



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03582/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC
On 3 December 2018

Decision & Reasons Promulgated
On 6 February 2019

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

TK
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Wilkins, Counsel, instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. In this decision I remake the appeal against a decision refusing the appellant's asylum claim. This follows an earlier decision of mine dated 4 March 2018, in which I found that the decision of the First-tier Tribunal ('FTT') dated 26 April 2018, contains an error of law and must be set aside.

Background

2. The appellant is a citizen of Saint Lucia ('St Lucia') and is 26 years old. He arrived in the United Kingdom ('UK') on 30 May 2017 and claimed asylum on 7 September 2017. After hearing detailed oral evidence relatively recently at a hearing on 17 April 2018, the FTT accepted that the appellant is gay. The FTT was concerned that adverse inferences could be drawn regarding the appellant's credibility, as a consequence of his delay in claiming asylum. The FTT noted that the appellant is a well-educated person who held a job in retail banking in St Lucia and did not accept his explanation for not claiming asylum sooner. Nonetheless, the FTT considered that the appellant gave detailed, plausible and consistent evidence regarding the development of his awareness of his sexuality. The FTT noted that the appellant noticed he was attracted to males from a young age but adopted an "*avoidance strategy*". He did not speak to others about his sexuality and took an "*extremely cautious*" approach to revealing his sexuality whilst residing in St Lucia. He was discreet about his sexuality at least in part due to fear but he was also concerned about prevailing societal norms in St Lucia. Since arriving in the UK the appellant has had a brief relationship, which ended when he left London for Manchester.
3. The FTT accepted that the appellant joined 'Grindr' (a dating website for gay men), whilst still residing in St Lucia, in January 2014, and has been a fairly active user since then. The FTT also accepted that the appellant was able to avoid anyone on the site realising he was in St Lucia by adjusting his profile and removing any reference to distance. The FTT regarded the precautions taken by the appellant in his use of Grindr as consistent with "*his extremely cautious approach to revealing his sexual orientation*" whilst in St Lucia.
4. The FTT concluded that the "*threshold of persecution suffered or apprehended*" by the appellant as a gay man had not been reached. In my decision identifying an error of law in the FTT's decision, I explained that the FTT noted there were "*few incidents*" of violence against gay men but failed to engage with the apparently cogent evidence that there might be more violence in St. Lucia than the statistics or reports indicated, because of the underreporting of crimes and incidents of victimisation against gay people, and this failure was sufficient to impugn the reliability of the FTT's overall finding that there is no apprehended or prospective risk for those who are openly gay in St Lucia. The FTT's finding that the appellant is gay was not subject to any cross-appeal and is a preserved finding of fact.
5. I now turn to the issues to be determined by me, when re-making the decision.

Approach to this case

6. This has not been designated a country guidance case. The number of asylum applicants from St Lucia is very low and a St Lucian country guidance decision was considered unnecessary. However, both representatives agreed to prepare and conduct the appeal in a similar manner to a country guidance case. It is

with this in mind that the appellant prepared a consolidated bundle of all relevant country background information from a variety of sources and instructed a country expert, Dr Bere Mahoney. She attended the hearing and was cross-examined by Mr McVeety.

7. After the hearing, I considered that the quantity and quality of the material and submissions before me might justify the case being designated a formal country guidance decision and wrote to the parties to seek their views. The appellant agreed with this course, but the respondent objected to the case being retrospectively classified as a country guidance decision given the small number of asylum seekers from St Lucia. As the parties have been unable to agree, this decision does not provide country guidance in the formal sense. The decision however seeks to comprehensively set out conclusions regarding the treatment of openly gay men in St Lucia, having considered wide-ranging country background evidence.

The issues in dispute and applicable legal framework

8. At the beginning of the hearing, both representatives agreed that the correct approach to determining whether a gay person is at risk of persecution is set out in HJ (Iran) v SSHD [2010] UKSC 31. At [82] Lord Rodger said this:

“When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant’s country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living “discreetly”. If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g. not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very

right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.”

9. Lord Hope set out the approach described by Lord Rodger in his own words, by reference to a staged approach, at [35].

“(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant’s case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.

(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office’s Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

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

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

be persecuted, it will be necessary to consider whether that fear is well founded.

(e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted?"

