Economic, Social and Cultural Rights: Civil Society Report
<u>2011</u>		
January	<i>Women's Support Group Sri Lanka</i>	The status of lesbians, bisexual women and transgendered persons in Sri Lanka: NGO shadow report to the Committee on the



		Elimination of All Forms of Discrimination Against Women
1 March	<i>International Lesbian, Gay, Bisexual, Trans and Intersex Association</i>	Erasure of the gays in Sri Lanka
April-June	<i>Equal Ground</i>	Struggling against homophobic violence and hate crimes
21 September	<i>Sri Lanka news – Adaderana.lk</i>	Sri Lanka faces increase in homosexuals
<b><u>2012</u></b>		
13 January	<i>Canadian Immigration and Refugee Board</i>	Sri Lanka: treatment of sexual minorities, including legislation, state protection and support services
7 March	<i>Home Office UKBA</i>	Sri Lanka Country Report
26 June	<i>Appellant IP</i>	Witness statement
28 June	<i>Appellant LH</i>	Witness statement
23 October	<i>UNHCR</i>	Guidelines on international protection no 9: claims to refugee status based on sexual orientation and/or gender identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees
November	<i>Coalition for sexual rights</i>	Joint stakeholder submission to the Universal Periodic Review: CREA, Equal Ground, The Sexual Rights Initiative and the Women’s Support Group
9 December	<i>Equal Ground</i>	Towards a lesbians, gays, bisexuals, transsexuals and transgendered (LGBT) stigma and discrimination index for Sri Lanka
21 December	<i>UNHCR</i>	UNHCR eligibility guidelines for assessing the internal protection needs of asylum seekers from Sri Lanka
<b><u>2013</u></b>		
Undated	<i>Freedom House</i>	Freedom in the World 2013
January	<i>Equal Ground</i>	Strengthening of legal protection for LGBT in Sri Lanka: road to decriminalisation

10 February	<i>Ceylon Today: Anukshi Jayasinha</i>	When words do more than hurt
July	<i>United Kingdom Home Office</i>	Sri Lanka Operational Guidance Note v.14
1 July	<i>Prathiwadhiya Blogspot.com</i>	Should the Norway ambassador's homosexual mania be allowed in our country?
14 July	<i>Sri Lanka Sunday Times</i>	Grama Niladhari: Grassroots go-between between State and common man
19 August	<i>Prathiwadhiya Blogspot.com</i>	Here are the real false devotees
23 August	<i>Gay Star News</i>	Sri Lanka's 1 <sup>st</sup> gay marriage ends in arrests for corruption
24 August	<i>Prathiwadhiya Blogspot.com</i>	Is this Sri Lanka or is it a colony of faggots?
30 August	<i>Prathiwadhiya Blogspot.com</i>	What could have been broken off by a tip of a fingernail needs the use of an axe
1 September	<i>The Nation</i>	A society's struggle against abandoning homosexuality
6 September	<i>Prathiwadhiya Blogspot.com</i>	Daily Mirror media reports support homosexuality
23 September	<i>Pink News</i>	Former Commonwealth Head of Human rights condemns Sri Lanka over gay harassment
28 September	<i>Prathiwadhiya Blogspot.com</i>	Residents' of Annuradhapura district, are you aware of this?
November	<i>Equal Ground</i>	Report on the situation of LGBT persons in Sri Lanka submitted in the matter of LH and IP (Sri Lanka)
14 November	<i>Gay Star News</i>	Sri Lanka begins 'systematic targeting' of gays
14 November	<i>Gay Star News</i>	Sri Lanka gays forced underground as world leaders gather for summit.
December	<i>Equal Ground</i>	Human rights violations against lesbian, gay, bisexual and transgender (LGBT) people in Sri Lanka: a shadow report  Submitted for consideration at the 110 <sup>th</sup> session of the UNHCR human rights committee, March 2014, Geneva

<b><u>2014</u></b>		
Undated	<i>Freedom House</i>	Freedom in the World 2014
12 January	<i>Ceylon Today</i>	Colombo a hive of 'gay' activity
27 February	<i>US State Department</i>	Country report on human rights practices 2013 - Sri Lanka
10 April	<i>Foreign and Commonwealth Office</i>	Human rights and democracy report 2013 - Section XI: Human rights in countries of concern - Sri Lanka
12 May	<i>Mr Kumaravadivel Guruparan, University of Jaffna, Sri Lanka</i>	Country expert report
13 May	<i>Appellant IP</i>	Further witness statement
13 May	<i>Appellant LH</i>	Further witness statement
29 May	<i>La Trobe University, Australia</i>	Homophobia and the legality of gay sex in the Commonwealth
8 July	<i>Professor Anthony Good</i>	Report on Mr LH and Mr IP
7 August	<i>Professor Anthony Good</i>	Email attaching information on duties of Grama Sevaka/Grama Niladhari, character certificate, passport applications, and police clearance certificate, with copy forms attached.

## Appendix B

### Summary of country background evidence

#### **A. Equal Ground**

1. The reports prepared by Ms Rosanna Flamer-Caldera, Executive Director of the Sri Lankan LGBT support organisation, Equal Ground, form the basis of much of the international evidence before us. The first such report in the bundle, prepared from evidence taken between April-June 2011, is entitled "Struggling against homophobic violence and hate crimes". The report, which is undated, was based on 109 interviews in 13 districts of Sri Lanka. After setting out the legislative history, the report gives a number of examples of difficulties experienced by LGBT persons with reference to sections 365 and 365A of the Sri Lankan Penal code which criminalise same-sex activity, recording that there are a dearth of cases under which 'prevent[s] an in-depth analysis of how the law has been interpreted'.
2. Other provisions of the Sri Lankan Penal Code which have been used in homosexual cases are section 352, which concerns enticing or taking a minor out of lawful guardianship and is sometimes used where an underage lesbian leaves home for an older woman. Similarly, for adult women, section 353 which deals with abduction may be used to force women to return to their families.
3. Where child abuse is concerned, the courts in Sri Lanka have 'systematically failed in ensuring the certainty of punishment'. Section 360E of the Penal Code which dealt with solicitation of a child for sexual abuse was arguably better suited for dealing with that particular issue.
4. Transgender persons and homosexual prostitutes may be arrested and harassed under sections 2 and 3 of the Vagrants' Ordinance 1842 for behaving in a 'riotous, disorderly manner' or being 'common prostitutes' acting in an indecent manner. The provisions in question are not specific to homosexual activity and deal with public behaviour: the maximum fines are 5 Rupees under section 2 and 10 Rupees under section 3. Arrests under these sections are said to subject the individuals to harassment, ridicule, and the payment of bribes to secure their release.
5. Homosexuality is regarded as a mental illness in Sri Lanka, the report says: in several cases, LGBT individuals have been taken to psychiatrists or psychologists in the hope of 'curing' their homosexuality. Medical treatment was not in general denied to homosexuals but there were difficulties in finding sufficient LGBT-friendly psychiatrists or psychologists, and fear of discrimination could lead to failure to divulge all relevant circumstances to an individual's doctor. The report notes that the difficulties for men are in mainly 'in the public realms': women are harassed at the private and community level, and transgender and cross-dressers are constantly harassed by the police, arrested and abused. A number of women have been the subject of kidnapping charges against their partners, even though they were adults, but the cases were not followed through and charges were dropped. Culturally, parents have control of their daughters' lives and daughters leave home only for marriage, the report asserts. The courts failed to distinguish reliably between consensual and non-consensual homosexual sexual activity.
6. Details are given of a number of specific incidents. In November 2012, two men arrested in a public lavatory while engaging in oral sex pleaded guilty to a charge of gross indecency

and were fined Sri Lankan Rupees 1500 each (about £7.50). The report states that there have been no other cases relating to adults, but refers to *R v Wickremasinghe* [1934] LKHC 7, in which the High Court of Sri Lanka dealt with a case of sexual abuse of a child under 16. In *Amerasinghe v Daluwatta* [1998] LKCA 128/98, in dealing with procedural errors regarding an allegation of homosexuality against a member of the Army, the court did not deal with the homosexuality at all. Neither of those cases relates to the modern form of section 365 or the new section 365A. Much of the report deals with what happens in other parts of Asia under similar provisions, in particular in India.

7. The Sri Lankan constitution states at Article 12 that 'all persons are equal before the law' and have the right to equal protection of the law. Article 13 requires due process and article 15 protects freedom of expression and free speech. The constitution prohibits gender-based discrimination. However, it does not contain express protection against discrimination on the grounds of sexual orientation: the report considers that LGBT persons are protected only if they 'maintain a hetero-normative performance'. There have been cases of transgender men and women being arrested for 'misleading the public'. There have been no cases where the Labor Tribunal dealt with unfair dismissal based on sexual orientation.
8. In August 1999, a letter published in *The Island* (which is not in the material before us) urged the unleashing of convicted rapists at a proposed conference on lesbian issues. A complaint to the Press Council was not successful and the complainant was fined. The Press Council considered that '...lesbianism itself is an act of sadism, and salacious publication of any opinion against such activities does not amount to a promotion of sadism or salacity...'
9. The next Equal Ground report is that of 9 December 2012, 'Towards a lesbians, gays, bisexuals, transsexuals and transgendered (LGBT) stigma and discrimination index for Sri Lanka' (the 'Pilot Study'). The Pilot Study records the outcome of interviews of 119 persons known to Equal Ground, of whom 55% were Buddhist, 20% Christian, 15% Muslim, 6% Hindu, and the others of unspecified religion. 85% were educated to secondary school level or above and 66% were in employment, with a further 22% self-employed. 65% lived in a city, 16% in a town, and 17% in a rural area or village. As would be expected from their education, they were relatively well off, with 40% earning over Rupees 40,000 a year. A quarter were gay men and a further 18% were bisexual men; 29% were lesbian and 18% transgender.
10. Of that group, 33% were currently single, 40% in a committed homosexual relationship, and 14% in an open relationship. Only 13% were in a heterosexual marriage, and 9% of those were also in a same sex relationship. Of those who were in a non-heterosexual relationship, 30% lived with their partners, but 70% did not. The relationships which had lasted for over 4 years came to 31% of those in a relationship, with 20% having been in a relationship for 5-9 years. 17% were in relationships which had lasted less than a year.
11. 71% of the sample had never been excluded from a social gathering or activity on the basis of their gender identity or sexual orientation; 20% had been excluded only a few times. 87% had never been excluded from religious places or activities in the last two years; 78% had never faced exclusion from family activities in the same period, although 18% had been excluded a few times, but less than 1% had been excluded often. Most of the respondents were aware of gossip concerning them, with only 25% never having become aware of gossip. 46% were aware of frequent gossip. 62% had been victims of verbal abuse,

harassment or threats, in most cases only a few times. 38% had not had any such experience.

12. However, when considering more serious ill-treatment such as physical abuse, harassment, assault, rape and/or battery, in the last two years, 80% had not had any such experience. Less than 1% had experienced it 'often', with even smaller numbers reporting that serious ill-treatment had occurred 'a few times' or 'once'. Only one such individual had experienced serious ill-treatment on the basis of sexual orientation, with the other 22 persons experiencing it on the basis of their gender identity (that is to say, they were transsexual or transgender).
13. A similar pattern emerged for emotional or psychological abuse or trauma: over a 2 year period, 38% of the respondents had not experienced any such difficulty; 62% had, but only six individuals had been affected by reason of their sexual orientation alone, but for 58 individuals (49% of the sample) there was an element of gender identity underlying their treatment. The same pattern continued when the respondents were asked about blackmail and/or manipulation in the last two years: 54% had no such experience. Less than 1% were blackmailed or manipulated often, but 32% had that experience a few times. Only 6 individuals, much less than 1% of the sample, had that experience on grounds of sexual identity alone. For 39% of the sample group, blackmail and/or manipulation was related to their gender identity, either wholly or partially.
14. The study recorded that the overwhelming majority of those who experienced discrimination were discriminated against by their families, friends or neighbours, although there were also problems in the workplace and from the clergy on occasion. No legal actions had been undertaken by any of the respondents.
15. In other areas, 76% of the sample had no problems with housing or inability to rent accommodation. Less than 1% had that experience often, and almost all of those who did have a problem related it to their gender identity or expression, not merely their sexual orientation. 25% of the sample had lost jobs in the last two years, but less than 1% of the sample lost jobs for reasons related only to sexual orientation. The picture in relation to the refusal of employment or work opportunities was much the same. Almost all of the respondents (88%) reported no refusal of promotion or alterations to the nature of their work or job descriptions on the basis of their sexual orientation, gender identity or expression. The vast majority (the table is difficult to read) had not experienced any denial of health services on either ground.
16. In its conclusion and recommendations, the Pilot Study noted that most of the social exclusion was from friends, but that it was to friends also that there was the highest level of disclosure of individuals' sexual orientation and gender identity. In most cases, the study revealed that more people were discriminated against on the basis of gender identity/expression or both sexual orientation and gender identity/expression, rather than sexual orientation alone. There was concern regarding a perceived lack of safe home environments, with some LGBT individuals being stigmatised and discriminated against by their family members in the home, their same-sex partners and even neighbours. This part of the report lacks quantitative focus and is less helpful: "The study revealed that between 4.2% and 74.79% of the respondents face some form of LGBT related stigma and discrimination...the study reported high levels of verbal abuse, emotional abuse and blackmail alongside gossip." The Pilot Study also reported fear of being 'outed' among those who had not experienced any problems.