10. The stages described above can be simplified as follows in the context of this case:
 - i. Is the appellant gay, or would he be treated as gay by potential persecutors in St Lucia? if yes
 - ii. What would the appellant do if he is returned to St Lucia? Will he conceal aspects of his sexuality? if yes
 - iii. Why will he do so? If it is because he fears that otherwise he will be persecuted, then
 - iv. It is necessary to consider whether his fear of persecution is well-founded. This requires an assessment of whether men who are perceived to be gay or gay men living openly in St Lucia are liable to or face a real risk of persecution.
11. The FTT has already accepted that the appellant is gay and that is now undisputed. It is also undisputed that the appellant has lived an openly gay life in the UK and would wish to do so in St Lucia, but would not, because he fears that he will be seriously harmed. Mr McVeety accepted on behalf of the respondent that upon return to St Lucia, the appellant would conceal aspects of his sexuality and would be discreet, as he has done in the past. He also accepted that a significant and material reason for this relates to his fear of being exposed to persecution as a gay man. In the circumstances, Mr McVeety and Ms Wilkins agreed that this case raises a single discrete issue: are there substantial grounds to support a real risk that openly gay men face persecution in St Lucia?
12. Although the country background evidence mostly refers to LGBT individuals, the only factual scenario before me relates to gay men. Although there may be an overlap between the factors affecting other minorities, neither party invited me to consider anything other than the experiences of gay men.
13. The burden is upon the appellant to establish there is a real risk of persecution. In AA v SSHD [2006] UKAIT 00061, the AIT had to consider a risk said to arise not because of individual circumstances of the particular appellant but because of the belonging to or perception of belonging to a particular class of persons. The AIT held that in such circumstances, the appellant needs to show "*only that there is a consistent pattern of such mistreatment such that anyone returning in those circumstances faces a real risk of coming to harm even though not everyone does*". That approach was upheld by the Court of Appeal in AA (Zimbabwe) v SSHD [2007] EWCA Civ 149:

“The issue is whether the evidence establishes a real risk. The Appellant does not need to show a certainty or probability that all failed asylum seekers returned involuntarily will face serious ill-treatment upon return. He needs to show only that there is a consistent pattern of such mistreatment such that anyone returning in those circumstances faces a real risk of coming to harm even though not everyone does.”

14. Lord Hope summarised the test to be met in order for there to be persecution in HJ (Iran).

“12. The Convention does not define "persecution". But it has been recognised that it is a strong word: *Sepet and Bulbul v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, para 7, per Lord Bingham. Referring to the dictionary definitions which accord with common usage, Lord Bingham said that it indicates the infliction of death, torture or penalties for adherence to a belief or opinion, with a view to the repression or extirpation of it. Article 9(1)(a) of the EC Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees ("the Qualification Directive") states that acts of persecution must

"(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights ... or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, para 40, McHugh and Kirby JJ said:

"Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it."

13. To constitute persecution for the purposes of the Convention the harm must be state sponsored or state condoned. Family or social disapproval in which the state has no part lies outside its protection. As Professor J C Hathaway in *The Law of Refugee Status* (1991), p 112 has explained, "persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community." The Convention provides surrogate protection, which is activated only upon the failure of state protection. The failure of state protection is central to the whole system: *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495. The question is whether the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals..."

15. It is worth repeating Lord Hope's reminder in HJ (Iran) that the surrogate protection of the Refugee Convention is only activated upon the failure of state protection. In Horvath v Home Secretary [2001] 1 AC 489 Lord Hope said this:
- “...I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy.”
16. Lord Clyde put it in similar terms at 510f, as follows:
- “There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and readiness to operate that machinery.”
17. Lord Clyde added at 511c that *“it will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy”*.
18. The Horvath test has been clarified by the Court of Appeal on several occasions. In DK v SSHD [2006] EWCA Civ 682 the Court of Appeal highlighted that the issue is not merely whether the authorities are willing to provide protection, but whether they are capable of providing the particular individual with adequate protection. This chimes with Article 7 of the Qualification Directive, which requires individualised assessment of whether there is sufficient protection, stating that protection is *“generally”* provided when the actors:
- “take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.”
19. It is also important to consider the extent to which there are organisations outside of the framework of the state that are able and willing to assist in providing protection, for example, by making complaints on behalf of individuals.
20. I must consider whether persecution extends to the whole of the country and if it does not whether the appellant can be reasonably expected to relocate to another part of the country - see SSHD v AH (Sudan) and others [2007] UKHL 49.