17. The report noted that many organisations in Sri Lanka offer assistance to LGBT people and some were primarily focused on addressing LGBT-related issues. The research project made recommendations to the state of Sri Lanka, but would also look at improving the quality of the study.
18. The next of the Equal Ground documents is a January 2013 situation analysis entitled 'Strengthening of legal protection for LGBT in Sri Lanka: road to decriminalization'. The study's limitations are set out at the beginning: it was noted that the quantitative research could not be conducted in depth and that the study focused on urban spaces such as the main towns of each district; and further, that case law on child abuse cases and adult consensual sex under sections 365 and 365A were hard to access: the report had depended heavily on published articles about child rights. There is little new material in this report, which recommends decriminalisation of adult same sex consensual intercourse in private; the passing of laws and implementation of non-discrimination policies, to ensure equal protection, equal opportunity and substantive rights; police training; sensitisation of lawyers; and awareness creation in Sri Lanka generally.
19. The last Equal Ground document in the background bundle was prepared and submitted for consideration at the 110th session of the UNHCR General Council in March 2014 in Geneva and is entitled 'Human rights violations against lesbian, gay, bisexual and transgender (LGBT) people in Sri Lanka: a shadow report'. This report gives further examples: a lesbian wearing trousers and of a masculine appearance, arrested and questioned for five hours by the police when walking back to her motorcycle in 2012, and charged with vagrancy; an anonymous call to Equal Ground in 2008 by a man who said that while staying in a known gay guest house in Colombo with a male friend, the police broke down the door, forced him to put his fingerprints on unused condoms, and to give evidence against his friend, who was fined. It records the account of a graduate student in Galle who was interviewing several men and one transgender woman for his thesis on safer sex: the men were arrested and beaten and the transgender woman sodomised with a wooden stick; the student was accused of promoting homosexuality, slapped, and thrown into a police cell with such force that he injured his ankle. The example of the two gay men in the public toilet in Colombo who had to pay a fine was also included.
20. The report records difficulty experienced by Equal Ground in relation to a series of peer educators workshops on stopping the spread of HIV/AIDS organised by a partner organisation in August 2013: a State-controlled newspaper, Lakkima, printed an article entitled 'Male prostitution brothels run by homosexual groups', in which it claimed that the children were being brainwashed to become homosexual. Officers from the CID visited the Executive Director of the partner organisation and questioned him, before telling him he could continue the workshops only if homosexuality, human rights and section 365A of the Penal Code were not mentioned. The partner organisation curtailed its HIV/AIDS workshops in that area and withdrew an application for funding from the Global Fund to fight AIDS, tuberculosis and malaria, one of the very few working with the MSM (males who have sex with males) population in Sri Lanka. There had been other similar incidents.
21. In another incident, sometime between 2008-2010, two women working in the same workplace in Nuwara Eliya district were suspected of being in a relationship and were harassed to such an extent that they left their jobs. The incident was reported to Equal Ground in an anonymous call on 29 July 2013. Later in 2013, an employer discovered that he had a lesbian tea picker among his employees and forced her to work on one of the most treacherous, steep slopes. A transgender man lost his job in early 2013 because a security

guard, searching his belongings, found Equal Ground material there. He told the factory management, who threatened to tell the man's family of his sexuality, then fired him.

22. The report dealt with difficulties in housing, and with hate crimes. A 19-year old transgender woman reported anonymously to Equal Ground in 2013 that she had been cycling home one evening when a man stopped her, dragged her into a forest and raped her. Another anonymous report in August 2013 was of a bisexual male who at the age of 16 had been taken into a school washroom and raped by two older students. In October 2013, a transgender man reported being attacked in front of a hardware store, where he and his boyfriend were standing. He is said to have suffered a serious blow to his eye, and alleged that two men on motorbikes followed them home.
23. The report gave examples of forced marriages entered into by lesbian women under family pressure: in one case, the relationship of two lesbians was discovered and one woman's family caused her to marry a Sri Lankan man; when she was unhappy and tried to return to her parents' home, they chased her back to her husband. In another case, a woman was separated from her female partner, locked up by her family and given in marriage to a man eight years younger than she was. In the third example given, a woman from Nuwara Eliya lived with her girlfriend and they looked after her ailing mother together. When her mother died, the woman's brother threatened to take away her inheritance unless she married a man. The woman complied: her girlfriend killed herself.
24. The report prepared in November 2013 by Equal Ground for these proceedings follows the familiar format. It sets out the legal position in Sri Lanka and the state's failure to meet the Yogyakarta principles. It confirms that sections 365 and 365A are not used to prosecute LGBT individuals, but rather to harass and target them and violate constitution and fundamental rights in that way. The LGBT community are secondary citizens, afraid to report incidents of violence for fear of further stigmatisation or victimisation at the hands of the police. Examples were given: in 2009, a gay member of Equal Ground chose not to report the theft of his Apple laptop by his former boyfriend to the police; in 2010, Equal Ground's offices were burgled but they did not report it for fear of systematic harassment once the police knew where their offices were; and in 2013, a female to male transsexual reported having been required to remove the sarong he was wearing during a medical examination for vomiting in hospital. HIV infections had risen from 11% in 2011 to 13% in 2013. LGBTIQ individuals often dropped out of school due to bullying, marginalisation and discrimination.
25. The President had personally removed from the draft human rights action plan any reference to legalisation of homosexuality.
26. Examples were given of violence against lesbian and gay women in Sri Lanka: families often forcibly married off women who were found to be in lesbian relationships, and depression and even self-harm could be the consequences. Lesbian women who were not yet 'out' could be blackmailed; they were sometimes raped to 'cure' them, or sent to institutions which purported to cure homosexuality. Religion and beatings were also used to try to drive out the homosexual orientation of lesbian and bisexual women. The report relied on the Pilot Study as evidence that 'many participants' were excluded from social gatherings, work, education, and sometimes healthcare, by reason of their sexual orientation or gender identity. Many had reported being harassed, threatened, assaulted, raped or battered for those reasons. The example of the student researcher in Galle and the police ill-treatment of those he was interviewing was included, as was the example of the



gay men in a public toilet in Colombo, who were fined for public indecency and released on payment of a bribe.

27. The hostility of some publications, and the assertion that gays sought to convert heterosexuals, is set out. The conflation of being gay with being a paedophile was prevalent. There had been a spike in hate speech against the LGBT community due to a rapid rise in Sinhala Buddhist Nationalism, which is described as 'akin to Islamic and Christian right wing extremism'. A Nationalist Facebook page had sought to incite violence against Equal Ground, identifying Ms Flamer-Caldera, its Executive Director, and stating that the organisation was 'only a front to debase the fabric of society' in Sri Lanka and convert all Sinhala Buddhists to homosexuality.

## **B. Collective for Economic, Social, and Cultural Rights in Sri Lanka**

28. In its report of September 2010 on the implementation of the International Covenant on Economic, Social and Cultural Rights in Sri Lanka, this civil society group notes that:

"125. Sri Lanka is one of the few countries in the Asia and Pacific region with a low level of HIV prevalence. Recent figures reveal that transmission through homosexual and bisexual acts amount to 11%, and it is estimated that the country has a population of 24,000 – 37,000 men who have sex with men, considered to be at greatest risk.

126. Much needs to be done to address the absence of policies which reflect the needs of persons of different gender identities and the criminalisation of same sex orientations render it difficult for people from these communities to access public health services in a manner that is open and informative about their medical and personal histories. Thus, services which are available to people living with HIV/ AIDS are accessed by those who are willing to face stigmatisation or have to hide their sexual orientation. ...

158. It is appropriate to mention here that significant issues such as reproductive health and rights, sexual rights as well as gender and related topics are inadequately represented in the curricula of the Sri Lankan education system including higher education which has resulted in poor awareness and even poorer understanding of most of these issues.

159. The rigid religious interpretations and traditional social perspectives have been thrusting patriarchal and heteronormative values on children preventing them from discussing these 'social taboos' openly for a greater tolerance and understanding. Consequently, the harsh attitude extending to phobia towards different sexual orientations has led to physical and mental harassment and discrimination, resulting in dropping out from school, and even leading to suicide."

## **C. Women's Support Group Sri Lanka (WSG)**

29. The WSG prepared a shadow report in January 2011 entitled "The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka" for submission to the UNHCR Committee on the Elimination of all forms of Discrimination Against Women (CEDAW). The report is not specifically concerned with the position of gay men, but of women, whether lesbian or bisexual, and transgender individuals.
30. The WSG report notes the criminalisation of homosexuality, albeit with very few prosecutions and no convictions in 50 years, and assesses the effect of that legislation as follows:

"This criminalization paves the way for police and anti-gay groups to brand all lesbian, bisexual, transgendered persons as 'perverts' and criminals. The fear of being apprehended

and identified as a person of non-normative sexual behavior or practice leads to a cycle of silence by members of the LBT community, by their families and friends and by the society as a whole and makes them vulnerable to a range of abuses including extortion, intimidation, unlawful arrest and detention, harassment and torture. Homophobic and transphobic articles repeatedly appear in the media, especially the print media, including in some State owned newspapers and in newspapers that follow State policy. These articles constitute a means by which society strengthens its resistance to recognition of LBT communities and continues to isolate, ridicule and justify acts of violence on members of the LBT communities. With regard to women's sports teams, there have been unofficial reports where women who are key players in the National team have lost their positions once it has been speculated that they are lesbians. In this sense, there is direct discrimination which impedes the full enjoyment of the right to equality by specific categories of women in Sri Lanka who face discrimination due to their sexual orientation and gender identity/expression."

The abbreviation 'LBT' (lesbian, bisexual and transgender) excludes consideration of the position of gay men.

#### **D. International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)**

31. A report by ILGA dated 1 March 2011 is entitled 'Erasure of the Gays'. The premise of this short article is that male homosexuality in particular is confined to a Colombo elite and not an option across the country.

"Homosexuality is often sidelined by the mainstream social discourse in Sri Lanka. This does not suggest that our society does not tolerate homosexuality; rather it seems resolved to overlook it by rejecting it completely from the popular consciousness. This defensive approach to homosexuality signifies a need to conserve the sexually homogenous character superimposed on our society. Thus homosexuality is not an "issue." However this does not mean that the Sri Lankan LGBT community does not have issues. These issues could only be addressed through foregrounding homosexuality per se. In as far as our society does not acknowledge the LGBT community as a part of its fabric, their grievances will remain unrecognized. ...Homosexuality, at least on paper, remains a crime in Sri Lanka.

32. The article records the evidence of an individual, Nishada, described as 'an insider of the LGBT rights discourse' who feels disapproval when he is seen in public with his boyfriend.

"... Nishada tells me that gays are hardly ever harassed physically, although he claims that the Nacchi community, or men who think of themselves as women, are often subjected to harassment. Nacchi people he says is the "face" of Sri Lankan LGBT community. "They are great dancers; they get paid for dancing at weddings. Sometimes when they return from wedding ceremonies, the police would stop them and take their money," Nishada says. The dress and behaviour of the Nacchi people, or the "queens," make them easily recognizable targets. As a socially marginalized group they are vulnerable and often sexually exploited, I gathered from Nishada. ...

He says that many gay men and women are stuck within their unhappy marriages (obviously making their spouses equally unhappy) because they are compelled to remain closeted owing to the stigma attached to homosexuality. It seems to me that homophobia in our society works at an insidious level; it does not openly manifest itself as it is jettisoned from the collective consciousness of the masses. It is at micro-level that the homosexuals are discriminated and condemned, often by the immediate family members. This makes it difficult for homosexuals to openly acknowledge themselves and embrace their identity. ...

Nishada says that HIV positive homosexuals are often discouraged from seeking medical attention as homosexuality is a crime in our country. He also adds that on the grounds of sexual orientation, they are often discriminated at health clinics. This connectivity compels homosexuals to remain without proper medical attention, which is hazardous to their health and that of the entire body-politic. ... He stresses that decriminalizing homosexuality can substantially lessen the stigma attached to this orientation, and this in turn would encourage homosexuals to seek medical attention.

I was once told by an elderly, university educated woman whose son is a homosexual that, homosexuality is a myth prevalent among the "English speaking people in Colombo." It is certainly a myth prevalent among most of the straight members of our society that homosexuality is a "disease" that can be cured, especially by counselling. It is this kind of mythology that gay activism should seek to counter.

Nishada says that there are four gay rights organizations which are actively engaged in promoting the rights of the Sri Lankan LGBT community. ...However, he admits that these organizations are elitist in character and the administrative positions in the organizations are reserved for an elite coterie. Nishada tries to rationalize this state of affairs by saying that given the nature of the issue, only those who are economically and socially empowered can be openly gay. However it seems to me that this marginalization of the non-English speaking, subaltern homosexual has paved the way for the collective self closeting of the LGBT community. Colombo-centric homosexual mainstream hardly ever leaves its elitist cocoon. Even though I do not wish to underrate the work that is being done by the existing organizations, grassroots level alternative organizations are necessary to take gay activism to a national level.

I have suggested in this article that homosexuality should be 'issufied' - i.e. it should be made an issue. This does not suggest that homosexuality is not already an issue; rather my point is that it is not an issue because society does not acknowledge it as such. Same politics are at work when a Sinhalese argues that ethnicity is not an issue or when the elite declare that class is not an issue. The ability to overlook differences is the prerogative of the privileged group. Homosexuality should be recognized in order to empower the homosexuals.... Issufying homosexuality entails the potential danger of exciting homophobia at a macro-level, but this would inevitably happen as more and more homosexuals are opting to be openly gay. The Sri Lankan body-politic would soon have to perceive homosexuality, and acknowledge it as a part of the social-fabric."

## E. UNHCR

33. The UNHCR eligibility guidelines of December 2012 agree that there have been very few prosecutions, but that there is hostile press coverage of the LGBT community, with accusations levelled against CoJ of 'promoting homosexuality' in the context of its HIV/AIDS conference. The organisation is said to have closed because of police interest in its staff, but there is no mention of the corruption issues which Ms Flamer-Caldera thought might well have been the principal reason. There is little differential assessment of the risk to gay men in Sri Lanka. The report concludes that:

"LGBTI individuals may, depending on the individual circumstances of the case, be in need of international refugee protection often, but not exclusively, on account of belonging to a particular social group. Depending on the circumstances of the case, the same may apply to partners and other dependants of individuals with the above profile. LGBTI individuals cannot be expected to be discreet about their sexual orientation or gender identity in order to avoid persecution".

34. The guidelines identify a heightened risk for lesbians and bisexual women, who face homophobic abuse and physical violence, privately and in public, particularly in rural Sri Lanka. They reflect difficulties experienced by transgender, transsexual and intersex persons, albeit the evidence is not particularly strong or precise:

“The absence of precise and specific information or reported incidents relating to the treatment of these persons should not be understood as indicating an absence of risk of serious harm.”