Hearing

21. Mr McVeety indicated that he did not cross-examine the appellant. Mr McVeety made it clear that the respondent now accepted his credibility and the case requires a more objective and general assessment of the conditions for openly gay men in St Lucia.
22. Dr Mahoney was the only witness to give evidence. She relied upon her report dated 26 October 2018. She was cross-examined by Mr McVeety regarding her written report as well as an academic article she co-researched and co-authored published on 19 June 2017 in 'Frontiers in Psychology' entitled, *"It's just more acceptable to be white or mixed race and gay than black and gay": The perceptions and Experiences of Homophobia in St Lucia*. During the course of this decision, I shall refer to this as 'the academic article'. Mr McVeety noted that the academic article refers to some participants as being openly gay in the north of St Lucia, where they believed they were treated with a degree of respect. Dr Mahoney acknowledged that some participants considered that they were able to be openly gay at times but that they still had to modify their behaviour dependent on where there were and who they were with. All participants regardless of where they lived or worked, concealed their sexual orientation when at work. This in itself calls into question the extent to which the two participants who identified the north as a safer place, were able to be openly gay. Dr Mahoney also drew attention to the self-confessed limitations of the academic article. The research involved a very small sample size of nine participants (of whom five were gay men, the remainder identifying as lesbian or bisexual) and the inherent difficulties in recruiting a large and diverse sample of St Lucian sexual minorities. As such, the study was described as *"exploratory and its conclusions tentative"*.
23. During the course of cross-examination Dr Mahoney referred to statistics relating to the offence of buggery alluded to in her report. At my request Ms Wilkins compiled a table of these statistics for the years 2011 to 2017, which I refer to below.
24. Mr McVeety invited me to find that there is insufficient evidence to support the proposition that openly gay men face a real risk of persecution. He asked me to note the paucity of any media reports of homophobic violence in St Lucia. He submitted that if it existed, there would be reports in the media, yet Dr Mahoney was unable to point to any recent reports. Mr McVeety also submitted that the reports relied upon by the appellant clearly make references to some gay men living openly in St Lucia. Mr McVeety described the law criminalising gay sexual behaviour as being rarely enforced.
25. In a nutshell, Mr McVeety submitted that there is not in general a risk to the life or risk of sufficiently serious harm to an openly gay returnee on return to St Lucia. In contrast, the appellant's case is that it is clear from the country background evidence that a real risk exists. In support of this, Ms Wilkins

relied upon a detailed and carefully drafted skeleton argument summarising the relevant country background evidence. I refer to the representatives' respective submissions in more detail, when making my findings on the evidence below.

26. At the end of submissions, I reserved my decision, which I now provide with reasons.

Country background evidence

Dr Mahoney's evidence

27. Dr Mahoney is a chartered psychologist (CPsychol) and chartered scientist (CSci). She is a Fellow of the Higher Education Academy and a Senior Lecturer in Psychology / PhD course leader at the University of Worcester. She is also an approved researcher for the Office of National Statistics.
28. Dr Mahoney is not a citizen of St Lucia and has never visited St Lucia. She cannot be properly described as a country expert on St Lucia with extensive experience of researching or reporting on a variety of matters relating to St Lucia. Importantly, Dr Mahoney does not describe herself as such. Her qualifications and expertise for the purposes of her report, are set out at the beginning of the report in these terms:

"I am a Chartered Psychologist, Chartered Scientist, Associate Fellow of the British Psychological Society, and a Fellow of the Higher Education Academy with over 20 years of experience working as academic and researcher. Victimisation and sexuality, the role that social contexts and culture play in victimology, and the impact of victimisation on wellbeing are aspects of my specialist research, and relevant to the issues I have been asked to express an opinion on in relation to the client. I have also worked with police constabularies on projects exploring how their strategies are perceived by the public, and conducted and published research on perceptions of criminality, additional specialist research topic knowledge I have that is relevant to the client's case. My research expertise in victimisation includes being an Approved Office for National Statistics (ONS) Researcher that enables me to access sexuality and victimisation data collected by the ONS in the UK that is restricted in its availability to those the ONS have trained and approved as suitable to work with this information because of its confidential and sensitive nature. This is relevant to the client's case because I am familiar with, and have worked with/published research that uses official crime victimisation and sexuality data, and issues related to official data on victimisation and sexuality are central to the client's case. Additionally, I am familiar with the challenges of accessing and using these sorts of data to understand how sexuality and victimisation are linked, and my suitability for these particular tasks is reflected in my ONS Approved Researcher status. I am also a Co - Opted Committee member of the British Psychological Society's Psychology of Sexualities Section, the Society's specialised subsystem that focuses on understanding the psychological experiences of sexuality and gender identity minorities. As Committee members we are asked to provide expert commentary on sexuality legislation, reports and human rights issues

with national and international scope. Therefore, I am actively involved with my Professional Statutory Regulatory Body's engagement with LGBTQ experiences, wellbeing and welfare, all issues relevant to the client's case. I lead, and am involved in, a number of cross - University projects exploring how sexuality, victimisation and wellbeing are linked, and supervise a number of doctoral students whose research focuses on sexuality, gender and victimisation. This includes one of the few research projects being run that focuses specifically on the experiences of LGB individuals in Saint Lucia, and this work is part of a broader research project on sexuality in Saint Lucia (see Couzens, Mahoney and Wilkinson, 2017). This is relevant to the client's case because of the scarcity of such research, and the diverse and complex sources of information and data on sexuality and victimisation that this work entails. Therefore, my expertise and experiences as a chartered psychologist and researcher, knowledge and skills in research governance and research ethics (see CV), role within the British Psychological Society, and specific research on sexuality and culture (with a focus on Saint Lucia) I am involved in provide me with expertise that qualify as relevant to the issues I have been asked to express an opinion on in relation to the client's case."