Persons undergoing gender reassignment have reportedly had difficulty in amending government documents to reflect their reassigned gender.

#### **F. Freedom House**

35. The Freedom House report for 2013 is mostly concerned with the overall political situation in Sri Lanka after the civil war. It deals only very briefly with sexual matters, recording that rape and domestic violence against women are problematic, that women are the subject of discrimination and that existing protection laws are only weakly enforced. The reports note that “child rape is a serious problem”. Both the 2013 and 2014 reports deal with the question of LGBT orientation in the same brief terms:

“Members of the LGBT (lesbian, gay, bisexual, and transgender) community face social discrimination and some instances of official harassment. Sex “against the order of nature” is a criminal offense, though cases are rarely prosecuted.”

#### **G. Canadian IRB**

36. The Canadian IRB Response to Information Request of 13 January 2012 entitled “Sri Lanka: Treatment of sexual minorities, including legislation, state protection, and support services” is based principally on evidence from Equal Ground, including some undisclosed correspondence in 2010 and 2011 between Ms Flamer-Caldera and the Research Directorate. The report confirms that the law criminalising homosexuality is rarely enforced and has led to no convictions in the 50 years of its existence. It records difficulties for LGBT individuals in rural Sri Lanka, as a result of which they tend to migrate to the cities where it is possible “for them to meet others who are like them and have relationships, albeit on the down low”.

“The Executive Director of EQUAL GROUND expressed the opinion that LGBTIQ people in the Tamil or Muslim communities may face greater difficulties because these groups are “ultra conservative” (EQUAL GROUND 7 Dec. 2011). However, she also noted that the LGBTIQ community is “increasingly” threatened by Sinhalese Buddhist nationalists, among others, who claim that “homosexuality is a western value which erodes Sri Lankan culture, morals and family values” (ibid.).

The Executive Director also provided the following information regarding socio-economic and regional differences within Sri Lanka with regard to the LGBT community: [T]here is a huge difference in how people are treated based on their socio-economic status. LGBTIQ persons in the rural areas for example, suffer enormous hardships - stigma and discrimination is rife - and they cannot be openly gay or enjoy a normal same sex relationship. Most rural gay men especially, migrate to urban areas where there are more opportunities for them to meet others who are like them and have relationships, albeit on the down low. (ibid.)

The Xinhua news agency states that most homosexuals in Sri Lanka live in the larger cities (21 Sept. 2011). In further correspondence with the Research Directorate, the Executive Director of EQUAL GROUND stated that "a significant number of LGBT persons" live in Colombo (EQUAL GROUND 12 Dec. 2011). The Executive Director added that acceptance levels in Colombo were "slightly better" than those of other areas, but that "[i]n most places in Sri Lanka, marginalization and homophobia are the norm" (ibid.)."

37. The report notes the additional difficulties for rural women and lesbians in general:

"A report on the situation of lesbian and bisexual women in Sri Lanka produced by EQUAL GROUND, based on research conducted between April 2010 and June 2011, states that lesbian and bisexual women are more vulnerable than gay and bisexual men because women are not seen as equal. According to the report, lesbian and bisexual women are ostracized by their family and society and some have been driven to suicide ... The report adds that lesbian and bisexual women are often subject to a combination of homophobic violence, gender-based violence, and domestic ... According to the report, lesbian and bisexual women face the greatest risk of violence from their parents, siblings and relatives, who attempt to "institutionalize these women, restrict them from leaving the home, withdraw economic and other necessary support, arrange unwanted marriages and express other forms of physical aggression" ... The report also notes that these women are dependent on their families and some may feel powerless in confronting violent threats by their family members or threats to report them to the police."

38. The difficulties for transgender individuals are also noted:

"Sources report that it is difficult to amend the sex classification on official documents (US 8 Apr. 2011, Sec. 6; WSG Jan. 2011, 5). According to sources, individuals must first have their sex on identity documents changed before going through sex-reassignment surgery (ILGA 10 Apr. 2011; WSG Jan. 2011, 5). The WSG shadow report states that a medical practitioner "risks his/her license if he/she performs sex altering surgery on a client whose birth certificate notes his/her sex at birth" (ibid.). WSG adds that ... transpersons have spoken of the reluctance of employers to offer them employment. In one case a man had been dismissed from his employment after he had been 'discovered' by his employer. ...According to WSG, there have been court cases against women accused of "misrepresentation" and "impersonation" for "disguising" themselves as men and cases of transwomen arrested for "misleading the public" ..."

## **H. United Kingdom Foreign and Commonwealth Office**

39. The Foreign and Commonwealth Office (FCO) identified Sri Lanka in its report on Human Rights in Countries of Concern for 2013 as one of 28 countries of concern, based on circumstances in Sri Lanka in 2012. The entry for LGBT is brief:

**"Lesbian, gay, bisexual and transgender rights**  
Homosexuality remains illegal under Sri Lankan law. The British High Commission supported lesbian, gay, bisexual and transgender rights activists in raising concerns over harassment."

## **I. United Kingdom Home Office UKBA/UKVI**

40. The most recent full Sri Lanka Country of Origin Report is that for 2013, dealing with circumstances in 2012 in Sri Lanka. There is a later report which deals only with Tamil separatism. At section 19.01 it deals with the circumstances of LGBT individuals in Sri Lanka. The report reflects the international materials concerning the discrimination experienced by gay men, lesbians and transgender individuals in Sri Lanka, with particular

reference to the risks for lesbians and transgender individuals. The international NGO evidence relied upon dates back to 2010 and 2011. More recent commentary is included from the Gay Times Gay Guide, but the Guide does not appear to have been updated since the closing down of CoJ or the 1995 modification of the statutory prohibition in Article 365A, extending it to lesbians by making the language gender-neutral.

“There is a sizeable gay population in Sri Lanka but many gays and lesbians cannot come to terms with themselves due to family pressures and behavioural expectations imposed by Sri Lankan culture. A gay identity does not make much sense to many homosexuals. Male homosexuality in any event is illegal. There is no gay scene in the western sense in Sri Lanka but there are several gay groups who lobby for reform and provide support and counseling to gays and lesbians. Many of these groups also organise occasional gay events such as parties and outings. Sri Lanka has a lot to commend it but we would not recommend it as a specifically gay destination. ...Homosexual acts between men, regardless of age, are prohibited under Section 365a of the Penal Code with a penalty of up to 10 years imprisonment. The law is not enforced and there have been no prosecutions for 50 years but in a largely Buddhist country homosexuality is seen as a sin. Local gay groups complain that the mere existence of the law is enough for the police and anti-gay groups to brand gays and lesbians as "perverts" and lawbreakers. They argue it is discriminatory and stigmatises gays and lesbians leading to abuse of gay people in their community. In 1996 The Sri Lankan gay group "Companions On A Journey" was established. During its 6 year existence [CoJ] has suffered harassment including assaults on its founders, death threats and the stoning of its offices. There is still rampant homophobia in Sri Lanka for example the Sri Lankan Press Council ruled in favour of a paper that published a letter saying convicted rapists should be let loose amongst a lesbian conference to give them "a taste of the real thing".”