29. The summary of Dr Mahoney's report accurately reflects the remainder of the report and her oral evidence.

"There is substantial evidence demonstrating that homophobic victimisation is underreported in Saint Lucia. This reflects LGBT individuals' fear of the repercussions of making such reports because same - sex sexual behaviour is criminalised on the island. Critically, homophobic discrimination and victimisation are not recognised legally as crimes, and sexual and gender minorities have few/no legislative protections, in Saint Lucia. *De facto* official reports of homophobic victimisation cannot be made because they are not recognised by law. A range of human rights and media reports confirm homophobic discrimination and victimisation to be normative experiences for Saint Lucia's LGBT citizens whose safety and protection cannot be guaranteed. The lack of 'official' reports reflects these factors and not that such experiences are rare."

30. Dr Mahoney has referred to the appellant as a 'client' in her report. This is unfortunate; however, I am satisfied that she has approached her task with the requisite degree of independence, reliability and objectivity. As regards knowledge of a country, it has been accepted that to be an expert one does not necessarily have to live there or to visit regularly. Dr Mahoney was questioned closely by Mr McVeety. She answered his questions directly and did not seek to exaggerate in any way. Dr Mahoney's report appropriately uses a variety of source materials to support her conclusions. These include raw data, local press, local and international human rights reports, online and academic articles. It was agreed at the hearing that Dr Mahoney provides a helpful insight into the proper way to approach the scarce information available regarding the treatment of gay men in St Lucia. She was very helpful in collating information that the parties were unable to find. This included the statistics for the offence of buggery in St Lucia, referred to in more detail below.

31. When Dr Mahoney's oral evidence is considered alongside her report, the key matters that emerge are set out below.
- (i) St Lucia is a small island with a geographic area totalling 616km and a population of some 178,000. It is a parliamentary democracy. The economy is tourism dependent (89% of GDP) and there are high rates of unemployment and crime.
 - (ii) St Lucia lacks many of the official reporting and monitoring structures, systems and processes that are normative in Europe and larger Caribbean islands such as Jamaica. Official crime data is available but data on the experiences of victims of crime i.e. victimisation surveys are non-existent.
 - (iii) Same-sex sexual behaviour is a criminal offence in St Lucia. Homophobic discrimination and victimisation are not recognised legally as crimes, and even if reported would not be recorded as such because they are not recognised.
 - (iv) Historically and currently, homophobia and homophobic victimisation are normative experiences for gay men in St Lucia. St Lucia is a deeply conservative, traditional and religious society in which there is widespread disapproval of homosexuality. The fear of being disowned by family, discriminated against and stigmatised by society, "internalised homophobia", as well as fears of violence or threats of violence are relevant factors preventing many gay people from being openly gay in St Lucia. This is reflective of the wider (particularly English-speaking) Caribbean region, where many sexual minorities conceal and suppress their sexual identity to prevent social exclusion and criminalisation.
 - (v) There is very limited peer reviewed academic research on homophobia in St Lucia. The three peer reviewed papers that have been published including the academic article co-authored by Dr Mahoney, support the following: homophobic victimisation is a common experience for openly gay people but this is underreported because of a fear of the consequences of disclosing one's sexuality; within the Catholic dominated education system, gay students experience homophobic motivated verbal and physical abuse; gay men develop self-loathing and an aversion to other gay men because of "internalised homophobia" resulting from sociocultural and religious influences; sexual minorities who are "light-skinned" are likely to receive a greater degree of tolerance than those who are "dark skinned"; regional disparities exist in the level of socio-cultural tolerance toward sexual minorities, with the more developed north of St Lucia (with its attendant tourism and better health / employment / education opportunities) being more tolerant than the south.
 - (vi) Given the relevant legal framework, official reports of homophobic victimisation are difficult to make. This must be seen in the context of a population in which there is a marked reluctance on the part of gay men to report a crime of violence against them out of fear that they will be stigmatised, abused or charged with a criminal offence themselves. The

lack of reported violence for reasons relating to a person's sexuality in the media is therefore not necessarily a reliable indicator of the absence of such violence. The lack of official or other reports must be viewed in its proper context: there is a deep-rooted reluctance to report such incidents and there is an underplaying of homophobic incidents to protect St Lucia's tourist industry.

- (vii) There is substantial evidence demonstrating that homophobic victimisation is underreported in Saint Lucia. This is based in part on distrust of the police, fear of retaliation and a general reluctance to raise matters that may draw attention to a person's sexuality.
- (viii) The statistics for the offence of buggery in St Lucia (<http://stats.gov.lc/subjects/society/crime>) demonstrates that it is inaccurate to suggest that the law criminalising homosexual sex is rarely used. There has been a steady stream of crimes reported / accepted / detected for the offence of buggery from 2011 onwards. This includes a 600% increase of buggery crimes reported between 2016 (4) to 2017 (24).
- (ix) St Lucia's only prominent LGBT organisation 'United and Strong' is an activist non-governmental organisation with very limited resources. It operates discreetly and does not publicise its operations. It does not function as a support agency. Individuals within United and Strong have however been openly critical of the government's approach to sexual minorities.
- (x) In order to live in St Lucia safely, this appellant would have no alternative but to live discreetly. Given the country's small size and the nature and extent of homophobic discrimination and victimisation across St Lucia, internal relocation from the appellant's home in the north-west of St Lucia elsewhere would not be safe or reasonable.

Legal framework and government / societal discrimination

32. In two responses to information requests dated 18 December 2017 and 2 November 2018, the respondent summarised his understanding of the country background materials on how LGBT persons are treated in St Lucia. The respondent accepts that consensual same-sex activity is illegal. The 2018 information request makes reference to the US State Department's Country Report on Human Rights Practices for 2017, which says this:

"Consensual same sex sexual activity is illegal under indecency statutes, and some same sex sexual activity between men is also illegal under anal intercourse laws. Indecency statutes carry a maximum penalty of five years' imprisonment, and anal intercourse carries a maximum penalty of ten years in prison. No legislation protects persons from discrimination based on sexual orientation or gender identity.

While the indecency statutes and anal intercourse laws were rarely enforced, there was widespread social discrimination against lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons in the deeply conservative society.

The few openly LGBTI persons faced daily verbal harassment. Civil society groups received reports that LGBTI persons were denied access to rental homes or were forced to leave rental homes and were denied jobs or left jobs due to a hostile work environment.

There were few reported incidents of violence or abuse during the year.”

33. Section 132 of the Criminal Code No 9 of 2004 in St Lucia states that a person is liable to up to ten years imprisonment if they commit an act of gross indecency. Section 133 defines buggery as “*sexual intercourse per anus by a male person with another male person*”. By section 133(1) a person who commits buggery commits an offence and is liable on conviction on indictment for (a) life, if committed with force and without the consent of the other person (b) ten years, in any other case.
34. It is not disputed that same-sex sexual activity is illegal in St Lucia and consensual buggery is punishable by imprisonment. There is no anti-discrimination legislation based on sexual orientation or gender identity.
35. The respondent’s position is that in practice gay people are not arrested and prosecuted for homosexual activities. The US State Department refers to these laws as being rarely enforced. There is support for this in a 2018 Human Rights Watch (HRW) Report, *Paradise Lost – the Plight of LGBT people in the Eastern Caribbean*. This states:

“no island actively pursues criminal investigations for breaking these laws, their mere existence intensifies a toxic homophobic culture that allows lesbian, gay, bisexual and transgender (LGBT) people to be bullied at school, that fuels their mistrust of police, and allows them to be alienated from – or even abused by – their families. Despite this, each island has a core group of LGBT activists leading the fight for equality.

...

Like many islands, St. Lucia depends on tourism – its beaches are constantly included in “best honeymoon” articles. But while its tourism minister said in 2015 that the island welcomes visitors from the LGBT community, the country has no plans to change its gross indecency and buggery laws. For the country’s Universal Periodic Review at the UN in 2015, St. Lucia rejected decriminalizing same-sex relationships and creating anti-discrimination laws.”
36. Dr Mahoney’s examination of the criminal statistics from the Central Statistics Office of St Lucia reveal that there has been a steady flow in crimes reported and detected for the offence of buggery. The table prepared by Ms Wilkins includes, inter alia, the following information. For 2017: 24 crimes reported (refers to all crimes reported); 23 accepted (refers to as matters that are reported, investigated and found not to be false) and 7 detected (refers to matters that are investigated and person/s are arrested and charged, or warning given). For 2016: 4 crimes reported, 4 accepted and 2 detected. There is no other information available on the nature of the crimes reported, accepted or detected. It is therefore unclear whether these are limited to buggery as defined

by section 133(1)(a) i.e. without the consent of the other person or (b) i.e. merely having sexual intercourse per anus between two consenting males. Mr McVeety submitted that it is curious that given the number of buggery crimes recorded as detected in recent years, Dr Mahoney was unable to give any example of the local press reporting such a crime. When questioned about this, Dr Mahoney emphasised that the absence of such reports is not that surprising given the deeply conservative and religious society, and the wish by the government and the majority of the population to render sexual minorities invisible as well as a desire to avoid adverse publicity for the tourism industry. Dr Mahoney was also asked why United and Strong had not publicised the cases of buggery, she explained that as a group they had to be very careful about what they said. In addition, they may not have even known about them given the lack of publicity and the reluctance of gay men generally in St Lucia to come forward or seek help.