41. The respondent’s Operational Guidance Note on Sri Lanka (OGN) issued July 2014 references the UNHCR, FCO, and US State Department Reports, as well as evidence from Gay Times and ILGA. It set out the support given to Equal Ground by the British High Commission in Colombo, which on 18 May 2013 presented Ms Flamer-Caldera with a cheque to support her organisation, to recognise the International Day against Homophobia and Transphobia (IDAHO), as reported by Sri Lanka’s Daily Financial Times. The Guidance concludes that:

“... Homosexuality is illegal in Sri Lanka but there is no evidence of systematic state persecution. Opportunistic targeting, societal hostility and discrimination against LGBT persons does exist and in individual cases may reach the Article 3 threshold.”

## **J. Other materials and Press reports**

42. A report entitled “Dance Ponnaya, Dance! Police Abuses Against Transgender Sex Workers in Sri Lanka” by Andrea Nichols of the University of Missouri-St. Louis, St. Louis County, provided further evidence of difficulties for male-to-female transgender sex workers in Sri Lanka, based on 24 in-depth interviews and 3 focus groups, which indicated that transgender sex workers experienced victimization by police simultaneously targeting their feminine gender expression and homosexuality. These abuses include verbal, physical, and sexual abuse as well as inequality in the police response to both their victimization and criminality
43. A number of press reports from Sri Lanka and elsewhere are included in the bundle. The earliest press report is an article from the Sydney Star Observer, Australia (a gay news source) entitled “Gay Rights are Human Rights” published on 17 February 2005, almost ten years ago. Its contents are brief and self-explanatory.

44. On 27 July 2009, the Interpress Service News Agency published an article entitled “Rights, Sri Lanka: Gay community takes heart in Indian court ruling”, in which the High Court of Delhi found section 377 of the Indian Penal Code to be unconstitutional. The article reports the reaction of Ms Flamer-Caldera of Equal Ground, CoJ, WSG and Sherman de Rose of CoJ, the first gay man to declare himself as such in Sri Lanka:

“However, Rosanna Flamer-Caldera, Executive Director of Equal Ground, a nongovernmental organisation which fights for human and political rights of the Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) community of Sri Lanka, is cautious about the ruling. “While we are hugely thrilled by the decision and it gives us a lot of hope, we also have to be cautious in moving forward,” she said. In the past six months, Flamer-Caldera and her colleagues have received death threats by phone and emails from what she describes as ‘Muslim fundamentalists.’ “We did a workshop in the eastern region (where there is a sizable concentration of Muslims) and one ‘gentleman’ accused us of trying to promote homosexual behaviour. Since then we have had some threatening calls and emails,” she said.

Between 8 to 10% of Sri Lanka’s 20 million people are believed to be gay, according to activists. De Rose, the first gay person to come out, said activists were planning a consultation in coming weeks in the capital Colombo, bringing together the gay community from across the country in an interaction with stakeholders like judges, parliamentarians, religious leaders and decision-makers. “We hope to attract the participation of about 200 people from all over the country. Indian experts are also attending,” he said, adding that they plan to re-examine the Sri Lankan issue in the light of the Indian judgment. “I have found Sri Lankan leaders supportive of our rights to live the way we want but that is their individual view. That view is not common on an organized scale,” he said, noting that same-sex couples are always worried about public opinion and want to “run away abroad.

A sexual rights activist from Women’s Support Group (WSG) said they were overjoyed by the ruling but also expressed concern that there have been some appeals filed against the judgment. “We need to wait and see what happens,” she said. WSG, along with CoJ and Equal Ground, is among the more prominent groups fighting for the rights of LGBTIQ community. There were other reasons for not being ‘over-excited’ over the ruling. “Up till 1995, the subject of this law was only men. However, the 1995 amendment to Sri Lanka’s Penal Code made it ‘gender-neutral’ and now the Penal Code criminalizes both male and female homosexual sexual activity,” according to a statement on WSG’s website. “That’s why we need to be cautious (in trying to change the laws,” said the sexual rights activist. Flamer-Caldera says, “There have been discussions with civil society on how to move forward.”

While there is a higher level of tolerance and more awareness in Colombo for gay community’s rights, there is still ignorance of these issues at grassroots level. However De Rose believes there is much more acceptance from society over their rights now compared to when he launched the organization in 1995. ...

The WSG website says LGBT people are subject to discrimination on many fronts. They face blackmail by others, face threats to their family, career, and their life while some have been thrown out of their homes and others have lost their jobs. It says the legal system and the stigma associated with being ‘different’ in Sri Lankan society makes it difficult for members of the LGBT community to come out of the closet. “Around you, there are many people who hide their sexual and gender identity from those around them due to the fear of what may happen to them if their identity is known,” it said.”

The Indian decision was subsequently overturned by the Indian Supreme Court (see *MD (same-sex oriented males: risk) India CG [2014] UKUT 65 (IAC)*).

45. On 5 July 2010, Lakbima News published an article by Ranga Jayasuriya entitled “‘We are all human’, says gay rights activist”, recording the views of Ms Flamer-Caldera, as expressed at a conference in June 2010, and to the reporter, as follows:

“Two weeks back, during an annual gay pride celebration held in Colombo, Rosanna Flamer-Caldera made a passionate plea for equal rights for the Sri Lankan gay and lesbian community. “...We are not only hair dressers and drag queens, we are also doctors, journalists, artists, lawyers, accountants, nurses....we are everywhere and anywhere and we continue to strongly advocate on behalf of all of us and mainly the mostly invisible Lesbian, Gay, Bisexual and Transgender community of Sri Lanka. ...We want to celebrate our lives, our loves and most of all – who we are. We do not want to be in closets anymore. We shouldn’t have to be in closets to begin with! Embrace your uniqueness. Embrace your sexuality. Embrace diversity. Be proud of who you are, whatever your sexual orientation may be. Closets are for clothes. Step out. Be Proud.”

Not all the members of the Sri Lankan gay and lesbian community have come out of their closets. But, those who dared to come out have organized themselves in self-help groups, which campaign for human and sexual rights of the LGBT community. They help their members in distress, provide counseling and legal aid, conduct ballroom dancing sessions, screen movies and celebrate annual events of the calendar of the world wide LGBT community. Going a step further, they also promote HIV AIDS awareness in the wider social spectrum.

Flamer-Caldera’s plea for equal rights has, at last, caught the attention of political powers. Prime Minister D.M Jayaratne, last week told a daily English newspaper that the government was prepared for a dialogue with the local gay and lesbian community. The prime minister said that gay and lesbian activists should explain what they mean by equal rights. Flamer-Caldera says local activists have requested an appointment with the prime minister. ...Flamer-Caldera says that LGBT activists want the government to expunge the section of the penal code which criminalizes homosexuality.

“It is silly to label homosexuality as being a western concept. It is in existence in the animal kingdom from time immemorial. It is, in fact, an archaic law which is ‘ imported’ from the west.” Second, according to Flamer-Caldera, local LGBT activists urged that the constitutional guarantees of non-discrimination be extended to include gender identity and sexual orientation. “We want to be treated like other citizens. We are all human. We are all equal,” she says.