37. The Canadian IRB report published on 26 April 2013, addressing the treatment of sexual minorities in St Lucia does not specifically address whether people have been arrested for consensual buggery. However, an older Canadian IRB publication dated 6 December 2005 referred to a police source accepting that the criminal code dealing with buggery had been used in recent years but that most homosexuals are “in the closet” and would not openly come out as being gay.
38. St Lucia has not ratified the International Covenant on Civil and Political Rights, which protects privacy, including private consensual acts between adults. In 2011 and 2015, St Lucia rejected recommendations of the UN Human Rights Council to relax the criminalisation of same-sex behaviour and was the only UN member in the Americas formally to oppose the inclusion of sexual orientation and gender identity in a UN human rights non-discrimination declaration.
39. The US State Department report for 2017 states that there was “*widespread societal discrimination*” against LGBTI persons and “*the few openly LGBTI person faced daily verbal harassment*”. Although the academic article draws attention to two individuals who felt safer in the north of St Lucia where they were able to identify as openly gay at times, they felt compelled to conceal their sexual identity at work and when commuting for work purposes had to undergo a form of identity shifting know as ‘passing’. I accept Dr Mahoney’s evidence that whilst there are some openly gay men in St Lucia, including the two questioned for the academic article and an employee at United and Strong, they are very few in number. I accept Dr Mahoney’s evidence that the very few openly gay men in the north of St Lucia must conceal their sexual identity at regular intervals in their daily life, for reasons relating to a fear of persecution.
40. The HRW report describes the seven Eastern Caribbean islands as the most homophobic group in the Caribbean with toxic homophobic cultures. Academic studies referred to by Dr Mahoney also refer to pervasive homophobia expressed within families and in schools, work and in everyday

life. The Rights in Exile Programme quoted by Dr Mahoney summarises the daily discrimination that gay people face because of their sexuality. This includes two examples of St Lucians who reported homophobic victimisation but were refused help by the police.

41. Widespread negative social attitudes towards homosexuality reflect and are reinforced by the laws criminalising same-sex sexual relations and the attitude of the government: in November 2017, two ministers publicly engaged in homophobic and anti-LGBT rhetoric and the Minister in the Office of the Prime Minister Sarah Flood-Beaubrun said that she opposed changes to Saint Lucia's anti-LGBT laws, and that same-sex parents were not 'ideal parents'. This is despite United and Strong having visited her in June 2017 with information about the unacceptable nature of discrimination targeting members of the LGBT community. United and Strong have delivered training to police and government officials but as Dr Mahoney notes, they continue to espouse homophobic ideas. The training provided to the police has been very limited, but this has not prevented LGBT people having suspicions about the organisation's independence and trustworthiness.
42. There are also reports of LGBT tourists experiencing homophobic motivated victimisation in 'safe' contexts such as tourist resorts and overseas university campuses.

Violence / threats of violence / underreporting

43. There are no statistics available on homophobic violence or victimisation in St Lucia. The official crime data on St Lucia does not specify whether any of the crimes are motivated by homophobia and there is no data at all on the experiences of the victims of crime. Even in countries that criminalise homophobic victimisation, official reports underestimate the extent of such incidents. The official data on St Lucia is unhelpful in demonstrating the true extent of violent crimes against gay people.
44. However, several murders have been reportedly linked to homophobia: United and Strong is quoted in the Canadian IRB report dated 11 June 2009 as stating that the gay community faces "*a daily reality of fear, stigma, discrimination and persecution*" and that no one was convicted for the murders of two gay men in 2005 and 2006. According to the 2013 Canadian IRB report, United and Strong have reported that:

"there are attacks against homosexuals that 'go unnoticed.' Abuses have taken place. We have had deaths of gay men that are still unsolved or unresolved...These were openly gay people and these cases were not cases where they were just killed. The killings were brutal, with multiple stab wounds and beatings. There have been gay people who have been beaten in the street. Society targets the highly effeminate guys and the butch looking women. Some have been raped. They get verbally abused on a daily basis. And what works against them is the fear of reporting these incidents. People are internalizing things, instead of seeking help."