What about same sex marriages and civil unions? She says it is too far off. “We take a step at a time. Same sex marriages are not in our agenda now.” That would stoke the fears of the prime minister, who deemed same sex unions as incompatible with local culture. ...In 2001, Sri Lanka’s notorious Press Council ordered Sherman de Rose, an activist of the founding LGBT rights group, Companion on a Journey to pay legal fees to the Island newspaper, turning down a petition against the publication of a letter which advocated lesbian women to be raped by convicted rapists to ‘cure’ them. Rejecting the petition, the Press Council held that lesbianism was, “an act of sadism” and that homosexuality was an immoral and abnormal crime.

That however had unexpected positive fallout. It drew public attention to the rights of the gay community. Flamer-Caldera says gays and lesbians don’t ask for special rights. “We ask to be treated like follow citizens. We asked to be accepted for who we are.” That, of course, isn’t too much to ask for.”



46. On 21 September 2011, Adaderana, another Sri Lankan news source, reported an article published by the Chinese press agency, Xinhua, entitled "Sri Lanka faces increase in homosexuals":

"Sri Lankan authorities on Wednesday said that there has been an increase in the number of homosexuals in the country despite its strong Buddhist culture and traditions. A survey conducted by the Sri Lankan Health Authorities have revealed that there are over 30,000 homosexuals and over 40,000 prostitutes in the island amongst its estimated 20 million population.

Out of these figures, more than 8,000 prostitutes are found in the capital Colombo where illegal brothels continue to operate, Sri Lankan Medical Authorities said. Prostitution is illegal in the island nation and has become a severe problem for the local police who continue to carry out raids and arrests on secretly functioning brothels in many parts of the country. Homosexuality is also a taboo subject in Sri Lanka where socially it is unaccepted and most often seen as an offence. According to Sri Lankan Medical Authorities, while the numbers for homosexuality have increased, most homosexuals are found to be in school and university hostels.

Most homosexuals are found in big cities in Sri Lanka and health authorities have decided to conduct island wide awareness programmes to prevent the spread of sexually transmitted diseases amongst such people. Director of the National Aids Control Unit in Sri Lanka, Dr. Nimal Edirisingha told Xinhua that while these were the estimated figures of homosexuals and prostitutes in the country, the numbers could be higher. According to Dr. Edirisingha, there are also 1388 people affected with HIV/AIDS in the country and this figure has remained the same for the past few years. (Xinhua)"

47. On 2 February 2013, Ceylon Today's reporter Anukshi Jayasinha reported on the harm which can be caused in social media posts in an article entitled "When words do more than hurt". The article deals principally with racist hate speech in social media, while recognising that "[h]ate speech can be any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities or to women." There is no other reference to LGBT issues or sexuality in the article.
48. A number of articles are reproduced in translation published on the Prathiwadhiya Blogspot in Sinhala, beginning on 1 July 2013 with an article entitled, "Should the Norway ambassador's homosexual mania be allowed in our country?" and continue on 19 August 2013 with "Here are the real false devotees", then on 24 August 2013, "Is this Sri Lanka or is it a colony of faggots?" and on 30 August 2013, "What could have been broken off by a tip of a finger needs the use of an axe", on 6 September 2013, "Daily Mirror media reports support homosexuality", and finally, on 28 September 2013, "Residents of Annuradhapura district, are you aware of this?". The contents of these posts can properly be regarded as hate speech. The reach of this particular blog is unclear.
49. On 1 September 2013, The Nation carried an article by Kusumanjalee Thilakarathna entitled "A society's struggle against abandoning homosexuality", which dealt with the reaction to the controversy about the gay marriage which had taken place between a male child and an adult man:

"Was it a new beginning for Sri Lanka? Does this hint at a degradation of social values? What will happen to the Sri Lankan culture? So many questions were raised when media revealed a homosexual marriage ceremony at Ratmalana last week. Sexuality and gender issues are still not a comfortable topic in public discussions in Sri Lanka. In fact homosexuality is still considered a taboo. Not speaking about homosexuality is not going to

solve the issues. Thinking that the 'issue' of homosexuality will simply disappear if it is not talked about is wishful thinking. People are in doubt about the 'right attitude' they should have towards the LGBT (Lesbian, Gay, Bi sexual and Transgender) community. Some are confused, not knowing which side to take. Some try to rationalize it where some become homophobic. ...

Lawyer, Human Rights Activist Shiral Lakthilaka said that Sri Lanka should also consider the human rights aspect of the issue. "When you speak about homosexuality in Sri Lanka you have to take three aspects into consideration; the human rights aspect, religious aspect and the Victorian mentality among the Sri Lankans," Lakthilaka stressed. "When homosexuality is spoken about in the human rights perspective it falls under the category of minority rights and group rights. This is a subject which should come into broader discussions. There should be a platform where sexual minorities could speak of their issues," he added. The religious position in Sri Lanka does not give any leniency toward LGBT community. All religions in Sri Lanka have generally perceived that homosexual behavior is a sinful act. Christianity, Hinduism as well as Islamic community consider homosexuality as a sinful act. There are no explicit rules for lay persons prohibiting homosexual behavior in Buddhism. Yet, since homosexuality is against social standards in the country, it could be considered as sexual misconduct ... There are few organizations and movements offering help for the LGBT community and most of them are online support groups. Since the country doesn't have a proper screening process for these support groups and organization, it is hard to trust which group is genuinely offering help and which groups have hidden motives which could cause more harm than good. Legalizing homosexuality or not it would be better if the country could have a proper method to monitor these mushrooming support groups.

Another group of people harbor the opinion that homosexuality is becoming a trend in society. Some say homosexuality is only an issue in Colombo. On one hand if homosexuals are claiming that they are not special, it is quite confusing why homosexuals themselves are trying to show off their 'pride'. On the other hand if homosexuality is normal and cannot be changed or 'cured', is it ethical to condemn their sexual preference?

Although the majority of the Sri Lankan community consider 'homosexuality' as a special issue where solutions should be obtained, the real question is the danger innocent young people face, due to the lack of awareness on sexual and gender issues including homosexuality. If they are not properly educated they will seek information through unreliable sources."

50. On 23 September 2013, Pink News carried an article entitled "Former Commonwealth head of human rights condemns Sri Lanka over gay harassment":

"The former head of Human Rights at the Commonwealth, Dr Purna Sen, has condemned the Sri Lankan Government over the harassment of activists campaigning for LGBT rights. Speaking at the Labour Party Conference in Brighton, Dr Sen, who is Chair of the Kaleidoscope Trust, said it was "wholly unacceptable for the country preparing to host Commonwealth leaders in a few weeks time to try to silence the LGBT community and human rights defenders through threats and intimidation." The Commonwealth Heads of Government Meeting (CHOGM) takes place in Sri Lanka in November.

"It is imperative that Sri Lanka as the CHOGM hosts must adhere to the principles underlying the Commonwealth and respect the right to active and safe democratic engagement by all human rights defenders," Dr Sen added. "If this kind of harassment continues then both the Secretary General and the Heads of Government Meeting in Colombo must be prepared to speak out publicly and condemn any infringement on the rights of LGBT people whether in Sri Lanka or anywhere else in the Commonwealth."