45. In an article addressing the 43rd homicide victim in St Lucia in 2017, Linus Constantine, St Lucia News Online describes the body of 18-year old Marvin Anthony having been found with his throat slit and 56 stab wounds. This article refers to wide speculation that Marvin was gay and his murder looks like a hate crime. The article then states:

“This is not uncommon in St Lucia. Over the last 10 years, several members of the LGBT community have met their deaths in similar fashion. There were the deaths of Verne Romolus, Germaine Nestor, Marcellus Augustin and the death of Ethelbert ‘Romeo’ Evelyn in Dennery. They were all openly gay and they were all beaten and stabbed to death.”
46. The appellant explained in his interview that he knew Linus Constantine personally because they worked together, and there were rumours he was gay.
47. The Rights in Exile Programme report dated July 2016, referred to by Dr Mahoney reported that the police do not properly investigate cases of violence against gay people and alleged homophobic murders remain unsolved. In an online article dated 4 June 2018 describing the difficulties of leading a gay life in St Lucia, reference was made to an older US State Department report from 2008 which described at least two cases of violence against homosexuals including one young man having been hung from a tree because he was openly gay. The number of reported murders of those who were openly gay or rumoured to be gay must be seen in the context of St Lucia’s very small population size. The evidence that the police are reluctant to properly investigate crimes of violence against gay men has been denied by the government but is entirely consistent with the homophobia prevalent in St Lucian society.
48. The St Lucian police have become overstretched and have struggled to cope with a general increase in serious crime in the last few years. In the Canadian IRB report dated 20 July 2017, reference has been made to a news website (St Lucia Times 1 July 2017), quoting the National Security Minister as having said that St Lucia “*is facing an unprecedented crime wave*” with 29 homicides already recorded in 2017. This is linked to a dramatic increase in gang related activity. Various sources quoted in the IRB report describe the police force as plagued by weaknesses in numbers, morale and infrastructure. Given the need to quell gang activities, investigating crimes of violence against gay men, particularly given the legal framework and the prevailing attitudes is most unlikely to be viewed as a priority by the St Lucian police. This lends support to the claim by United and Strong that the police have not adequately investigated murders allegedly motivated by homophobia.
49. The 2013 Canadian IRB report also records that several sources stating that advocates for LGBT rights in St Lucia received death threats. This report also quoted a lawyer as saying that the police are very often mentioned as perpetrating acts of violence against sexual minorities and that crimes are therefore not reported because of fear of abuse by the police.

50. Dr Mahoney has explained that homophobic victimisation is underreported in St Lucia because of a number of interrelated factors: (a) same sex behaviour is criminalised; (b) homophobic discrimination and victimisation are not recognised as crimes; (c) those who are gay fear prosecution and abuse from the police; (d) United and Strong are in practice limited in what they can do; (e) self-loathing, guilt and 'internalised homophobia' deters reporting; (f) few people are willing to be open about their sexuality in such a conservative society. Dr Mahoney refers to two instances where individuals reported homophobic victimisation to the police but were refused help. United and Strong have stated:
- “the fact that the law [against same sex sexual activity] is there, there is no formal redress for homosexuals. It basically means that when you go to the police for something, it exposes you. Right now it is the police officers on their own deciding not to enforce this law. Homosexuals ask themselves, what if the police officers decide to [arrest] me because this law exists.”
51. Human rights reports, including the US State Department's report for 2017, refer to few reports of violent crimes against gay people. I accept Dr Mahoney's evidence that there is likely to be a significant degree of underreporting of such crimes for a combination of reasons. Her evidence in this regard is consistent with the 2017 US State Department which notes a reluctance to report incidents and a 2016 report from the Rights in Exile Programme, in which it is said that many victims will not report crimes out of the fear that they themselves will be prosecuted, while state agencies in charge of investigations often identify crimes against LGTB persons as crimes of passion or blame the victims' lifestyle for attacks.
52. In terms of reporting incidents to United and Strong, Dr Mahoney explained that many LGBT activists believe that their headquarters was burnt down by homophobic arsonists in 2011, even though the alleged cause was an electrical fault, and its members are known as activists and "self-avowed criminals". Dr Mahoney is therefore of the view that LGBT individuals in St Lucia are likely to fear being "outed by association" if they align themselves with this organisation. An individual is therefore likely to be inhibited reporting issues to United and Strong. United and Strong leaders have said that LGBT individuals in St Lucia are so much in fear of being found out that they are reluctant to even use the critical prevention, education and health services that they need to protect themselves and others. It also puts them off from testing for sexual infections, even, in some cases if they are suffering from HIV or AIDS symptoms. There is therefore force in Ms Wilkins's submission to the effect that given that LGBT individuals are reluctant to use ostensibly confidential medical services even when their life might be at risk, they are also plausibly reluctant to report, even anonymously, LGBT hate crimes.