She said: "The recently adopted Commonwealth Charter states it is an association 'devoted to improving the lives of all peoples of the Commonwealth'. This puts an obligation on the organisation to act against this sort of harassment." The Kaleidoscope Trust, based in London, has received reliable reports that Sri Lankan activists have been threatened with arrest and organisations have been warned they could be closed down if they continue to advocate for LGBT and human rights."

51. Four reports from Gay Star News, an international news website for LGBTI reporting are included in the bundle. The first, dated 31 August 2013, is headed "Sri Lanka's 1<sup>st</sup> gay marriage ends in arrests for corruption":

"Sri Lanka witnessed its first gay wedding this month followed by a state crackdown that saw the bride and groom, their relatives and other guests at the event in capital city Colombo arrested, Sri Lankan media reported. Neth FM Balumgala, a local radio station, said the wedding was held in the capital on 16 August, observing all the traditional rituals, including the exchange of rings and vows. The young bride was a school student and his mother and relatives attended the event, the radio station said. Soon after the ceremony, officials from the anti-corruption unit swooped down on the house, reportedly used as a meeting place by the gay community, and arrested the bridal pair as well as bystanders. Police also seized videos and books from the house. The radio station quoted neighbors as saying that the majority of people who used to frequent the house were young male students. A local television channel also reported the incident though the mainstream media remained silent. ...There was no immediate news of what had happened to the people arrested.

The local media is mostly anti-homosexuality, taking pot shots at gay parades and gay fashion shows organized by advocacy groups. Earlier, it had attributed anti-gay sentiments to President Mahinda Rajapaksa over the appointment of Norway's new ambassador to Sri Lanka. She was reported to be a lesbian and the media said Rajapaksa was determined that her partner would not be allowed in. He was reported as saying that the Buddhist nation would lose its identity if it allowed same-sex activities."

52. The second report is dated 7 September 2013, entitled "Sri Lanka begins systematic targeting of gays" and records what happened next. The child 'bride' was identified by the radio station and vilified: he took refuge in a Buddhist temple and sought to become a monk. The station then disclosed his novice name as well. In October 2013, the report states that a Buddhist monk was arrested for allegedly having sex with five underage boys. In early 2013, a branch of the Sri Lankan police made a public presentation stating that homosexuality is the leading cause of child abuse in Sri Lanka.

53. The third report, "Human rights groups report damns treatment of LGBTIs across Commonwealth", published ahead of the Commonwealth Heads of Government Meeting (CHOGM) on 11 November 2013, deals with the position of LGBT individuals across the Commonwealth. There is no specific reference to the position of LGBT individuals in Sri Lanka.

54. The fourth report, "Sri Lanka gays forced underground as world leaders gather for summit" records that the CHOGM meeting refused to discuss LGBTI rights during the summit. A proposed meeting to be held dealing with LGBTI rights across the Commonwealth during the summit had been cancelled due to threats to gay rights leaders in Sri Lanka:

"Sri Lankan gay activists have been threatened and ordered to keep silent as Commonwealth leaders gather in the country. The LGBTI campaigners say they have been

forced underground, reflecting a wider crackdown on civil society ahead of the Commonwealth Heads of Government Meeting (CHOGM) from tomorrow (15 November). Commonwealth leaders have refused to discuss gay, trans and intersex issues at the summit – despite the fact 80% of member countries still criminalize homosexuality. GSN has learned Sri Lankan activists have been warned to stop their activities ahead of CHOGM.

Some individuals have been threatened and told they may be in danger if they do not comply. ...The Sri Lankan LGBTI activists don't want to reveal any more details of the threats against them, for fear of angering the government and putting themselves at more risk."

55. ON 12 January 2014, Ceylon Today reported that the position in Colombo had improved after the CHOGM conference came to an end. The article by Ruwan Laknath Jayakody entitled "Colombo a hive of 'gay' activity" listed the most popular cruising spots in Colombo, referring in one place to gay sex as 'criminal transmission of HIV' and explained that some of the identified places (not reproduced here) are for 'white collar tie-wielding executives' but others result in 'alleged incidents of blackmail' or involve intravenous drug users. :

"Colombo's gay scene suffered a setback when the government beefed up security ahead of the Commonwealth Heads of Government Meeting (CHOGM), forcing gay men out of some of their favourite hangout places. Now with the security having been scaled down, they are back. But, doctors have raised concern over an increased risk of Sexually Transmitted Disease (STD) among gay men. Societal prejudice and stigma have discouraged gay men from seeking medical attention. Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) activities are relatively thriving in isolated parts of Colombo and also in its suburban outskirts. ...The list goes on with the other popular hangouts of gay men, ...which provide the only sexual, physical, emotional and economical relief for most MSMs [men having sex with men]. In schools, hostels, hospitals and army barracks, gay sex is a mutually beneficial relationship. In prisons, however, there is sometimes sexual violence of the non-consensual nature.

Two national surveys into the homosexual activities of men were conducted recently, neither of which however, included foreigners in the country. The first, which took one and a half months to complete, was carried out with the assistance of the involved communities. The research was conducted in four Districts, Colombo, Anuradhapura, Nuwara Eliya and Batticaloa and the results were then extrapolated to the entire country. In 2010, there were 35,000 MSMs in Sri Lanka. Based on hitherto unpublished data, in the most recent estimation, which took one week to finish and was based on 'hot spots', a conclusion was reached that there were 8,000 MSMs in the country. The data of the two size estimations cannot be compared as the methodologies vastly differed."

56. Particular risks are identified for effeminate Nachchis and for male sex workers, who meet their clients through Facebook apps, the internet, chat sites, mobile phones, and tourist guidebooks and of course through 'hot spot' cruising. The report notes that there is no state protection available for those who get into difficulty and that long-term relationships between men are almost unheard of, and are secretive. Marriages with opposite sex partners by MSMs have a very high failure rate. HIV/AIDS is rising and male prostitutes and male sex workers are a high risk group for infection:

"National STD/AIDS Control Programme Director Dr. Sisira Liyanage added "There is an increasing trend among MSMs, particularly in the last quarter of this year, which has registered HIV positive cases as 20% when earlier it was 10%. It may not be a question of good or bad or right or wrong but MSMs are mentally and socially different people." While

not all MSMs are MSWs or male prostitutes, it is well documented that this is a high risk group, as far as contracting HIV and HIV prevention is concerned, because of the risky behaviour they exhibit or are exposed to or are involved in.

The term male prostitute or male sex worker is a convoluted one. It covers a broad range of stigmatized gender identities and discriminated sexual orientations, diverse characters and economic practices, dominated by medieval laws and maligned policies. While it is thought odious and loathsome, deviant and perverted, it is also pilloried and abhorred in equal measure, and is capable of evoking revulsion and provoking silence. Some, in their ignorance, even consider it a disease, a curable one at that. Yet, it is a fetishized subject - a literal elephant in the room. Entering the rough trade and taking a look at this Sadistic world, harassed by shadows and sarees, in search of those bonded by the love that dares not speak its name. H.H. Sarath Kumara, a MSM gets the final word: "Sexuality is private."