Findings on the country background evidence

53. Having conducted a thorough assessment of all the country background evidence, I have reached the following conclusions:

- (i) The evidence from cogent sources (US State Department and HRW) suggests that the indecency statutes and anal intercourse laws have been rarely enforced. There is an absence of references to any such arrests and prosecutions in the local press but there are more anecdotal references to prosecutions a few years ago. The picture that emerges from the official statistics on the criminal offence of buggery is unclear, but nonetheless concerning. There remains a distinct possibility that some of the crimes of buggery that have been recorded relate to consensual acts. I accept Ms Mahoney's evidence that it is very challenging to find reliable official data in St Lucia. In any event, the mere fact that criminalisation of same-sex sexual relations is in existence and is known to have been used in the past, adds an additional and aggravating dimension to the prevalent homophobic attitudes in society and the government. However, the evidence is not sufficiently clear to support a finding that openly gay men face prosecution by the state, under sections 132 or 133(2) of the Criminal Code.
- (ii) Whilst United and Strong has been an advocate of LGBT rights in St Lucia and the region, its role in assisting those who fear or have faced discrimination and violence for reasons relating to their sexuality is limited. United and Strong has publicised the difficulties faced by LGBT people in St Lucia, but its role is limited to more general advocacy. It is not a support agency able to offer meaningful support to LGBT people who have faced discrimination or violence. There is a deep-seated reluctance on the part of gay men to seek help, support or protection either formally or informally in St Lucia. There is no formal complaint structure or mechanism for LGBT people in St Lucia.
- (iii) There are a very small number of openly gay men in St Lucia. They face daily harassment, verbal taunts and threats. They also face discrimination in obtaining accommodation and in employment. Historically and currently, homophobia and homophobic victimisation are normative experiences for gay men in St Lucia. St Lucia is a deeply conservative, traditional and religious society in which there is widespread disapproval of homosexuality. The fear of being disowned by family, stigmatised by society and "internalised homophobia", as well as fears of violence and the possibility of criminal prosecution, are all factors contributing to gay men not being openly gay in St Lucia.
- (iv) Levels of criminality and violence in St Lucia are very high overall. The level of violence against those perceived to be gay is unclear. This is a consequence of the government not recognising sexually motivated victimisation as a crime, the absence of official records and underreporting. There are a variety of sources (for example, United and

Strong and St Lucia News Online) providing unverified reports of men perceived to be gay having been killed in particularly violent circumstances for reasons relating to their sexuality. I accept the evidence that over the last 10 years men perceived to be gay have been murdered in particularly violent circumstances, and there is no obvious explanation for this, other than their perceived sexuality. This is very concerning. The reported violent homophobic incidents may not be of sufficient frequency by themselves to amount to a consistent pattern of mistreatment, but the relatively small number must be seen in the light of the very small number of openly gay men and the very small population size. When the violent incidents are combined with the laws criminalising same-sex relations and the discrimination in society, I accept there is a climate of significant fear and anxiety for gay men in St Lucia.

- (v) The evidence available supports an absence of a sufficiency of protection against violence toward men who are perceived to be gay. The police force is over-stretched, and their record of investigating murders considered to be motivated by homophobia, is poor. There is evidence that victims of threats of violence and violence motivated by homophobia are unwilling to seek protection from the police because they fear further abuse from the police and the state. There is no entity in St Lucia, state or otherwise, in relation to which a complaint can be made for reasons relating to a person's homosexuality. This must be seen in the context of a society where there is endemic discrimination against openly gay men.
- (vi) The few openly gay men in St Lucia face a daily diet of verbal abuse, threats of violence, harassment and discrimination in almost every sphere including education, employment, accommodation and within the family. The discrimination faced by gay men can be properly described as frequent and protracted. This discrimination occurs in a country which criminalises same-sex sexual relations and has demonstrated an inability or reluctance to fully investigate serious incidents of violence against men perceived to be gay.
- (vii) When all the evidence is considered cumulatively, openly gay men face a real risk of persecution on the entire island of St Lucia and the requisite high threshold is met. To use the language of Article 9 of the Qualification Directive, the accumulation of various measures against men perceived to be gay in St Lucia, including violations of their human rights is sufficiently severe to affect openly gay men in a manner that constitutes persecution. Although the general attitudes in the north of the island may be more tolerant than the south, this is entirely relative and there remains a real risk of persecution for openly gay men residing anywhere on the island.
- (viii) Not all St Lucian gay men are at risk of persecution. The prevailing homophobia is so deep-rooted and pervasive, that there are instances of gay men having "internalised" it. Some St Lucian gay men may live discreetly not because of a fear of persecution but because of social pressure or cultural and religious reasons. It will therefore be necessary to

carefully consider in each individual case whether a St Lucian gay man would choose to live discreetly and the reasons for this.

Conclusion

54. I conclude that there is a real risk of persecution for gay men who are openly gay in St Lucia. The respondent has accepted that this appellant will act discreetly because of a fear of persecution. It follows that the appellant has been successful in establishing the sole issue raised in this appeal: he has a well-founded fear of persecution in St Lucia.

Decision

55. I allow the appellant's appeal on asylum grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

UTJ Plimmer

22 January 2019

Upper Tribunal Judge Plimmer